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## APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 20TH, 1917.

### RE ONTARIO BANK.

### IRWIN AND EASTWOOD'S CLAIMS.

*Bank—Winding-up—Claims upon Assets—Disallowance by Referee—Affirmance by Judge—Refusal by another Judge of Leave to Appeal to Appellate Division—Renewal of Application before Appellate Division—Winding-up Act, R.S.C. 1906 ch. 144, sec. 101—Amendment by 5 Geo. V. ch. 21 (D.)—Successive Applications—Jurisdiction—Determination of Application upon Consideration of Merits—Hopeless Appeal—Refusal of Leave.*

Motion on behalf of W. Irwin and I. Eastwood for leave to appeal to this Court from an order of MASTEN, J., in the Weekly Court (27th April, 1917), confirming the report of a Referee disallowing the claims of the applicants to rank upon the assets of the bank in a winding-up under the Dominion Winding-up Act.

Leave to appeal was refused by MIDDLETON, J., ante 245.

By 5 Geo. V. ch. 21 (D.), sec. 101 of the Winding-up Act, R.S.C. 1906 ch 144, is amended by providing that leave to appeal may be granted by a Judge of the High Court Division, or by leave of the Court or a Judge of the Court to which the appeal lies.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Daniel O'Connell, for the applicants.

J. W. Bain, K.C., for the liquidator.

J. A. Paterson, K.C., for contributories.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that objection was taken to the application on the ground that an application had been previously made to and refused by a Judge of the High Court Division.

Notwithstanding, but subject to, the objection, the application had been heard, and it had been very fully discussed in all its phases; indeed, counsel for the applicants had been heard upon it as fully as if it were really an appeal, not merely an application for leave to appeal.

As the applicants had failed to make out any case upon the merits, it might not be necessary to consider the interesting questions discussed as to the effect of the recent legislation—whether or not successive applications for leave to appeal might be made, and, if so, to what extent an application such as this would be in substance an appeal to this Court from the order of the Judge refusing a previous application for leave, and so would not be anything extraordinary, although without such legislation it might be so considered. See Ex p. Stevenson, [1892] 1 Q.B. 394, 609; Re Central Bank of Canada (1897), 17 P.R. 395. But an application to a Judge of the High Court Division after a refusal by this Court would seem to be out of the question.

All the members of the Court thought that, upon the merits, no case for leave to appeal had been made out, and the motion should be disposed of on that ground, without real consideration of any of the questions arising out of the recent legislation.

The applicants sought in the winding-up proceedings to be paid, out of the assets of the bank, $3,000 each and interest; the $3,000 being the price paid by each of them for stock in a brewing company—stock in respect of which they became active directors in the management of the concern, upon which they received dividends, which, as directors, they took part in declaring. The substance of their claims was, that their payments for the stock were obtained by fraud—against which the bank's agent, at the time when the transaction took place, ought to have protected them; and that the bank received and had the benefit of their money so obtained.

The story of the claimants was an extraordinary one; the claims were stale claims; the transactions took place about 13 years ago, and the applicants admitted knowledge of the grounds of their claims, now made, as long ago as 1910. [The learned Chief Justice referred to other circumstances and facts shewn by the evidence.]

Upon the merits, the applicants had no claim of any character against the bank; to give leave to appeal would be but to open the way to a hopeless undertaking; and, in the interest of the parties, it was best to determine the matter upon the merits.

*Application dismissed.*

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SECOND DIVISIONAL COURT. JUNE 26TH, 1917.

## RE ONTARIO RAILWAY AND MUNICIPAL BOARD AND TORONTO AND HAMILTON HIGHWAY COMMISSION.

*Highway—Toronto and Hamilton Highway Commission—Increased Width of Highway—Apportionment among Municipalities of Additional Cost—Order of Ontario Railway and Municipal Board—Application for Leave to Appeal—5 Geo. V. ch. 18, sec. 13 (O.)*

Motion by the Corporation of the Township of Etobicoke for leave to appeal from an order of the Ontario Railway and Municipal Board upon an application made by the Toronto and Hamilton Highway Commission, dividing the additional cost of a wider roadway from O'Connor road, in the township of Etobicoke, easterly to the west limit of the city of Toronto, among the municipalities, in the same proportions as those adopted by the Legislature in regard to the original roadway.

