Held, that the very right and justice of the case did not require the Court to permit the defendants to raise the new defence by amendment.

Brown v. *Dunn*, 6 P.R. 67, applied and followed.

Wallace Nesbitt, for the appellants.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the respondents.

PRACTICE.] [May 12.

RUTHERFORD *v.* RUTHERFORD.

Parties—Action to realize charge on land—Subsequent incumbrances—Right to vary judgment—Amount of charge—Marshalling.

Testator devised his farm to his son, "subject to the following conditions," that his widow should have the use of half the farm during life or widowhood, and that one-fifth of the value of the farm should be paid to his two daughters. By a subsequent clause of the will he directed that at the death of his wife the half that she occupied should "be equally divided or the value thereof between my three children."

The widow occupied the west half. The son incumbered both halves in favor of different mortgagees. In an action brought by one of the daughters against the son, it was alleged that by agreement the value of her legacy had been ascertained at $400, and judgment was given declaring her entitled to a charge upon the east half for $400, directing a reference to add incumbrancers and take accounts, and in default of payment to sell the land.

Upon motion by the incumbrancers upon the east half, who were added as parties in the Master's office, to set aside or vary the judgment,

Held, reversing the decision of STREET, J., that there was no necessity and no right on the part of the added parties to alter or vary the judgment to enable them to obtain their rights as against the amount of the charge fixed thereby as between the plaintiff and the defendant.

2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in the west half were subject to the charge. If they chose, they could redeem the plaintiff, and, standing in her place, at their own expense, have recourse to the west half

Moss, Q.C., for the appellant.

Watson, Q.C., and *Edmison*, for the respondents.

HIGH COURT OF JUSTICE.

MEREDITH, C.J., ROSE, J., MACMAHON, J. } [May 18.

REGINA *v.* BRENNAN.

Criminal law—Murder—Manslaughter—Criminal Code, sec. 229—Provocation—Assault—Legal right—New trial.

The defendant was tried upon an indictment for the murder of S. It was not denied that he had killed S., but it was urged that, by sec. 229 of the