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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 8TH, 1919.

FIELDEN v. JACQUES.

Principal and Agent—Action by Agent for Commission on Sale of Shares—Evidence—Onus—Special Agreement—Release.

Appeal by the plaintiff from the judgment of LENNOX, J., ante 99.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Erichsen Brown, for the appellant.

T. L. Monahan, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. DECEMBER 11TH, 1919.

*RE RUSSELL AND TORONTO SUBURBAN R.W. CO.

Appeal—Right of Appeal to Appellate Division from Order of High Court Division on Appeal from Award under Ontario Railway Act—R.S.O. 1914 ch. 185, sec. 90 (15), (16)—Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (dd)—Arbitration Act, R.S.O. 1914 ch. 65, sec. 17.

An appeal by the railway company from an order of SUTHERLAND, J., 16 O.W.N. 352, dismissing an appeal from an award of arbitrators determining the compensation to be paid to William

* This case and all others so marked to be reported in the Ontario Law Reports.

Russell for a part of his farm taken for the company's railway and for loss and damage by severance, injurious affection, etc.

The appeal came on for hearing before MEREDITH, C.J.C.P., LATCHFORD and MIDDLETON, JJ., and FERGUSON, J.A.

R. S. Robertson, for William Russell, the respondent, objected that no appeal lay.

R. B. Henderson, for the railway company, was heard in answer to the objection.

MEREDITH, C.J.C.P., in a written judgment, said that the respondent's objection was based upon the judgment of the Court of Appeal in Birely v. Toronto Hamilton and Buffalo R.W. Co. (1898), 25 A.R. 88; but that judgment was quite inapplicable to this case. Here the arbitration was under the Ontario Railway Act, R.S.O. 1914 ch. 185; and that Act gives a right to any party to the arbitration to "appeal therefrom upon any question of law or fact to the Supreme Court:" sec. 90 (15); and the words "Supreme Court" mean the "Supreme Court of Ontario:" Interpretation Act, R.S.O. 1914 ch. 1, sec. 29 (*dd*). By sub-sec. 16 of sec. 90 of the Railway Act, it is enacted that "upon such appeal"—that is, an appeal under sub-sec. 15—"the practice and proceedings shall be as nearly as may be the same as upon an appeal from an award under the Arbitration Act"—that is, under sec. 17 of the Arbitration Act, R.S.O. 1914 ch. 65, which provides that "an appeal shall lie to a Judge of the Supreme Court and to a Divisional Court in the same manner, and subject to the same restrictions, as in the case of a reference under an order of the Court."

The learned Chief Justice was therefore of opinion that the railway company's "proceedings" upon appeal in this case had been quite regular, and that the objection must be overruled, and the appeal heard on its merits This opinion was quite in accord with an unreported ruling of the First Divisional Court—a ruling which necessitated an appeal to a single Judge of the High Court Division first and then an appeal to a Divisional Court of the Appellate Division.

The costs of this part of the appeal should be costs to the railway company, the appellant, in the appeal in any event.

The other members of the Court agreed, written reasons being given by LATCHFORD and MIDDLETON, JJ.

Objection overruled.

HIGH COURT DIVISION.

SUTHERLAND. J. DECEMBER 8TH, 1919.

*RE BAILEY COBALT MINES LIMITED.

Company—Winding-up—Order under Dominion Winding-up Act—Offer to Purchase Assets—Terms of Offer—Payment by Allotment of Shares in New Purchasing Company to be Created—Power of Master to Accept Offer—Power of Court—Winding-up Act, sec. 34 (h)—Ontario Companies Act, sec. 184 (1), (2)—Rights of Minority Shareholders—Reference to Master in Ordinary—Illness of Master—Jurisdiction of Assistant Master in Ordinary pro Tem.—Judicature Act, secs. 76 (7), (8), 77—Rules 759, 760.

Motion on behalf of certain shareholders of the company, the affairs of which were in the course of being wound up under the Dominion Winding-up Act, by way of appeal from the report of F. J. Roche, Assistant Master in Ordinary pro tem., dated the 17th October, 1919, approving of the acceptance of an offer made by A. J. Young to purchase all the assets of the company, and directing the liquidators to carry out a sale to Young upon the terms proposed; motion by the liquidators to confirm the report or for a direction to the liquidators to accept the offer and carry out the sale; and motion by the liquidators to amend the order of reference by referring the matter to the Assistant Master in Ordinary instead of to the Master in Ordinary.

The motion were heard in the Weekly Court, Toronto.

William Laidlaw, K.C., for the appellant shareholders.

R. S. Robertson, for the liquidators.

J. A. Macintosh, for the liquidator Langley personally.

G. H. Sedgewick, for creditors.

Frank Arnoldi, K.C., for a body of shareholders.