The motion was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

A. C. McMaster, for the Corporation of the Township of Etobicoke.

R. S. Robertson, for the Toronto and Hamilton Highway Commission.

Irving S. Fairty, for the Corporation of the City of Toronto.

The judgment of the Court was read by RIDDELL, J., who said, after referring to the provisions of the statutes relating to the Toronto and Hamilton Highway—5 Geo. V. ch. 18, secs. 6, 9, 13, 18, 19 (3), (5), 21; 6 Geo. V. ch. 16; 7 Geo. V. ch. 19—that the Commission decided on a roadway of 18 feet as a general rule, but decided that from O'Connor road easterly to the west limit of Toronto, the roadway should be 24 feet. They applied to the

Board under sec. 13 of 5 Geo. V. ch. 18, and the Board gave permission to build the roadway of that width. Before determining the apportionment of the additional cost, the Board very properly asked the opinion of the Commission. The Board, however, did not adopt in its entirety the "tentative apportionment" of the Commission, but made a change, as they had the right to do. The Board thought the apportionment made by the Legislature of the cost of the original roadway a reasonable apportionment, and thought that the additional cost should be divided in the same proportion. There was nothing to indicate that the Board did not exercise the statutory discretion in good faith; but the Corporation of the Township of Etobicoke complained and asked leave to appeal.

If there were any matter of law even fairly arguable, the inclination of the Court would be to grant leave to appeal; but here the legislation was perfectly clear and unambiguous, the statutory bodies had exercised their statutory powers in the way prescribed by the statute and in good faith, and the Board had not misconstrued the law in any particular.

*Motion refused with costs.*

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SECOND DIVISIONAL COURT. JUNE 26TH, 1917.

## *CITY OF TORONTO v. MORSON.

*Assessment and Taxes—Taxation by Municipalities of Salaries of Federal Officers—Powers of Provincial Legislature—Exemptions—Assessment Act, 4 Edw. VII. ch. 23, secs. 2 (8), 5 (14); R.S.O. 1914 ch. 195, sec. 5 (15)—Omission of Word "Imperial."*

Appeal by the defendant from the judgment of McGillivray, Co. C.J., 11 O.W.N. 195, in favour of the plaintiffs, the Corporation of the City of Toronto, in an action brought in the Court of the County of Ontario, to recover municipal taxes for the years 1912 and 1914 in respect of the income of the defendant as one of the Junior Judges of the County Court of the County of York for those two years.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL, LENNOX, and ROSE, JJ.

Robert A. Reid, for the appellant.

Irving S. Fairty, for the plaintiffs, respondents.

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

MULOCK, C.J. Ex., read a judgment in which he said that the first defence to the action was that, by the British North America Act, 1867, the defendant was exempt from taxation under provincial legislation in respect of his salary or income as a Judge. He was appointed by the Governor-General in Council and paid out of the Consolidated Revenue Fund of Canada. The same point was raised in Abbott v. City of St. John (1908), 40 S.C.R. 597, which in effect decided that under provincial legislation every member of the Civil Service of Canada in respect of his salary as a Dominion Government official was liable to taxation in the Province in which he resided. That case governs this, and must be followed. The law as declared by the Supreme Court of Canada is the law in Canada until otherwise determined by higher authority, and is binding on all lower Courts.

