

the security given by them should stand as security for the costs of all the defendants, but were not entitled to have the second order for security set aside as irregular.

*W. E. Middleton*, for plaintiffs. *J. H. Moss*, for defendant.

Meredith, C.J., MacMahon, J., Lount, J.]

[July 17.

HENNING T. MACLEAN.

*Will—Construction—Alternative disposition—Death of testator and wife "at the same time"—Executors—Breaches of trust—Limitation of actions—Technical breach—Trustees acting honestly and reasonably.*

The testator by his will bequeathed to his wife all his estate and appointed her his executrix; he then proceeded: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time I request the following disposition to be made of my property"—disposing of his estate and appointing executors. The will made no provision for any other event. The testator and his wife shortly after the will was made went to Europe, and both of them died in Italy, the wife on the 11th December, 1888, and the testator on the 27th of the same month.

*Held*, that the testator and his wife were not deprived of life at the same time, the deaths not being the result of a common accident or other catastrophe, but due to ordinary disease; and, as the actual event was not provided for, there was an intestacy.

There is nothing irrational or absurd in the provision that the alternative dispositions of the will should take effect only in the event of the testator and his wife being deprived of life at the same time, even if the words "at the same time" be read as meaning, without any interval of time elapsing between the death of one and that of the other.

*Held*, also, that, although the appointment of executors to carry out the alternative provisions of the will never took effect, the persons named as executors, having applied for and obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the statute of limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R.S.O. 1897, c. 129, s. 32.

*Held*, moreover, that the executors were entitled to be relieved from personal liability for all breaches of trust committed by them under 62 Vict., 2nd sess., c. 15, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful, the trial Judge took the same views of its effect as they did, and for twelve years everybody interested in the estate acquiesced in that view.

*Robinson*, K.C., *H. J. Scott*, K.C., and *H. O'Brien*, K.C., for plaintiffs.