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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 11TH, 1916.

PRESTOLITE CO. v. LONDON ENGINE SUPPLIES CO.

Sale of Goods—Gas-tanks—Out-and-out Purchase—Filling with Gas other than that Manufactured by Vendors—Unfair Competition—Passing off—Action for Injunction—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 10 O.W.N. 454.

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

S. F. Washington, K.C., and J. G. Gauld, K.C., for the appellants.

G. S. Gibbons, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that the single ground upon which the plaintiffs could succeed, if at all, in this action, upon the case made at the trial, was that the defendants had been guilty of that which may be called "unfair competition" with the plaintiffs, or had been injuring the plaintiffs in their trade by passing off upon purchasers their (the defendants') goods as if they were the goods of the plaintiffs.

One of the defendants' advertisements gave an impression of their purpose, at the least, to sail close to the wind of taking an unfair advantage of the plaintiffs' trade. But, if the defendants had been guilty, there could not have been any great difficulty in proving it, directly; and there was no direct evidence of it; all the witnesses shewed that, in one way or another, they were made aware of the fact that they were buying the acetylene gas of the defendants, not of the plaintiffs, though contained in the

old "portable tanks" of the plaintiffs, which the plaintiffs had sold, and had no property in or possession of.

So long as purchasers had been in some way quite undeceived, as to the gas they were purchasing, the plaintiffs had, as a matter of law, no sufficient cause of complaint against the defendants; and that, according to the evidence adduced at the trial, was found by the trial Judge to be the case; and the learned Chief Justice could not say that the finding was wrong: but it was plainly one which ought not to be an encouragement to sailing closer to the wind.

It was not contended that the "inscription" upon the portable tanks gave the plaintiffs any right of action in this case; and it could not be so contended in respect of any of the claims made in the pleadings, the tanks having been sold "out-and-out," as it was said. But it does not follow that there is no means by which a refilling of the tanks by others than themselves might be legally provided against; nor that an action does not lie for inducing the breach of a contract.

The appeal must be dismissed.

RIDDELL and KELLY, JJ., concurred.

MASTEN, J., also concurred, for reasons stated in writing.

Appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 12TH, 1916.

*SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Security for Costs—Action against Local Board of Health and Medical Officer of Health—Amount of Security.

Appeal by the plaintiffs from the order of MIDDLETON, J., in Chambers, ante 139, affirming an order of the Junior Local Judge at Belleville requiring the appellants to give security for the defendants' costs of the action in the sum of $400.

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

W. C. Mikel, K.C., for the appellants.

A. A. Macdonald, for the defendants, respondents.

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

THE COURT affirmed the order for security, but reduced the amount to $100 if money be paid into Court or $200 if a bond be given. Liberty reserved to the defendants to apply hereafter to increase the amount. All costs to be costs in the action. Security to be given within four weeks from the 12th December, 1916.

SECOND DIVISIONAL COURT. DECEMBER 14TH, 1916.

*RE SANDERSON AND TOWNSHIP OF SOPHIASBURGH.

Municipal Corporations—Motion to Quash Resolution of Council Requiring Removal of Obstructions from Land Alleged to be a Highway—Municipal Act, R.S.O. 1914 ch. 192, secs. 282, 283—Determination of Question of Highway or no Highway—Originating Notice—Rules 10 (2), 605, 606 (1)—Dedication—Evidence.

Appeal by James N. Sanderson from an order of MIDDLETON, J., 10 O.W.N. 222, dismissing the appellant's motion to quash a resolution of the Municipal Council of the Township of Sophiasburgh directing the overseer of highways for the township to notify Sanderson to remove all obstructions from what was said to be a public road in the village of Northport, and "after proper notice if the obstructions be not removed the overseer to move the same."

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

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

E. M. Young, for the township corporation, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the question whether the land in dispute was or was not a highway could not be determined upon an application made under the provisions of the Municipal Act respecting the quashing of by-laws and resolutions for illegality. He was unable to agree in the finding of Mr. Justice Middleton that the place in question was a highway. The order dismissing the motion to quash must stand, but stand upon different grounds, and without costs here or in the Court below.

