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COURT OF APPEAL.

MAY 10TH, 1911.

PARENT v. LATIMER.

Improvements on Land—Honest Belief in Ownership—R.S.O. 1897 ch. 119, sec. 30—Evidence—Agreement—Survey—Boundaries—Wall Built on Strip in Dispute—Knowledge that Rights Disputed.

Appeal by the defendants from the judgment of a Divisional Court, ante 210, affirming the judgment of BOYD, C., in favour of the plaintiffs in an action to recover possession of land. The facts are fully stated in the judgment of MEREDITH, C.J., in the Divisional Court, ante 210-214.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. H. Moss, K.C., for the defendants.

J. Sale, for the plaintiffs.

At the close of the argument of counsel for the appellants, the judgment of the Court was delivered orally by MOSS, C.J.O., dismissing the appeal with costs, and affirming the judgment of the Divisional Court.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 11TH, 1911.

GELLER v. LOUGHRIN.

Intoxicating Liquors—Amendment of Criminal Code—6-7 Edw. VII. ch. 9 (D.)—Irregular Conviction—Payment of Fine and Costs under Duress—Destruction of Liquor—Action against Commissioner of Police—Claim that Commission Void — Ultra Vires — R.S.C. ch. 92 — Notice of Action — Nominal Damages—New Trial—Costs.

Appeal by the plaintiff from the judgment of VALIN, J., Judge of the District Court of Nipissing, in an action tried with

a jury at North Bay on the 23rd November, 1910. The following statement of facts is taken from the judgment of RIDDELL, J.

The plaintiff was a merchant residing in Cochrane; in September, 1909, he was in Toronto, having gone there to be married; and he bought some $43 worth of whiskey and gin for the purpose (as he said) of celebrating his marriage in Cochrane with his friends and customers. He directed the vendors to send the liquor from Toronto to him by express at Cochrane. It was so shipped, and it arrived at Cochrane a few days after the plaintiff, who seems to have thought he was acting lawfully, as he told Clark, the constable, what he had done. Some four or five days after the plaintiff reached home, Clark came to him and told him that the defendant, a Commissioner of Police appointed under the authority of R.S.C. ch. 92, wanted to see him at the Court. The liquor intended for the marriage feast was seized at the station. The defendant, upon the plaintiff's appearing before him at the Court House, took out a paper and told him that he would have to pay a fine, as this was the second offence, and that unless he paid the fine the same day he would go six months to North Bay, *i.e.*, to gaol. The first conviction seems to have been for keeping cider, and it was quashed by the Chancellor. There was no information, no summons, no charge laid or read, no formal conviction, no record of any kind except an entry in the returns book; a fine, $100, was demanded with $10 costs (not because the costs were in fact $10, but because the defendant always fixed the costs at that amount).

The defendant told the Chief of Police Shields "to take the liquor and dispose of it as was usually done." It did not appear what became of the liquor, nor did the defendant seem to have paid any further attention to it. Notice of motion to quash the conviction was served upon him, the matter came on several times before the Court, counsel for the defendant asking for an enlargement, and finally the defendant stated that there were no papers, and CLUTE, J., considered that no order could be made.

An action was brought in the County Court of the County of York, 23rd March, 1910, the statement of claim setting out that the defendant on the 23rd September, 1909, assumed to convict the plaintiff as for a second offence, etc., and imposed a fine of $100 and $10 for costs, which the plaintiff paid under duress—that the defendant had previously caused the plaintiff to be apprehended by a constable and brought before him to answer a supposed charge, etc., that the plaintiff in order to vacate whatever adjudication the defendant made was put to large costs—that

the defendant seized and caused to be destroyed a quantity of liquor of the plaintiff's of about the value of $60; "and the plaintiff claims from the defendant the return of the fine and costs before mentioned as money had and received by the defendant to and for the use of the plaintiff, and a further sum not to exceed in the whole the jurisdiction of a County or District Court for damages in respect of the grievances mentioned, etc., etc."

The defendant said that if he did convict the plaintiff, which he did not admit, he did so under R.S.C. 1907, ch. 92, that the plaintiff incurred the costs uselessly and voluntarily, and that if the defendant destroyed the liquor, which he did not admit, he was justified in doing so.

The case was tried in the District Court at North Bay, the 23rd November, before Valin, Dist. J., and a jury—at the close of the plaintiff's case the learned Judge allowed an amendment to set up R.S.O. 1897, ch. 88, sec. 8. It appeared that no notice of action had been given, and judgment of nonsuit was given, which was entered as a judgment dismissing the action with costs. From this judgment the plaintiff appealed.

The appeal was heard in part before MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.: but by consent of counsel the argument was continued before CLUTE and RIDDELL, JJ., who disposed of the appeal.

J. B. Mackenzie, for the plaintiff.

J. M. Ferguson, for the defendant.

CLUTE, J.:—The statement of claim sets out in effect that on the 23rd of September, 1909, the defendant convicted the plaintiff as for a second offence against Statutes of Canada, 1907, ch. 9, and imposed a fine upon the plaintiff of $100, together with the sum of $10 costs, which the plaintiff then and there under duress of said conviction paid to the said defendant.

It is further charged that the defendant had previously caused the plaintiff to be apprehended by a constable of the Provisional Judicial District of Nipissing and brought before the defendant, to answer a charge of having committed an offence under the said statute, and thereby did assault and falsely imprison the plaintiff. A claim is also made for a fruitless attempt to set aside the conviction, and also for the destruction of a certain quantity of liquor of the value of $60. The plaintiff claims return of the fine and costs as money had and received to the use of the plaintiff, and damages for the other causes of action above alleged.

The principal ground argued by Mr. Mackenzie was that the Dominion Statute, R.S.C. ch. 92, was *ultra vires*, that the commission under which the defendant assumed to act was void, as were all proceedings taken and done in pursuance thereof.

It has long been settled law that an Act such as the one in question is within the competency of the Dominion Parliament: Valin v. Langlois, 3 S.C.R. 1, and 5 App. Cas. 115; Attorney-General v. Flint, 16 S.C.R. 707; In re Henry Vancini, 34 S.C.R. 621. This being so, the defendant was entitled to notice of action, and no notice was given. There can be no dispute, upon the evidence, that the defendant was acting, and properly acting, under his commission, and all that he did was under and by virtue of that authority. This, in my opinion, affords a complete answer to the plaintiff's action.

It was urged by Mr. Mackenzie that no notice of action was required in respect of the fine of $100 imposed on the plaintiff, and of the costs, and that he was entitled to recover the same as money had and received for the plaintiff's use. I do not think so. It was money paid over by virtue of the imposition of an act of the defendant while in the discharge of his office.

With reference to the destruction of the liquor, I do not think the plaintiff has shewn any damage. Under sec. 614 of the Code, it was the duty of the officer seizing the liquor to bring the same before the Commissioner, and if it appeared to the satisfaction of the Commissioner that a violation of the Act had been committed or was intended to be committed, with respect to said liquor, it shall be declared forfeited and shall be destroyed.