Another defence was raised: that the provincial legislation relied upon by the plaintiffs exempted the defendant from taxation of his income or salary as a Judge. The Act under which the defendant was assessed in 1912 was the Assessment Act, 4 Edw. VII. ch. 23. By sec. 2 (8), "income" means "the annual profit or gain or gratuity . . . directly or indirectly received by a person from any office or employment, or from any profession or calling," etc. By sec. 5, all income derived, either within or out of this Province by any person resident therein shall be liable to taxation," subject to the following exemptions . . . (14) The full or half-pay of any officer . . . of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's Imperial Treasury, and the income of any person in such Naval or Military services . . ."

In the Assessment Act as found in R.S.O. 1914 ch. 195, sec. 5 of 4 Edw. VII. ch. 23 is re-enacted as sec. 5 with certain changes. Clause 14 becomes clause 15, but the wording is the same except that "His Majesty's Imperial Treasury" becomes "His Majesty's Treasury." Having regard to the provisions of the Consolidated Revenue Act, R.S.C. 1906 ch. 24, sec. 4, and the Judges Act, R.S.C. 1906 ch. 138, sec. 27, whereby the salaries of Judges are made payable out of the Consolidated Revenue Fund of Canada, and other enactments and considerations, the reference in clause 15 is still to the Imperial and not the Canadian Treasury.

Finally, it was argued that, according to sec. 2 (8) of the Assessment Act, R.S.O. 1914 ch. 195, the salary must be one derived from "a trade or commercial or financial or other busi-

ness or calling;" but these words qualify only the preceding word "profits."

The appeal should be dismissed without costs.

LENNOX and ROSE, JJ., concurred.

RIDDELL, J., agreed that the appeal should be dismissed, giving reasons in writing. He was of opinion that the appeal should be dismissed with costs.

HODGINS, J.A., agreed with the judgment of RIDDELL, J., but thought that the dismissal should be without costs.

*Appeal dismissed without costs.*

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## HIGH COURT DIVISION.

CLUTE, J. JUNE 25TH, 1917.

## *LINK v. THOMPSON.

*Contempt of Court—Refusal to Do Act Required by Judgment—Appropriate Remedy—Practice—Writ of Attachment—Notice of Motion for an Order to Commit—Personal Service of Judgment and Notice—Person Ordered to Do Act not Appearing—Power to Order Issue of Writ—Rules 545, 547.*

Motion by the plaintiff to commit Margaret Thompson, the defendant, for contempt of Court in failing to comply with the terms of the judgment in this action, dated the 3rd May, 1917, requiring her to produce the infant Grace Jean Link and deliver the possession of the infant to the plaintiff.

The motion was heard in the Weekly Court at London.

C. G. Jarvis, for the plaintiff.

No one appeared for the defendant.

CLUTE, J., in a written judgment, said that a copy of the judgment was served upon the defendant personally, the original being exhibited at the time of such service. The defendant was also personally served with the notice of this motion, but did not appear.

Rule 545 provides that "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by attachment, or by committal."

Reference to English Order XLII., r. 7; Harvey v. Harvey (1884), 26 Ch. D. 644, 654; Mander v. Falcke, [1891] 3 Ch. 488; In re Evans, [1893] 1 Ch. 252; D. v. A. & Co., [1900] 1 Ch. 484.

This was a case falling within Rule 545. Under the practice before the Judicature Act, the appropriate remedy was by attachment. It would not be illegal now, in a case like the present, to order commitment; but it is better practice to observe the old distinction between attachment and committal—attachment was the only proper remedy for disobedience of a judgment or order of the Court in refusing to do that which was ordered to be done.

This being a motion to commit, and not for leave to issue a writ of attachment, the question whether a writ may issue without re-serving the defendant arises.

In Piper v. Piper, [1876] W.N. 202, an application was made for a writ of attachment against a defendant in contempt, who did not appear. The notice of motion was for an order to commit. It was contended that the Court might order a writ of attachment on the notice of motion. The Vice-Chancellor held, on the principle that the greater includes the less, that he had power to order a writ to issue, and he ordered it accordingly. Following that case and having regard to the fact that the defendant in this case had been personally served with a copy of the judgment and with the notice of motion, the learned Judge ordered a writ of attachment to issue (form 120, Holmested's Judicature Act, 4th ed.)

