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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 30TH, 1916.

POWERS & SON v. HATFIELD & SCOTT.

Contract—Sale of Goods—Formation of Contract from Correspondence—Acceptance of Offer—Absence of Ambiguity—Breach by Failure of Vendor to Deliver Goods—Abandonment—Rise in Market-price—Failure to Prove Damage—Time of Breach.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 10 O.W.N. 198.

The appeal was heard by MEREDITH, C.J.C.P., CLUTE, RIDDELL, and MASTEN, JJ.

E. G. Porter, K.C., for the appellants.

G. H. Kilmer, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 30TH, 1916.

FOSTER v. MACLEAN.

Discovery—Examination of Plaintiff—Time for—Rule 336—Statement of Defence Delivered, but Particulars Ordered and not Delivered.

Appeal by the defendants from the order of BRITTON, J., in Chambers, 10 O.W.N. 457.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and MASTEN, JJ.

K. F. Mackenzie, for the appellants.

W. E. Raney, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs to the plaintiff in any event.

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1916.

WIGLE v. HUFFMAN.

Will — Annuity — Arrears — Dower — Money Lent — Funeral Expenses—Administration.

Appeal by the defendant Randolph Huffman from the judgment of KELLY, J., 10 O.W.N. 431; and appeal by the plaintiffs from the same judgment in so far as it dismissed the action as against the defendant William Huffman.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and MASTEN, JJ.

J. Sale for the defendants.

F. D. Davis, for the plaintiffs.

THE COURT dismissed both appeals with costs.

SECOND DIVISIONAL COURT. NOVEMBER 2ND, 1916.

JESSOP v. CADWELL SAND AND GRAVEL CO.

Land—Injury to, by Operations on Neighbouring Land—Water Lots—Assessment of Damages.

Appeal by the defendants from the judgment of KELLY, J., 10 O.W.N. 392.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and MASTEN, JJ.

J. H. Rodd, for the appellants.

T. Mercer Morton, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

*RE WATSON AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation—Award—Appeal—Quantum—Evidence—Addition of Percentage for Compulsory Taking—Municipal Arbitrations Act, R.S.O. 1914 ch. 199, sec. 4—View of Premises by Arbitrator—Reasons for Award.

Appeal by T. H. Watson from an award of the Official Arbitrator for the City of Toronto upon an arbitration held for the purpose of determining what compensation should be paid to the appellant by the city corporation for lands expropriated for public park and boulevard purposes. The arbitrator awarded the appellant $52,550, with interest from the time possession was taken by the corporation, and costs of the arbitration.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

I. F. Hellmuth, K.C., and J. W. Bain, K.C., for the appellant.

Irving S. Fairty and C. M. Colquhoun, for the city corporation, respondents.

MEREDITH, C.J.C.P., read a judgment in which he referred at length to the evidence, the findings of the arbitrator, and the grounds of appeal. Upon the whole case, he concluded, he could find no reason for saying that the appellant should have been awarded greater compensation. He mentioned some recent decisions (not yet reported) of the Supreme Court of Canada in cases of appeals against awards of compensation for lands taken under the provisions of the Dominion Railway Act, but mainly for the purpose of making it apparent that they had not been overlooked. All cases such as this, he said, depend so much, if not altogether upon questions of fact, that any other case is of little, if any, authoritative value.

Full compensation had been awarded by the arbitrator, and there could be no justification for adding a farthing to the amount awarded. Though mentioned in the reasons for appeal, the point that ten per cent. should be added for compulsory taking was not contended for or even mentioned by counsel for the appellant.

*This case and all others so marked to be reported in the Ontario Law Reports.

In this case, instead of adding anything for contingencies, it would be fairer to take off a large sum, for no one could doubt that, had the respondents not taken the lands, they would still be on the appellant's hands, burdened with the depressing effect of the war upon land speculations. No rule or practice of adding ten per cent. or any other fixed amount prevails or has prevailed in Ontario; such a method of computation has been more than once disapproved.

It was contended that the arbitrator had not set out in his reasons for his award the information which sec. 4 of the Municipal Arbitrations Act, R.S.O. 1914 ch. 199, required; but the section does not require it except when the arbitrator proceeds partly on a view or upon any special knowledge or skill possessed by himself; and so, where not so set out, no special advantage in either way is to be attributed to him; and, if the point had been well taken, the case would not be one for setting aside the award, but for supplementing it in that respect.

The appeal should be dismissed.

