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APPELLATE DIVISION.

MARCH 20TH, 1914.

FINE v. CREIGHTON.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Tender by Vendor of Conveyance—Refusal of Purchaser to Accept—Termination of Agreement under Provision therefor—Action by Vendor for Specific Performance or Damages—Dismissal—Appeal.

Appeal by the plaintiff from the judgment of KELLY, J., 5 O.W.N. 677.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. Cohen, for the appellant.

L. E. Awrey, for the defendant, the respondent.

THE COURT dismissed the appeal with costs.

MARCH 23RD, 1914.

*HAIR v. TOWN OF MEAFORD.

Municipal Corporation—Local Option By-law—Action to Restrain Town Council from Submitting to Electors—Liquor License Act, sec. 141, *sub-secs.* 1, 5, *sec.* 143*a*—*By-law Submitted in Previous Year and Defeated—Judgment Declaring Submission Illegal—Consent Judgment—Compromise—Ineffectiveness—Validity of Previous Submission of By-law—Absence of Evidence—Necessity for Proof—Rights of Electors—Refusal of Injunction.*

Appeal by the plaintiff from the judgment of HODGINS, J.A., the trial Judge, 5 O.W.N. 868.

*To be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

A. E. H. Creswicke, K.C., for the appellant.

W. E. Raney, K.C., for the defendants, the respondents.

THE COURT dismissed the appeal with costs.

MARCH 27TH, 1914.

RE CLAREY AND CITY OF OTTAWA.

Municipal Corporation—Waterworks By-law—Expenditure of Money—Powers of Council—Special Act, 3 & 4 Geo. V. ch. 109 (O.)—Necessity for Submission of By-law to Electors.

Appeals by the Corporation of the City of Ottawa from orders made by LENNOX, J., on the 29th November, 1913, and the 7th January, 1914, quashing by-laws passed by the city council (5 O.W.N. 370, 673).

The appeals were heard by MULOCK, C.J.Ex., MAGEE, J.A., SUTHERLAND and LEITCH, JJ.

I. F. Hellmuth, K.C., and F. B. Proctor, for the appellant corporation.

G. F. Macdonnell, for the applicant, the respondent.

THE COURT dismissed the appeals with costs.

HIGH COURT DIVISION.

CAMERON, MASTER IN CHAMBERS. MARCH 24TH, 1913.

REX EX REL. SULLIVAN v. CHURCH.

Municipal Election—Deputy Reeve of Town—Right of Town to Have Deputy Reeve—Municipal Act, 1913, sec. 51—Number of Municipal Electors—Computation—Evidence—Affidavits—Tenants not Entitled to Vote—Secs. 56, 57, 58 of Act—Remedy by Proceeding in Nature of Quo Warranto to Unseat Deputy Reeve where Town not Entitled to Deputy Reeve.

Application by the relator, Murtagh Sullivan, elector and ratepayer, to unseat Thomas S. Church, who was elected by ac-

clamation to the office of Deputy Reeve of the Municipality of the Town of Arnprior at the municipal election held on the 5th January, 1914.

E. E. A. DuVernet, K.C., and R. J. Slattery, for the relator.

J. E. Thompson, for the defendant.

THE MASTER:—This application is made under the Municipal Act of 1913, sec. 51, sub-secs. (1) and (2), which are as follows:—

"(1) A town, not being a separated town . . . shall . . . be entitled where it has more than 1,000 and not more than 2,000 municipal electors, to a first deputy reeve," etc.

"(2) The number of municipal electors shall be determined by the last revised voters' list, but in counting the names, the name of the same person shall not be counted more than once."

