

executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated.

Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor.

Simpson, K.C., for administrators. *Riddell*, K.C., for specific legatees *Shepley*, K.C., for estate of John Simpson. *W. N. Ferguson*, for estate of David Fisher.

Boyd, C.,] IN RE OLIVER AND BAY OF QUINTE R.W. CO. [March 11.
Costs—Taxation—Railway Act—Delegation by judge—Review of taxation
—Principle of taxation—Items—Desistment—Arbitration.

The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 Vict., c. 29 (D), provided for by ss. 154, 158, is not for the judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred: and his conclusions may be adopted or varied by the judge.

If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed.

Held, with regard to items in dispute upon taxation:—

1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.
2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.
3. That "instructions for brief" upon arbitration should be allowed.
4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.
5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with.
6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.
7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed: see 6 O.L.R. 543.

Marsh, K.C., for owner and mortgagee. *Middleton*, for railway company.