

it had been "retained" by them as residuary legatees. . . . The purpose of the Court of Appeal, as I understand it, was to require the beneficiaries who had been overpaid to restore to the estate for the benefit of the petitioners (the Uffners) and Maria Evans, if she should be found to be entitled, what they had received in excess of the sum which they would have received had the division of the residue been made into the proper number of shares. . . .

Upon the whole, I am of opinion that the Master was wrong in holding, as he appears to have done, that the appellant and Morgan were jointly and severally liable to make good and repay the excess which they were declared to be liable to make good, and the interest upon it, and that he ought to have found that each was liable for what he had received for himself of what was treated as the share of the residue belonging to the executors, in excess of what he was actually entitled to, and the interest upon what he had so received, and to have taken the accounts upon that footing.

I would, therefore, allow the appeal and vary the report in accordance with the opinion I have expressed, and would give no costs of this appeal or of the appeal to my brother Anglin to either party.

MACMAHON, J.—I agree in this.

IDINGTON, J., also concurred, giving reasons in writing.

JANUARY 7TH, 1905.

#### DIVISIONAL COURT.

### DOYLE FISH CO. OF TORONTO v. LONDON COLD STORAGE AND WAREHOUSING CO.

*Warehousemen—Cold Storage of Fish—Liability for Spoiling—Duty of Warehousemen—Condition of Fish—Examination—Negligence.*

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiffs in action to recover damages for the loss of 193 boxes of smelts which were delivered by plaintiffs to defendants to be kept in cold storage, and which, as plaintiffs alleged, were spoiled owing to the negligence of defendants; and dismissing defendants' counterclaim for the storage charges on the fish.

The main contest on the facts at the trial was as to (1) whether the fish were in good order and condition when they