In the present case the forfeiture and destruction of the liquor were also acts strictly within the jurisdiction of the defendant as commissioner, in respect of which he was entitled to notice of action. 6-7 Edw. VII. ch. 9, sec. 6(D.), expressly provides that every constable appointed under any law of Canada may seize upon view anywhere within the limits specified in any proclamation under Part 3 of the Act any intoxicating liquor in respect of which he has reason to believe that a violation of the provisions of the said part is intended, and he shall forthwith convey any liquor so seized, together with the owner or person in possession thereof, before a commissioner or justice, who shall thereupon proceed as provided in sec. 614. That was what was done in this case. The constable seized the liquor on view and brought the same and the plaintiff before the magistrate. There is no dispute as to the owner; that was admitted. It was suggested, however, that the two cases of whiskey and three cases of gin were intended for the marriage celebration.

All the acts of the defendant which formed the subject-matter of this action were the acts of the defendant as commissioner, while in the exercise of his office, and notice of action not having been given, the plaintiff cannot succeed. To mark the disapproval of the Court on the part of the defendant in not making out a proper conviction and order for the forfeiture and destruction of the liquor, I think he should be deprived of the costs of this appeal.

Appeal dismissed without costs.

RIDDELL, J., gave reasons in writing for arriving at the same conclusion, being of opinion, however, that as regards the claim for damages for the destruction of the liquor, the defendant was not entitled to notice of action, and the plaintiff had the right to have the matter submitted to a jury. As, however, the plaintiff could prove no actual damage in this respect, the liquor having to be destroyed in any case, the most he would be entitled to on a new trial would be nominal damages, a result which would not warrant the Court in granting that relief.

MEREDITH, C.J. MAY 11TH, 1911.

RE JEBB.

Will—Construction—Devise—Estate in Fee—"In Case of the Decease"—Effect of Wills Act—Vendors and Purchasers Act.

Application under the Vendors and Purchasers Act.

A. Cowan, for the vendor.
R. U. McPherson, for the purchaser.

MEREDITH, C.J.:—This is an application under the Vendors and Purchasers Act, and the question is as to the estate which the vendor, Charles Francis Bond Head Jebb, took in the south half of lot 1 in the 14th concession of the township of West Gwillimbury, in the county of Simcoe, under the will of his uncle Charles Jebb, dated the 12th December, 1880.

By the will the testator devised this land to his wife, Mary Ann, during widowhood, and after making that disposition the will provides as follows:—

"After my wife's decease my real estate consisting of the

south half of lot number one in the fourteenth concession of West Gwillimbury, containing one hundred acres more or less, to go to Charles Francis Bond Head Jebb, my nephew, on his arriving at the age of twenty years, the said Charles Francis Bond Head Jebb to pay to his brother George Arthur Barry Beatty Jebb the sum of one thousand dollars, on the said George Arthur Barry Beatty Jebb arriving at the age of twenty years; if my wife Mary Ann Jebb should die before Charles Francis Bond Head Jebb should arrive at the age of twenty years, I wish the interest of my real estate or rent, to be paid to my nephew Thomas B. Jebb son of Washburn Jebb, until said Charles Francis Bond Head Jebb shall come to the age of twenty years."

Then follows the provision upon which the question between the parties arises, which reads thus:

"In case of the death of Charles Francis Bond Head Jebb the said real estate to go to his brother George Arthur Barry Beatty Jebb, and in the case of the decease of both of the said brothers, the said real estate to go to the next heir, and after his death to the next heir."

A bequest to A. when and if he attain the age of twenty-one years, and in case of his death to B., is a gift absolute to A. unless he dies under age: Home v. Pillans, 2 Myl. & K. 23, and the rule is the same where the bequest is to A., and in the event of his death to B.: Re Mores' Trust, 10 Hare 171; Schenk v. Agnew, 4 K. & J. 405.

This rule appears to apply to devises of real estate where the devise passes the fee simple: Hawkins on Wills, 2nd ed. 256, and cases there cited, and the learned commentator adds: "and in a will made since 1837 a devise to A. simpliciter, and in case of his death to B., would, it should seem, receive the same construction."

In Re Walker and Drew, 22 O.R. 332, the present Chief Justice of the King's Bench applied the rule to a devise to the wife of the testator absolutely, and in the event of her death to be equally divided among his children, holding that the widow took the fee simple absolutely.

In Bowen v. Scowcroft, 2 Y. & C. Ex. 640, at pp. 660-1, Alderson, B., pointed out that there was an obvious distinction in the application of the rule between a bequest of personalty and a devise of land, as a bequest of the personalty gives the whole interest, while a devise of land gives only a life interest, adding that "in the former case therefore the words 'in case of their demise,' preceding a gift over, cannot well have their proper effect except by considering them as applicable to a be-

quest over as a substitution for the previous gift in case the party to whom it is given should not survive the testator. But in the case of land the most natural meaning of the words (which seems to me to be 'after their demise') may very reasonably have its full effect."

This was the case of a will to which the Wills Act was not applicable, and the effect of that Act would seem to be to do away with that distinction, as a devise of land now passes the whole estate or interest of the testator unless a contrary intention appears by the will.

As said by Mr. Jarman (Jarman on Wills, 6th ed., 2144-5) the difficulty, in cases where the gift over is to take effect "in case of the death" of the first taker, "arises from the testator having applied terms of contingency to an event of all the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening, and such time, where the bequest is immediate (*i.e.*, in possession), necessarily is the death of the testator, there being no other period to which the words can be referred."

In my opinion, Charles Francis Bond Head Jebb having attained the age of twenty years took an estate in fee simple absolute in the land devised to him.

Even before the Wills Act, though no words of limitation are used, the fee would have passed because of the charge in favour of George Arthur Barry Beatty Jebb; Pickwell v. Spanner, L.R. 6 Ex. 190; L.R. 7 Ex. 105, and the rule would therefore be applicable.

But apart from that aspect of the case, I think it is clear from the provisions of the will that the event upon which the gift over was to take effect, which the testator had in mind, was the death of Charles Francis Bond Head Jebb before attaining the age of twenty years. The land is to go to him on his attaining that age, and to go charged with the legacy of $1,000 to the very person who is to take the land "in case of the death of Charles Francis Bond Head Jebb," and provision is also made for the event of the widow dying before the latter attains the age of twenty years, in which case "the interest of my real estate or rent" is to be paid to another nephew of the testator until Charles attains that age.

It is highly improbable, in view of these provisions, that the testator intended that Charles should take only a life estate, and to satisfy the terms of contingency which the testator has

used, the circumstance in association with which the death of Charles is contingent to be connected with his death is its happening before he should have attained the age of twenty years.

There will be a declaration in accordance with the opinion I have expressed, and unless other disposition of them has been arranged between the parties, there will be no costs of the motion.

DIVISIONAL COURT. MAY 11TH, 1911.

RE HUNTER.