Glynn Osler, for Penn Canadian Mines Limited, a creditor, and for a body of shareholders.

T. J. Agar, for a body of shareholders.

C. W. Kerr, for a body of shareholders.

W. R. Sweeney, a shareholder and creditor, in person.

G. W. Adams, for A. J. Young.

SUTHERLAND, J., in a written judgment, referred to the order made on a previous application in the same matter (16 O.W.N. 342). The offer now in question was a new one by the same person, upon different terms.

The learned Judge then dealt with the jurisdiction of Mr. Roche, the reference having been directed to the Master in Ordinary. By an order in council of the 13th December, 1918, Mr. Roche was appointed Assistant Master in Ordinary pro tem., during the illness of Mr. Neville, the Assistant Master, who had since died. The Master in Ordinary himself had been ill since the spring of 1919; and on the 3rd May, 1919, the Chief Justice of Ontario made a written direction that Mr. Roche should perform the duties of the Master during the illness of the latter: see sec. 76 (7) and (8) and sec. 77 of the Judicature Act, and Rules 759 and 760. Mr. Roche took the oath of office prescribed for all officers, but did not take the same oath again before entering upon the duties of Assistant Master in Ordinary pro tem. The learned Judge said that he attached no weight to the objection made to Mr. Roche's jurisdiction. Instead of it being obligatory for him to take the oath again, to do so would be a work of supererogation.

It was argued that there was no authority in the Winding-up Act or elsewhere for empowering a sale of the assets of a company in liquidation to be made which involved the compulsory acceptance, by even a minority of shareholders in the company, of shares in a new company proposed to be created for the purpose of taking over the assets of the company in liquidation.

The learned Judge had come to the conclusion that this point was not so free from reasonable doubt as to warrant him in determining that the Assistant Master in Ordinary could properly approve of the acceptance of the offer or direct the liquidators to accept it and carry out a sale, or to warrant him (the learned Judge) in making a substantive order to that effect.

There was no such provision as was contained in the English Companies Act of 1862, secs. 161, 162, and in the Companies (Consolidation) Act of 1908, sec. 192 (123). Reference to Re Cambrian Mining Co. (1883), 48 L.T.R. 114; In re Imperial Mercantile Credit Association (1871), L.R. 12 Eq. 504; In re Agra and Masterman's Bank (1866), ib. 509, note; Emden's Winding-up of Companies, 8th ed. (1909), p. 325.

It was argued that, as the Winding-up Act, R.S.C. 1906 ch. 144, also contains a section, 34 (*h*), authorising the liquidator with the approval of the Court, to "do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets, and as the provisions of the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 184 (1) and (2), should be held to apply to this company, the two Acts should be read together, and under them the Court should be declared to have power to sanction the acceptance of the offer and direct the liquidators to carry out the sale.

The learned Judge said that he was unable to come to the conclusion that it was clear that, under the order made pursuant to the Dominion Winding-up Act, the provisions of the Ontario Act could be said necessarily to apply. There should be clear statutory authority to compel minority shareholders to accept shares in another company in place of a share in the proceeds of a sale for cash.

The appeal should be allowed and the other motions dismissed; no order as to costs.

LENNOX, J. DECEMBER 10TH, 1919.

RE SCOFI AND HARRIS.

Deed—Conveyance of Land—Power of Appointment Given to four Grantees—Exercise of Power by two Appointing in Favour of Remaining two—Sufficiency to Pass Estate—Estoppel—Distributive Powers—Construction of Deed—Title to Land—Vendor and Purchaser.

Motion by Etta Scofi, vendor, for an order, under the Vendors and Purchasers Act, declaring invalid the objection made to the title to certain land which the applicant had agreed to sell to Annie Harris.

The motion was heard in the Weekly Court, Toronto.

J. A. Broudy, for the vendor.

H. Stanley Honsberger, for Annie Harris, the purchaser.

LENNOX, J., in a written judgment, said that the only question submitted to him arose out of the fact that in a conveyance, in the chain of title, in which Charles Badder and Charles Skryetz were grantors and Samuel Dvoretsky and three others were grantees, the habendum limited the grant to such uses as the grantees might by deed or will appoint and in default of appointment to the grantees in fee. Two of the grantees joined in a deed purporting to exercise their powers and vest their estate and rights under this deed in favour of and in the other two of them. The form of the conveyance by which this was done was not in question. By subsequent conveyances the property was said to have been duly conveyed to the vendor, if the deed from two of the original grantees to other two of them was sufficient in law.

The question raised was: Could the power of appointment, limited to four grantees, be exercised by two of them in favour of the other two and pass the estate?

