

be allowed to enforce their mortgage, notwithstanding the liquidation, by an action upon the mortgage in this Court. Any attempt to exercise the power of sale would result in litigation, and the right of the mortgages should be determined in an action brought by them.

The appeal of the mortgagees should be allowed, with costs here and below, to be added to their claim.

ORDE, J.

MARCH 12TH, 1920.

TRICKEY v. ROSS.

*Appeal—Report of Mining Commissioner pursuant to Reference in Action—Questions of Fact—Conflicting Evidence—Demeanour of Witnesses—Agreement—Refusal to Disturb Report—Partnership—Interests in Mining Property—Motion to Confirm Report—Necessity for—Practice—Judgment on Further Directions—Costs—Counsel Fee.*

Appeal by the defendant from a report of the Mining Commissioner, and motion by the plaintiffs for judgment thereon.

The report was made pursuant to a reference to the Commissioner in an action.

The appeal and motion were heard in the Weekly Court, Toronto.

J. Cowan, for the defendant.

W. R. Smyth, K.C., for the plaintiffs.

ORDE, J., in a written judgment, said that he had come to the conclusion that the Commissioner was right. There was a direct conflict of evidence on many points between the plaintiff Montagu and the defendant and his witnesses. The Commissioner, having seen the witnesses, believed Montagu in preference to the defendant. After a careful perusal of the evidence, the learned Judge saw no reason for disturbing the Commissioner's findings. It was significant that wherever there was any written evidence it supported Montagu's story and discredited the defendant's.

The defendant rested his case substantially upon the contention that he and the plaintiff Montagu were partners, and that consequently he was entitled to share with Montagu, and that the plaintiff Trickey entered into his agreement with Montagu with notice of the defendant's interest and took subject to it. The plaintiff Kinney was a trustee for Montagu, and Kinney's rights (it was alleged that he had a small interest) were necessarily subject to those of the others.