Will—Codicils—Construction—Residuary Clause—Division of Residue among Children in Proportion to Personal Property Bequeathed to Them—Alteration in Amount of Legacies by Codicil—Effect of, on Residuary Clause.

Appeal by H. A. Hunter and D. J. Hunter from the order of MIDDLETON, J., ante, 540.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

E. D. Armour, K.C., for the appellant H. A. Hunter.

W. C. Mackay, for the appellant D. J. Hunter.

Shirley Denison, K.C., for the widow of the testator W. H. Hunter.

C. R. McKeown, K.C., for the executor.

J. M. Kearns, for the adult children other than the appellants.

J. R. Meredith, for the infants.

TEETZEL, J.:—An appeal by Henry Albert Hunter and David John Hunter from a judgment of Mr. Justice Middleton, upon a notice for the construction of the will of William Henry Hunter, deceased, 2 O.W.N. 540.

David John Hunter was not represented on the original motion, but his share in the residuary estate being affected by the construction adopted by the learned Judge, all parties consented to his joining in the appeal.

Appellants are sons of the testator, and the question for determination arises from the language of the residuary clause in the will, and of two codicils.

By his will the testator, after disposing of several parcels

of real estate among his children and directing the balance to be sold by his executors, bequeathed pecuniary legacies to each of his ten children and a number of other persons; the total amount of such legacies to the children being $28,500; and the amount given to each of his six sons being $2,000.

He had in an earlier part of his will given to his son, W. H. Earl Hunter, a large amount of personal property other than money. The will closes with this residuary clause:—

"All the rest, residue and remainder of my estate both real and personal not hereinbefore disposed of, I give, devise and bequeath to my children, they to share in said residue in proportion to the personal property herein bequeathed to my said children; but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at $2,000."

In the first codicil, after cancelling a devise of certain land to David John Hunter and giving it to another son, the testator says:

"I hereby order and direct that the sum of $7,000 shall be paid to my son David John Hunter in the place and stead of the sum of $2,000 bequeathed to him in my said will," and immediately following this he says:

"I hereby order and direct that the sum of $7,000 shall be paid to my son Henry Alfred Hunter (meaning the appellant Henry Albert Hunter) in the place and stead of the sum of $2,000 bequeathed to him in my said will."

By a second codicil the testator revoked the bequest "in my said will in favour of Henry Albert Hunter," and "in lieu thereof" devised to him certain lands, and then closed the codicil in these words: "this revocation of the bequest in my said will in favour of my said son Henry Albert is not to apply to his share of my estate as set forth in the residuary paragraph of my said will. In all other respects I do confirm my said will."

My brother Middleton held that the testator, by giving the legacy of $7,000 in the first codicil in the place and stead of the "two thousand dollars bequeathed to him in my said will," did not in any way alter or enlarge the legatee's rights under the residuary clause, being of opinion that, notwithstanding the codicil, that clause of the original will still stands, and defines the shares by referring to the bequests therein made, just as if they had been repeated in the residuary clause, which does not say "in proportion to the shares which my children may take in my estate," but in proportion to the shares "herein bequeathed."

Counsel for appellants argued that as the first codicil effected a republication of the will as of its date, and the second codicil effected a republication of the will as amended by the first codicil as of its date, the will and codicils must be read together, and that the legacy of $7,000 in the first codicil being a substitution for the original legacy of $2,000, the residuary clause must be construed as if the $7,000 legacy to each appellant had been originally written in the will instead of the $2,000 legacy.

In support of this agreement a judgment of Mr. Justice Kay, Re Courtauld's Estate, Courtauld v. Cawston, briefly reported in 1882 W.N. 185, was cited.

A full report of the judgment and much of the argument in that case is to be found in 47 L.T.R. 647. This case was not called to the attention of my learned brother.

The point of the decision, which was upon the particular language of the will and codicil in that case, was thus stated by the learned Judge: "I think on the whole, in the absence of authority, I am bound to give to the word 'substitution' its largest meaning, and to read the will and codicil, as one is bound to do, as one document, and to treat the words of the testator as if he had said: I direct that these increased legacies shall be read as if they were inserted in the will for all purposes; in which case the residue must be divided amongst the legatees as if their original legacies had been the amounts mentioned in the codicil, and not in the will."

From the condensed report in the Weekly Notes, which was the only reference cited to us, I found some difficulty in differentiating it from this case, but after comparing the provisions of the will, and having regard to the important bearing which in the extended report certain language in the Courtauld will had in indicating the testator's intention, as viewed by the learned Judge, I am of opinion that the case is clearly distinguishable from the one at bar. The decision turned entirely upon the particular language in the will, from which, and without professing to modify or extend the established rules of construction applicable to substitutional gifts, the learned Judge arrived at the conclusion above stated as to what the testator meant.

[The learned Judge made an extract from the judgment of Kay, J., in the Courtauld case, 47 L.T.R., at p. 650, indicating that in that case the testator intended that there should be a substitution, not only for the purpose of increasing the pecuniary legacy itself, but also as providing for a different mode of

dividing the residue from that which would have obtained if there had been no revocation, and proceeded]: Unless read in this way the judgment would extend the general rule of construction applicable to substitutional legacies further than it has ever been extended.

This general rule is that where one legacy is given as a mere substitution for another, the substituted gift is subject to the incidents and conditions of the original one, although it is not so expressed in the testamentary instrument, for instance, as regards freedom from legacy duty, property on which they are charged, or fund out of which they are payable, time of payment, etc. See Williams on Executors, 10th ed., 1040-1041; Theobald on Wills, 6th ed., 160-161; and Jarman on Wills, 6th ed., 1128, where the cases in which the rule has been discussed or recognized are collected.

Speaking of this rule, the Master of the Rolls, in King v. Tootel, 25 Beav. 23, says: "No doubt the substituted and additional legacy is usually given on the same terms as the original one, but this must be taken with this qualification,—that it is consistent with the terms of the gift and the scope of the rest of the will."

The latest reported case in which the rule was considered is In re Joseph. Pain v. Joseph, [1908] 2 Ch. 507, reversing a judgment of Eve, J., [1908] 1 Ch. 599; Farwell, L.J., at p. 512, says: "The rule which Eve, J., has relied on in support of his judgment is a rule of construction and not a rule of law. It is adopted by the Court under certain circumstances to aid in arriving at the testator's intention, and, so far as I am aware, it has been confined (although I am not prepared to say it is absolutely impossible to extend it), to questions of amount. Where the amount of the legacy to a legatee has been altered, added to, or diminished by a codicil, and the substituted amount is given to the same person in lieu of, or in addition to, the original legacy, the bequest made by the codicil is subject to the same conditions and incidents as the original legacy in the hands of the original legatee."

I have read all the cases cited by counsel, and many others, and find none which support a ruling that, where the substitutionary gift is expressed in such language as the two in this case, a construction should be applied that would have the effect of not only increasing the legatee's interest in the pecuniary legacy, but of increasing his interest as a residuary legatee, and at the same time by implication reducing the interest of other residuary legatees not referred to in the substitutional gift.