Not alone because a writ of attachment was issued under the old practice in a case like the present, should the order for the issue of a writ be now made, but also becuase it is a more appropriate remedy, carrying with it, as it does, the right of the plaintiff to a writ of sequestration: Rule 547. See also Oswald's Contempt of Court, 3rd ed., pp. 24, 30, 263; Seton's Forms of Judgments, 7th ed., vol. 1, p. 457.

The plaintiff is entitled to the costs of the motion if asked for.

MIDDLETON, J. JUNE 28TH, 1917.

## POOLE v. WILSON.

*Executors—Action against Executor of Division Court Clerk for Fees not Paid to Bailiff—Evidence of Bailiff—Corroboration—Entries in Clerk's Books—Time-limit—Public Officers Act, R.S.O. 1914, ch. 15 sec. 13—Application of Payments on Account—Surety for Clerk—Liability—Interest—Change in Contract—Rate of Interest—Acquiescence.*

Action by a Division Court bailiff against the executor of the deceased clerk of the Court and his surety, a guarantee company, to recover a balance due for bailiff's fees.

The action was tried without a jury at London.

J. C. Elliott, for the plaintiff.

F. E. Perrin, for the defendant Wilson, executor of George Wilson, deceased.

C. H. Ivey, for the defendant guarantee company.

MIDDLETON, J., in a written judgment, said that the amount claimed was $894.55, including interest computed annually with rests at 6 per cent. up to the 31st December, 1916. The plaintiff was appointed bailiff in November, 1893, and had held that office ever since. The late George Wilson was then clerk and held office till May, 1916, when he died. From the 16th June, 1899, the defendant company had been the clerk's surety for the due discharge of his duties. The statutory bond required the clerk to "pay over to any bailiff or bailiffs of the Division Court the fees to which he or they may become entitled under the tariff of fees, unless when the clerk and bailiff otherwise agree in writing."

On the 16th May, 1902, the clerk and bailiff had an accounting, and an acknowledgment was signed by the clerk admitting a balance due of $155. Each year since, statements had been rendered by the bailiff to the clerk shewing the fees claimed, and payments had been made by the clerk on account. There had always been a large and growing balance due. A demand was made for interest, and this was acceded to, and interest was included in the accounts from time to time. The general accuracy of these accounts, and of the entries in the bailiff's books, was established by reference to the clerk's books. The entries in "home" suits corresponded, and in most cases entries in "foreign" suits also corresponded.

The learned Judge was satisfied to accept this as corroboration of the plaintiff's evidence, which he credited.

It is the clerk's duty to collect and pay over the bailiff's fees in "foreign" suits; and, in the absence of any evidence to the contrary, the presumption is, that he did receive his own and the bailiff's fees from the foreign clerk.

Section 13 of the Public Officers Act, R.S.O. 1914 ch. 15, was relied upon as barring any claim for fees beyond 10 years; but, upon due application of payments on account, the balance represented items earned within this period.

It was argued that the bargain for interest, at any rate the bargain for interest at 6 per cent., a rate in excess of legal interest, discharged the surety.

The fundamental principle was, that the contract of the surety could not be changed without his consent. It made no difference that the change might or might not prejudice him. When the principal debtor has covenanted to pay a certain sum and interest at a certain rate, and the surety has undertaken the due performance of this covenant, he may escape liability if the covenant is varied by any change of interest, for liability upon this varied contract has not been undertaken by him.

But, when he guarantees payment of a sum due or to become due, he is not discharged because the debtor makes a new bargain which does not in any way interfere with his liability, but merely imposes an additional and collateral liability to pay interest. If there was any bargain to give time, the surety would be discharged; but the only contract was to pay interest on all balances unpaid.

There was nothing to prevent the surety at any time paying the claim and suing the debtor. There was nothing to prevent the creditor himself suing: York City and County Banking Co. v. Bainbridge (1880), 43 L.T.R. 732.

