" authorized by the apparent intention of the " donor, although no words of exclusion are " expressly used. Thus, he says, in *Bovil* v. " *Rich*, 1 Chan. Cases, 309, the testator gave " all the rest of his estate to A B in trust, " 'to give my children and grandchildren " 'according to their demerits.' A B gave " the estate to one, excluding the rest. Lord " Nottingham refused to set aside the appoint- " ment, as the children were to come in by " the act of the devisee, and he was to give " or distribute according to their demerits, " therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the plaintiff without considering his case, and that as his will was executed before the plaintiff was born he must have decided without considering. This is not so. He had the power to revoke or alter his will, and if he had thought that the plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favour by a codicil. In Domat's Civil Law, Part 2, Book 5, para. 3877, it is said, and with very good reason, "If he who " was charged with a fiduciary bequest or " substitution at the time of his death in " favour of some one of his children whom " he should think fit to choose, has given in " his lifetime, to one of his children, the " things which were subject to the fiduciary " trust, this donation would be in the place " of an election if the same were not revoked. " For although the liberty of this choice " ought to last until the time of the death of " the person charged with the fiduciary sub- " stitution, and it was for the interests of all " the children that the said donation should " not destroy the said liberty, yet it would " be sufficient that the donee had been made " choice of, and that the said choice had not " been revoked; seeing the choice would be " confirmed by the will of him who, having " it in his power to make another choice, had " not done so. So it would be the same thing " as if the choice had been made at the time " of his death."

The courts in Lower Canada are not bound by the current of decisions in England, as the judges in England before 1874, and Lord Alvanley in the case of *Kemp* v. *Kemp*, considered themselves to be bound in deciding whether a power was exclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict., c. 37.

A similar Act was not necessary in Lower Canada. The Courts there were not trammelled by the current of authorities to which Lord Alvanley and other judges in England were forced to yield.

Judge Ramsay, in his written reasons, says, and says with some force, speaking of the law of England before 1874, "It is only by " the help of repeated legislation that the " law there has come down to that reason " from which I apprehend our law starts. It " was therefore quite unnecessary for us to " make any Act similar to the English Act " 37 & 38 Vict., c. 37."

Mr. Justice Ramsay also, in his reasons, states that, "Under the Roman law and under " the old *régime* of France there was a great " question as to the effect of the substitution of " the children or of a class, as for instance the " relations, and that at last it seems to have " been determined that when the children of " the *grevé* were called *nominatim* they held " of the original testator, and that the father " could not affect the disposition; but that " when the children were called collectively, " there was a difference of opinion as to " whether the father could select among the " children so as to give to some and exclude " others." He adds, "Although the affirma- " tive of the proposition cannot be supported " on a strictly legal argument, it seems to " have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If, then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he shall " decide," does not affect the nature or substance of the substitution. It only gives