In this case I think that as regards the pecuniary and residuary legacies to his children the scheme of the will in the mind of the testator was that his sons should each receive two thousand dollars in money, and that each should also receive out of the necessarily uncertain residue the proportion thereof which $2,000 bore to the whole $28,500, and that the daughters should receive the proportion thereof which their several legacies bore to the $28,500, and that when he constituted in the residuary clause the basis of division by using the words "in proportion to the personal property herein bequeathed" etc., etc., he intended that basis to remain unless afterwards expressly altered by him.

There is nothing in the fact that in his first codicil he increased the $2,000 to each of the appellants by $5,000, or in the language used, to indicate that he intended to disturb the basis which he had fixed for dividing his residuary estate, or to affect the interests his will gave to his other children in the residue, beyond what was incident to its reduction by $10,000 to satisfy the additions to the two legacies.

I think having regard to this scheme the words "in proportion to the personal property herein bequeathed" were intended to be restrictive and exclusive, and to refer to the very instrument which he was then about to execute, in contradistinction to any other instrument which he might afterwards execute, and that to import into the will by implication the effect contended for by appellants would do violence to the language used by the testator in expressing his intention.

For this principle of construction, see Bonner v. Bonner, 13 Ves. 379; Henwood v. Overend, 1 Mer. 26; Early v. Benbow, 2 Coll. 341; and Re Miles, 14 O.L.R. 241.

The latter part of the second codicil wherein the testator refers to Henry Albert's share of his estate "as set forth in the residuary paragraph of my said will" indicates, I think, that he fully intended that the clause as originally framed should apply in ascertaining his share in the residue.

Upon the argument a contention was raised that as in the second codicil no reference was made to the first codicil, the revocation of "the bequest in my said will in favour of my son Henry Albert Hunter," could not, consistently with the interpretation adopted in the judgment appealed from, be construed as a revocation of the $7,000 legacy in the first codicil.

I am unable to adopt this view, for while the will and both codicils must be read as one document, and may in general be properly described or referred to as the testator's will, this does

not exclude the use of the word "will' in a more restricted sense, as distinguishing it from a codicil, where the tenour of the language used indicates that to be the testator's intention. This is well illustrated in the last two paragraphs of the second codicil, where the testator uses the expression "my said will" three times. It is quite plain that in the first and third instances he intends to refer to his will in a comprehensive sense, whereas in the second his reference is restricted to the first testamentary instrument. The testator knew he had made a codicil amending his original will by increasing the legacy to $7,000, and in using the word "will" in the revocation clause of the second codicil, it must be assumed that he had the first codicil in his mind, and intended to revoke the legacy for the increased amount, and not a legacy which he had already revoked.

The judgment will therefore be affirmed, with a further declaration as regards David John Hunter that he is entitled to a share of the residuary estate of the deceased in the proportion which $2,000 bears to the total pecuniary legacies, $28,500, and not in the proportion which $7,000 bears to the same.

I think it is a proper case in which to order costs of all parties to be paid out of the estate, those of the executor as between solicitor and client.

MEREDITH, C.J.:—I agree.

CLUTE, J.:—I agree.

DIVISIONAL COURT. MAY 11TH, 1911.

RE McALLISTER.

Will—Construction—Trust—"Heirs" of Living Person—Legal Estate—Equitable Estate—Use of Income—Executors—Rule in Shelley's Case.

Appeal by Harmon McAllister from the order of RIDDELL, J., of February 6th, 1911, ante 704.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

E. D. Armour, K.C., for the appellant.

E. F. Lazier, for the executors.

J. R. Meredith, for the infants.

BOYD, C.:—After the death of the testator's wife all the real and personal property is given to their three children, Harmon, John, and Sarah, share and share alike. Stopping at this point that would vest in each child an equal one-third to be held in fee. But the testator evidently intends a lesser benefit for the son Harmon, because he proceeds: "Subject . . . as to the share . . . of Harmon that he shall hold the same as trustee of his heirs, and use the income as he may see fit, etc." The effect of these words is to modify his holding of the share; the disposal of the income indicates that he shall have a legal estate for life, but as to the remainder in fee, he shall hold as "trustee of his heirs," *i.e.*, in respect of, or for the benefit of his heirs. That is in effect an equitable limitation in favour of those who shall be his heirs at the time of his death; so that we have in Harmon a legal estate for life, and an equitable estate in remainder for those who shall be his heirs. These provisions, if they can be carried out, are according to the testator's intention, and to give the fee simple to Harmon by the operation of the rule in Shelley's case, would frustrate his expressed object. But the inexorable rule of law, so called, is not to be invoked where the devises are of diverse quality, *i.e.*, one legal, and the other equitable. "It is well settled," says Lord Herschell in Van Grutten v. Foxwell, [1897] A.C. at p. 662, "that if the estate taken by the person to whom the lands are devised for a particular estate of freehold, and the estate limited to the heirs of that person are not of the same quality, that is to say, if the one be legal and the other equitable, the rule in Shelley's Case has no application."

The over-reaching effect of Shelley's Case may be also avoided if it is permissible to read the words used, "trustee of his heirs," as referable to persons to be ascertained in a particular way pointed out by the testator, or as used to embrace all the descendants of the ancestor collectively, successively, and indefinitely. I would read "heirs" as here used, as meant to cover the case of several persons equally entitled, *i.e.*, co-parceners as all children are under our legal system, and think that the word was intended to describe those who would, on the death of Harmon intestate, be entitled to his real estate. See on this aspect of the case Greaves v. Simpson, 10 Jur. N.S. 609, and Evans v. Evans, [1892] 2 Ch. 173, followed in Haight v. Dangerfield, 5 O.L.R. at p. 278. This construction would again vest the legal estate in fee as a contingent remainder in the persons who at Harmon's death answered the description of his heirs.

The will, if construed according to the testator's intention,

keeps distinct the two estates vested in Harmon held by him in a dual character; one his legal and beneficial estate for life, and the other the dry legal estate in remainder held in trust for the persons who should turn out to be his heirs at his death. These two estates cannot be made to merge or coalesce by the operation of the rule of law in Shelley's Case: Merest v. James, 6 Madd. 118, and Collier v. McBean, 34 Beav. 430.

The construction of this will is *inter apices juris*, and like all such enquiries is not without difficulty. However, according to my best judgment, the result reached by my brother Riddell is right and ought not to be disturbed. There will be no costs of appeal, except those of the infants, to be paid out of the estate.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I agree.

DIVISIONAL COURT. MAY 11TH, 1911.

KENNEDY v. KENNEDY.

Will — Construction — Status to Maintain Action — Summary Judgment on Pleadings—Con. Rule 261*—Powers of Court Under—Pleading—Practice.*

Appeal by the plaintiff from the judgment of LATCHFORD, J., of the 20th January, 1911, ante 625.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

A. J. Russell Snow, K.C., for the plaintiff.

E. D. Armour, K.C., for the defendant James H. Kennedy.

The defendant, Robert Kennedy, appeared in person.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Latchford, reported 18 O.W.R. 442.