RIDDELL, J., also read a judgment. He said that the sole power given to the Court to quash a by-law or resolution is found in the provisions of secs. 282 and 283 of the Municipal Act, R.S.O. 1914 ch. 192, and the power is to quash for illegality. There was nothing illegal in serving a notice asserting an ill-founded claim: Ball v. Carlin (1908), 11 O.W.R. 814, at pp. 816, 817, and cases cited.

Moreover, the motion could not be made upon originating notice under Rule 605; and the provisions of Rule 606 (1) were not applicable.

The motion to quash should have been dismissed; but not upon the ground that dedication had been proved.

There should be no costs here or below.

KELLY, J., was of opinion, for reasons stated in writing, that the resolution could not be quashed for illegality, and that the motion should have been dismissed on that ground. The question whether the locus was a public road was not before the Court for determination; and he would have difficulty on the evidence in arriving at a conclusion favourable to the respondents. No costs here or below.

MASTEN, J., read a short judgment in which he said that the appeal should be dismissed, but he desired to guard himself against expressing any view that such a resolution as that in question could not properly be attacked by originating notice (see Rule 10 (2)). Neither did he desire to express any opinion on the question whether a determination pro or con respecting the validity of the resolution in question would operate as a final and conclusive judgment on the issue as to whether the lands in question had become a public highway by dedication.

MEREDITH, C.J.C.P., said that the appeal was in substance allowed, but the motion to quash the by-law was dismissed on other grounds, and there were to be no costs in either Court.

HODGINS, J.A., IN CHAMBERS. DECEMBER 13TH, 1916.

RE DUMONCHELLE AND VOTERS' LIST OF SANDWICH WEST.

Parliamentary Elections — Ontario Voters' Lists Act, R.S.O. 1914 ch. 6, secs. 15 (1), 33, 40—Appeal to County Court Judge—Power to Substitute Voter as Appellant—Application to Judge of Divisional Court for Directions—Refusal to Give Directions because Question to be Raised not Proper for Consideration of Divisional Court—Costs—Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79.

Application by one Dumonchelle, a voter, for directions under sec. 40 of the Ontario Voters' Lists Act, R.S.O. 1914 ch. 6, looking to a hearing before a Divisional Court upon the question whether the Judge of the County Court of the County of Essex had power, upon an appeal to him under the Act, to substitute a voter as appellant.

H. A. Harrison, for Dumonchelle.
F. C. L. Jones, for Hough.
No one for the County Court Judge.

HODGINS, J.A., in a written judgment, said that the section was rather a peculiar one, but he entertained the application, as it seemed a more reasonable practice than requiring the voter to apply in the first instance to the Divisional Court. His only power, however, was to require security for costs and to direct upon whom notice should be served; and, if he declined to do this for any reason, he did not thereby shut out an application to a Divisional Court. He merely indicated his opinion; but, at the same time, that opinion should be the result of considering whether the question raised was one with which a Divisional Court should be properly occupied.

The applicant here desired to raise the point that the County Court Judge had no power to substitute Hough, a voter as to whom no objection could be taken, as appellant, in place of Snell, whom the learned Judge had held to be improperly upon the voters' list.

The County Court Judge, in a written judgment, had considered Snell's status as an appellant, had decided against him,

and, having then substituted Hough as the appellant, decided the issue raised in that appeal.

Section 33 of the Voters' Lists Act is: "If an appellant . . . is found not to be entitled to be an appellant, the Judge may, in his discretion, allow any other person who might have been appellant . . . to intervene and prosecute the appeal . . . upon such terms as the Judge may think just."

The applicant relied on the decision in Re West York Voters' List (1907), 15 O.L.R. 303. In that case the appellant was, as stated, not qualified to appeal, and the decision proceeded upon that fact, and it was nowhere suggested that his name was in fact upon the voters' list.

