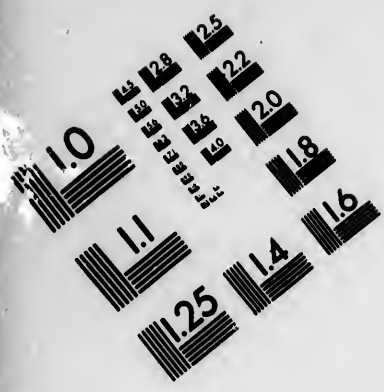

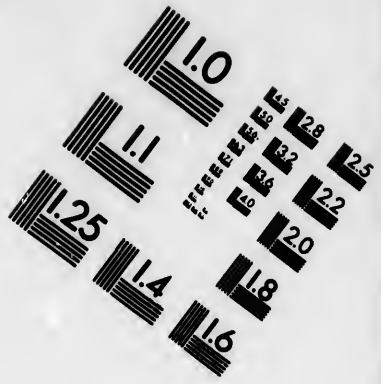

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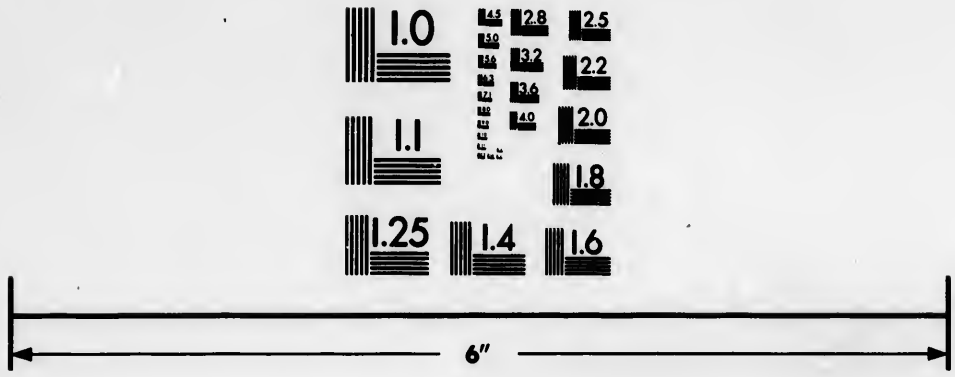

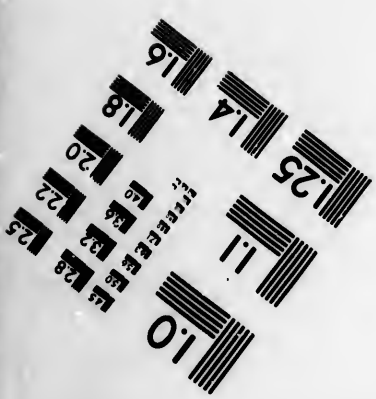

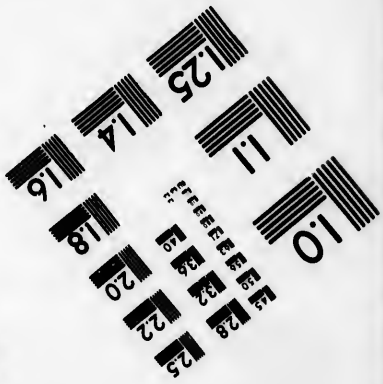

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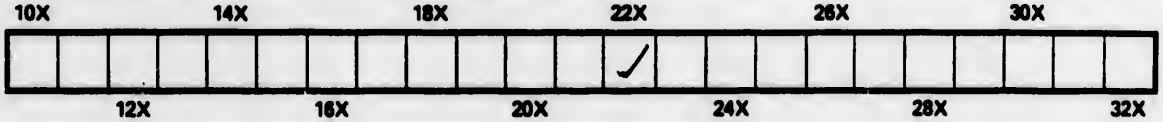

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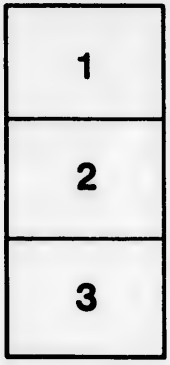

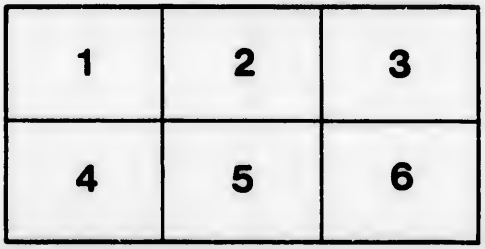

THE FRASER INSTITUTE CASE.