The learned Judge had no doubt that it was sufficient for the purpose intended. It would probably be better conveyancing if all four had been joined as appointors, appointing and conveying to two of them, but it was not essential here, whatever might be argued as to want of concurrence in the case of an appointment to a stranger. If united or concurrent action could be said to be necessary in any case, no such question could arise here, where all four joined in what was done, and all were estopped by their act.

If it were necessary to find other reasons, the rights and powers conferred by the deed should be construed distributively. It was not contemplated that, after the death of one, the others would be helpless, or that they should make a joint will.

There was no objection to the title upon the point raised. Costs were not asked, and there should be no order as to costs.

HODGINS, J. A., IN CHAMBERS. DECEMBER 10TH, 1919.

*REX v. ZURA.

Criminal Law—Offence of Having Prohibited Publications in Possession—Publications in Enemy Language—Dominion Orders in Council—War Measures Act, 1914—Police Magistrate's Conviction—Amended Conviction—Criminal Code, sec. 1124—Information—Sufficiency—Presumption—Plea of "Guilty"—Criminal Code, secs. 852, 853, 855—Evidence Taken after Plea—Nature of Offence—Justification of Punishment Imposed—Jurisdiction of Magistrate—Description of Offence—Authority of Press Censor—List of Prohibited Publications.

Motion to quash the conviction of the defendant for the offence of having prohibited literature in his possession. The conviction was made by the Police Magistrate for the City of Fort William.

The motion was renewed upon a return made by the Police Magistrate: see Rex v. Zura (1919), ante 163.

D. Campbell, for the defendant.

Peter White, K.C., for the Crown.

HODGINS, J. A., in a written judgment, said that the magistrate had now made a formal return of all papers pursuant to the notice served on him under Rules (of 1908) 1279 et seq. He had amended the conviction by setting out two prohibited publications,

among a number of others which were prohibited, and had convicted the accused for having these two in his possession. This the magistrate had authority to do; and, if not, sec. 1124 of the Criminal Code gave the Judge power to amend: Rex v. Demetrio (1912), 20 Can. Crim. Cas. 318, 3 O.W.N. 602.

The information was laid under order in council No. 703, amending No. 2381, dealing with the printing, publishing, or importing for sale and distribution of publications in a foreign language. The Chief Press Censor might, in certain circumstances, by order under his hand, published in the Canada Gazette, prohibit the printing, publication, etc., of such matter within Canada.

The provisions as to publications in enemy languages were very wide and sweeping, so that possession of "any publication" in an enemy language constituted an offence and made the offender liable to a fine of $1,000 or to imprisonment for a term not exceeding two years, or both.

It was urged that the information was insufficient, in that it did not identify the publications, but called them merely "prohibited literature." The information went further, however, by adding the words, "contrary to the provisions of order in council 2381 as amended by order in council 703." The only "prohibited literature" mentioned in either order in council was that prohibited by the Chief Press Censor, and the offence consisted in having in possession any such publication, i.e., any publication which was prohibited.

The two prohibited publications referred to were produced to the magistrate and to the defendant before plea, and, with these before him, he pleaded "guilty." By sec. 4 of order in council 2381, the matters alleged in the information were to be presumed to be true unless rebutted.

Reference to the Criminal Code, secs. 852, 853, and 855; and the War Measures Act, 1914, 5 Geo. V. ch. 2, sec. 6:

The information was good, and the offence was presumed to have been committed, unless that presumption was rebutted—it was not rebutted, the plea being "guilty."

Reference to Regina v. Weir (1899), 3 Can. Crim. Cas. 102, 106.

The amended conviction was no departure from the information to which the prisoner pleaded "guilty."

There was no reason why the magistrate, notwithstanding the plea of "guilty," could not proceed to take evidence in the presence of the defendant and before conviction, in order to ascertain the nature and quality of the offence so as to determine the proper measure of punishment. The evidence then taken shewed that the defendant had a large quantity of prohibited literature which

was produced and identified. It was apparent that he was not an innocent possessor of objectionable publications, but really a distributor thereof. The evidence justified the sentence imposed —two years' imprisonment at hard labour.

Dealing with further objections, the learned Judge held:—

(1) That the amended conviction shewed the magistrate's jurisdiction.

(2) That the expression used in the information, "prohibited literature," coupled with the references to the orders in council, sufficiently described the real offence: sec. 852 of the Criminal Code.

(3) The third objection was that no list was specified containing prohibited publications, nor was there any proof of the competency of the Censor to prohibit. The lists produced were, however, sufficient; the orders in council sufficiently designated the person authorised to prohibit; and the War Measures Act, 1914, justified the orders in council.

Motion dismissed with costs.

HODGINS, J. A., IN CHAMBERS. DECEMBER 11TH, 1919.

*REX v. OLLIKKILA.

