

sec. 28, under which he assumed to act, were, I think, clearly not applicable. The work directed by the award to be done by English on the respondent's lands had been completed by him, and the proceeding should have been, if under the Act, that provided by sec. 35 for the neglect of the respondent to maintain the ditch as directed by the award. The provisions of that section were not complied with, and the acts of the engineer and of the appellant were therefore wholly unauthorized and illegal.

I desire not to be understood as not agreeing in the other reasons assigned by the learned Chief Justice for his judgment. I have formed and express no opinion as to them, not having found it necessary for the disposition of the appeal to do so.

The appeal, in my opinion, fails and should be dismissed with costs.

Deroche & Madden, Napanee, solicitors for plaintiff.

J. English, Napanee, solicitor for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

CARR v. O'ROURKE.

*Administration—Grant—Discretion of Court—Next of Kin—Persons to be Cited—Surrogate Courts Act, secs. 41, 59.*

Appeal by plaintiff from judgment of Surrogate Court of Kent dismissing the action, which was brought by the brother of Daniel Carr, deceased, to revoke letters of administration of his estate granted to defendant, who is married to a niece of the deceased. Robert Daniel Payne, a nephew of deceased, had been in October, 1899, appointed committee of his person and estate. Plaintiff alleges that defendant is not one of the next of kin, and that as brother of deceased, plaintiff is entitled to administer. Daniel Carr left him surviving the plaintiff, and one sister, whose daughter is married to defendant. The Surrogate Court held that plaintiff, having for many years been a citizen of and domiciled in a foreign country, was not entitled to administer, providing that any other fit and proper person of equal degree of relationship to deceased or the appointee of such person applied, and that at all events plaintiff is practically blind, and, from age and physical infirmities, not a fit and proper person; that there was no evidence of collusion between the committee and plaintiff; and that it was not the practice to cite persons living outside the Province, where, as in this case, suitable relatives resided in it.