

Court of Appeal.]

[Nov. 13.]

HOGABOOM v. GILLIES.

*Interpleader—Sheriff—Security for goods seized—Failure of—Barring claimant.*

Upon appeal from the order and decision of the Queen's Bench Division, 16 P.R. 96, the court was equally divided, and the appeal was dismissed.

*Per* HAGARTY, C.J.O., and OSLER, J.A. : The order should be reversed.

*Per* BURTON and MACLENNAN, J.J.A. : The order should be affirmed.

*W. R. Riddell* for the appellant.

*J. A. Macdonald* for the respondent.

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COUTTS v. DODDS.

*Costs—Order as to, under Rule 1170—"Good cause"—Divisional Court—Amending Rule 1274, application of—Appeal—Agreement of parties.*

Under Rule 1170, as it stood before the amendment made by Rule 1274, a Divisional Court had the power to make such order as to costs as might seem just, irrespective of "good cause."

*Myers v. Defries*, 4 Ex.D. 176 ; *Marsden v. Lancashire, etc. R.W. Co.*, 7 Q.B.D. 641, followed.

*Island v. Township of Amaranth*, 16 P.R. 3, approved.

Where similar motions are made to the same court in two actions, and the parties in the first agree that the decision in the second shall govern, there is nothing to preclude an appeal in the first action, even though there is no appeal in the second.

*Per* MACLENNAN, J.A. : Rule 1274 was inapplicable to this action, which was tried before it came into force.

*W. M. Douglas* for the appellant.

*Aylesworth, Q.C.*, for the respondent.

MEREDITH, J.]

[Nov. 13.]

PURCELL v. BERGIN.

*Costs—Failure to establish will—Costs of person named as executor.*

Where the person named as an executor in a written instrument failed, in the final result of this action, to establish it as the last will of the testator, and the court of last resort refused to order that his costs incurred therein should be paid out of the estate ;

*Held*, that the court of first instance could not make an order for payment out of moneys paid into that court by the administrators *pendente lite* of these costs as costs of the litigation, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because he never was an executor.

*W. H. Blake* for the applicant.

*J. H. Moss, contra.*