MASTEN, J., also read a judgment, in which he said, among other things, that, were he sitting as the Judge of first instance determining the matter, he would, as the evidence now affected him, award to the claimant a larger sum than the arbitrator had allowed; but that was a very different thing from saying, when sitting in an appellate tribunal, that the award of the arbitrator was incorrect and should be set aside. The appeal was not based upon any misconduct of the arbitrator nor upon any improper admission or rejection of evidence nor upon any omission to value some element or thing that should have been considered nor upon any other error or application of a wrong principle by the arbitrator. It was not a case where the appellate Court ought to interfere with the finding of the arbitrator.

The learned Judge discussed all the points raised by the appellant, and referred to the unreported cases in the Supreme Court of Canada mentioned by the Chief Justice.

RIDDELL and LENNOX, JJ., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

*RE LASCELLE AND WHOLEHAN.

Criminal Law—Police Magistrate's Conviction—Order Quashing for Want of Jurisdiction—Order of Judge in Chambers Protecting Magistrate against Action—Right of Appeal from—Public Authorities Protection Act, R.S.O. 1914 ch. 89, secs. 3, 4, 8—Judicature Act, R.S.O. 1914 ch. 56, secs. 26, 63—Qualified Protection—Exception as to Things Done Maliciously and without Reasonable and Probable Cause.

Appeal by Lemuel Lascelle from an order of MIDDLETON, J., in Chambers, of the 7th September, 1916.

The order quashed the conviction of the appellant by the Police Magistrate for Chesterville for the use by William Lascelle, infant son of the appellant, of grossly insulting language to a lady in a public street in Chesterville, but protected the magistrate from action against him, on payment by him of costs. The appeal was from the part of the order which protected the magistrate.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. A. Stiles, for the appellant.

J. A. Macintosh, for the Police Magistrate, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the appellant, treating his conviction as one which, under sec. 4 of the Public Authorities Protection Act, must be quashed before any action can be brought against the respondent for anything done under it, moved, under sec. 63 of the Judicature Act, to quash it, and it was quashed; but, at the instance of the respondent, it was provided by the order, under sec. 8 of the Public Authorities Protection Act, that no action should be brought against the respondent.

Two questions arose: (1) whether an appeal lay against the protecting provision of the order; and, if so (2), whether that provision ought to stand.

It was difficult to suggest any good reason why an appeal should not lie against a provision depriving a person of a right of action which otherwise he would have. Under sec. 26 of the Judicature Act, subject to two exceptions not in point, an appeal lies to a Divisional Court of the Appellate Division from any judg-

ment, order, or decision of a Judge of the High Court Division in Court, and from any judgment, order, or decision of a Judge in Chambers which affects the ultimate rights of any party.

Under sec. 63 of the Judicature Act, a motion to quash a conviction is to be made in Chambers; and the like practice applies to a motion to quash a conviction for a crime, under Rules of Court made pursuant to the provisions of the Criminal Code.

Under sec. 8 of the Public Authorities Act, it is the Court which may provide that no action shall be brought. It may be that, in strictness of practice, the conviction should be quashed in Chambers and the protection order made in Court; but, for the purposes of this appeal, that is immaterial.

If the unqualified protection which the order in appeal afforded should stand, the respondent would be in a better position than if he had acted within his jurisdiction, and so had the benefit of sec. 3 of the Public Authorities Protection Act; he seemed to be protected against malice and want of reasonable and probable cause, and that should not be.

In all the circumstances of the case, protection to some extent was properly given, but it should not have been unqualified, it should not have been extended to things done, if any, maliciously and without reasonable and probable cause.

To that extent, the protection clause of the order should be varied, and in other respects the appeal should be dismissed without costs.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

*REED v. ELLIS.

Negligence—Master and Servant—Injury to Servant from Fumes and Dust in Factory—Failure of Master to Take Proper Precautions—Servant Attacked by Disease—Proximate Cause—Findings of Jury—Form of Question Put to Jury—Evidence—Connection between Illness and Alleged Cause.

Appeal by the defendants from the judgment of LATCHFORD, J., upon the findings of jury, in favour of the plaintiff, for the recovery of $3,000 damages and the costs of the action.

