THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 15TH, 1906).

VOL. VIII. TORONTO, SEPTEMBER 20, 1906. NO. 8

FALCONBRIDGE, C.J. AUGUST 24TH, 1906.

TRIAL.

DAVIDS v. NEWELL.

Easements—Light—Air—Ventilation — Private Way — Prescription—Proof—Injunction—Damages—Costs.

Action for an injunction and damages in respect of trespass to land, etc.

T. D. Delamere, K.C., and C. C. Ross, for plaintiffs.

E. E. A. DuVernet and D. C. Ross, for defendants.

FALCONBRIDGE, C.J.:—Plaintiffs have proved their paper title, and it lay upon defendant to shew satisfactorily the enjoyment of the three easements which he claims, for such a length of time as to confer a right.

He failed entirely to prove any agreement or license such as is set up in paragraph 4a of the statement of defence as amended.

R. S. O. 1897 ch. 133, sec. 36, stands in defendant's way, and prevents any claim by him for access and use of light.

But it is improper to couple "light" and "air" together in every case: Gale, 7th ed., p. 572; and he has established his right to maintain his openings for access of air, i.e., ventilation.

As to the right of way claimed over the alleged lane, the burthen rests on defendant to prove his enjoyment for the requisite length of time to have been open, peaceable, and as of right, "nec vi, nec clam, nec precario:" Gale, p. 201. This, I think, he has failed to do in the clear and satisfactory manner which the law requires when it is sought to take any property or any kind of enjoyment thereof from the true owner.

The defence therefore fails except as to the minor and comparatively immaterial point mentioned above. No doubt, if defendant had confined his claim to that one matter, plaintiffs would not have taken the trouble to contest it. Therefore there should be no allowance made therefor in considering the question of costs.

Plaintiffs will have judgment as indicated above, with $25 damages and an injunction and full costs.

MACLAREN, J.A. AUGUST 27TH, 1906.

C.A.—CHAMBERS.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Appeal to Court of Appeal—Leave to Appeal per Saltum—Order Quashing Municipal By-law—Judicature Act, sec. 76a—Grounds for Granting Leave.

Motion by the corporation of the town of Owen Sound for leave to appeal per saltum to the Court of Appeal under sec. 76a of the Judicature Act from the order of MABEE, J., ante 239, quashing a local option by-law of that town.

D. C. Ross, for the corporation.

J. Haverson, K.C., for Sinclair.

MACLAREN, J.A.:—An appeal lies to the Supreme Court in such a case from a judgment of this Court under sec. 24 of the Supreme Court Act. Mr. Haverson argues that sec. 76a of the Judicature Act applies only to actions, and not to judgments in proceedings like this, which are not begun by writ. I can see no ground for so restricting the section, which in terms applies to any judgment, order, or decision of a Judge in Court, at the trial or otherwise, from which an appeal lies from this Court to the Supreme Court.

The only question remaining is whether this is a proper case to grant such leave. There are several important debatable questions of law involved, and I am of opinion that this case fairly comes within the principles laid down in Canada Carriage Co. v. Lea, 5 O. W. R. 86, and Playfair v. Turner, 7 O. W. R. 744. The motion is accordingly granted.

MEREDITH, C.J. JUNE 22ND, 1906.

CHAMBERS.

RE ELGIE, EDGAR, AND CLEMENS.

Interpleader—Application for Order — Stakeholder — Chattel Mortgage—Surplus in Hands of Mortgagee—Claim under Order for Payment of Part of Surplus — Claim under Purchase from Mortgagor.

Appeal by Elgie & Co., applicants, from order of Master in Chambers, ante 33, dismissing an application for an interpleader order.

F. Arnoldi, K.C., for appellants.

J. A. Scellen, Berlin, for claimant Clemens.

T. E. Godson, Bracebridge, for claimant Edgar.

MEREDITH, C.J., dismissed the appeal with costs to the claimant Clemens and without costs to the claimant Edgar.

MABEE, J. SEPTEMBER 14TH, 1906.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. GRAND TRUNK R. W. CO.

Railway—Leasehold Interest in Land—Sub-lease—Covenant —Payment of Rent—Acquisition of Fee—Compensation—Interest—Agreement—Reference—Costs.

Action for rent or in the alternative for compensation in respect of plaintiffs' leasehold interest in certain lands.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs.

W. Cassels, K.C., and W. A. H. Kerr, for defendants.

MABEE, J.:—Under the document of 20th January, 1886, plaintiffs had defendants' covenant for the payments of the rent as set forth therein, and defendants are therefore liable for such payments, unless something has taken place to relieve them of that covenant.

It is contended for defendants that they are released from their covenant by reason of the agreement made between them and plaintiffs dated 26th July, 1892, being an arrangement for the construction and maintenance of the Union Station at Toronto, and a surrender executed by the defendants dated 20th July, 1894. The fifth Esplanade agreement, also dated 26th July, 1892, was relied upon for the arguments advanced by defendants' counsel. . . .