Criminal Law—Having "Objectionable Matter" in Possession—Consolidated Orders respecting Censorship (May, 1918)—Orders I. and II.—Information Laid on Behalf of Attorney-General for Canada—Presumption—Conviction by Police Magistrate—Validity—Jurisdiction—Possession of Prohibited Publications—Certificate of Magistrate—Return—Rules (of 1908) 1279 et seq.—War Measures Act, 1914.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of Fort William, for the offence of having "prohibited literature" in his possession.

The amended conviction and all papers having been returned, pursuant to Rules (of 1908) 1279 et seq., since the 14th November, 1919 (see ante 163), the motion was renewed.

D. Campbell, for the defendant.
Peter White, K.C., for the Crown.

HODGINS, J.A., in a written judgment, set out the information, the amended conviction, and the certificate of the magistrate on

his return, and said that the information was laid under the "Consolidated Orders respecting Censorship" passed on the 17th January, 1917, and the 22nd May, 1918. The Orders of the latter date only were in force: see the volume of Dominion statutes for 1919, p. lxvi. Order II., sec. 2, provides "that no person shall, unless with lawful excuse or authority, the proof of which shall be on him . . . receive or have in his possession or on premises in his occupation or under his control . . . any newspaper, tract, periodical, book circular, or other printed publication . . . containing objectionable matter." "Objectionable matter" is minutely defined in 15 paragraphs of Order I. By sec. 5 of Order II., the Secretary of State, "may by warrant under his hand prohibit the possession within Canada of any newspaper," etc., as above; and sub-sec. 2 of sec. 5 provides: "From and after publication by the Secretary of State . . . in the Canada Gazette of a notice of the issue of such warrant and of its terms conformably to such notice, every number, issue, or copy of such newspaper, tract, periodical, book, circular, or other printed matter so prohibited shall for all purposes and by all courts and authorities be conclusively deemed to contain objectionable matter." On any prosecution under these Orders, the following rule applies (sec. 7): "In any prosecution or proceeding brought, had, or taken under this Order by or on behalf or by the direction or under the authority of the Attorney-General of Canada, all matters alleged in the information, charge, or indictment shall be without proof rebuttably be presumed to be true."

Under Order III., any offence against these Orders is deemed to have been committed either at the place where it was actually committed or at any place where the offender may be.

What was said in the Zura case, ante 224, applies equally in this case. The possession of certain publications may be prohibited by the Secretary of State. The Canada Gazette proves this prohibition regarding those produced. The information is good and sufficiently describes the offence; and the conviction, either as amended or in its original form, is not improper.

The learned Judge was satisfied in this case, as he was in the Zura case, that the defendant pleaded "guilty" with full knowledge of what he was charged with; and the magistrate's certificate should be accepted in both cases as conclusive. Reference on this point to Rex v. Dagenais (1911), 23 O.L.R. 667, 18 Can. Crim. Cas. 287; Rex v. Barlow (1918), 1 W.W.R. 499.

Motion dismissed with costs.

LENNOX, J. DECEMBER 12TH, 1919.

*RE BAILEY COBALT MINES LIMITED.

Company—Winding-up under Dominion Act—Order of Judge in Court—Motion for Leave to Appeal from—Inapplicability of Rule 507—Application of sec. 101 of R.S.C. 1906 ch. 144—Other Cases of Similar Nature—Amount Involved—Importance of Case—Leave Granted.

Motion by the liquidators for leave to appeal from the order of SUTHERLAND, J., of the 8th December (ante 221), setting aside a report of Mr. F. J. Roche, Acting Assistant Master in Ordinary. The order was made in the Weekly Court.

The motion was heard in the Weekly Court, Toronto.
G. H. Sedgewick, for the liquidators.
Frank Arnoldi, K.C., for a large number of shareholders.
William Laidlaw, K.C., and G. R. Munnoch, for the respondents.

LENNOX, J., in a written judgment, said that the three objections to the report were: (1) that Mr. Roche had no jurisdiction; (2) that the Winding-up Act did not authorise the disposition of the assets of the company in liquidation in the way proposed, i.e., payment for the assets was to be made by the transfer of shares of the stock of a new company to be formed; (3) that the proposed transaction was improvident and improper.

The learned Judge said that his jurisdiction to grant leave to appeal was purely statutory and to be exercised under the provisions of Rule 507 or under the provisions of sec. 101 of the Winding-up Act, or both. Rule 507 provides only for an appeal from the decision of a Judge in Chambers, and excepts cases where a right of appeal is specially conferred; it does not apply here, either alone or conjointly with sec. 101.

Clauses (*b*) and (*c*) of sec. 101 were clearly applicable—the decision on the proposed appeal was likely to affect other cases of a similar nature or winding-up proceedings, and the amount exceeded $500. The question raised by the second objection, that on which SUTHERLAND, J., acted in setting aside the report, was an important one.

