

The order of the judge of the proper Surrogate Court, on the day this action was begun by the issue of the writ of summons, that letters of administration should be issued to the plaintiff, was a judicial act and was to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act; and the order was such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order.

Judgment of IDINGTON, J., 40 C.L.J. 479, reversed.

*W. M. Boulbee*, for plaintiff. *D. C. Ross*, for defendants.

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Falconbridge, C.J.K.B., Street, J., Britton, J.] [Nov. 5, 1904.

BESSEMER GAS ENGINE CO. v. MILLS.

*Company—Extra-provincial corporation—Sale of goods without license—Resident agent.*

The plaintiffs, a foreign corporation not licensed to do business in Ontario, authorized F., a resident of the Province, to sell their engines at certain specified prices, upon commission. F. never went out to solicit orders, but took only those which came to him at his place of business. He sold an engine for the plaintiffs to the defendant, and this action was brought to recover the price.

*Held*, that F. was a resident agent or representative of an extra-provincial corporation, within the meaning of s. 6 of 63 Vict. c. 24(O.), and the plaintiffs, being unlicensed, were, by s. 14, incapable of maintaining the action.

Judgment of the County Court of Lambton reversed.

*Hanna*, for defendant. *Riddell*, K.C., for plaintiffs.

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Street, J.]

IN RE MARTIN.

[Nov. 24, 1904.

*Will—Restraint upon alienation—Validity—Summary application to determine—Rule 938.*

A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid.

*Held*, that Rule 438 gives no authority to determine such a question.

*J. M. Ferguson*, for the devisees, the applicants. *J. E. Day*, for the executors. *J. A. Walker*, K.C., for the proposed mortgagees.