Interest at the legal rate of 5 per cent. may be recovered, even when there is no mention in the bond. There may be a recomputation, based upon interest computed at this rate. On the basis of 6 per cent., the interest charged amounts to $1,449.45; this will make a substantial reduction.

As against the executors the agreement binds for 6 per cent.

It does not seem fair conduct on the part of the plaintiff to allow matters to run into arrear for many years, and then sue the surety—but the plaintiff acted honestly, trusting that the clerk, a man who stood well in the community, would ultimately pay. There was no connivance or collusion. The case is within Durham Corporation v. Fowler (1889), 22 Q.B.D. 394.

Judgment against the defendant executor for the amount claimed, on the basis of 6 per cent. interest, and against the surety for the amount due on a new computation at 5 per cent. interest.

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SUTHERLAND, J. JUNE 28TH, 1917.

## KEELEY v. REAUME.

*Landlord and Tenant—Lease—Inability of Lessors to Give Possession of Demised Premises—Validity of Contract—Former Tenant Refusing to Give up Possession—Action by Lessee for Specific Performance—Declaration—Reversion—Right to Receive Rent of Premises—Damages—Cancellation of Lease.*

Action for specific performance of a lease and damages for the detention of the premises.

The action was tried without a jury at Sandwich.

O. E. Fleming, K.C., for the plaintiff.

J. H. Rodd, for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that the lease to the plaintiff was a definite and complete contract. It was not, nor was it intended to be, a conditional lease, contingent upon one Ingram, the tenant in possession when the lease was executed, vacating the premises by the 1st December. The lease was under the Act respecting Short Forms of Leases, and contained the usual covenant for possession and quiet enjoyment. The difficulty was not so much a defect in title as an alleged inability to give possession at the date contemplated. Apart from the fact that Ingram was in possession, and possibly could not be ejected by the lessors, the defendants, the plaintiff was entitled to specific performance of the lease: Mortlock v. Buller (1804), 10 Ves. 292, 315; Castle v. Wilkinson (1870), L.R. 5 Ch. 534, 537; Cato v. Thompson (1882), 9 Q.B.D. 616, 618; Rudd v. Lascelles, [1900] 1 Ch. 815, 819.

The plaintiff had a right to rely upon his contract and bring his action upon it. Reference to Foa's Relationship of Landlord and Tenant, 4th ed. (1907), p. 20.

Judgment declaring that the plaintiff became by the lease entitled and is now entitled to the reversion for the unexpired portion, if any, of Ingram's term, and to all rents accruing under

Ingram's lease from the time the plaintiff's lease took effect, the 1st December, 1916, until its termination by effluxion of time or otherwise; declaring that the agreement, if any, made by the defendant Reaume with Ingram, whereby the rent reserved under the lease to the latter was reduced, was in derogation of the defendants' grant to the plaintiff; and adjudging that the defendants shall pay to the plaintiff $100 a month on the first day of each and every month from December, 1916, until such time as Ingram shall vacate. In the alternative, if the plaintiff prefer, he may have a judgment setting aside the lease and for repayment of the sum of $200 paid by him to the defendants, with interest from the date of payment, and with such damages only as in that event he may be entitled to. If the parties cannot agree upon the damages, and the plaintiff elects the alternative relief, there will be a reference to the Master to ascertain the damages. In either case, the plaintiff will have his costs of action as against the defendants.

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FERGUSON, J.A. JUNE 29TH, 1917.

## GOLDBOLD v. PURITAN LAUNDRY CO. LIMITED.

*Master and Servant—Wrongful Dismissal—Action for—Defences—Misconduct—Insolence—Evidence—Contract—Validity—Company—Execution of Document under Seal—Signatures of President and Secretary—Part Performance—Damages—Costs.*

Action for damages for wrongful dismissal, the hiring being by a written contract made in May, 1915.

