

(which was avowedly the evidence sought to be obtained here by the examination in question) would not be receivable, and therefore the subpoena and appointment should be set aside.

The Master in Chambers has no power to refer a matter before him to the Divisional Court.

*Riddell*. K. C., for defendants. *Shirley Denison*, for plaintiff.

Osler, J. A.]

GARDNER v. PERRY.

[July 22.

*Executor—Life tenant—Misappropriation by co-executor—Negligence—Delay in compelling accounting—Leases for years by life tenant—Covenant as to straw and manure—Property in—Emblements.*

R. G. died in 1870, having by his will given the income of his estate to his widow for life and subject to certain bequests—the residue to the children of his brothers and sisters, and appointed T. H., J. G. and the widow executors and executrix of his will with power “to dispose of the property if they see fit.” J. G. managed the estate until the time of his death in 1885 by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895 when the widow after much pressure by her friends took proceedings against him for an account, the result of which was he was found largely indebted and a large sum was lost to the estate. The widow died in 1902. Probate of her will was then granted to the defendants and T. H. was removed as trustee and the plaintiffs appointed in his place. In an action by plaintiffs against defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate.

*Held*, that, as all the alleged acts of negligence or breaches to trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act R.S.C. 1897, was a good defence. *In re Bowden, Andrew v. Cooper* (1890) 45 Ch. D. 447 commented on and followed.

During the widow's lifetime two of the farms belonging to the estate were leased for five years dependent on her living so long and the lessees covenanted to cultivate, till, manure, . . . and will spend, use and employ in a proper husbandlike manner all the straw and manure . . . and will not remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and will carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy fowl seeds) and will thereafter and not before spread the same on the land.

*Held*, 1. The defendants were not entitled to the straw and manure as emblements as the widow was not in actual occupation or cultivation of the lands on which it was produced.