The land covered by the sub-lease from plaintiffs to defendants of July, 1886, forms part of the Union Station, and is clearly land which defendants by their agreement with plaintiffs of 26th July, 1892, were bound to acquire for station purposes; the fee was in the city of Toronto; plaintiffs were lessees with renewal rights; and, had defendants at that time taken steps to acquire this land, compensation would have been made to plaintiffs for their rights as such lessees; no steps were taken by defendants to obtain title to the lands in question, and plaintiffs have ever since been paying rent to the city under the lease to them, but defendants have paid no rent under their sub-lease since July, 1894. It may be that the strict right of plaintiffs is to recover upon the basis of defendants' covenant, but I think the more equitable way to dispose of the matter is to treat it as the parties at the time seemed to contemplate, and so far as possible place them in the position they would have been in had the lands been acquired by the defendants pursuant to the terms of the agreement.

I do not think plaintiffs were bound to provide these lands in question for station purposes, nor do I think that anything that has been done by any of the parties has deprived plaintiffs of their right to be compensated for the interest they had in the lands under their lease from the city; and the Statute of Limitations forms no bar. I am unable to say that plaintiffs have estopped themselves from making this claim; the correspondence shews they have been demanding payment of rent as the same fell due; and certain other demands and offers were made by them, which, however, form no part of the case, although appearing in the exhibits, as all immaterial matters were excepted. It does not appear that plaintiffs have been compensated by the city, as counsel for defendants contended, nor do I think that the construction of the York street bridge, and the clauses of the agreement

bearing upon that work, stand in plaintiffs' way. If plaintiffs once had the right to be paid by defendants for their leasehold interest, which I think they had, I am unable to say that anything has taken place to deprive them of such right. It is possible that the position of defendants as against a claim for rent may be stronger, but I am not considering that aspect of the case. The pleadings make a claim, in the alternative, for compensation. It was agreed at the trial that if I came to the conclusion that plaintiffs were entitled to recover upon this alternative claim, the parties would agree upon a referee, as nothing is before me upon which I could fix the amount payable. There will, therefore, be a reference to ascertain the value of the leasehold interest of plaintiffs in the lands in question as of July, 1892. Plaintiffs will be entitled to interest upon that sum, and defendants will be entitled to credit for the rent paid by them to plaintiffs subsequent to that date. Had defendants acquired title to the property, the sum paid would, under the Union Station agreement, have gone to capital account expenditure, and plaintiffs would have been chargeable with one-half the interest thereon, as the agreement provides. The referee will credit defendants with the sum plaintiffs would have been liable to pay to them for such interest, and generally take the account in such manner as will leave the parties in the position they would have occupied had the agreements been carried out at the time and in the manner I think their letter and spirit required. Reimbursement for any rentals paid by plaintiffs to the city is not claimed.

If the parties are unable to agree as to the amount that should be paid to plaintiffs, or as to a referee, I will name one upon the application of either party upon notice to the other. It is of course obvious that the position of both parties, as between themselves and the city, and also as between themselves, in the event of defendants at any time acquiring the fee from the city, or making the latter compensation therefor, is left untouched by anything that may have been disposed of in this action.

Plaintiffs will have costs down to and including the trial, but if a reference is necessary the costs thereof will be reserved as well as further directions.

CARTWRIGHT, MASTER. SEPTEMBER 17TH, 1906.

CHAMBERS.

WOODRUFF CO. v. COLWELL.

Company—Parties to Action—Authority to Use Name—Solicitor—Meeting of Shareholders.

Action by the company and the Messrs. Woodruff personally to restrain defendant from acting as manager of the company and dealing with its assets, etc.

Defendant moved to strike out the name of the company as plaintiffs and to require the other two plaintiffs to give security for costs.

C. A. Moss, for defendant.

W. N. Ferguson, for plaintiffs.

THE MASTER:—The defendant has filed an affidavit on which he has been cross-examined. He admits that the Messrs. Woodruff and himself are the only directors of the company, and that a majority of the stock is held by them.

He contends, however, that under the provisions of an agreement made in April last the Woodruffs have ceased to have any interest in the company.

This, however, is denied by the other side; and it seems clear that this is a question in dispute between the parties. In these circumstances, I think the motion should be dismissed with costs in the cause.

This seems to be the course indicated as proper in such cases by Jessel, M.R., in Pender v. Lushington, 6 Ch. D. 70, 79, 80.

Plaintiffs' solicitors seem to have authority to bring the action, so far as the Woodruffs are concerned, by the telegram sent by them from San Francisco. And by another telegram they have assumed to dismiss the defendant from the office of manager.

No doubt, there will be given all proper directions as to calling a meeting of the company if defendant still disputes the rights of the Woodruffs in the company, if the injunction is granted. . . .

A somewhat similar question came up and was dealt with in Saskatchewan Land and Homestead Co. v. Leadley, 2 O. W. R. 944, 1075, 1112; S.C., 3 O. W. R. 133, 191.