The action was tried without a jury at Toronto.

R. H. Greer, for the plaintiff.

F. J. Hughes, for the defendants.

FERGUSON, J.A., in a written judgment, said that the charges against the plaintiff of mismanagement, incompetency, and misconduct had not been made out.

In reference to the charge of insolence, the learned Judge said that he could not think that, because, in the course of a nagging, provoking interview, the plaintiff, thoughtlessly and in an angry outburst, advised the defendants' manager "to go chase himself" or "to take a run", it should be found that he was properly

discharged; particularly when that remark was not the ground on which the defendants acted. The real ground was found in the evidence of Mrs. Vaughan, the president of the company, where she in effect stated that her husband, the general-manager of the company, was a nervous, irritable, fault-finder, given to driving and fighting with those under him. This resulted in it being impossible for the plaintiff and the defendants' general manager to work together harmoniously, and was the true cause of the general-manager discharging the plaintiff.

The contract was binding and enforceable. It purported to be made between the plaintiff and the defendants, and to be under seal. It was signed by two of the three directors of the company, that is, by the president and the secretary and general-manager. It was made for the purpose of carrying on the business for which the company was incorporated. It was partly performed. There was nothing to indicate to the plaintiff that the president and general-manager were not authorised to make and execute the contract in the manner adopted: see Vansickler v. McKnight Construction Co. (1914), 31 O.L.R. 531; A. E. Thomas Limited v. Standard Bank of Canada (1910), 1 O.W.N. 379; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co. (1907), 14 O.L.R. 22.

The evidence as to damage shewed that the plaintiff was now employed as superintendent of another laundry, at a salary of about $22 a week, and that there was a scarcity of "help." There was nothing in the evidence to suggest that he was not competent, or that his reputation had suffered by reason of the dispute with the defendants, and it was probable that he would secure other employment at a figure more nearly approaching that provided for in the contract.

In all the circumstances, justice would be done by fixing the plaintiff's damages at $500, to which should be added the sum of $35 to cover his wages for the week prior to his discharge. He was also entitled under the contract to a bonus, as therein provided, up to the date of his dismissal. If the parties could not agree upon this amount, there should be a reference to Mr. J. A. C. Cameron, as Official Referee, to ascertain it.

The plaintiff was entitled to costs on the appropriate scale; and, if that be the County Court scale, there should be no set-off.

HARRISON v. HARRISON—BRITTON, J., IN CHAMBERS—JUNE 25.

*Husband and Wife—Differences between—Reference to Arbitration—Award—Action for Alimony—Motion to Stay Proceedings.*] —Motion by the defendant to stay proceedings in an action for alimony. BRITTON, J., in a written judgment, said that, prior to the commencement of the action, there was a reference to arbitrators of matters between the parties (husband and wife), and it was contended by the defendant that the plaintiff was bound by the award, and could only proceed, if at all, under it. The learned Judge was of opinion that the motion should not prevail. Not all the matters mentioned in the statement of claim were dealt with by the arbitrators. The defendant having put in a statement of defence, so that the issues between the parties were clearly defined, the case could be dealt with by a trial Judge, upon evidence both oral and other, if any. It was least open to question whether or not alimony granted in the first instance, or future alimony, when an increase is asked, or when asked for a different cause, might be the subject of arbitration, so as to prevent the wife from maintaining an action. The action should not be stayed. It could be better disposed of by trial than by affidavit evidence. Motion dismissed. Costs to be costs in the cause, unless otherwise ordered by the trial Judge. D. O'Connell, for the defendant. Gideon Grant, for the plaintiff.

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HUGHES v. GODDARD—CLUTE, J.—JUNE 26.

