

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

OSLER, J.A., who, after setting out the facts, continued:—

Either or both of these provisions (clause 13 of the appellant's contract and his bond) *prima facie* warrant, in one form or another, a judgment for indemnification of the respondents, and that has hardly been contested. But the appellant urges that under the agreement with Macintosh a duty was cast upon the respondents to fence off or picket by a hoarding or other guard that part of the street within which his work was being done, and that it was owing to their neglect of this obligation that the locus in quo was left open to access by the deceased. . . .

Under the circumstances, it must, in my opinion, be held that the appellant is not in privity with Macintosh's contract. The two contracts are separate and distinct. His own contract is absolute, and by the terms of it he must abide.

I notice Mr. Bicknell's contention that his client should not have been ordered to pay the costs incurred by the city in defending the action. In doing this their course was not unreasonable; the appellant did not offer to assume the burden of the defence, and the appellant's liability under such circumstances may well be rested on his contract.

We can only dismiss the appeal.

SEPTEMBER 19TH, 1902.

C. A.

THORNE v. PARSONS.

*Will—Construction—Gift—Intention to Include Choses in Action—
Reference—Appeal from Report—Looking at Original Will—Costs.*

An appeal by defendants H. Thorne, A. M. Thorne, and C. Thorne from an order of a Divisional Court reversing the finding of the Master in Ordinary upon a reference in an action involving the construction of the will of William Thorne.

The appeal was heard by MEREDITH, C.J., OSLER, MACLENNAN, MOSS, LISTER, J.J.A.

D. O. Cameron and T. J. Blain, Brampton, for appellants.

S. H. Blake, K.C., for respondents J. M. Thorne and W. H. Parsons.

W. T. J. Lee, for respondent W. H. Thorne.