It is contended by the relator that the municipal electors in the town of Arnprior, which is not a separated town, fall short of the number of "more than 1,000" required by sub-sec. (2). He files a number of affidavits in support of the motion, and the voters' list and assessment rolls were produced before me at the hearing, by the town clerk. From the affidavits and this material it appears that the total number of persons on the voters' list is 1098; of these 12 were struck off by the County Court Judge on the revision of the list, and 87 voted in other subdivisions. These being deducted from the above total, 999 names are left. Two names were said to be down on the same subdivision more than once, but one of these was shewn, by the affidavit filed by the defendant, to be properly on the list, and this was accepted by the relator. I have, therefore, allowed one of these. This leaves a total of 998 names of qualified electors.

Mr. Thompson argued strenuously that, as there were some slight differences in the spelling and in the occupation of the persons said to be named twice on the voters' list, the names should not be taken off. In view, however, of the uncontradicted affidavits filed by the relator as to the identity of these persons, and that in the only case where the relator's statement was disputed the defendant filed an affidavit, I do not see my way clear to allow these voters to be counted more than once.

Counsel for the relator also contended that the names of 35 tenants, who, he contended, are not entitled to vote, should be deducted from the list; and affidavits are filed shewing that

these persons were not tenants on the day of the election or for one month prior thereto. These affidavits are uncontradicted, nor were the deponents cross-examined upon them, nor was the town clerk, who was present at the hearing, called to contradict these affidavits. Although it may not be necessary for the decision of this application, I think that the 35 tenants' names should be taken off, on account of the sworn uncontradicted statement that these tenants were not, at the time of the election or for one month prior thereto, resident in the municipality.

The persons whose names are to be placed on the voters' list at municipal elections are set forth in sec. 56 of the Municipal Act of 1913. By sec. 57 it is enacted that, "subject to sections 59, 60, and 61, every person whose name is entered on the proper voters' list shall be entitled to vote at a municipal election, except that in the case of a tenant he shall not be entitled to vote unless he is a resident of the municipality at the date of and has resided therein for one month next before the election;" and, by sec. 58, no question of disqualification shall be raised at the election, except in the case of a tenant "from his not residing in the municipality for one month next before the election and at the time of the election."

I do not see how these names can be counted as qualified voters upon the facts as sworn before me at the hearing. If this be so, the municipality is not entitled to a deputy reeve under the Act, and the election of Mr. Church to such office was null and void, and is set aside.

I disposed at the hearing of a preliminary objection raised by Mr. Thompson, that the municipality should be a party to the proceedings. Whether or not a substantive application can be made against the municipality for a declaration that it was not entitled to a deputy reeve under the Act, I think that the ordinary remedy of the elector to apply by way of quo warranto remains unaffected.

The application will be allowed with costs.

LENNOX, J. MARCH 24TH, 1914.

WRIGHT v. TORONTO R.W. CO.

Arbitration and Award—Motion to Set aside Award—Misconduct of Arbitrators—Reception of Testimony not on Oath —Unfounded Reference to Offer of Settlement—Rejection of Competent Evidence — Irregularities in Procedure — Costs.

The plaintiff was injured in a collision between two cars of the defendant company, and brought this action to recover damages for her injuries.

While the action was pending an agreement was made between the parties for the submission of the plaintiff's claim to arbitration. The plaintiff appointed Dr. W. T. Stuart her arbitrator; the defendants appointed Dr. N. A. Powell; and these two chose Dr. Harley Smith as the arbitrator.

Dr. Stuart and Dr. Smith agreed upon $9,095 as the amount to be paid the plaintiff by the defendants for her injuries, and awarded that sum; Dr. Powell not joining in the award.

The defendants moved to set aside the award, on the ground of the misconduct of the arbitrators.

D. L. McCarthy, K.C., for the defendants.
R. McKay, K.C., for the plaintiff.

LENNOX, J.:—This was clearly an arbitration and the plaintiff has neither law nor equity to support her contention to the contrary.

But upon the other question—whether the manner in which the inquiry was conducted is ground for setting aside the award —I regret the conclusion I feel compelled to come to, and shall be better pleased should an appellate Court determine that I am in error.