An order should go allowing the liquidators to appeal to a Divisional Court of the Appellate Division from the order of Sutherland, J. The costs of the motion should be costs to the successful party in the appeal, unless the appellate Court should otherwise order.

SUTHERLAND, J. DECEMBER 12TH, 1919.

RE WELLS & GRAY LIMITED AND WINDSOR BOARD OF EDUCATION.

Arbitration and Award—Motion for Order for Enforcement of Award Valid on its Face—Written Reasons of one of three Arbitrators, whether Forming Part of Award—Extension of Time for Moving to Set aside Award—Stay of Execution upon Order for Enforcement.

Motion by the company, contractors for the erection of a school building, for leave to enforce an award of arbitrators in the same manner as a judgment or order of the Court; and cross-motion by the Board of Education of the City of Windsor to extend the time for moving to set aside the award.

The motions were heard in the Weekly Court, Toronto.
Strachan Johnston, K.C., for the contractors.
J. H. Rodd, for the School Board.

SUTHERLAND, J., in a written judgment, said that there were three arbitrators; an award in writing, dated the 26th May, 1919, was signed by the arbitrators Stanworth and Holman, the third, Fleming, named by the School Board, not joining. The award was for the payment of $8,000 by the Board to the contractors. A question was raised as to whether the time for making the award had been duly extended by the arbitrators; and there was also a question whether the written reasons of the arbitrator Stanworth were to be regarded as part of the award, or could be looked at; and it was argued that these reasons disclosed that the award was made on a wrong principle.

The learned Judge said that the award was valid upon its face, and that he could not, upon the material before him, definitely determine that the reasons formed part of the award, or could be looked to in considering its validity. Upon a motion to set aside the award, the question of its validity might properly be gone into, and the real facts determined.

An order should now be made for the enforcement of the award, but proceedings thereunder, by way of execution or otherwise, should be stayed, and the time for moving to set aside the award should be extended. The costs of these motions should be left to be disposed of upon the hearing of the motion to set aside the award.

ROSE, J. DECEMBER 12TH, 1919.

M. J. O'BRIEN LIMITED v. LA ROSE MINES LIMITED.

Mines and Mining—Boundaries of Mining Location—Evidence—Survey—Mines Act, R.S.O. 1897 ch. 36, secs. 26, 27—Surveys Act, R.S.O. 1897 ch. 181, secs. 17, 18, 19—Finding of Fact of Trial Judge.

Action for a declaration that the eastern limit of the plaintiffs' land, known as "Mining Location R.L. 403," was a certain irregular line described in the statement of claim; for an injunction restraining the defendants from trespassing upon and carrying away ore from the land lying to the west of such line; for an account of all ore removed from and all damage done to the land; and for other relief. That the defendants had been mining to the west of the line mentioned was not disputed—the dispute was as to whether or not that line was the true eastern boundary of the plaintiffs' land.

The action was tried without a jury at a Toronto sittings.
W. N. Tilley, K.C., and R. H. Parmenter, for the plaintiffs.
R. S. Robertson and G. H. Sedgewick, for the defendants.

ROSE, J., in a written judgment, said that the lands of the plaintiffs and of the defendants were in the township of Coleman. In 1903, the territory which forms that township was still unsurveyed, and Robert Laird, an Ontario Land Surveyor, now deceased, was retained to survey certain mining locations in such territory. This retainer was pursuant to the requirements of the Mines Act then in force, R.S.O. 1897 ch. 36. Sections 26 and 27 of that Act referred to; also Carrick v. Johnston (1866), 26 U.C.R. 69; and the Surveys Act, R.S.O. 1897 ch. 181, secs. 17, 18, 19.

After reviewing the evidence, the learned Judge said that, whatever might be the true western boundary of the defendants' land, the plaintiffs had failed to prove their title to the land in question, and their action failed. He was not called upon to say, and the evidence did not enable him to say, where the eastern boundary of the plaintiffs' property really was.

It was unnecessary to consider the evidence adduced by the defendants in support of their plea of estoppel.

Action dismissed with costs.

MIDDLETON, J. DECEMBER 13TH, 1919.

*RE SMITH AND DALE.

Deed—Conveyance of Land—Construction—Grant—Habendum—Life-estate Commencing from Date of Death of Grantor—Remainder in Fee Simple to Trustee "for the Purposes of my Will"—Estate Commencing in Futuro—Subsequent Conveyance by Grantor and Life-tenant without Concurrence of Trustee of Remainder—Beneficial Interest—Power of Appointment by Will—Title to Land—Application under Vendors and Purchasers Act—Notice—Rule 602—Estoppel.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title was invalid, and that the vendor could make a good title.

