

case whether it would do so or not, and that nothing appeared in this case to justify the making of such declaration.

4. The court should not interfere as to the portion of the real estate to be occupied by plaintiff until the matter came before the trial judge.

5. As plaintiff had succeeded on the principal question before the court she should have the costs of the appeal.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., and *A. Roberts*, for respondent.

Full Court.]

BRUHM V. FORD.

[July 18, 1900.

Contract to erect mill—Counterclaim for damages for defective performance—Evidence—New trial.

In an action brought by plaintiff to recover an amount claimed by him for work done and materials supplied in constructing a mill for defendants, defendants counterclaimed for damages arising from the defective performance of the work which plaintiff was employed to do.

Held, that defendants were entitled to damages suffered by reason of the loss of the use of the mill during the sawing season, but as there was no evidence to fix the amount of damage, and as damages were allowed, to which defendants were not legally entitled, there must be a new trial.

F. B. Wade, Q.C., for appellant. *J. A. McLean*, Q.C., for respondent.

Full Court.]

IN RE WHEELOCK.

[July 18, 1900.

Probate Court—Settlement of estate—Jurisdiction—Parties—Improper rejection of evidence—Costs.

In settling the estate of W. in the Probate Court the judge of the court, at the instance of the next of kin of deceased, undertook to dispose of the sum of \$1,000, which the administrator, a brother of the deceased, contended had been given him by deceased, two years before her death, as a gift for his two sons. Evidence was tendered by the administrator for the purpose of shewing that the money received by him from deceased had been invested for the two boys by paying off a mortgage held by R., and that the fact of the investment had been communicated to the donees. The judge declined to receive the evidence on the ground that at the time it was tendered the court had been adjourned solely for the purpose of hearing argument by counsel, and that he could not receive further evidence.

Per TOWNSHEND, J., RITCHIE, J., concurring.

Held, 1. The probate judge had power to hear and consider evidence at any time before making his final decree, and he was wrong in refusing to receive the evidence tendered.