

original agreement; and negotiating for and obtaining an extension of time did not affect their legal position. I hold that the limbs and tree-tops are included in what the Tillson Co. purchased, and that the tree-tops are not brush, unless the company so determined—and if the company so determined, they were to be left on the land and piled, the object of that manifestly being for the purpose of burning in clearing the land.

I think *McGregor v. McNeil*, 32 C. P. 538, governs this case.

[*Johnston v. Shortreed*, 12 O. R. 633, referred to.]

If obliged to determine the question of fact as to alleged agreement for a further extension of time to defendants, my conclusion would be . . . that defendants have not established that agreement. The onus was upon them. This must be considered in dealing with the costs. Further, as to costs, defendants were warned by the Tillson Co. that in getting the stuff off plaintiff as tenant would have to be considered.

In dismissing the action, I limit the costs which plaintiff is to pay to defendants to the sum of \$80.

JULY 4TH, 1904.

DIVISIONAL COURT.

RE MUMBY.

Will—Construction—Absolute Gift to Widow unless She Remarries—Death of Widow without Remarrying.

Appeal by Charity V. Mumby and Charles J. Mumby from order of STREET, J., 3 O. W. R. 146, declaring that upon the true construction of the will of the deceased Charles Henry Mumby, his widow, Margaret Ann Mumby, not having married again, had, under and by virtue of the devises and bequests in the will contained, at the time of her death an estate in fee simple in the real estate and an absolute interest in the existing personal estate owned by the testator at the time of his death.

G. H. Kilmer, for appellants.

D. L. McCarthy, for the official guardian and other parties in the same interest.

M. Wright, Belleville, for executors.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.—I am of opinion that my brother Street's view was the right one, and that his order should be affirmed.