W. A. McMaster, for the vendor.
T. B. Richardson, for the purchaser.

MIDDLETON, J., in a written judgment, said that the vendor derived title under a conveyance made by Amanda Wiggins and Joseph Wiggins, subsequent to the 5th September, 1903, on which date Amanda Wiggins, then the owner in fee of the land now in question, executed a conveyance in which she was the party of the first part and her husband the party of the second part. By this conveyance, in consideration of $1, she conveyed the land "from and after the death of the party of the first part unto and to the use of the party of the second part (should he survive the party of the first part) for and during the term of his natural life, with remainder over in fee simple to David R. Boucher . . . in trust for the purposes of my will." The habendum strictly followed this grant.

Amanda and her husband, having, as mentioned, conveyed the land and received the price, could not now be found, and it was not known whether she was yet alive. Boucher, it was said, left the Province for the West years ago, and so far had not been found. He was not a party to the conveyance under which the vendor derived title.

The land had passed through several hands; but objection was now taken that, by reason of the provision quoted, a good title could not be made.

For the vendor it was argued that the deed containing this provision was inoperative, in that it purported to create a freehold estate commencing in futuro—"from and after the death

of the party of the first part"—and, therefore, the property was still vested in the grantor.

The statement that no estate in freehold can be created to commence in futuro is confined to attempts at such creation by common law conveyance: where, as here, the word "grant" is used, it has a wider significance and operation; and, even if no actual conveyance of the legal estate were effected, the conveyance would operate as a covenant to stand seised.

The learned Judge was of opinion, however, that the remainder expectant after the lives of Amanda and Joseph would be held, under the conveyance, by Boucher as trustee, and that the beneficial interest would be subject to a power of appointment to be exercised by Amanda by will; and that, when she sold and Joseph joined for the purpose of conveying his life-estate, the effect was to convey the whole beneficial interest in the estate to the purchaser: Re Campbell Trusts (1919), ante 23, and cases cited.

In this view, the vendor could now make a good title.

Had it been practicable, the learned Judge would have directed notice of this application to be given, under Rule 602; but there was no one to notify. No one could assert any title save as claiming through Amanda. She, having conveyed the property and received the price, would be estopped; those claiming under her would also be estopped; and so good title was made by estoppel.

Before the issue of the order, a formal notice of motion and an affidavit setting out the facts should be filed.

MATTERS v. RYAN—LENNOX, J.—DEC. 9.

Infant—Custody—Dispute as to Parentage—Trial of Issue—Evidence—Finding as to Birth of Child.]—An issue as to the custody of a child, directed to be tried. There was a dispute as to the parentage of the child, the plaintiff and the defendant each alleging that she was the mother. The issue was for the purpose of having the question of who was entitled to the custody determined. The issue was tried without a jury at an Ottawa sittings. LENNOX, J., in a written judgment, after stating the facts and circumstances and referring to the evidence adduced at the trial, found that Margaret Ryan, the defendant in the issue, was the mother of the child, and was entitled to retain the custody thereof, and directed judgment to be entered for the defendant accordingly, with costs of the motion upon which the order directing the trial of the issue was made, and of the issue and trial, to be paid by the plaintiff to the defendant. The defendant must not, however, remove the infant, or suffer the infant to be removed, beyond the juris-

diction of the Supreme Court of Ontario until the time for lodging an appeal shall have expired, nor thereafter, in the event of an appeal being taken, until further order. R. T. Harding, for the plaintiff. C. J. R. Bethune, for the defendant.

RE NORTHERN ONTARIO FIRE RELIEF FUND TRUSTS—MIDDLETON, J., IN CHAMBERS—DEC. 9.

Trusts and Trustees—Relief Fund—Surplus in Hands of Committee of Subscribers—Consolidation with another Fund—Disposition of—Further Fire Relief—Hospitals.]—Motion for a direction as to the consolidation and distribution of two funds. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that he had considered this matter with anxiety. When the former application was made (see Re Northern Ontario Fire Relief Fund Trusts (1913), 4 O.W.N. 1118), it was not considered probable that other fires would occur in Northern Ontario calling for public aid, and so it was thought that the surplus remaining in hand would be best dealt with by providing for hospital accommodation in the district. Under the order then made, the municipalities permitted to share in the fund were called upon to assume responsibility for the maintenance and upkeep of the hospitals. As to the money set apart for the Townships of Tisdale and Whitney, the municipalities did not assume the suggested burden, and that fund still remained in the hands of the trustees. Experience had shewn that all were wrong in assuming that there would not be other serious fires calling for assistance, for there had been another very serious fire, and another fund collected for aid of the sufferers from that fire, and with respect to it a surplus fund also remained in the hands of trustees. It was now asked that the money remaining from the first fund be consolidated with the new fund and be kept for the purpose of assisting sufferers from other fires. This was far more nearly in keeping with the original intention of the donors of the fund; and experience had shewn that, in addition to great and disastrous fires calling for the creation of special funds, other fires were from time to time occurring calling for financial aid. The township councils had now proposed the scheme of establishing a public cottage hospital at South Porcupine, and asked that the money be used for the purpose of that scheme. There was no question that the scheme was in itself a good one; but the provisions made fell far short of the unqualified obligation to maintain called for by the order made some years ago. In fact the scheme made no real provision for maintenance. The learned Judge felt that he could best carry out the terms of the

original trust by following the suggestion made by the trustees upon this application; and he, therefore, directed that the funds be consolidated as asked, and that there should be one board of trustees as suggested by counsel. The details of the order might be discussed, if necessary, after counsel had prepared it. A. C. McMaster, for the trustees.

