

BOYD, C.

SEPTEMBER 12TH, 1902.

CHAMBERS.

RE MURRAY.

Will—Devise of Land to Lessee—Contract by Testator with Lessee to Build House—Performance of Contract by Executor Out of Personalty—Remedy in Damages.

Application (heard at Woodstock) by Neil S. Murray, executor of the will of James Murray, late of the township of West Zorra, for an order under Rule 938 declaring the construction of the will and determining certain questions.

All the questions raised were disposed of at the hearing except as to the liability in respect to the building of a house upon the farm devised to John Robert Murray. The testator in his lifetime made a lease of this farm to his son John Robert Murray for five years from 1st March, 1901, at a yearly rental of \$200, payable in October each year, and undertook to build a house on the farm, of certain expressed dimensions, during the first year of the term. There was a provision for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on 19th June, 1902, after the expiry of the first year of the term, but had not built or done anything towards building the house. By his will dated 7th February, 1901, the father devised this farm on certain conditions (not now material) to his son, the lessee; but no reference was made in the will to the lease, which was dated 29th January, 1901, some nine days before the date of the will.

Peter McDonald, for executor.

J. W. Mahon, for John R. Murray.

J. P. Mabee, K.C., for Andrew W. Murray.

A. S. Ball, K.C., for the official guardian.

BOYD, C.—It was argued that the devisee was entitled to have the house built on the land at the expense of the personal estate, and it was counter-argued that at most the devisee as lessee could only get damages for non-performance of the agreement to build. The latter is the better construction. *Cooper v. Jarman*, L. R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished. The common ground of decision in both these cases is that, as there was an existing contract with work partly performed thereon before the