*Vendor and Purchaser—Agreement for Exchange of Lands—Action for Specific Performance—Misrepresentations by Common Agent of both Parties—Evidence—Waiver—Costs.*] —Action for specific performance of an agreement for the exchange of lands in the city of Toronto. The action was tried without a jury at Toronto. CLUTE, J., in a written judgment, set out the facts at length, and said that he accepted the evidence of the defendant as wholly trustworthy, and found that the defendant was induced to enter into an agreement by the representations made by one Davy, who was acting for both parties, and was to receive a commission from both parties; that the representations made were false; and that there was no waiver on the part of the defendant. The case was not one for enforcing specific performance, and the action should be dismissed. The misrepresentations having been made by the common agent of both parties, each party should pay his own costs. Action dismissed without costs. W. N. Tilley, K.C., for the plaintiff. T. R. Ferguson, for the defendant.

WHYTE v. HENDERSON—MASTEN, J.—JUNE 26.

*Principal and Agent—Commission on Sale of Secret Process—Contract—Liability—Joint Obligation to two Agents—Release by one—Effect of—Reference.*]—Action by the executrix of Edward D. Whyte, deceased, for the recovery of a commission alleged to have become payable by the defendant to the deceased. The claim was founded on an agreement in writing, dated the 25th January, 1911, between the defendant, of the one part, and the deceased and one H. W. Gordon, of the other part. The agreement related to the sale of a certain secret process of which the defendant was the owner. The action was tried without a jury at Toronto. MASTEN, J., in a written judgment, after setting out the facts, said that the question before him was the defendant's liability to pay a commission—the quantum, if one was payable, not being in dispute. The learned Judge finds that the agreement sued on was proved; that a sale was negotiated through an introduction made by Whyte and Gordon, or one of them; and that the agreement was in that way fulfilled, and a commission became payable by the defendant to Whyte and Gordon. By a judgment of the Appellate Division, pronounced on appeal from the judgment at a former trial, it was determined that the obligation to Whyte and Gordon under the agreement was joint. The beneficial interest in the share of commission to which Whyte was in his lifetime entitled did not pass to Gordon on Whyte's death; and the defendant was liable to account for that share to the plaintiff. Upon the evidence adduced, the rights of the parties could not be fully determined. They were entitled to try out more fully whether Gordon and Whyte were parties and to debate and establish the effect of the release given by Gordon, and to have it determined whether the debt which originally existed had or had not been fully paid and discharged. There should, therefore, be a reference to the Master to inquire and report what, if anything, is due to the plaintiff, having regard to the findings now made. Further directions and costs reserved. G. H. Watson, K.C., and N. Sinclair, for the plaintiff. Casey Wood and E. G. McMillan, for the defendant.

RE COX—BRITTON, J., IN CHAMBERS—JUNE 27.

*Infant—Custody—Right of Mother—Neglected Child—Children's Aid Society—Children's Protection Act of Ontario, R.S.O. 1914 ch. 231—Investigation by Juvenile Court—Application to Judge in Chambers upon Habeas Corpus—Discretion—Welfare of Infant.*]—Motion on behalf of Kate Cox, on the return of a habeas corpus, for an order for the delivery to her, by the Children's Aid Society of Toronto, of her infant child Kathleen. BRITTON, J., in a written judgment, said that it appeared that the child was in the care of the society, but had not been made a ward of the society. The child was given shelter, care, and attention, and was well treated in respect to food, clothing, and medical attendance. The question of custody was still before the Juvenile Court for the City of Toronto pending an investigation. The father of Kathleen was killed in the war. The child had not been committed under the Children's Protection Act of Ontario, R.S.O. 1914 ch. 231; but, upon such a motion as this, the Judge has a discretion: no obligation is cast upon him to give the custody of the child to a parent. Here the applicant had so misconducted herself that the Judge should refuse to enforce her alleged right to the custody of the child; and at present the child was much better cared for than if with the mother. Pending the investigation, assented to by and continued at the instance of the mother, this application was premature. Motion refused; no costs. T. N. Phelan, for the applicant. W. B. Raymond, for the Children's Aid Society of Toronto.

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SHAW v. HOSSACK—BRITTON, J., IN CHAMBERS—JUNE 27.