Here Snell was upon the voters' list, and so within the definition given in sec. 15 (1) of the Voters' Lists Act. He had been, during the pendency of the appeal, found by the Judge not to be entitled to be an appellant, and Hough had consequently been substituted.

The West York case was inapplicable, in view of the amendment which came into force at the session following its decision (8 Edw. VII. ch. 33, sec. 6, amending the Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 33), nor could the present statute be read except as authorising what the learned County Court Judge did.

For this reason the learned Justice of Appeal said, he thought that he ought to give no directions, as, if he did, it would result in bringing before a Divisional Court a question which it was really unnecessary, in his view, to ask.

The applicant expressly disclaimed any intention of attacking the learned County Court Judge's judgment on the appeal, which involved, among other things, the meaning of the words "legal or equitable freeholder," in the Municipal Act; so that this decision was solely concerned with the power of the Judge under sec. 33.

The applicant must pay the costs if they were exigible under the Judge's Orders Enforcement Act, R.S.O. 1914 ch. 79.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 11TH, 1916.

REX v. KURTEMI.

Liquor License Act—Magistrate's Conviction for Having Intoxicating Liquor for Sale upon Unlicensed Premises — Boarding-house—Excessive Quantity of Liquor Found in—Knowledge of Wife of Defendant—Liquor License Act, R.S.O. 1914 ch. 215, sec. 102 (2)—Motion to Quash Conviction—Magistrate's Reasons for Convicting—Admissibility.

Motion to quash a conviction of the defendant by a magistrate for having intoxicating liquor for sale upon his premises in violation of the Liquor License Act in a place where a local option by-law was in force. The offence was said to have taken place in August, 1916.

James Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the situation was far from satisfactory. If the evidence alone was looked at, there was, no doubt, evidence upon which the conviction must stand; but Mr. Haverson said that the magistrate's reasons might be looked at, and that these shewed that the magistrate gave credence to some part of the defendant's evidence, refused to find the facts proved in accordance with the contention of the Crown, and only convicted because he thought the Crown case made out by reason of an excessive quantity of liquor being found upon the defendant's premises, failing to observe the distinction drawn in Rex v. Borin (1913), 29 O.L.R. 584, between the "having" of liquor upon the premises and the mere fact of liquor being upon the premises—the "having," which is what the statute (Liquor License Act, R.S.O. 1914 ch. 215, sec. 102 (2)) requires, importing knowledge and intention on the part of the accused.

If it were the case that there had been a miscarriage by reason of the magistrate not knowing the law, then the Department would, no doubt, be glad to bring about the remission of the fine; but, the learned Judge said, he was not convinced that this was the case—even assuming that he might look at the reasons of the magistrate, as to which he was doubtful—for the magistrate had found that the wife of the defendant, who represented him in his absence, knew that the beer was upon the premises, and aided in its secretion.

Liquor may be "had" upon the premises, within the statute, even when the property in it is not in the accused, and the keeper of a boarding-house, who permits a boarder to bring beer upon the premises for unlawful consumption, is guilty of an offence against the Act. This is not in conflict with the Borin case, for there it was shewn that the liquor was brought upon the premises by boarders without the knowledge or consent of the accused or of those for whose conduct she was responsible.

If this case was not duly presented at the trial, that was the misfortune of the accused.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 11TH, 1916.

YOUNG v. SPOFFORD.

Costs — Interpleader Issue — Goods Seized under Execution Claimed by Son of Execution Debtor — Issue Found in Favour of Execution Creditor with Costs—Motion to Compel Execution Debtor to Pay Costs or to Enforce Payment against Surplus of Goods.

Motion by the execution creditor for an order requiring the execution debtor, the father of the claimant, to pay the costs of an interpleader issue.

R. L. McKinnon, for the applicant.
L. W. Goetz, for the execution debtor.

MIDDLETON, J., in a written judgment, said that goods were seized under an execution against the father; they were claimed by the son, and an issue was directed. At the trial, the late Chancellor found against the son's claim, declared the goods exigible, and awarded costs against the son.