The plaintiff worked for the defendants in their factory from 1888 to 1914, with two short intervals. His claim was for injury to his health by reason of the insanitary condition of the factory.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

H. E. Rose, K.C., for the appellants.

T. N. Phelan, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the defendant was by trade a jewellery polisher, and as such worked for the defendants and their predecessors in business for the period above mentioned, being for most of the time foreman of the polishers. He left the defendants' employment finally in 1914, in consequence of a hæmorrhage of the lungs; and then, as he testified, for the first time learned that he had the disease called tuberculosis or consumption. The jury found that this disease was "the reasonable and probable consequence" of the negligence of the defendants in "not taking proper and reasonable precautions by some mechanical or other device for disposing of fumes and dust."

It was contended by the defendants that no evidence was adduced at the trial upon which reasonable men could find that the plaintiff's present state of illness was caused by the breach of any duty which the defendants owed to him.

Upon the appeal the plaintiff's counsel did not contend that the disease was directly lodged in the plaintiff's body through any want of care on the defendant's part, but that their business was carried on in breach of their duty to take reasonable care of their servants, and that that breach of duty, as found by the jury, was so long-continued as to lower the man's vitality, and in consequence of such lowered vitality the germs of this disease were enabled to find a lodgment in his body and to begin and carry on to its present stage their destructive work, and all also that might follow.

The learned Chief Justice said that this contention might prevail if the negligence of the defendants was the proximate, not a remote, cause of the injury. The difficulty was in the proof, which should be convincing.

Morrison v. Pere Marquette R.R. Co. (1913), 28 O.L.R. 319, and Coyle or Brown v. John Watson Limited, [1915] A.C. 1, were cases of proof; but cases decided under Workmen's Compensation legislation must be applied with care to such a case as this, in which common law rights only were involved.

The learned Chief Justice commented on the paucity of the testimony, in the plaintiff's behalf, adduced with a view to connecting the admitted illness with the alleged cause of it. If the jury meant that lack of proper and reasonable precautions by

some mechanical device for disposing of fumes and dust was the proximate cause of the plaintiff's disease, there was no evidence upon which reasonable men could so find: see Finlay v. Tullamore, [1914] 2 I.R. 233.

Again, there was no evidence upon which reasonable men could find the defendants guilty of actionable negligence towards the plaintiff.

The learned Chief Justice commented on the form of the question put to the jury, "Was the disease from which the plaintiff suffers the reasonable and probable consequence of any negligence on the part of the defendants?"

The appeal should be allowed and the action dismissed.

LENNOX, J., read a judgment in which RIDDELL, J., concurred. They were of opinion that, whether the remedy was at common law or under the Public Health Act, R.S.O. 1914 ch. 218, the verdict could not be upheld, because the plaintiff had failed to give evidence that the tuberculosis was occasioned by the defendants' negligence or the alleged condition of their factory or their system of carrying on their operations or business therein. The appeal should be allowed.

MASTEN, J., also read a judgment. He was of opinion that the appeal must be allowed, and based his opinion on the absence of evidence to establish a causal connection between the alleged failure of the defendants to furnish "proper and reasonable precautions by some mechanical or other device for disposing of fumes and dust," as a cause, and the condition of ill-health from which the plaintiff was suffering, as a result.

Appeal allowed with costs and action dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 3rd, 1916.

*RE TORONTO GENERAL HOSPITAL TRUSTEES AND SABISTON.

Arbitration and Award—Motion by Assignee of Lease to Set aside Award Fixing Amount of Rent on Renewal of Lease—Interest of Assignee in Lease—Disclaimer upon Appeal—Previous Submission—Rental Value of Property for Factory Purposes—Admissibility of Evidence—Previous Decision of Divisional Court—Judicature Act, sec. 32—Basis of Award—Question of Fact—Municipal Taxation—Misconduct of Arbitrators in Arriving at Sum to be Awarded—Third Arbitrator "Splitting the Difference" between Sums Named by Colleagues—Evidence of.

Appeal by Robert A. Sabiston from the order of FALCONBRIDGE, C.J.K.B., 10 O.W.N. 331, dismissing the appellant's motion to set aside an award.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL LENNOX, and MASTEN, JJ.

W. Laidlaw, K.C., for the appellant.

H. E. Rose, K.C., for the trustees, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the appeal was against an order dismissing the appellant's application to set aside an award fixing the rent for a new term of a renewable lease.