ROBINSON v. SHANNON—FALCONBRIDGE, C.J.K.B.—DEC. 10.

Landlord and Tenant—Lease—Action by Tenant for Rescission—Misrepresentation—Failure to Prove—Acts of Landlord not Amounting to Repossession—Counterclaim for Rent.]—Action by a lessee for a declaration that his lease was void for misrepresentation and for a return of the first gale of rent paid. Counterclaim by the defendant, the lessor, for the second gale of rent. The action and counterclaim were tried without a jury at Belleville. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff had failed to establish the truth of his charges of misrepresentation. The defendant did not try to induce the plaintiff to enter into the lease, but first suggested another place for the plaintiff. The rent, so far from being excessive, was, in the opinion of several credible witnesses, a fair one for the property. The defendant had done acts authorised by the lease (e.g., ploughing by tenant) or necessary for the protection of the buildings as by locking or nailing up doors, etc., but nothing which could be considered as taking possession of the place. The action should be dismissed with costs, and there should be judgment on the counterclaim for the defendant for $125 (the second gale of rent) with costs. E. G. Porter, K.C., and C. A. Payne, for the plaintiff. F. E. O'Flynn, for the defendant.

RIVERDALE LAND AND IMPROVEMENT CO. v. CHAPPUS—LENNOX, J.—DEC. 11.

Vendor and Purchaser—Agreement for Sale of Tract of Land—Payments Made—Release of Lots in Tract—Counterclaim by Vendor—Rescission—Forfeiture—Amendment—Costs.]—Action for an account and damages in respect of an agreement for the sale of land, tried without a jury at Sandwich. LENNOX, J., in a written judgment, said that, at the conclusion of the evidence, counsel for the plaintiff company admitted that he had not estab-

blished a claim for damages; and the only point submitted by the plaintiff company (the purchaser) for decision was, whether it was entitled to a release of certain lots in Riverdale Park without further payment. Upon a consideration of the evidence, the learned Judge found that the plaintiff company was not entitled to any of the relief claimed.—By counterclaim, the defendant asked to have it declared that his agreement with the plaintiff company was at an end and for incidental relief. The learned Judge said that the defendant was entitled to get back his property, except the parts sold, and to retain the sum of $1,000 said to have been paid.—There should be judgment for the defendant, dismissing the action, declaring that any moneys paid were forfeited, rescinding the agreement and declaring it null and void, revesting the property in the defendant, vacating the registry of the agreement, and awarding the defendant possession. The defendant should be at liberty to amend his counterclaim so as to cover the relief granted. The defendant's costs of his defence and counterclaim should be paid by the plaintiff company. F. C. Kerby, for the plaintiff company. F. D. Davis, for the defendant.

RE BRUNNER—LENNOX, J., IN CHAMBERS—DEC. 11.

Infant—Custody—Application of Parents—Removal of Boy from Industrial School.]—Motion by the father and mother of John Brunner, an infant of 10 years of age, for an order for the custody of the infant. LENNOX, J., in a written judgment, said that in June, 1917, the boy was committed to the custody of the Children's Aid Society under the Act relating to neglected and dependent children, by the Police Magistrate at Oshawa, and was brought before the learned Judge, under a writ of habeas corpus, by the keeper of the Victoria Industrial School at Mimico. There was no reason to doubt the justice or regularity of the committment, or to question what had been done in reference to the boy in the meantime; and no complaint was made. His parents, residing in Windsor, were now in a position and were anxious to provide, care for, and have the custody of the boy. The application was not opposed. The boy had promised the learned Judge to endeavour to keep out of mischief and behave properly. He appeared to be an alert, intelligent, little fellow, spoke nicely, and appeared to be alive to the few words said to him by way of advice. The Judge ordered and directed that the boy be immediately placed in the charge of his parents' solicitor, to be taken to Windsor and then and there delivered into the custody of his parents. In so far as the Judge had power so to do,

he relieved the Children's Aid Society and the Victoria Industrial School from further responsibility. Nothing by way of reimbursement, payment, or costs was asked for. H. L. Barnes, for the applicants. J. E. Farewell, K.C., for the Police Magistrate and the Children's Aid Society. T. Ferrier, for the Victoria Industrial School.