The goods were worth more than the execution, and the son was worth nothing; so an order was now sought to compel the father, as execution debtor, to pay the costs of the contest with the son.

The father and son swore to a gift from the father to the son, but this did not avail against the execution.

Re Sturmer and Town of Beaverton (1911-12), 25 O.L.R. 190, 566, was relied upon; but what was there decided was that, when

the nominal plaintiff was a mere shadow for the real actor, the arm of the law was long enough and strong enough to reach behind the man of straw and to compel the real actor to assume the burden of costs he had in truth incurred in the name of his alias.

One might suspect that the father here put the son up to claim these goods, but that was not shewn; for all that appeared, the son might have acted in the assertion of what he believed to be his own right.

The case must be very exceptional in which the remedy, if it exists at all, should not be sought either at the trial or from the trial Judge immediately after the trial.

Reliance was placed on certain cases in which costs of an interpleader issue were allowed out of the fund. These were all cases of contest between creditors coming in to share, and in none of these cases was the ultimate liability of the debtor considered. He was insolvent and ignored.

There may have been a good gift as between father and son, void only as against the father's execution creditors. If so, the goods might be liable under an execution against the son. As to this, nothing should now be decided.

Motion dismissed without costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 11TH, 1916

*RE ONTARIO BANK.

Bank — Winding-up — Moneys in Hands of Liquidator Representing Outstanding Circulation and Unclaimed Deposits—Claim of Minister of Finance—Jurisdiction of Referee under Winding-up Order to Entertain—Order Giving Leave to Bring Action Reversed on Appeal—Advertisement for Claims—Order of Referee Barring Claims not Sent in and Proved—Status of Minister to Appeal.

Appeal by the liquidator of the bank from an order of an Official Referee, to whom the powers of the Court were delegated for the purpose of the winding-up of the bank, allowing the Minister of Finance to bring an action against the liquidator to enforce a claim in respect of two sums of money; and motion by the Minister of Finance for leave to appeal from another order of the Referee.

J. W. Bain, K.C., and C. C. Robinson, for the liquidator.
J. A. Paterson, K.C., for a committee of shareholders.
W. G. Thurston, K.C., for the Minister of Finance.

MIDDLETON, J., in a written judgment, said that the two sums which were the subject of the Minister's claim were, $60,000 representing outstanding circulation and $30,000 representing unclaimed depositors' balances.

The Referee was of opinion that he had no jurisdiction under the winding-up order to deal with these matters.

The learned Judge said that, in his opinion, the claim was one which must be asserted in the winding-up. The first and most important duty of the liquidator was the dealing with the funds in his hands according to law.

In re Tobique Gypsum Co. (1903), 6 O.L.R. 515, and In re Sun Lithographing Co. (1892), 22 O.R. 57, indicated the limits of the jurisdiction under the Winding-up Act and orders made thereunder.

The winding-up order had established a forum for the determination of all the questions incident to the liquidation and the adjustment of the rights of all interested in the due winding-up of the company—including the distribution of the assets—and to this forum all claiming under the liquidation must resort.

Claims were advertised for, and all sent in were paid in full. The Referee made an order barring all claims not sent in and proved in response to the advertisements. The Minister asked leave to appeal from this order. In the opinion of the learned Judge, the Minister has no locus standi to appeal. His claim is not barred by the order. If the statute intends that the amounts not claimed shall go to the Crown or be held by the Minister, his claim will be recognised; but, if the intention is, that all the unclaimed assets shall be distributed in ease of the shareholders who have been compelled to pay in pursuance of their double liability, there must be some way of barring claimants who will not prove their claims. If they are hurt by the order, they, and not the Minister, must complain.

The appeal should be allowed and the matter remitted to the Referee. No costs so far as the Minister is concerned. The costs of the liquidator and of the shareholders represented will be part of their general costs.

Appeal allowed.

MULOCK, C.J.Ex. DECEMBER 11TH, 1916.