The first point, taken now for the first time, was, that the appellant, being merely an assignee of the lease and having in turn assigned it, though only as security for a debt he owed, had no interest in the matter, and that, therefore, the award was a nullity. It was too late to raise this point, even if there were something substantial in it. The appellant became a party to the arbitration proceedings at their inception, the party on the one side; and, after conducting, on that side, a long-drawn-out arbitration, including an application to the Court for an opinion on a question of admissibility of evidence, appealed against the award on other grounds, and only now, at the last moment, took this point, stultifying himself in regard to all his earlier conduct in the matter. If the appellant had taken this ground at the outset, if he had then disclaimed any interest in the lease, all of these costly proceedings might have been avoided; but that he did not,

because he had a substantial interest in the lease, and, had the award been favourable to him, would have taken a renewal of it; but, being against him, as he thought, and having been moved against on consistent grounds, and that motion having failed, this ground was taken, doubtless in the hope that it might upset the award and give the appellant the costs of the motion and of this appeal, if not a chance of another arbitration upon a new discovery that after all the appellant really had an interest in the lease, a chance supported by an acceptance of the re-assignment of the lease to him by the company to whom he assigned it as security only. The appellant could take nothing by this point.

The next point was, that the arbitrators wrongly admitted evidence adduced with a view to shewing the rental value of the property for factory purposes; and it was upon this very point that the arbitrators and parties sought and obtained the opinion of a Divisional Court of the Appellate Division, and, upon getting it, the arbitrators admitted the evidence: but it was now contended that upon this motion the question was open to the appellant again, and that the opinion then given by the Court was wrong and should be disregarded—relying upon British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673. But, without considering whether sec. 32 of the Judicature Act is or is not applicable, it is not reasonable to ask the Court to reverse its conclusion upon the very point, in the same matter, recently; and, if it were, it was difficult to understand how it could be contended reasonably that the landlord, in such a case as this, might not give evidence for the purpose of shewing the demised property to be of greater value for some other uses than that to which it had in the past been put, uses to which it may and can be put by the tenant, and to go fully into all matters bearing upon the question, subject to reasonable powers of restriction of evidence for remoteness etc.

The next point was, that the new rental was computed on the basis of the property being used for industrial purposes, when in fact it could not be made so available. But that was a question of fact, upon which the arbitrators might reasonably find as they did; and there was no appeal from the award—the appeal was from a decision upon a motion to set it aside.

The next point was, that the arbitrators did not take the subject of municipal taxation into consideration. But there was nothing to shew that the arbitrators omitted this or any substantial material matter from due consideration.

The last point was, that the arbitrators did not really make an award: that, in truth, two of the arbitrators being wide apart in their estimation of a proper rental, the third arbitrator, without exercising any judgment in the matter, induced or forced them to agree upon a sum half-way between the amount which one had found to be the proper sum and the amount which the other had found. But this was denied by the third arbitrator, who testified that, before any attempt was made to agree upon any amount, he had exercised his judgment independently and had concluded that the amount actually awarded was the right amount.

The appeal should be dismissed.

LENNOX, J., read a judgment to the same effect.

RIDDELL and MASTEN, JJ., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

ROYAL BANK OF CANADA v. HEALEY.

Assignments and Preferences—Assignment to Bank of "Book-accounts, Debts, Dues, and Demands"—Exclusion of Moneys Arising from Insurance upon Goods in Stock Destroyed by Fire—Construction of Document—Ejusdem Generis Rule—Contest between Bank and Assignee for Benefit of Creditors—Adjustment of Amount Due by Insurance Companies—Binding Effect.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 10 O.W.N. 424.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

S. F. Washington, K.C., and T. H. Crerar, for the appellants.

E. H. Ambrose, for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the single question involved in this litigation, and the only question which had hitherto been considered in it, was whether the moneys in question were dues or demands, howsoever arising or

secured, which became due and owing to the defendants' assignors, in their business; that is, the rights of the parties depended altogether upon the meaning of the writing in question, given by the defendants' assignors to the plaintiffs, their bankers, as security for all their indebtednesses and liabilities to the plaintiffs. The real point in the case was whether the writing contained some qualification of the plaintiffs' rights. He was of opinion that insurance moneys were included in the assignment to the plaintiffs, and that the appeal should be allowed and judgment should be entered for the plaintiffs for the amount sued for.

MASTEN, J., was of the same opinion, for reasons stated in writing.

RIDDELL and LENNOX, JJ., were (for reasons stated by each in writing) of the contrary opinion, agreeing with the judgment of SUTHERLAND, J.

The Court being equally divided, the appeal was dismissed.

SECOND DIVISIONAL COURT. NOVEMBER 3RD, 1916.

LAHEY v. QUEENSTON QUARRY CO. LIMITED.

Fixtures—Sale of Land—Articles not Affixed to Freehold—Evidence—Intention—Money Paid into Court—Costs.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 18.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and MASTEN, JJ.

