

said that the plaintiff's fundamental contention was, that there was no power of sale which James H. Kennedy could rightly exercise.

The learned Judge, however, was of opinion that there was, apart from the residuary clause, a statutory power of sale vested in the executor: Trustee Act, R.S.O. 1897 ch. 129, sec. 16, the enactment in force when the sale was agreed upon; and this power might be exercised without the purchaser being put on inquiry to ascertain if it was being duly exercised. The sale was not carried out until after the new Act, 1 Geo. V. ch. 26, came into force; and that Act (sec. 46) made the provision found in sec. 16 of the earlier Act "subject to the provisions of the Devolution of Estates Act;" but the result was not changed, because the Devolution of Estates Act expressly preserves the express and implied power of sale found in the will; and, moreover, the right of the purchasers was based upon the contract, which was made before the amendment: see sec. 14 of the Interpretation Act, R.S.O. 1914 ch. 1.

Further, the power expressly conferred by the will did not fall merely by the direction to the executors to use the fund for a purpose which offended against the rule as to perpetuities. The executors would hold the fund to be distributed among those who would take upon an intestacy. This was not strictly an intestacy as to the property.

Then, the plea of *res judicata* had been satisfactorily made out; not so much because of any clearly expressed adjudication upon the precise point as because the adjudication which had taken place was necessarily predicated upon a determination, adverse to the plaintiff, of the very point in issue. In the former litigation two grounds were put forward as shewing the invalidity of the sale now in question, and the judgments were conclusive as to both; equally so if in the litigation one ground alone had been maintained: *Henderson v. Henderson* (1843), 3 Hare 100; *Bake v. French*, [1907] 1 Ch. 428; *Humphries v. Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531; *Re Ontario Sugar Co.*, *McKinnon's Case* (1910), 22 O.L.R., 621; *Southern Pacific R.R. Co. v. United States* (1897), 168 U.S. 1.

So far as the land registered under the Land Titles Act was concerned, the registration was sufficient to confer an absolute title upon the purchasers.

*Action dismissed with costs.*