Communication with Dr. St. Charles, the attendant physician, for the purpose of getting the history of the case, is not, I think, complained of, but, beyond this, unsworn statements by Dr. St. Charles should not have been listened to; and even the history of the case, if given piecemeal to the arbitrators individually, would be distinctly improper. The communications made by Dr. St. Charles to the arbitrators who made the award, including as they did his unsworn opinion, practically an argu-

ment, as to the character, extent, and permanency of the plaintiff's injuries, in my opinion, clearly vitiates the award.

Even if he had made similar statements to Dr. Powell—and I am of opinion that he did not—the result would be the same.

An equally formidable objection to the award is the ex parte and unfounded reference to an offer of settlement. Even if founded upon fact, and even if made to the Board as a whole, a disclosure of this kind would be improper. The wrong here began when the plaintiff's solicitor discussed this phase of the question with the arbitrator of his choice, before his actual appointment. From this alone it might with some force be argued that this arbitrator ipso facto became disqualified. But there is a great deal more than this. It is difficult to believe that the subsequent communication to the third arbitrator of the alleged offer of $7,500, or that it had been suggested by any one to the plaintiff and rejected as inadequate, was purely casual, and it is impossible to believe that it was not calculated to affect the decision. The evidence shews, too, that these two arbitrators were then discussing the case in a general way in the absence of the other arbitrator. I do not see how this method of investigation can be upheld.

I am of opinion, too, that a physicial examination and subsequent evidence by Dr. Beemer should have been permitted. Admitting that the plaintiff was not prima facie bound to submit herself for physical examination, it is a question whether the objection in this instance was taken in good faith, seeing that it is accompanied by the meaningless proposal that, instead, she should be examined by the arbitrators for the third time. I can find nothing in Mr. McCarthy's letter of the 28th October, or in anything that subsequently happened, to preclude him from introducing this evidence at the time it was proposed by the three arbitrators at a properly constituted meeting of the Board. It was at least injudicious for the plaintiff's solicitors to write to the arbitrator of their own appointment the long argumentative refusal of the 24th December. It was of the essence of a fair investigation, if this letter was justifiable at all, that it should come into the possession and remain under the control of the Board and be of record in their proceedings, and it was not enough to leave it to this arbitrator to shew the letter to the other arbitrators or not as he might think fit; it was for the solicitors to see to it that the letter would be available for all and an open record in the case. The reference in this letter to the probable action of counsel for the plaintiff should not have been

made, and a copy of the letter should have been furnished if the original was lost.

Dr. Powell alone seems to have fully realised the judicial character of the duties imposed by the submission; and the arbitrator for the plaintiff, I should say, not at all.

It is true that the arbitrators have not the right to say what evidence shall be given; but they have not the right to reject competent evidence offered by either counsel. They came to the conclusion that the evidence of a specialist was necessary to a proper understanding of the matters in issue; and, one of the counsel having adopted this view, they should not have rejected it at the instance of the other.

I need not take up other grounds of objection. The first two are, I think, fatal to the validity of the award. Subject to the question of physical examination—a question which, I think, the plaintiff's counsel was hardly in a position to raise—the exclusion of Dr. Beemer's evidence is an equally strong objection to the award. The defendants were to pay the costs of the arbitration. The attitude of the defendants' counsel in the early stages of the inquiry and his omission to insist directly upon the Board admitting the evidence contributed, I think, to the conspicuous irregularity of the proceedings in this case; and the costs now incurred in straightening the matter out may well be added to the costs covered by the agreement.

The award will be set aside, but, in the circumstances, the defendants will pay the plaintiff's costs of and incidental to the motion.

References: Livingstone v. Livingstone, 13 O.L.R. 604, and Campbell v. Irwin, 5 O.W.N. 957, where the cases are collected.

BOYD, C. MARCH 25TH, 1914.

RE McLAUGHLIN.

Will—Construction—Devise of Life Estate to Wife for Benefit of Family—Direction to Executors to Sell at Death of Wife and Divide Proceeds among Children—Vested Estates of Children—Share of Daughter Dying after Death of Testator and Leaving Issue since Deceased—Right of Surviving Husband.

