

that the case being stated the present conviction would be set aside, and a new trial would be granted to the prisoner, and, that being the view the Court has taken of the case, we deem it proper and right, as much in the interest of the prisoner as in other interests, that we should not comment upon the evidence that was before the jury in this case or upon the way in which the case was finally presented to the jury.

Then it may be said that there could be no reason to suppose for a moment, from the case as it presents itself to our view, that if Mr. Justice Riddell, the trial Judge, had been requested to charge the jury in the way in which it is now stated he should have done, he would have refused to do so. It would be as obvious to his mind as it now appears to be obvious to the mind of everybody, that it is desirable, in view of the evidence, that the direction based upon that should be given to the jury, and that Mr. Justice Riddell should be asked to present it to the jury as the law required it to be presented. That view of it seemed at the time to present itself to everybody's mind, but those in charge of the case seemed to be directing their minds to other views of the case, and that view of it was overlooked, or at all events not thought of sufficiently to determine the issues before the jury. The result of that seemed to have been that perhaps the prisoner had not had his case presented to the jury for his advantage as fully as it would have been had the matter been presented on his behalf in that way, stating the view that he had been drinking to some extent, this extent, of course, to be for the jury to say. Without entering upon the case further, with a view to the new trial, we conclude by saying that this result is one that has been reached after full consideration of the case.

---

SEPTEMBER 30TH, 1909.

McNEIL v. STEWART.

*Will—Construction—Devise—Death of Devisee—Vested Estate—Contingency — Subsequent Divesting — Power of Appointment.*

Appeal by the plaintiff from the order of a Divisional Court, 11 O. W. R. 868, reversing the judgment of FALCONBRIDGE, C.J.K.B., *ib.* 162.

The point for decision turned upon the construction of the 5th paragraph of the will of Mary Gibson, as follows:—

“I give devise and bequeath all the rest and residue of my real and personal estate whatever and wheresoever not hereinbefore dis-