*Appeal—Motion to Extend Time for Appealing to Divisional Court under Rule 492—Forum.*]—Motion by the plaintiffs for an order extending the time for appealing to a Divisional Court from the judgmentof the trial Judge, CLUTE, J., ante 183. BRITTON, J., in a written judgment, said that a motion to extend the time for appealing under Rule 492 should be made before the Divisional Court itself: Imperial Loan Co. v. Baby (1889), 13 P.R. 59; Holmested's Judicature Act, 4th ed., p. 1090. Motion dismissed; no costs. W. J. McCallum, for the plaintiffs. D. J. Coffey, for the defendants.

RE CANADIAN ORDER OF FORESTERS AND ELLIS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JUNE 28.

*Insurance—Life Insurance—Contract to Pay Wife of Insured—Separation Deed—Will—Substitution of Beneficiary not in Preferred Class—Ineffectiveness—Insurance Act, R.S.O. 1914 ch. 183, sec. 178.*]—Motion by Bessie F. Ellis, widow of Austin D. Ellis, deceased, for payment out of Court of moneys representing an insurance upon the life of the deceased. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the insurance certificate was a contract with the deceased to pay to the applicant, and the insurance moneys formed no part of the estate of Austin D. Ellis, and were not affected by a deed of separation. The brother of the deceased was not one of the class of preferred beneficiaries under the Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 178, and the bequest which the deceased assumed to make to him was ineffective. Order for payment out to Bessie F. Ellis. No costs. McGregor Young, K.C., for the applicant. H. Sanders, for the executors and for Martha E. Bowman individually.

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HODGINS v. AMOS—MIDDLETON, J.—JUNE 28.

*Contract—Adoption of Child—Covenant with Mother of Child—Maintenance—Death of Adopting Father—Action against Executors—Will—Contingent Gift to Child—Application of Income for Maintenance—Encroachment on Corpus—Insurance—Costs.*]—Action by an adopted child (an infant) against the executors of the adopting father, for maintenance, under a covenant with the mother of the plaintiff. The action was tried without a jury at London. MIDDLETON, J., in a written judgment, said that the plaintiff's claim failed for two reasons: (1) the plaintiff was not a party to the contract; (2) the right to maintenance, upon the true construction of the contract, ceased on the death of the father. The residuary estate was given to the plaintiff when he should attain 21, with a gift over if he should not attain that age. The income from the estate, past and future, might be used for his maintenance, even though his interest was contingent: In re Bowlby, [1904] 2 Ch. 685, 697. The capital could not be used unless an insurance was placed on the life of the infant to protect

the fund. The plaintiff should have at least two years' more schooling, at a cost, including board and clothing, of $300 per annum. When it becomes necessary to encroach on the corpus, the Official Guardian will arrange the insurance. Costs of the parties, fixed at $50 for the plaintiff, $25 for the executors, and $30 for the residuary legatees, to be paid out of the corpus. F. E. Perrin, for the plaintiff. J. M. McEvoy, for the representatives of the residuary legatees. M. P. McDonagh, for the executors.

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RE FREEMAN AND ROYAL TEMPLARS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JUNE 29.

*Insurance—Life Insurance—Adverse Claims—Payment of Insurance Moneys into Court—Trial of Issue between Claimants—Payment of Premiums by one Claimant—Salvage.*]—Motion by the society for leave to pay $1,000 insurance money into Court and to be relieved from liability. The Chief Justice, in a written memorandum, said that the society should have leave to pay the money into Court, and that an issue should be tried between James Freeman and those claiming adversely, in which James Freeman should be plaintiff. James Freeman to confer with the Official Guardian as to salvage in respect of the alleged payment of premiums, which the Official Guardian offered to allow. Order accordingly. Costs in the issue. Lyman Lee, for the society. S. H. Bradford, K.C., for James Freeman. F. W. Harcourt, K.C., as Official Guardian, representing infants.