Counsel for the plaintiff advanced no argument against the conclusion of the learned Judge upon the main point, but contented himself with contending that the judgment in question should not have been made as and when it was.

Where the merits of a case have been dealt with, and the rights of the parties have been rightly determined, the Courts are very loath to set aside the adjudication on any ground—

especially is that the case where the whole complaint is as to practice.

In Hall v. Eve, 4 Ch. D. 341, at pp. 344, 345, James, L.J., says: "This case reminds me of a saying of the late Mr. Jacob, that the importance of questions was in this ratio: first, costs; second, pleading; and third, very far behind, the merits of the case." The inclination of the Courts at the present day is to reverse the order, and if the merits of the case have been dealt with, matters of practice, important as they are in some instances, and of costs, important as they are in most instances, are not much considered.

Nevertheless, the plaintiff is entitled to have her rights declared not only rightly, but in the right way.

There are many cases in which expressions are to be found indicating that Con. Rule 261 is not to be applied except in very simple cases—that where a lengthy argument and citation of numerous authorities are necessary to make out a case the plaintiff should not succeed, and the like: see Holmested & Langton, pp. 446 sqq., Snow's Annual, etc. But all these are made by way of excusing the Court from giving judgment in this summary manner. I can find no case in which it has been decided that the Court has no power to decide under such circumstances —nor can I find any case in which a judgment has been given which, being right upon the merits, has been set aside because given in this manner. These are cases such, *e.g.*, as Steeds v. Steeds, 22 Q.B.D. 537, in which the Court listened to a very elaborate argument and the citation of many authorities, and then found it necessary to reserve judgment—yet without indicating that they had not the power to act under this rule.

I have no doubt my learned brother would have been quite justified in refusing to act under this rule, but I have equally no doubt that he had the power so to do, and that having done so, his judgment cannot be set aside unless it is wrong in law: "Quod non fieri debet, factum valet." But the case has not been argued on the merits, and I think the plaintiff should have an opportunity, if she is so advised, to argue the law.

The case of Foxwell v. Kennedy involves the same will, the argument in that case has not been completed, and if the plaintiff in this action is so advised, she should be allowed to make her argument upon the law when Foxwell v. Kennedy comes on for argument on May 15th.

Costs of the present argument reserved.

FALCONBRIDGE, C.J.K.B.:—I concur.

DIVISIONAL COURT. MAY 16TH, 1911.

ANTAYA v. WABASH R.W. CO.

Railway — Negligence — Contributory Negligence—Findings of Jury—Evidence.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 991.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

J. H. Rodd, for the plaintiff.

H. E. Rose, K.C., for the Wabash R.W. Co.

W. A. Foster, for the Grand Trunk R.W. Co.

MULOCK, C.J.:—This is an appeal from the judgment of Middleton, J., dismissing the action.

The action was brought by the plaintiff against the two defendant companies for injury to her caused by the train of the Wabash Railway Company on the 11th June, 1910, at the railway station at the village of Belle River.

The railway is owned by the Grand Trunk Railway Company, the Wabash Co. having certain running rights over it. There are two tracks, and on the day in question the plaintiff was a passenger by the Grand Trunk train and alighted at the Belle River station for the purpose of proceeding to the village.

The railway tracks run east and west, and the plaintiff was on the platform on the north side of the two tracks and required to cross the two tracks in a southerly direction to reach the village. At the easterly end of the station platform was a sidewalk and pathway for foot passengers, but this pathway where it crossed the railway right of way was not a public highway, but the private property of the Grand Trunk Co. The train by which the plaintiff had arrived was on the southerly track and the plaintiff was standing just clear of the north track, apparently waiting for the Grand Trunk train to proceed easterly before she attempted to cross. When the last car was opposite her and she was about to step upon the north track for the purpose of crossing to the south, a train of the Wabash Railway arrived on the north track, and she was struck by the engine and injured in the head, and the action is brought for damages because of such injury. Her intellect is impaired and she was unable to give any explanation of how the accident happened.

The following are the questions submitted to the jury, with their answers:—

(1) Was there any negligence on the part of the defendants, or either of them, which caused the accident to the plaintiff? A. Yes.

(a) As to the Grand Trunk? A. Yes.

(b) As to the Wabash? A. Yes.

(2) If so, what was that negligence?

(a) On the part of the Grand Trunk? A. They should have taken more care of the passengers on account of the train being late.

(b) On the part of the Wabash? A. The Wabash did not take proper precaution knowing that the Grand Trunk Railway was late.

(3) If you find the defendants or either of them guilty of any negligence, could the plaintiff by the exercise of reasonable care have avoided the accident? A. No.

The learned trial Judge in his charge to the jury fully explained to them that if they found negligence on the part of the defendants, or either of them, they should specify the nature of such negligence.

As to the Grand Trunk Railway Co. the evidence shews no circumstance establishing any liability on their part. The train which struck the plaintiff was not under their control or operated by them.

As to the Wabash Railway Co., the answer that "The Wabash did not take proper precautions knowing the Grand Trunk Railway was late," does not specify any act of negligence which caused the accident, and is only another way of saying that the Wabash Company was guilty of negligence which caused the accident, thus failing to state with particularity any act of negligence which was the direct cause of the accident.

The place where it occurred was not a highway, but a private way provided by the railway for the use of the plaintiff and others, and it was the duty of the Wabash Co. to have exercised reasonable care in the running of its train past the crossing when people might be encountered. (The Grand Trunk Railway Co. v. McKay, 34 S.C.R. 81, does not apply to the case of a private crossing.)

There thus being no finding of any act of negligence which caused the accident, no verdict could be entered for the plaintiff, and the only question here is whether, under the circumstances, a new trial should be granted. There is no reason to suppose that in the case of a new trial the evidence would differ from

that adduced at the present trial, and no exception can, I think, be taken to the charge of the learned trial Judge, who instructed the jury that if they found negligence causing the accident, they must go farther and find the particular act of negligence which caused the accident.

Having failed to do so, the presumption is (Andreas v. Canadian Pacific R.W. Co., 37 S.C.R. 1), that there was no evidence to justify any finding beyond what they have found.

I, therefore, think under the circumstances that the plaintiff has failed to shew actionable negligence on the part of either of the defendants, and that this appeal should be dismissed with costs.

CLUTE and RIDDELL, JJ., agreed in dismissing the appeal, for reasons stated by each in writing.

DIVISIONAL COURT. MAY 16TH, 1911.

RE FITZMARTIN AND NEWBURG.

Municipal Corporations—Local Option By-law—Motion to Quash —Residence—What Constitutes—Evidence—Onus.

Appeal from the order of MIDDLETON, J., ante 1114, dismissing a motion to quash a local option by-law.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

J. B. Mackenzie, for the appellant.

W. E. Raney, K.C., for the respondent corporation.

MULOCK, C.J.:—This is an appeal from the order of Middleton, J., dismissing the motion to set aside a local option by-law.

