

FIRST DIVISIONAL COURT.

DECEMBER 19TH, 1919.

\*MATHESON v. TOWN OF MITCHELL.

*Will—Devise of Lands to Town Corporation for Public Park forever—Acceptance on Conditions of Will—Condition or Proviso that Park be Kept in Proper Order and Repair—Breach—Action for Mandatory Order to Compel Corporation to Perform Condition—Obligation to Superintend Performance not Assumed by Court—Forfeiture for Breach—Claim for Declaration—Continuous Breach Beginning more than 10 Years before Action—Limitations Act, R.S.O. 1914 ch. 75, secs. 5, 6(9)—Proviso—Condition Subsequent—Rule against Perpetuities.*

Appeal by the plaintiff from the judgment of ROSE, J., 44 O.L.R. 619, 15 O.W.N. 314.

The appeal was heard by MACLAREN and MAGEE, JJ.A., and LATCHFORD and MASTEN, JJ.

J. C. Makins, K.C., for the appellant.

F. H. Thompson, K.C., for the defendant, respondent.

MACLAREN, J.A., in a written judgment, said that the action was brought by the executor of the will of the late Thomas Matheson for a mandamus to compel the town council to keep in proper repair as a public park certain land devised to the town corporation by the testator, who died in 1883, or, in the alternative, that the land should be given up to the plaintiff to form part of the estate of the testator.

The trial Judge held that the case was not a proper one for a mandatory order such as was formerly made in the Court of Chancery, because the Court would not undertake to superintend for all time to come the performance of continuous duties involving the exercise of a certain amount of discretion. In this the trial Judge was right.

There was a proviso in the will to the effect that if the town council should not keep the land and the fences surrounding it in proper order and repair and as a public park should be kept, the land should revert to and become part of the testator's estate. In answer to the claim based upon this proviso, the defendants set up the Limitations Act, R.S.O. 1914 ch. 75, sec. 5 and also sec. 6(9). The trial Judge held, upon the evidence, that there had been a continuous breach of the duty to keep in repair for over 30 years before the institution of the action, and that the plaintiff's right of action first accrued more than 30 years before he instituted it, and that the statute was a good defence. On this ground also, the action was properly dismissed.