

Ct. of Ap.]

NOTES OF CASES.

[Ct. of Ap.

From Sprague, C.]

HUGHES v. HUGHES.

*Executor de son tort—Administration—Personal representative—Administration of Justice Act, sec. 9.*

An executor *de son tort* is treated as an executor for the purpose of being charged only, and his presence before the Court will not dispense with that of a regular representative where the estate of an intestate is to be administered.

Where the estate of a deceased person itself forms the subject of a suit, such person is not a party interested in the matters in question in the suit within the meaning of section 9 of the Administration of Justice Act, R. S. O., cap. 49. This section is confined to cases in which the deceased person was in his life-time interested in the matters in question in the suit.

*Donovan*, for appellants.

*E. Blake*, Q. C., and *Geo. Morphy*, for respondents.

From Proudfoot, V. C.]

McLAREN v. CALDWELL.

*All streams, public highways—Floating timber on—Private Improvements—Private rights—C. S. U. C., cap. 48, sec. 15—Costs—Stay of execution under Appeal Act.*

The plaintiff, a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, in parts of the bed of which he had the fee simple, ran through his lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff, and those through whom he claimed, spent large sums of money in making improvements upon the stream and in deepening it, and thereby made it available. The defendant, who owned timber limits in the neighbourhood, claimed the right to float his timber down the stream.

*Held*, reversing the decision of PROUDFOOT, V. C. (BURTON, J. A., dissenting), that the stream was a public waterway by virtue of C. S. U. C. cap. 48, sec. 15, which, by its terms, applied to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same during the spring, summer and

autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed relying on the authority of decided cases.

*Boale v. Dickson*, 13 C. P. 337, overruled.

Per BURTON, J. A. By the Common Law those streams only which are sufficiently large to be navigable are highways by water, while small streams, being unnavigable and not susceptible of use as a common passage for the public, are not subject to the servitude of the public interest. The statute is declaratory only of the Common Law right of every one to use a stream capable, in its natural state, of transporting timber, etc., and declared also that it was not essential to the public easement that its capacity should be continuous. The Act was not intended to confer any new right.

Sec. 27 of the Court of Appeal Act does not apply to cases of injunction, the decree for an injunction being, so to speak, executed as soon as made.

*Bethune*, Q. C., and *Moss*, for appellant.

*McCarthy*, Q. C., and *Creelman* for respondent.

From C. C. York.]

CLARK v. BARRON.

*Rule absolute on ground not taken therein.*

A verdict was set aside and a non-suit entered, upon a ground not taken as a defence at the trial, or in the rule *nisi* to set aside the verdict.

*Held*, that it was erroneous for the learned Judge in the Court below to have so given effect to the defence. It appearing upon the whole evidence that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule to set aside the plaintiff's verdict was discharged.

*E. Douglas Armour*, for appellants.

*Falconbridge*, for respondent.

From C. C. Bruce.]

HUNTER v. VANSTONE.

*New trial—Discretion of Judge—Appeal from.*

An application for a new trial is an application to the discretion of the Court; and where