R. H. THOMPSON CO. v. BROWN.

Promissory Notes—Accommodation Endorser—Surety — Agreement to Release Principal Debtor—Failure to Prove—Dividend on Debt Received by Holder of Notes from Trustee for Creditors of Principal Debtor—Ratable Application on Portion of Claim Secured by Notes and Unsecured Portion.

Appeal by the defendant from the report of the Local Master at Welland, to whom the case was referred for trial.

The action was to recover the amount of certain promissory notes endorsed by Eva F. Brown, the defendant, for the accommodation of the makers, the A. T. Brown Printing Company.

The defence was that the printing company, pursuant to an arrangement with their creditors, transferred their assets to one Palmer in trust to convert into cash and to distribute the moneys realised ratably among the company's creditors, and that it was one of the terms of the arrangement that the creditors were to accept dividends on their claims in full satisfaction of their claims; and that the plaintiff company, one of the creditors, received and accepted a dividend upon their claim, which was therefore fully satisfied, and the defendant was relieved.

The Master decided against this defence, and reported that the plaintiffs should recover from the defendant the full amount of the notes endorsed by her.

The appeal was heard in the Weekly Court at Toronto.

G. Lynch-Staunton, K.C., for the defendant.

L. B. Spencer, for the plaintiffs.

MULOCK, C.J.Ex., in a written judgment, set out the facts and examined the evidence. He said that he agreed with the finding of the Master that the defendant had failed to shew an agreement which released the printing company.

The Master also found that the defendant had no right to have a ratable portion of the dividend received by the plaintiffs applied on the plaintiffs' claim against her. The plaintiffs received from the trustee a dividend of 70 per cent. on their whole claim against the printing company, and assumed to apply it upon their open account. Their whole claim was $3,511.77, of which $1,842.92 was upon an open account, and $1,668.85 upon the notes endorsed by the defendant.

The learned Chief Justice said that, in his opinion, the dividend was applicable ratably on the two sums—so that there should be a reduction for the benefit of the defendant of that portion of the debt for which she was liable. If she had paid the notes, she would have been entitled to rank as a creditor in respect of them on the debtor's estate and to receive as a dividend thereon the amount which the plaintiffs received on the portion of their claim for the payment of which she was surety: Hobson v. Bass (1871), L.R. 6 Ch. 792.

Where a creditor receives a dividend from the debtor's estate in respect of the creditor's whole claim, a part only of which is collaterally secured by a surety, the latter is entitled to have credited on his liability a proportionate part of such dividend: Bardwell v. Lydall (1831), 7 Bing. 489; Ex p. Holmes, In re Garner (1839), Mont. & Chit. 301; Gee v. Pack (1863), 33 L.J. Q.B. 49; Ellis v. Emmanuel (1876), 24 W.R. 832.

The appeal should be allowed upon this ground, and the defendant should be credited with the proper proportion of the dividend received by the plaintiffs; and the defendant's costs of the appeal should be paid by the plaintiffs.

FALCONBRIDGE, C.J.K.B. DECEMBER 14TH, 1916.

NICHOLSON v. ST. CATHARINES COLLEGIATE INSTITUTE BOARD.

Contract — Architect — Services in Connection with Erection of School Building—Liability of School Board for Payment—Absence of Writing and Seal—Acceptance of Plans and Adoption of Action of Committee and Members of Board—Misunderstanding as to Limit of Cost of Building—Evidence—Allowance to Architect.

Action by an architect to recover $8,306.02 for his fees in respect of the erection of a new school building for the defendants.

The action was tried without a jury at St. Catharines.

G. F. Peterson, for the plaintiff.

A. C. Kingstone and F. E. Hetherington, for the defendants.

FALCONBRIDGE, C.J.K.B., read a judgment in which he said, as to the defence that there was no contract under seal, that he was of opinion that there had been sufficient acceptance of the plaintiff's plans and adoption by the Board of the action of the committee and of individual members of the Board to take the case out of Waterous Engine Works Co. v. Town of Palmerston (1892), 21 S.C.R. 556, and like cases. It was rather within the lines of Bernardin v. Municipality of North Dufferin (1891), 19 S.C.R. 581; Campbell v. Community General Hospital of Ottawa (1910), 20 O.L.R. 467.