Motion by the executors of the will of Robert McLaughlin, deceased, for an order declaring the true construction of the will

and determining questions arising in the performance of the duties of the executors under the will.

The will (after a direction to pay debts and funeral expenses) was as follows:—

"I direct that all the residue of my property both personal and real shall be given to my wife . . . to hold in trust during her lifetime for my children and at her decease the whole of such property composed of my farm . . . together with stock and chattels of every kind shall be sold and the proceeds equally divided among my children, except that my son George shall receive $100 more than each of the other boys and girls.

"I desire that the old home shall still be a home for the family as much as possible and that any of the boys or girls who may be needed at home to help on the farm shall receive wages after they become of age."

The applicants raised for consideration the questions whether the children took a vested estate upon the death of the testator; and whether Hugh D. Copeland, the husband of Bella McLaughlin, a daughter of the testator, who survived him, leaving children her surviving, but these children having since died, leaving their father, Hugh D. Copeland, them surviving, took the share of his deceased wife.

B. F. Justin, K.C., for the executors and for Hugh D. Copeland.

W. H. McFadden, K.C., for George McLaughlin.

T. J. Blain, for Robert McLaughlin.

Boyd, C.:—I favour the construction of this will advocated by Mr. Justin. The lands vested in the children at the death of the testator, though the enjoyment was postponed during the life of the wife, who was to keep up the house for the benefit of the family. The death of any child during the life of the wife would not affect the vested ownership of that child's share in the corpus. In these circumstances, the husband of the deceased daughter and father of his deceased issue by that daughter will take the share which the testator's daughter would have taken had she lived till the time of distribution.

Costs out of the estate.

KELLY, J., IN CHAMBERS. MARCH 26TH, 1914.

ANDERSON v. GRAND TRUNK R.W. CO.

Costs—Summary Disposition of Costs of Action Rendered Unnecessary by other Proceedings—Rule as to Costs—Person in the Wrong to Answer.

Motion by the plaintiff for an order for payment by the defendants of the costs of the action.

Grayson Smith, for the plaintiff.
D. O'Connell, for the defendants.

KELLY, J.:—On the 5th September, 1911, the defendants the railway company obtained ex parte an order of the Dominion Railway Board authorising them to construct a siding into the lands of their co-defendants; this siding leading across a lane on which the plaintiff's lands abutted. The material on which the order was granted did not disclose the existence on the registered plan of this lane.

On the 19th September, the plaintiff, being then ignorant of the issue of the Railway Board's order, commenced this action and obtained, and served upon the defendants, an interim injunction order restraining them from constructing the siding on the lane. In defiance of the injunction order, the railway company proceeded, on the 20th September, to lay down the siding on the lane, and that work was practically completed at the time of the return of the motion to continue the injunction.

The plaintiff afterwards became aware of the order of the Railway Board, and such proceedings were then had before that Board as resulted in their making an order on the 12th October, 1911, amending the order of the 5th September, so as to declare the owners of certain lots (including the plaintiff's lands) to be "adjacent land-owners," within the meaning of sec. 6 of 1 Geo. V. ch. 22, amending sec. 235 of the Dominion Railway Act.

The plaintiff's rights were then dealt with by the Board; and, the object of this action having been thus substantially attained, there existed no reason for proceeding further with it, though when it was commenced the circumstances justified it.

The present motion is not in respect of costs of an action in which there is an ordinary discontinuance, but of one wherein further proceedings became unnecessary owing to the plaintiff

having otherwise, and, as I believe, by reason of this action, practically obtained the relief asked for.

The defendants were in the wrong, and there is nothing to take the case out of the rule that the persons in the wrong shall answer the costs: Knickerbocker Co. v. Ratz, 16 P.R. 191; Eastwood v. Henderson, 17 P.R. 578.

The application is, therefore, granted with costs.

