

plaintiffs had succeeded, subject to a claim for and a balance found due to the defendants for improvements under mistake of title. There should be no costs of the trial, to either party, because, although the plaintiffs ultimately succeeded upon one claim, they failed upon another; the plaintiffs should have the costs of their appeal to a Divisional Court, upon which they succeeded, although they renewed their alternative contention there; there should be no costs to either party of the reference, which was for the benefit of both, for, although the defendants had succeeded in establishing a lien for improvements, they were not in the position of a mortgagee or chargee who has taken possession in order to obtain payment of his debt; and the plaintiffs should have the costs of the motion for judgment on further directions. Judgment of FALCONBRIDGE, J., reversed.

J. C. Hamilton, for appellants. *W. H. McFadden* and *T. J. Blain*, for respondents.

HIGH COURT OF JUSTICE.

Boyd, C.]

MERCER v. NEFF.

[Oct. 20.

Executors and administrators—Will—Devise—Power to mortgage—Payment of debts—Trustee Act—Devolution of estates Act.

The testatrix devised land to her executor and trustees, and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land, and divide the proceeds among her children.

Held, that this was a devise of the farm out and out as to the legal estate—the words “and his executors and administrators” being equivalent to “heirs and assigns,” the executor had the right by virtue of s. 16 of the Trustee Act, R.S.O. c. 129, to mortgage for debts: and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19.

In re Bailey, 12 Ch. D. 273, and *In re Tanqueray*, 20 Ch. D. 478, followed.

The Devolution of estates Act, R.S.O. c. 127, does not apply to a case where the executor acts under the will and the provisions of the Trustee Act.

J. R. Roof, for plaintiff. *W. H. Irving*, for defendant Richardson. *C. H. Porter*, for other adult defendants. *A. J. Boyd*, for infant defendants.

Rose, J.]

CONFEDERATION LIFE ASSOCIATION v. LABATT.

[Oct. 25.

Notice of trial—Close of pleadings—Repenting—Order permitting third parties to defend.

Where a third-party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiff to be tried at Toronto without a jury, and notice of trial given before the plaintiffs were aware that such third-party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:

Held, that the order made upon such motion, which permitted the third