The Board paid for the advertising for tenders, and the plaintiff was authorised to return Newman's marked cheque (on his reducing the tender to the amount named by the next lowest tenderer) and accept instead an unmarked cheque.

As to the misunderstanding regarding the alleged limit of cost, both parties were to blame in not having some memorandum in writing on the subject. The plaintiff and all the other witnesses should have credit for speaking the truth according to their best recollection. The members of the Board and of the committee, no doubt, had the limit in their minds, and thought that the plaintiff thoroughly understood it; but, if the plaintiff had understood it, it was inconceivable that he would have imperilled his professional reputation by preparing plans and specifications so palpably and hopelessly far beyond that limit.

It was to be borne in mind also that the cost of the completed plans was increased by many thousands of dollars by the addition of four class-rooms, by putting an assembly-room at the top of the building, and by adding that the building should be of fire-proof construction.

One of the defendants' witnesses, an architect of eminence, declared that, even if the facts regarding the communication of a limit of cost to the plaintiff were in favour of the defendants' evidence and contention, the plaintiff ought to be paid $1,000 as about the amount of his disbursements on the first set of plans and two and a half per cent. on the second set.

That suggestion was accepted by the learned Chief Justice, and the plaintiff was allowed $1,000 in addition to $3,613.52 paid into Court, with costs, and with a direction for payment out to the plaintiff of the amount in Court.

MULOCK, C.J.Ex. DECEMBER 14TH, 1916.

MUNDEY v. REID.

Distress — Rent — Goods of Sub-tenant — Excessive Distress — Sale of Goods Distrained—Amount Realised more than Sufficient to Pay Rent—Finding of Fact of Trial Judge—Distress for Taxes—Payment by Head Tenant—Right to Distrain Goods of Sub-tenant—Right of Sub-tenant to Surplus Proceeds of Sale —Leave to Amend—Refusal.

Action for excessive distress.

The defendant, the lessee of a shop, sublet it to one Vise, who covenanted to pay rent and taxes. Vise sublet to the plaintiff, who covenanted with Vise to pay rent and taxes. In each lease the covenants were in the statutory form.

The plaintiff made default in payment of taxes; on the 16th March, 1915, there was owing for taxes $1,093.98, for which the municipality distrained on the plaintiff's goods in the demised premises. The defendant on the 16th March, 1915, paid these taxes.

There was owing to the defendant for arrears of rent $500; and on the 17th March, 1915, the defendant distrained for $1,593.98, being the amount of the taxes paid by him and the $500. The goods seized were sold, but realised only the gross sum of $855.05.

The action was tried without a jury at Toronto.

L. Davis, for the plaintiff.

H. C. Macdonald, for the defendant.

MULOCK, C.J.Ex., set out the facts in a written judgment, and said that from the sum of $855.05 the bailiff deducted $95.46 for his charges, and there remained $759.59 applicable towards payment of whatever the defendant was entitled to distrain for. It was admitted that he was entitled to distrain for $500 rent, his counsel abandoning any right to distrain for taxes. The balance, $259.59, was paid to the defendant by his bailiff.

In his statement of claim the plaintiff alleged that the distress for taxes was wholly illegal and unjustifiable, and that the defendant distrained and sold goods worth $2,000 to satisfy arrears of rent of only $500.

The plaintiff seemed to rest his whole case on the charge of excessive distress. That is a question of fact. There is much

uncertainty as to how much goods sold by a bailiff will realise. The sale was conducted in a proper manner and due regard was had to the rights of the plaintiff and the duty of the defendant.

There was no excessive distress in respect of the quantity of goods seized nor in respect of those sold. Had a lesser amount of goods been distrained, it might have proved insufficient, whereupon a second distress and sale would have been necessary, and that would have put the plaintiff to further expense. The defendant acted reasonably, and the plaintiff had against the defendant no cause of action which was covered by his statement of claim.