Gideon Grant, for the appellant.

A. C. Kingstone, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 1ST, 1916.

*STOCKBRIDGE v. McMARTIN.

Discovery—Examination in Ontario of Party Resident out of Ontario —Defendant by Counterclaim—Rules 328, 329, 345 (2)—Examination Confined to Counterclaim—Person for whose Benefit Action Brought—Assignor of Chose in Action.

Appeal by the plaintiff and the defendants by counterclaim from an order of the Master in Chambers requiring Clinton W. Kinsella, defendant by counterclaim, to attend at Cornwall, Ontario, for examination for discovery in the action as well as the counterclaim. Kinsella lived out of Ontario; the plaintiff sued as Kinsella's trustee in bankruptcy appointed by a foreign Court.

W. Lawr, for the appellants.

J. Y. Murdoch jun., for McMartin, the defendant by action and plaintiff by counterclaim, upon whose application the order was made.

Trusts and Guarantee Co. v. Boal (1915), 8 O.W.N. 476, was cited.

MIDDLETON, J., in a written judgment, said that the only cases in which an examination for discovery of a person resident out of Ontario could be had were those specifically provided for by Rules 328 and 329. The examination for discovery of a person for whose benefit an action is brought or of the assignor of a chose in action can only be had when that person is in Ontario: Rule 345 (2); Perrins Limited v. Algoma Tube Works Limited (1904), 8 O.L.R. 634.

Kinsella was a defendant to the counterclaim and as such liable to be examined under Rule 328; and, if he failed to attend, his defence to the counterclaim might be struck out.

The order should be varied by confining it to examination of Kinsella upon the matters in question upon the counterclaim.

Costs in the cause.

SUTHERLAND, J.

NOVEMBER 1ST, 1916.

FARR v. KERT.

Landlord and Tenant—Lease—Acceleration Clause—Distress—Seizure of Tenant's Goods—Illegality—Remedy — Injunction —Terms—Payment into Court of Value of Goods.

Motion by the plaintiff to continue until the trial an interim injunction granted by a Local Judge, restraining the defendants from selling goods distrained.

The action was by a tenant to recover damages for illegal trespass, distress, and seizure of his goods by the defendants, the landlord and his bailiff.

There was a dispute between the landlord and tenant as to whether the tenancy was merely for a month or for a longer term unexpired at the time of the seizure. The plaintiff had advertised certain of his chattel property for sale, and it was suggested that, if he had completed the sale, enough chattels would not have remained on the premises to satisfy the claim of the landlord for rent. The seizure was under an acceleration clause in the lease, and was based upon the attempted sale of the chattels.

The motion was heard in the Weekly Court at Ottawa.

T. D. McGee, for the plaintiff.

J. E. Caldwell, for the defendants.

SUTHERLAND, J., in a written judgment, set out the facts, and said that the ordinary course for a tenant desiring to resist what he considers an improper or illegal distress is by way of replevin; and it was questionable whether the remedy by injunction was open: Neal v. Rogers (1910), 22 O.L.R. 588, and cases there cited. But see Keay v. City of Regina (1912), 5 Sask. L.R. 372, 375.

Upon the facts disclosed, it would not be appropriate to continue the injunction until the trial, at all events without some security being given. The tenant placed a valuation of about $600 on the goods seized. If, within five days, he pays this sum into Court to abide the result of the action, the injunction will be continued till the trial; if not, the injunction will be dissolved.

Costs to be disposed of by the trial Judge.

RIDDELL, J., IN CHAMBERS. NOVEMBER 2ND, 1916.

*HENDERSON v. HENDERSON.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Matter of Practice—Specially Endorsed Writ of Summons—Affidavit of Merits—Counterclaim—Set-off—Rule 115.

Motion by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from an order of MIDDLETON, J., in Chambers, ante 69, dismissing an appeal from an order of the Master in Chambers refusing to strike out paras. 11 and 12 of the statement of defence and counterclaim.

Grayson Smith, for the plaintiff.
Britton Osler, for the defendants.

RIDDELL, J., in a written judgment, gave reasons for refusing leave for a further appeal. He said that there had recently been several dicta in the Appellate Division against allowing appeals except in cases of real importance and involving some substantial right; mere matters of practice should (except in extraordinary cases) be disposed of finally in the High Court Division.

The principles upon which leave to appeal under Rule 507 should be granted, if at all, are laid down in Robinson v. Mills (1909), 19 O.L.R. 162, at pp. 169, 170, and in Forbes v. Davison (1916), ante 86.

