

JANUARY 7TH, 1905.

DIVISIONAL COURT.

BOYS' HOME v. LEWIS.

UFFNER v. LEWIS.

Judgment — Construction — Order to Refund Money Retained by Executors—Residuary Legatees—Joint or Several Liability—Interest.

Appeal by defendant Lewis from order of ANGLIN, J., 4 O. W. R. 243, on appeal from a supplemental report of the local Master at Hamilton, affirming the report in so far as it dealt with the liability of appellant and his co-defendant Morgan, which was found by the Master to be a joint and several liability. The history of the two cases appears in the various reported decisions: 4 O. R. 18; 27 A. R. 242; 5 O. L. R. 684; 3 O. W. R. 625, 779.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

W. E. Middleton and A. M. Lewis, Hamilton, for appellant.

D'Arcy Tate, Hamilton, for plaintiffs and defendants the Elighs.

MEREDITH, C.J.—The appellant and Morgan were executors of the will of Daniel Evans, deceased, and were entitled under the will to one undivided one-fifth of his residuary estate. . . .

The question which the appellant presents for decision is, whether he and his co-executor Morgan are jointly and severally liable to pay the sum by which \$5,510.57 exceeded their proper share of the residue, and the interest upon it, or each of them is liable to pay one-half only of that sum and interest. . . .

By the judgment of the Court of Appeal . . . the executors, as well as the Boys' Home, were treated and dealt with as legatees who had received out of the estate, in satisfaction of their respective shares of the residue, more than they were entitled to, and who were liable to refund the excess. . . . The declaration and adjudication is, not that defendants John Lewis and Robert R. Morgan are liable to pay, but that they are liable to "make good and repay"—thus putting the declaration of liability on the footing that the money to which it relates was no longer in the hands of the appellant and Morgan in their capacity of executors, but that