The plaintiff urged that he was entitled at all events to the $259.59; but he could not recover it in this action without an amendment of the pleadings. That should not be allowed. The plaintiff's goods had been seized by the municipality for taxes; and, if the defendant had not paid the taxes, the goods would have been sold for taxes. The defendant apparently was out of pocket $1,093.98. It was the duty of the plaintiff to have paid that sum; but, there being no privity of contract between the plaintiff and defendant, the defendant was apparently without a remedy against the plaintiff, although the latter had received the benefit.

The plaintiff's conduct not being creditable, he was not entitled to have the Court exercise its discretion by permitting him to amend his pleadings.

Action dismissed with costs.

MIDDLETON, J. DECEMBER 15TH, 1916.

BONNICK v. LENNOX.
BONNICK v. WOLFE.

Assignments and Preferences—Assignment for Benefit of Creditors—Money Withdrawn from Business by Insolvent Trader before Assignment—Prosecution of Insolvent by two Creditors for Fraud—Payment to Prosecuting Creditors out of Money Withdrawn of Sums Sufficient with Dividend from Insolvent's Estate to Pay Claims in Full—Agreement—Intimation to Crown Attorney—Suspended Sentence—Deduction from Dividends of Sums Paid—Costs.

Actions by the assignee for the benefit of the creditors of one Topp to recover sums alleged to have been improperly paid to the defendants, two of the creditors of Topp.

The action was tried without a jury at Toronto.
J. A. Macintosh, for the plaintiff.
W. N. Tilley, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that Topp assigned for the benefit of his creditors on the 29th November, 1915, but the assignment was not to become operative till the 6th December. Topp was prosecuted for fraud in connection with his dealings, and pending trial was confined in gaol, bail being refused. The creditors prosecuting were the two defendants. On the 22nd December, 1915, an agreement was made between Topp and the defendants, in which it was recited that the estate in the hands of the assignee was expected to pay 55 cents on the dollar; and that the debtor, "through certain of his friends," was arranging to pay the remaining 45 per cent. of the claims of these two creditors—$2,304. Upon payment of this sum, the creditors were to "signify to the Crown Attorney . . . that all claims of the parties of the second part have been duly met and satisfied by the party of the first part. The money was paid, the signification to the Crown Attorney was made; the accused (Topp) elected to be tried summarily, appeared before the County Court Judge, pleaded "guilty," and was allowed to go on suspended sentence.

Under our law, the learned Judge said, a felony may not be compounded. By this circumlocution, practically the same end was achieved. In this case there may have been nothing wrong; but the question may arise in some case whether it is not within the evil aimed at by the rule to arrange that, upon a plea of "guilty" being entered, such representations be made to the Crown Attorney and the Judge as to bring about suspended sentence. This question did not require solution now.

It appeared that the $2,304 was part of a sum of $3,000 withdrawn by Topp from the assets of his business immediately before the assignment. The fact was as stated by Topp, that when the creditors began to press him, "I was afraid they would block me up in the business, and I would not have anything left—I thought it would be wise perhaps to have a few dollars." The "few dollars" were the $3,000 so taken.

The money always was Topp's, and on the assignment becoming operative it became the assignee's.

The defendants, beneficiaries under the assignment, had thus received money that was the property of the assignee—Lennox $1,521 and Wolfe $783—and it must be declared that the assignee is entitled to deduct and withhold these sums from their respective dividends.

Judgment accordingly with costs.

ABBEY v. NIAGARA ST. CATHARINES AND TORONTO R.W. Co.—BRITTON, J.—DEC. 11.

