

The motion to set aside the order was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

J. A. Macintosh, for Adams, the tenant.

G. H. Kilmer, K.C., for Fee, the landlord.

MEREDITH, C.J.:—I regret that we have to hold that this motion is entitled to succeed, and that the proceedings must be set aside, but, in the circumstances, it will be without costs.

When the application to remove the proceedings into the High Court came before me, the only objection taken was that the case did not come within the Act, because there was a conflict of testimony as to the right of the tenant to possession, and the case was not, therefore, one coming under the true intent and meaning of sec. 3 of the Overholding Tenants Act. Nothing was said about the other objection, which is now for the first time made. I would not have granted the order but for the argument that the cases were conflicting, and that there was no decided case in which it had been held that the Judge has jurisdiction under the Act to try questions of fact where there is a bona fide dispute and a conflict of testimony.

My brother Middleton, who, fortunately, is sitting with us this morning, tells us that in *Re Graham and Yardley*, argued on the 28th April, 1909, noted 14 O. W. R. 30, a Divisional Court determined that the Judge has jurisdiction under the Act to determine questions of fact, and that when the fact is determined by him in favour of the landlord, the case is clearly one coming under the true intent and meaning of sec. 3. That must be taken to be the law, as far as this Court is concerned, and we must hold that this objection fails.

The tenant is, however, entitled to succeed upon the other ground taken—the absence of a demand of possession after his tenancy was determined, which is necessary to give jurisdiction under the Act: *Re Grant and Robertson*, 8 O. L. R. 297.

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MIDDLETON, J.

MAY 19TH, 1910.

RE McDONELL, McDONELL v. SHANKIE.

*Will—Construction—Bequest of Annuity to Widow—Claim to Dower in Hands of Deceased—Implication—Intention.*

Appeal by George McDonell, Walter McDonell, Angus McDonell and James McDonell, four of the sons of Peter McDonell,