During the argument all objections to its validity were dismissed with the exception of one, namely, whether Thomas Carr, who voted, had ceased to be a resident of the municipality, and therefore not entitled to vote.

Carr was a married man, residing with his wife and family in their home in Newburg, the municipality in question, and was such a resident when rated, and when his name was placed on the voters' list.

The evidence shews that his wife and family continued to reside in Newburg, but that Carr had for a few weeks prior to the

voting day been absent from Newburg, but whether for some temporary purpose only does not appear. There is nothing but hearsay evidence as to the circumstances under which he was absent. The onus was upon the appellant to shew that Carr had ceased to be a resident of Newburg, and he has failed to establish the point. At most the evidence merely shews a brief absence by Carr, his wife and family remaining at what had been the common home in Newburg.

A person cannot be held to have ceased to be a resident of a municipality merely because for some unexplained reason he has crossed the boundary line into another municipality. That is substantially all that the evidence discloses.

I, therefore, think that the appellant has failed to shew that Thomas Carr at the time of voting had ceased to be a resident of Newburg. He therefore was entitled to vote, and this appeal fails and should be dismissed with costs.

CLUTE and RIDDELL, JJ., agreed in dismissing the appeal, for reasons stated by each in writing.

BRITTON, J. MAY 16TH, 1911.

ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE v. TOWN OF SAULT STE. MARIE.

Assessment and Taxes—Exemptions—"Burying Ground" not now Used for Interment—4 Edw. VII. ch. 23, sec. 5(2)—Land Sold for Taxes—Right to Recover Redemption Money.

Action for a declaration that part of lot 25, in the first concession of park lots in the town of Sault Ste. Marie lying between the southerly boundary of Queen Street and the southerly boundary of Water Street produced westerly, known as the old Roman Catholic Cemetery, is exempt from municipal assessment for the purpose of taxation.

V. MacNamara, for the plaintiffs.
J. L. O'Flynn, for the defendants.

BRITTON, J. (after stating the nature of the action):—The contention of the plaintiffs is that this land is "a burying ground within the meaning of the Assessment Act in force in

1900, and within the meaning of 4 Edw. VII. ch. 23, sec. 5, sub-sec. 2.'' This sub-section exempts from real property in the Province of Ontario, liable to taxation, ''every place of worship, and land used in connection therewith, churchyard or burying ground.'' This land was assessed for the years 1901, 1903, and for 1908. For the arrears of taxes for those years (1901, 1903, 1908) the land was sold on the 14th October, 1909. These arrears amounted to $399.29. This amount together with 10 per cent. thereon, making $439.22, the plaintiffs paid on the 7th October, 1910, to redeem the land. The plaintiffs seek to recover that amount and interest thereon in this action. In 1902 this land was assessed, and the taxes amounting to $57 were paid, and this amount was afterwards refunded to the plaintiffs. The plaintiffs sued for this, but at the trial its repayment was admitted. From the time of the consecration of this ground down to 1896 inclusive there was no assessment of it. It was assessed for 1897 and 1898 but taxes not collected; not assessed for 1899; assessed for 1900 but struck off by the District Judge; not assessed for the years 1904, 5, 6, and 7, assessed for 1909 and 1910, but taxes for these years were not paid, and are in question in this action.

It is admitted that the plaintiffs are the owners of the land mentioned subject to its use as a burying ground. Is it a ''burying ground'' within the meaning of the exemption clause in the statute? A meaning given in the Standard Dictionary to the words ''burial ground'' is ''a plot of ground set apart for burial of the dead.'' The words are synonymous with ''cemetery'' and ''graveyard.'' If looking closely for distinction, ''a burying ground'' would by itself imply a place where burying is presently taking place—and ''burial ground'' a place used in the past—but in the ordinary sense of the words, there is no practical difference between ''burial place'' and ''burying ground.''

The land in question, many years ago was ''consecrated'' and set apart by the Roman Catholic Church at Sault Ste. Marie as a burying ground. Although not now used for the interment of persons dying from time to time, it has remained ever since, and still remains, as a place set apart and regarded as the resting place for the remains of many who died years ago. The ground is not used for any other purpose. The graves remain, some of them marked by stones with inscriptions to the memory of those buried there. It is now a burial place—a burying ground, within the meaning of the statute. It is quite true that the p[illegible] is not properly cared for; it is unkempt—not, at

all times, protected by a sufficient fence—not beautified by sod, trees, flowers, or shrubs, but a burial ground all the same. It has not been used for commercial purposes, not let for pasture, not allowed to be used even temporarily for tents or buildings.

For the meaning of "burial ground" as used in a conveyance, see May v. Belson, 10 O.L.R. 686, and many cases there cited. These support my view.

It could not have been the intention of the legislature to remove from exemption a burial ground as soon as filled; even if all the space is not taken up by interments, it may well be that a new and more suitable burying ground would be secured. Burials may cease in a particular lot by reason of prohibition by the Board of Health, or for other reasons, but the old place would not, while continuing only as a burial place, be assessable: See Dominion Coal Co. v. Sydney, 37 N.S.R. 504.

In Montreal v. Meldola, 32 Q.S.C. 257, the word "parsonage" came up for consideration, and it was held that a parsonage to be exempt must be a house set apart by a church or congregation for the residence of its priest or minister, and accepted and occupied by him as such. By analogy this applies. The ground was set apart as a burying ground. The members of the church accepted it and used it as such. The remains of many persons were buried there and are there now. The land is occupied according to the intention at the time of its consecration.

I find as a fact that the land in question is "a burial ground," that it has not been abandoned, but is still maintained as such, and so remains, and as such is not liable to assessment for municipal taxation.

I am of opinion that the plaintiffs are not entitled to recover the sum of $439.22 paid for redemption, or any part of it. Boulton v. York, 25 U.C.R. 21 is an authority against the plaintiffs. Section 167 of the present Assessment Act is substantially the same as sec. 148 of the Act under which Boulton v. York was decided. The money when paid was for the purchaser. The plaintiffs were too late in taking action, and the amount of taxes for the years 1901, 1903 and 1908, realized by sale of the property, may be retained by the municipality.

There will be judgment for the plaintiffs for a declaration as asked that the land in the statement of claim mentioned was in 1900, and since, and is now, as a burying ground, exempt from municipal taxation.

The defendants must pay costs.

DIVISIONAL COURT. MAY 17TH, 1911.

HAMILTON v. PERRY.

Husband and Wife—Division Court Action Against—Consent to Judgment—Personal Judgment Against Wife—Married Women's Property Act of 1897*—Prohibition—Amendment of Judgment—Scandalous Affidavit—Costs.*

Appeal by the defendant Jane Perry from the order of CLUTE, J., in Chambers, of the 24th March, 1911.

The appeal was heard by MULOCK, C.J., TEETZEL and MIDDLETON, JJ.

W. J. Clark, for the defendant.

John King, K.C., for the plaintiff.