FALCONBRIDGE, C.J.K.B. MARCH 27TH, 1914.

BIRCH v. STEPHENSON.

McDOUGALL v. STEPHENSON.

Master and Servant—Death of Servant in Master's Burning Building — Absence of Fire-appliances — Non-compliance with Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60—Cause of Death—Conjecture—Negligence or Breach of Duty not Proved to be Cause of Death.

Actions by the widows of two men who were employed by the defendant in the Chatham "Planet" building, owned by him, which was destroyed by fire on the 9th May, 1913, to recover damages for their deaths respectively, they having lost their lives in the fire. The plaintiffs alleged negligence and neglect of statutory duty on the part of the defendant.

The actions were tried at Chatham.

I. F. Hellmuth, K.C., and J. G. Kerr, for the plaintiffs.

O. L. Lewis, K.C., and W. G. Richards, for the defendant.

FALCONBRIDGE, C.J.K.B.:—I am of the opinion that the causal connection between the alleged negligence or breach of duty of the defendant and the death of the plaintiffs' husbands has not been established. The alleged want of fire-escape appliances and non-compliance with the provisions of the Factory Shop and Office Building Act, is not proved to have been the proximate cause of their deaths. Exactly how the unfortunate men were killed is purely a matter of conjecture.

There was more than one easy, safe, and sufficient means of egress from the first floor, i.e., the second storey (in which

the plaintiffs' late husbands were at the time of their death) to the ground.

Richard Pritchard, the City Fire Chief, testified that he inspected the building before the fire. He asked for no further exits, etc.—there was no necessity whatever for them, he said. The defendant complied with every suggestion which he, Pritchard, made.

The actions must be dismissed with costs, if exacted. There will be a stay of proceedings for thirty days.

As to the law, I have consulted the following, amongst other, authorities. The statute is 3 & 4 Geo. V. ch. 60 (now R.S.O. 1914 ch. 229): Hagle v. Laplante (1910), 20 O.L.R. 339; Griffiths v. Grand Trunk R.W. Co. (1911), 45 S.C.R. 380; The Schwan, [1892] P. 419; Carnahan v. Simpson (1900), 32 O.R. 328; Ruegg on Employers' Liability, Can. ed., pp. 6, 12, 242 to 247, and 34, 39, 206, 239; Thompson v. Ontario Sewer Pipe Co. (1908), 40 S.C.R. 396; Canadian Coloured Cotton Co. v. Kervin (1899), 29 S.C.R. 478; Pomfret v. Lancashire and Yorkshire R.W. Co., [1903] 2 K.B. 718; Ross v. Cross (1890), 17 A.R. 29; Wadsworth v. Canadian Railway Accident Insurance Co. (1912), 26 O.L.R. 55, reversed, 28 O.L.R. 537; Winspear v. Accident Insurance Co. (1880), 6 Q.B.D. 42; Lawrence v. Accidental Insurance Co. (1881), 7 Q.B.D. 216; Hensey v. White, [1900] 1 Q.B. 481; Pressick v. Cordova Mines Limited (1913), 4 O.W.N. 1334, 5 O.W.N. 263; Ramsay v. Toronto R.W. Co. (1913), 5 O.W.N. 20, 556; Montreal Rolling Mills Co. v. Corcoran (1896), 26 S.C.R. 595; Young v. Owen Sound Dredge Co. (1900), 27 A.R. 649; Gorris v. Scott (1874), L.R. 9 Ex. 125; Goodwin v. Michigan Central R.R. Co. (1913), 29 O.L.R. 422; Ronson v. Canadian Pacific R.W. Co. (1909), 18 O.L.R. 337; Johnston v. Great Western R.W. Co., [1904] 2 K.B. 250; Stephens v. Toronto R.W. Co. (1905), 11 O.L.R. 19; Loffmark v. Adams (1912), 7 D.L.R. 696 (B.C.); Jones v. Morton Co. (1907), 14 O.L.R. 402; The Pennsylvania (1873), 19 Wall. (S.C.U.S.) 125; The Chilian (1881), 4 Asp. M.C.N.S. 473; Stone v. Canadian Pacific R.W. Co. (1912), 26 O.L.R. 121, reversed, 47 S.C.R. 634.