There was no case of conflicting decisions; and, treating the writ of summons in this case as specially endorsed, the defendants in the affidavit of merits filed with their appearance might set up a counterclaim. See Davis Acetylene Gas Co. v. Morrison (1915), 34 O.L.R. 155; Cox Coal Co. v. Rose Coal Co. (1916), ante 22.

What the defendants in their affidavit called a counterclaim was really a set-off: Girardot v. Welton (1900), 19 P.R. 162, 201; but there is no objection to the parties treating what is really a set-off as a counterclaim: Rule 115.

There was thus no reason to doubt the correctness of the order of Middleton, J.

The motion should be dismissed with costs to the defendants in any event of the action.

MIDDLETON, J. NOVEMBER 2ND, 1916.

RE WALMSLEY.

Will—Construction—Division of Fund among Children of two Named Persons—Distribution per Capita or per Stirpes—Period of Distribution—Unborn Children.

Motion by Joseph Walmsley, trustee under the will of Thomas Walmsley, deceased, for an order determining a question arising upon clause 16 of the will.

The motion was heard in the Weekly Court at Toronto.
H. S. White, for the trustee.
J. B. Clarke, K.C., for the children of James Walmsley.
S. W. McKeown, for the adult daughters of Nellie Peterman.
F. W. Harcourt, K.C., for the infant child of Nellie Peterman.

MIDDLETON, J., in a written judgment, said that by clause 16 the testator, who died in March, 1912, directed the sum of $6,000 to be paid to Joseph Walmsley in trust to invest and pay the income to his half-brother, James Walmsley, during his life, and upon his decease (which occurred on the 1st September, 1916) "to divide and distribute the said principal sum equally between and among the children of my said half-brother, namely, Joseph, Donald, and Annie, and the daughters of Mrs Nellie Peterman, one equal share to each child. Should any of the said daughters die before attaining the age of twenty-one years without leaving issue her surviving, her share is to go to her surviving sisters equally. The child or children of any deceased child are to receive the share which the deceased parent would have received if living."

The learned Judge said that he found no difficulty in deciding as to the shares to be taken by the Walmsleys and Petermans, because the testator had himself said "one equal share to each child." It was true that Joseph, Donald, and Annie were named, but they were named as being children of James, and the word "child" was apparently used to indicate all the beneficiaries taking upon a distribution. They were all either children of James or of Mrs. Peterman; and the last clause, which provides for a substitutional gift in the event of a "child" dying and leaving issue, was intended to apply to all. A further provision, intended to be for the benefit of the daughters of Mrs. Peterman, was that, in the event of any of these daughters dying under age without

issue, her share should go to her surviving sisters. Nothing in this conflicted with the theory that the testator's intention was an equal division per capita.

A distribution was contemplated on the death of James; and children who may hereafter be born to Mrs. Peterman can have no claim.

Fund to be distributed per capita among the children of James and the daughters of Mrs. Peterman; costs of all parties out of the fund.

WATSON v. MORGAN—BRITTON, J.—NOV. 4.

Fraud and Misrepresentation—Sale of Business—Undertaking of Vendor to Return Purchase-money if Purchaser Dissatisfied and Finds Business not as Represented—Findings of Fact of Trial Judge—Premature Action.]—Action to recover $1,000 paid by the plaintiff to the defendant as the sale-price of a confectionery business, plant, and stock, owned by the defendant. The sale-agreement contained this clause: "If the purchaser is not satisfied with this business and finds it not as represented the vendor will refund and return to him all the $1,000 within a period of three months from this 25th day of October, 1915." This action was commenced on the 24th November, 1915, and was tried without a jury at Toronto. In a written judgment, the learned Judge set out the facts and made findings thereon. He found that the plaintiff's demand for a return of the $1,000 was not because of an alleged misrepresentation as to the amount of the weekly receipts from the business, even if there was in fact such misrepresentation. There was no fraud on the part of the defendant. The onus of establishing misrepresentation was upon the plaintiff. The defendant denied that he stated that his receipts averaged $200 a week. What he did say, according to the evidence, was that the plaintiff, combining his own bakery business with the confectionery business, was getting a business from which $200 a week (gross receipts) could be realised. The defendant's version was the correct one, and the action must be dismissed. The action was premature, although no objection was taken as to that. Action dismissed with costs fixed at $50. W. D. McPherson, K.C., for the plaintiff. H. R. Moses, for the defendant.