MIDDLETON, J.:—A summons was on the 12th August, 1892, issued in the 2nd Division Court of Dufferin against the defendants, husband and wife, upon a note or agreement dated the 18th December, 1890. Nothing appeared to indicate the coverture of the defendant Jane Perry.

On the 12th September, 1892, the defendants consented to judgment, but this consent was not acted on until the 3rd October, 1897, when a judgment was entered as of the date of the consent, for the amount sued for, $111.32. This judgment was a personal judgment, and not in the form proper to a judgment against a married woman.

It is quite clear that prior to the amendment to the Married Women's Property Act of 1897, there was no personal liability in respect of the contracts of a married woman, and no judgment could be recovered against her personally. The relation of debtor and creditor existed only in the sense that the judgment creditor could obtain judgment against her separate property, and obtain payment out of it. Prior to the Act of 1882 in England, and of 1884 in Ontario, the creditor could only look to the property she had at the date of the contract, but after these dates her contract bound her after acquired separate property. As stated in Stogden v. Lee, [1891] 1 Q.B. 661: "A married woman cannot contract so as to bind her separate property, unless she has some separate property existing at the date of the contract, but if she has such property, her contract will bind it, and also her after acquired separate property." This of course does not mean "bind it" as a mortgage or charge, but only bind

it in the sense that when a judgment is obtained it can be taken under execution.

The judgment to enforce this liability was not a personal judgment, but a proprietory judgment. The form was settled in Scott v. Morley, 20 Q.B.D. 132, and the plaintiff was not entitled to a general judgment quod recuperet, per Osler, J.A., in McMichael v. Wilkie, 18 A.R. 472.

All this was changed in England in 1893, and here in 1897, but this case must be dealt with upon the law as it was in 1890-1892.

The Division Court therefore had no jurisdiction to make a personal judgment such as that pronounced, and to that extent there must be prohibition.

But the Division Court had jurisdiction to entertain the action and to pronounce a proper judgment, and as the defendant consented to judgment, and as on her cross-examination it appears that at the time of the contract and of the suit she had separate property, the Division Court may well amend the judgment. We have no such power.

I would have given the defendant her costs of these proceedings were it not for the most improper charges she has seen fit to make in her affidavit. It could make no possible difference to the result of this motion that in an entirely different matter the plaintiff had been convicted and punished. This statement is impertinent and scandalous, and had a motion been made against it I should have had no hesitation in ordering the affidavit to be removed from the files, and in directing the solicitor who filed it to pay the costs.

The appeal should be allowed and an order made prohibiting all further proceedings upon the personal judgment entered against the defendant Jane Perry, but this order is not to prevent the amendment of the judgment so as to make it a judgment in the proper form against the said defendant as a married woman, and without prejudice to any answer she may have to such motion.

No costs.

MULOCK, C.J.:—I agree.

TEETZEL, J.:—I agree.

DIVISIONAL COURT. MAY 17TH, 1911.

RE MACDONALD.

Will — Construction — Residuary Clause — "Distribution of What can be Spared"—Effect of Former Judgment Construing Same Will—Declaration against Intestacy—Vested Estates in Distributees—Capital Invested to Produce Annuity—Death of Annuitant—Accretion to Residue.

Appeal by three of the daughters and a son of the late John Sandfield Macdonald from the order of MIDDLETON, J., ante 605.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

E. D. Armour, K.C., and R. Smith, K.C., for the appellants Josephine Langlois and G. S. Macdonald.

R. L. Defries, for the appellants Louise Uppleby and Adele Pemberton.

C. A. Masten, K.C., for the respondent.

B. Osler, for Mrs. H. Spragge.

E. G. Long, for the Toronto General Trusts Corporation.

MEREDITH, C.J.:—This is an appeal by three of the daughters and a son of the late John Sandfield Macdonald, deceased, from the judgment of Middleton, J., dated 18th January, 1911, on an originating motion for the determination of certain questions arising upon the will of the deceased, dated the 31st May, 1872.

The material provisions of the will are set out in the reasons for judgment of my brother Middleton, reported in 2 O.W.N. 605, and it is not necessary to repeat them.

In my opinion the effect of the decree pronounced in the action of Langlois v. Macdonald, on the 28th June, 1875, was to determine the questions now raised, adversely to the contention of the appellants.

Except in so far as the provision of the will that the capital sum necessary to produce the allowance, *i.e.*, the annuity, given to each of the testator's daughters is to be paid after her death to such persons or persons as she may by will direct has that effect, there is no express disposition made of the beneficial interest in the corpus of the estate, save that contained in the paragraph of the will which reads as follows: "I direct that if the estate hereinbefore devised and bequeathed to my said trustees upon the trusts aforesaid prove sufficiently productive

from the investment of the proceeds of sales of real estate and the income derived from my personal estate, my trustees shall from time to time, and at least every two years, allot to my daughters and to my son George the pro rata distribution of what can be spared."

There can be little doubt, I think, that the intention of the testator was that, subject to the provision as to the capital sums necessary to produce the allowance to his daughters which I have mentioned, the corpus of his estate should be divided pro rata between his daughters and his son George, and that the provision as to periodical allotments was made in order to enable them to receive what could be paid to them without risking the contingency happening that there would not be enough left to provide for the annuity to the testator's wife and the other annuities and sums to be paid to the children, instead of waiting for a division until the death of all the annuitants.

It appears to me that the Court in construing the will in Langlois v. Macdonald determined that this was the testator's intention, and that the language which he used was sufficient to give effect to that intention.

The declaration of paragraph 2 of the decree is that the testator did not die intestate as to any portion of his estate, and that upon the true construction of his will the executors "are from time to time and at least every two years to allot to the plaintiffs and the defendant Lilla Macdonald in pro rata shares such portion of the estate of the said testator as appears to the defendants other than Henry Sandfield Macdonald not to be required to answer and secure the payments in the first paragraph hereof mentioned, and that the plaintiffs and the defendant Lilla Macdonald are entitled absolutely to such portions of the said estate."

The plaintiffs in this action were the testator's daughters except Lilla, and his son George Sandfield, and the first paragraph of the decree declared that the defendants the executors ought as soon as convenient to invest in stock of the Dominion of Canada a portion of the estate of the testator sufficient to answer the payment from time to time of the sums directed to be paid half-yearly to the plaintiffs, the defendants Lilla Macdonald and Henry Sandfield Macdonald, and the widow of the testator.

It is manifest that compliance with the declaration and adjudication contained in paragraph 2 of the decree must result ultimately in the allotment of the whole of the corpus remaining in the hands of the executors, for as soon as all the annuitants

have died there would be no right in the executors to retain any part of it.

I can find in the decree no warrant for the executors excluding any of the daughters of the testator, or his son George Sandfield, from sharing in any pro rata allotment made by them, and it appears to me that, had it been intended that only those of them who were living at the time an allotment was made should share, something to indicate that would be found in the decree; instead of that the decree provides that every allotment is to be made to the plaintiffs and Lilla Macdonald in pro rata shares.