PATTERSON v. ALLAN—LENNOX, J., IN CHAMBERS—MARCH 21.

Security for Costs—Evidence of Plaintiff's Residence out of the Jurisdiction—Insufficiency—Property in Jurisdiction—Affidavits.]—Appeal by the plaintiff from an order of the Local

Master at Brockville requiring the plaintiff to furnish security for the defendant's costs of the action, upon the ground that the plaintiff's residence was out of the jurisdiction. LENNOX, J., was of opinion, with great respect, that the learned Local Master erred in directing security for costs. It was not denied that the property conveyed by the defendant to the plaintiff in 1905 had been paid for in full; or that the plaintiff had been in possession of it, or that he relied upon the defendant, a solicitor, to give him a proper deed, or that there was in fact an error in the description requiring correction. The deed was registered in September, 1906, upon an affidavit—made, apparently, by a clerk in the defendant's own office—stating that the deed was "duly signed, sealed, and executed" by the defendant and his wife; and, on the face of this, without something more specific, no meaning could be given to the expression "there never was any legal delivery of the deed;" and most of the statements founding this application, or replying to the plaintiff's affidavit, were of this hazy character. This was not unimportant if the question of the plaintiff's real estate in Ontario had to be considered. But the evidence was decidedly in favour of the contention that the plaintiff resided and had a permanent residence in Ontario. He was a British subject; so far as appeared, he had no interests or property outside; he had held real estate in Ontario for nearly ten years; his wife was here; his home was here, for the time being at all events; and he swore that he intended to reside here permanently. Order made setting aside the order appealed from; the defendant to have 6 days for delivery of the statement of defence; costs here and below to the plaintiff in the cause. Featherston Aylesworth, for the plaintiff. E. F. Raney, for the defendant.

MOORE v. STYGALL—BRITTON, J.—MARCH 21.

Gift—Conveyance of Land to Nephew—Action to Set aside —Lack of Appreciation by Donor of Nature of and Effect of Execution of Deed—Mental Condition of Donor—Lack of Independent Advice—Improvidence.]—Action to set aside a conveyance of a house and lot in the village of Bridgeburg executed by the plaintiff, a widow eighty-six years of age, in favour of the defendant, her nephew. The conveyance was to the defendant in fee simple in remainder after the death of the plaintiff.

There was in fact no valuable consideration for the conveyance. The defendant supported it as a voluntary gift. The plaintiff, by her brother and next friend, alleged that, at the time she executed the conveyance, she was of unsound mind; that the conveyance was obtained by undue influence; that the act of giving it was improvident; and that she had no independent advice. BRITTON, J., after stating the facts, said: "I find that the plaintiff, when she signed the conveyance, was not capable of appreciating and did not appreciate the effect, nature, and consequence of her executing it. The giving away of this property to her nephew, to whom she was under no obligation and from whom she had no reason to expect favours, was not a deliberate, well-considered act of the plaintiff. The plaintiff was feeble-minded; she was forgetful. Considering that the present alleged gift did not take effect until after death, and notwithstanding the fact that the plaintiff had another house and $2,000 in money, the act was an improvident one." The case was not distinguishable from Kinsella v. Pask, 28 O.L.R. 393, which the learned Judge was bound to follow. Judgment for the plaintiff with costs (if demanded) setting aside the conveyance and directing the defendant to reconvey to the plaintiff. In default of such reconveyance, declaration that the plaintiff is, as against the defendant, the absolute owner of the property. C. H. Pettit, for the plaintiff. H. A. Rose, for the defendant.

LABATT LIMITED v. WHITE—LENNOX, J.—MARCH 24.

