judge should firmly assume the responsibility of determining himself, whether sufficient evidence has or has not been given to compel him to leave the case to the jury."

The rule must be refused.

Rule refused.

ENGLISH REPORTS.

COURT OF PROBATE.

In the Goods of Foster.

Will—Substituted executors.

A testator by his will appointed "my wife my sole executrix, and in default of her, I nominate and appoint as my executors, &c.," A. B. and C. D.

The wife took out probate, and at her death the court held that A. B. and C. D. were the substituted executors of the husband, and granted probate to them of his estate in preference to the wife's executors.

[Nov. 21, 1871, 25 L. T., N. S., 763.]

G. H. Foster, late of Regent's-park, in the county of Middlesex, died 1st Dec., 1858, having duly executed a will, bearing date 24th July, 1857. The appointment of executors was in the following terms:

"I hereby authorise my executrix and executors hereinafter named, to continue any security or securities which I may die possessed of, for any term in their discretion not exceeding five years from my death, notwithstanding any trusts in this my will contained, and I nominate and appoint my said wife the sole executrix of this my will, and in default of her I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will."

Probate of the will was granted to the wife, Maria Isabella Foster, on 24th Dec., 1858, and she died 25th May, 1871, having duly executed a will dated 4th Nov., 1870, whereby she appointed the said John Knowles and Richard Foster, together with F. Moseley, Benjamin Hugh Allen, Christopher Proctor, and John Rae Campbell to be executors and trustees. Probate of this will was granted on 5th July, 1871, and the question now arose whether the executors of the said Maria Isabella Foster were the personal representatives of G. H. Foster, her husband; or whether in default howsoever of Maria Isabella Foster, as executrix, the said John Knowles and Richard Foster, were entitled to take probate as substituted executors.

Dr. *Swabey* moved for a grant to them, and referred to *In the Goods of Johnson*, 2 Sw. & Tr. 595; 7 L. T. Rep. N.S. 357.

Lord Penzance.—This is a question of construction of what the testator meant when he said, "I appoint my wife my sole executrix, and in default of her, two others, A. B and C. D." The testator, by the words of the will, appears to have given the preference to his wife that she should be his executrix as long as she was able to act—but then comes the question whether the substitution of the two other executors was to take place in the event of the wife not acting at all, or whether it was to happen in case of some intervening circumstance like that of death, by which the wife would no longer be able to act. I think the will must not be construed with over-technical strictness. We must look to the object the testator had. It was that his wife should administer as she has done, and his reasonable wish was that she should administer as long as she could, or until her death put an end to the administration. In either one event or the other—in the event of her being unable to administer, or in the event of her death, then the others would be substituted. That is the reasonable interpretation of this will, and I am prepared to make a grant to the two other executors in accordance with that interpretation.

Teague and Ashdown v. Wharton and another.

Testamentary suit—Administration to a nominee of both parties refused.

Except under very special circumstances the court as a general rule will refuse to make a grant of administration to the nominee of the next of kin, who has himself no interest, even though all the next of kin may consent.

[Nov 21, 1871, 25 L. T., N. S. 764].

Emily Harvey Jeffries, late of Spring-grove, Isleworth, in the county of Middlesex, died a widow, and without parent or children. She and her husband died at different places within two hours of each other, and there was a question as to the survivorship.

By her will, dated 14th Oct., 1870, she had nominated her husband her sole executor and universal legatee. Mr. Jeffries also left a will, by which he had named his wife sole executrix and universal legatee.

The next of kin and persons entitled in distribution of the estate of Mrs. Jeffries were one brother, Mr. C. R. Teague, and three sisters, Mrs. F. M. Ashdown, Mrs. L. S. Wharton, and Mrs. Elizabeth Anne Owen. The two first named of these were about to apply for a grant of administration, but were met by a caveat lodged on the part of Mrs. Wharton. To avoid litigation it was subsequently arranged among the parties interested, that as they could not agree upon the appointment of any one of themselves as administrator, they should all consent to the appointment of a stranger—Mr. James Waddell

Dr. *Tristram*, on behalf of the defendant, accordingly moved for a grant of administration to Mr. James Waddell, as nominee of the next of kin. He cited *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467.

Inderwick consented on behalf of the next of kin of the husband. *Cur. adv. vult.*

Nov. 28.—Lord Penzance.—In this case the court was asked to make a grant to the nominee of the next of kin. The court expressed some difficulty at the time, upon which the case was cited of *Farrell* v. *Brownbill*, 3 Sw. & Tr. 467. From that case it appears that the court has done something similar. In that case there was a litigation. The next of kin came before the court, and the court made a grant, under the 73rd section, to the nominee of the next of kin. This was done on the authority of a case *In the goods of John Holroyd*, and I have had that case looked out to ascertain what were the facts. I find that in that case the next of kin were permitted to nominate somebody other than themselves to take the grant. There were special reasons there, because the persons put forward were persons who had been executors of the will