SCOTT v. GARDINER—LENNOX, J.—DEC. 11.

Report of Master—Motion to Set aside—Refusal to Receive Evidence—Reference back for Limited Purpose—Res Judicata.]—Motion by the defendants to set aside the report of the Local Master at Sandwich, on the ground that, acting under an order of the Court made by KELLY, J., on the 17th October, 1919, the Master refused to take evidence, tendered by or on behalf of the defendants, relevant to the questions to be determined upon the reference. The motion was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that counsel for the plaintiff, as a preliminary objection, submitted that the question now raised was disposed of by the order of KELLY, J., and referred to the reasons for judgment given by the learned Judge when he made the order referred to, as limiting the relief granted to the defendants to a resettlement of the minutes, after notice to all parties had been duly served. The application on that occasion included, as well, a direction to the Local Master to take the evidence now sought to be introduced as to a resettlement of the minutes. The reference back was for the purpose of resettling the minutes only. The order reads: "This Court doth order that . . . notice not having been given . . . the said report be and the same is hereby set aside and referred back to the said Local Master for the purpose of causing notice of settling thereof to be given to all interested parties. And this Court doth further order that notice of settlement of the said report be served on all parties." All this had been done, and the only complaint was that the Local Master refused to do more, that is, refused to take the evidence then and now in question. Reference to the reasons of KELLY, J., as noted ante 114. The learned Judge thought the objection was well taken, that the matter was *res judicata*, and that the Local Master was right. The motion should be dismissed with costs to be paid by the defendants to the plaintiff forthwith after taxation thereof, unless the report found money owing to them by the plaintiff; in that case the costs should be set off *pro tanto* Peter White, K.C., for the defendants. W. J. Beattie, for the plaintiff.

ONTARIO MOTOR CAR CO. v. GRAY—LENNOX, J., IN CHAMBERS —DEC. 12.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Rule 507—Notice of Motion Containing Scandalous Matter—Removal from Files.]—Motion by the defendant Gray for leave to appeal from an order of MIDDLETON, J., in Chambers, of the 2nd December, varying an order of the Master in Chambers and directing that all proceedings in this action subsequent to the service of the writ of summons be set aside, and that the defendant Gray be allowed three days within which to enter an appearance. LENNOX, J., in a written judgment, said that what the defendant really complained of was that MIDDLETON, J., made an order which wrested the action and issues from the hopeless chaos into which they had drifted by a succession of blunders, to which both sides contributed, and put the issues in order for a fair trial. The conditions of Rule 507 are conjunctive, not alternative. LENNOX, J., was not at all of opinion that there was good reason to doubt the correctness of the order of MIDDLETON, J.; and certainly the questions raised did not involve matters of such importance that leave to appeal should be granted. The notice of this motion contained scandalous matter, and it must be removed from the files of the Court. The motion must be dismissed with costs to the plaintiffs in any event. The defendant Gray in person. J. S. McLaughlin, for the plaintiffs.

MCLENNAN v. DINSMORE—MIDDLETON, J., IN CHAMBERS— DEC. 13.

Costs—Scale of—Taxation—Amount in Controversy—Set-off—Jurisdiction of Inferior Court.]—Appeal by the plaintiff from the ruling of a local officer as to the scale of costs. MIDDLETON, J., in a written judgment, said that the case was covered by Caldwell v. Hughes (1913), 4 O.W.N. 1192, the plaintiff's costs should be taxed on the Supreme Court scale, and the appeal must be allowed with costs. G. R. Munnoch, for the plaintiff. No one for the defendant.

SUPREME COURT OF ONTARIO.

RULES OF COURT.

At a meeting of the Judges held on the 5th December, 1919, Rule 773(*h*) was passed (to come into force forthwith).

(1) Add to Rule 249:—

(1). Such record shall contain the full style of cause, and shall shew the date when the writ was issued, and shall give the names of the solicitors for the several parties, and shall shew that judgment has been signed or the pleadings have been noted as closed as against any parties in default.

(2) Add to Rule 250:—

(6). In non jury actions in the County Court of the County of York notice of trial shall be given and the action entered for trial in accordance with the provisions of Rule 248, but if the action is not tried or disposed of at the sittings for which it is entered for trial it shall be placed upon the list for the next sittings and it shall not be necessary to give fresh notice of trial or re-enter the action notwithstanding the provisions of Rule 252.

(3) Add to Tariff "A," item 11 (*a*):—

11(*a*). Upon an appeal from the report of a Master or Official Referee or from an award of Arbitrators where questions of special importance or difficulty are involved an increased counsel fee may allowed in the discretion of the Taxing Officer at Toronto.