Negligence — Railway — Collision — Death of Passenger — Negligence — Finding of Fact of Trial Judge—Costs.]—Action by Agnes M. Abbey and David Bruce Abbey, the widow and son of Robert W. Abbey, who, when a passenger on a car of the defendants the Niagara company, was killed, against the Niagara company and the Grand Trunk Railway Company, to recover damages for his death. The death was caused by a collision of an engine of the Grand Trunk company with the car in which the deceased was being carried. The plaintiffs charged that both defendants were guilty of negligence occasioning the death. The action was tried at Welland. The question of damages only was left to the jury, and they assessed those of the widow at $6,000 and those of the son at $2,000, subject to the question of liability, which, by consent, was tried by the Judge alone. Upon the conflicting evidence adduced, the learned Judge found that the defendants the Grand Trunk company were not guilty of negligence either in excessive speed or in proceeding to the place of collision; but that the defendants the Niagara company were guilty of negligence in not seeing that the semaphore was in place to warn the driver of the Grand Trunk engine. Judgment for the defendants the Grand Trunk company dismissing the action against them without costs. Judgment for the plaintiffs, for the sums assessed by the jury, against the defendants the Niagara company with costs, including any additional costs incurred by reason of the other company being made a party. W. M. German. K.C., for the plaintiffs. A. J. Reid, K.C., for the defendants the Niagara company. D. L. McCarthy, K.C., for the defendants the Grand Trunk company.

MOORE v. MIDANICK—KELLY, J.—DEC. 15.

Timber—Assignment of Locatee's Rights—Action to Set aside—Evidence—Findings of Fact.]—Action for a declaration that a certain assignment, dated the 4th March, 1914, by the plaintiff to the defendant Midanick, of all the plaintiff's right, title, interest, claim, and demand in and to the north half of lot 6 in the 3rd concession of the township of German, is null and void, and for an order vesting the land in the plaintiff; for an injunction restraining the defendants from dealing or interfering with the land or any timber or lumber cut therefrom; for an accounting for all timber and lumber cut and removed and all profits made therefrom; and for

damages. The action was tried without a jury at Haileybury. KELLY, J., in a written judgment, set forth the facts, and said that the plaintiff's position was, that he, being the locatee of the land and owner of the timber thereon, the defendant Midanick, assuming to act as owner thereof, in conjunction with the defendant Leverton, illegally caused to be cut from the land a quantity of timber, which was then sold to Leverton and the defendant Morgan. The plaintiff denied executing the assignment. The learned Judge had no difficulty in finding that the signature to the assignment was the plaintiff's. Other grounds were urged by the plaintiff; but, having regard to all the circumstances of the case—set out in the judgment—the plaintiff failed, and the action must be dismissed with costs. G. Mitchell, for the plaintiff. A. Cohen, for the defendants.

KONKLE v. KONKLE—MIDDLETON, J.—DEC. 15.

Contract — Joint Dealing of Uncle and Nephew in Mining Lands and Company-shares—Moneys Paid by Uncle—Charge on Shares of Nephew—Conversion of Part—Personal Judgment against Estate of Nephew (Deceased)—Lien on Shares Remaining—Costs.]—Action by Judson O. Konkle against the administratrix of the estate of his deceased nephew John W. Konkle to recover moneys alleged to have been appropriated by the nephew in his lifetime in a joint transaction in mining lands and company-shares. The action was tried without a jury at Hamilton. MIDDLETON, J., stated the facts in a written judgment and said that by an agreement made between the uncle and nephew in June, 1911, and embodied in a written memorandum, 50,000 shares in the company held by the nephew were charged with half of the sum of $3,385, the amount advanced by the uncle for the purchase of an interest in the lands, for which shares in the company were afterwards substituted, and that there being now only 40,500 shares forthcoming, it must be presumed that the nephew converted 9,500 shares to his own use, and his estate must be charged with these at 8 cents a share, the selling price named in the agreement. Judgment for $760 against the estate of John W. Konkle and declaring a lien upon the remaining 40,500 shares for $1,692.50 and interest from the 26th June, 1911, less such sum as may be recovered under the personal judgment against the estate, with costs of the action, to be levied de bonis et terris intestatoris. C. W. Bell, for the plaintiff. W. S. MacBrayne, for the defendant.