Execution—Action for Declaration in Aid—Husband and Wife—Interest of Husband in Land Vested in Wife—Evidence.]—Action by Labatt Limited and the Kuntz Brewery Company Limited, execution creditors of Joseph White, against Sarah White and Joseph White, who were husband and wife, for a declaration that an hotel property in the town of Barrie standing in the name of the defendant Sarah White was really the property of the defendant Joseph White and liable to pay his debts, or that Sarah was a trustee thereof for Joseph, and for a sale of the property to satisfy the plaintiffs' executions, etc. The learned Judge discussed the evidence, in a short written opinion, and found the facts in favour of the defendants. Action dismissed with costs. W. R. Smyth, K.C., for the plaintiffs. A. E. H. Creswicke, K.C., for the defendants.

GREEN v. UNIVERSITY ESTATES LIMITED—CAMERON, MASTER IN CHAMBERS—MARCH 25.

Writ of Summons—Service out of the Jurisdiction—Action for Deceit—Tort Committed in Ontario—Rule 25(e)—Conditional Appearance.]—Motion by the defendants for liberty to withdraw their appearance and defence, to enter a conditional appearance, and to move to set aside the service of the writ of summons and statement of claim. The plaintiffs' claim was to set aside an agreement for the purchase of certain lots in Tuxedo Park, parish of St. Charles, in the Province of Manitoba, and to recover all moneys paid to the defendants, on the ground that the agreement was obtained by fraud and misrepresentation. The appearance was entered and the statement of defence delivered, according to the affidavits filed by the defendants on this application, inadvertently. The Master said that, admitting the inadvertence, the defendants would be in no way prejudiced if this application were dealt with as a motion to set aside the service of the writ of summons. There would be no object, at this stage, in allowing the defendants to enter a conditional appearance. Such an appearance would simply be entered for the purpose of enabling them to dispute the jurisdiction, and it would better serve the interest of the parties to deal with the application on its merits. The only question then to be decided was, whether this was a proper case to allow the issuing of a writ of summons for service out of the jurisdiction. There could be no doubt that the plaintiffs, on the material filed, brought themselves within Rule 25(e), i.e., the action was founded on a tort committed in Ontario. There was, therefore, no reason for allowing a conditional appearance to be entered. Reference to Standard Construction Co. v. Wallberg, 20 O.L.R. 649; Anderson v. Nobels Explosives Co., 12 O.L.R. 650. The present Rule 25(e) is identical with Con. Rule 162(e). Motion dismissed with costs to the plaintiffs in any event. Grayson Smith, for the defendants. J. A. Hutcheson, K.C., for the plaintiffs.

PIERCE v. GRAND TRUNK R.W. CO.—BRITTON, J., IN CHAMBERS—MARCH 26.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Rule 507—Refusal of Leave—Particu-

lars of Statement of Claim—Practice.] Motion by the defendants (under Rule 507) for leave to appeal to the Appellate Division from the order of MIDDLETON, J., in Chambers, 5 O.W.N. 962. BRITTON, J., said that leave to appeal must be refused. (1) There were no conflicting decisions upon the points involved. (2) There was no reason to doubt the correctness of the judgment from which leave to appeal was asked. (3) The proposed appeal would not, as it seemed to the learned Judge, involve matters of such importance that leave to appeal should be granted. Costs of the motion to be costs in the cause to the plaintiffs. Frank McCarthy, for the defendants. T. N. Phelan, for the plaintiffs.

SPETTIGUE v. WRIGHT—LENNOX, J.—MARCH 28.

Surrogate Court—Removal of Action into Supreme Court.] —Motion by the plaintiff to remove this case from the Surrogate Court of the County of Oxford, for trial, to the Supreme Court of Ontario. Order directing that this action be removed from the Surrogate Court, and that it be tried in the Supreme Court; the time and method of trial, at request of both parties, being reserved for subsequent order. Costs in the cause unless otherwise ordered by the trial Judge. John Macpherson, for the plaintiff. G. S. Gibbons, for the defendants.