What justification in the face of this provision would the executors have, in making an allotment under the will, for excluding Lilla Macdonald or those who represent her from a pro rata share of what they have decided to allot? I can find none.

The ratio decidendi in Leeming v. Sherratt, 2 Hare 14, seems to me to be applicable. In that case the testator gave his freehold and the residue of his personal property to trustees upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom so soon as his youngest child should attain the age of twenty-one years unto and equally among his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have, and it was held that a child who attained his majority, but died before the youngest attained twenty-one, was nevertheless entitled to a share of the fund. The Vice-Chancellor said the trustees are trustees of the residue for all the testator's children upon the happening of an event which in fact has happened, namely the youngest child attaining twenty-one, and he added that if there was any case which decided as an abstract proposition that a gift of a residue to a testator's children upon an event which afterwards happened did not confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

In the case at bar there is no gift of the residue except in the direction to allot, just as in Leeming v. Sherratt there was no gift except in the direction to pay and divide. In that case there was but one period fixed for the payment and division, while in the case at bar periodical allotments are directed, but that difference between the two cases cannot affect the application of the principle which the Vice-Chancellor applied. Though periodical allotments are directed, as I have pointed out, the direction to make them must eventually exhaust the whole of

the corpus of the estate, and therefore in my opinion the direction is in substance a direction to allot between the daughters and the son George Sandfield the whole fund, which brings the case clearly, I think, within the principle of the decision in Leeming v. Sherratt, and entitles the representatives of any of these beneficiaries who has died, or may happen to die before the final allotment is made, to the share of the one who is dead.

If it be not so, I see no escape from the conclusion that in a possible event, namely, the death of all the daughters and George Sandfield before the final allotment, what might remain unallotted at the death of the last survivor of them would be undisposed of; but the decree in Langlois v. Macdonald determines that there is no intestacy as to any part of the testator's estate, a conclusion which could have been come to only because the Court was of opinion that the daughters and George Sandfield took vested interests in the corpus of the testator's estate over which the daughters had not been given powers of appointment.

In my opinion the appeal fails and should be dismissed.

TEETZEL, J.:—I agree.

CLUTE, J.:—I agree.

HALL v. SHIELL—DIVISIONAL COURT—MAY 11.

Promissory Notes—New Evidence—Suspicious Circumstances—New Trial.]—Appeal by the defendant from the judgment of MIDDLETON, J., of the 20th November, 1910, in favour of the plaintiffs in an action on promissory notes. The judgment of the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) was delivered by RIDDELL, J., who in view of new evidence which could not fairly have been expected to be in the knowledge of the defendant at the trial, and of the suspicious circumstances attending the transactions in connection with which the notes were given, thought that it might well be that a different finding would be made upon a new trial, in which all the facts would be cleared up. A new trial was accordingly ordered, and the hope was expressed that the parties would be able to agree that the evidence so far should stand, to be supplemented as either party might desire. Costs of the former trial to be in the discretion of the trial Judge upon the new trial; costs of this appeal to be to the plaintiffs in the cause in any event. J. L. Ross, for the defendant. W. C. Mackay, for the plaintiffs.

POLSON IRON WORKS CO. v. LAURIE—MEREDITH, C.J.—MAY 12.

Sale of Boat—Action for Balance Due—Not Payable till Repairs Completed—Boat Lost before Repairs Completed—Alleged Negligence—Actus Dei—Impossibility of Performance.]—Action to recover $880.42 alleged to be balance due the plaintiffs for work done for the defendants. The defendants denied liability on the ground that plaintiffs had allowed the boat known as the Knapp Tubular boat, placed in their care by the defendants for the purpose of making alterations and repairs, to escape and become stranded on the eastern bank of the Bay of Toronto, whereby the defendants had incurred expenses and sustained damages, and they counterclaimed for return of moneys paid the plaintiffs. Judgment: I have already determined that the agreement deposed to by the defendant Laurie and Knapp is proved, and the result is that but for the loss of the boat the plaintiffs would not be entitled to recover the $500, which was not paid, on account of the $1,000 agreed to be accepted in settlement of the larger claim made by the plaintiffs, because it was a term of the agreement that the $500 was not to be paid until the repairs to the boat were completed. I have also found that the claim of the defendants, that the boat was lost through the negligence of the plaintiffs, is unfounded; and the effect of my finding is that the boat was lost through the act of God, the effect of the storm, and it became impossible owing to the condition in which the boat was to do anything to it. That is clear upon the evidence, and the plaintiffs are therefore relieved from the obligation to complete the boat, by reason of the impossibility of performance, and are entitled to recover the $500. Judgment for plaintiffs for $500, with costs on the High Court scale. The other claims are disallowed. Counterclaim dismissed, with costs. C. A. Moss, for the plaintiffs. C. H. Porter, for the defendants.

WEIR v. WEIR—MASTER IN CHAMBERS—MAY 13.

Security for Costs—Rule 1198(*d*)*—Costs of Former Proceeding Unpaid—"For the Same Cause."*]—Motion by the defendant for order for security for costs under Con. Rule 1198(*d*). The plaintiff took proceedings against the defendant under the Overholding Tenants Act in the District Court of Muskoka. He succeeded at first, but failed on the defendant's appeal to the Divisional Court, and thereby became liable for costs amounting

to a little over $100. The present action was brought in the High Court by plaintiff as executor of their father, against the defendant, for a declaration that the plaintiff, as such executor, is owner of and entitled to possession of the lands which were sought to be recovered in the first unsuccessful attempt. THE MASTER IN CHAMBERS (after stating the facts): "It will be noticed that in both clauses (*c*) and (*d*) of Rule 1198 the words used are "for the same cause." Having regard to the decisions as to the meaning of these words to be found in the cases cited in Holmested and Langton, on the rule, pp. 1427-1428, and especially to Lucas v. Cruickshank, 13 P.R. 31 (which seems very applicable), and Caughell v. Brower, 17 P.R. 438, I do not think the present motion can succeed. The first proceeding was based on the assumption of a tenancy which had expired. As I understand, the appeal was allowed on the ground that no tenancy was proved, and so the proceedings had no foundation. Here there is no such allegation necessary, and the plaintiff must prove his title; whereas, in the other proceeding, he had only to prove that the defendant stood to him in the relation of tenant, and then the plaintiff's title would not come into question, but only the right to immediate possession. Even if the judgment of the District Judge had stood, there would have been nothing to prevent the defendant next day from bringing an action of ejectment, if he could shew a superior title to that of the plaintiff, who could not have relied on the prior judgment as an answer to that action. I refer to what I said on this rule in Wendover v. Ryan, 7 O.W.R. 160. The motion will be dismissed with costs to the plaintiff in any event. The defendant may have two weeks further time to plead." O. H. King, for the defendant. A. J. Thomson, for the plaintiff.

CORRECTION.

In Re Canada Mail Orders Limited (Meakins' Case), ante 1055, it should have been stated that the counsel appearing for the contributories was Mr. J. A. Soule.