COURT OF QUEEN'S BENCH

FOR

LOWER CANADA.

JOHN FRASER & AL.,

Appellants.

AND

THE HON. J. J. C. ABBOTT & AL.,

Respondents.

Judgement Rendered June 24th, 1873.

Montreal:
PRINTED AT THE OFFICE OF J. C. BECKET, 180 ST. JAMES ST.

1873.

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THE FRASER INSTITUTE CASE.

JUDGEMENT OF THE COURT OF QUEEN'S BENCH

(APPEAL SIDE.)

RENDERED JUNE 24th 1873.

CANADA,
Province of Quebec } COURT OF QUEEN'S BENCH,
(APPEAL SIDE.)

Montreal, Tuesday, the twenty-fourth day of June, one thousand eight hundred and seventy-three.

PRESENT:

The Honorable Mr. Chief Justice Duval
" " " Justice Drummond
" " " Justice Badgley
" " " Justice Monk
" " " Justice Taschereau

No. 79.

John Fraser, of the City and District of Montreal, Gentleman, formerly Merchant; Alexander Fraser, of the Parish of Lachine, in the District aforesaid, Farmer; Jane Fraser, wife of, and duly authorized by Andrew Fraser of Hawkesbury, in the County of Prescott, in the Province of Ontario, Yeoman, and the said Andrew Fraser party to these presents, as being in community of property with his said wife, and for the purpose of authorising the said Jane Fraser; George Chapman of the City of Montreal, Merchant, in his capacity of Tutor duly appointed to George Wheatley, Sylvanus Fraser, and John Henry, three minor children issue of the marriage of the said George Chapman with the late Catherine Fraser his wife deceased; Donald Fraser,

formerly of Montreal, and now of the City of New York, in the State of New York one of the United States of America, Gentleman; and Elizabeth Fraser of the City of Montreal, Spinster, in their capacity of heirs at law of the late Hugh Fraser in his lifetime of the City of Montreal, Merchant.

(Plaintiffs in the Court below,)

and

Appellants.

and

The Honourable John J. C. Abbott of the City and District of Montreal, Esquire, Queen's Counsel, and John Cowan of the same place, Esquire, Merchant in their capacity of Executors of the last will and Testament of the said late Hugh Fraser, the said Honourable J. J. C. Abbott also in his capacity of universal residuary fiduciary legatee and Trustee, the Honourable Frederick Torrance, one of the Judges of the Superior Court of Lower Canada, residing in the City of Montreal aforesaid, in the capacity of universal residuary fiduciary legatee and Trustee, jointly with the said Honourable J. J. C. Abbott.

(Defendants in the Court below,)

Respondents.

The Court of our Lady the Queen now here, having heard the Appellants and Respondents by their counsel respectively, examined as well the record and proceedings had in the Court below, as the reasons of Appeal fyled by the Appellants, and the answers thereto and mature deliberation on the whole being had:

CONSIDERING.

1st.—That in the Eighteenth century the leading European Nations adopted a policy which tended to restrain the excessive accumulation of real Estate held in Mortmain, and by Corporate bodies, whether ecclesiatical or lay:—as evinced in England, by the passing of the Act, commonly known as the statue of Mortmain, in the ninth year of the reign of his late Majesty, King George the second, [Chapter 36], and in France by several laws

or ordinances, as well antecedent as subsequent to the edict or ordinance hereinafter mentioned:

2nd.—That Louis the fifteenth, then King of France, of Navarre, and amongst other outlying possessions, of several American colonies, including the Province of Quebec, wielding absolute power Legislative and Executive, in pursuance of the said policy promulgated an edict or declaration bearing date at Versailles the twenty fifth day of November, one thousand seven hundred and forty three, and duly registered in the Superior Council, *Conseil Supérieur* at Quebec, by which it was, amongst other things, decreed and enacted as follows:

"Art. I.—Conformably to the ordinances pronounced and "the rules made for the interior of our Kingdom, we ordain "(*voulons*) that there shall not be made, in our colonies of "America any foundation *fondation* or new establishment of "houses, or religious communities, or of Hospitals, Asylums, "*Congregations, Confraternitees, Colleges, or any other Corporation,* "*or community either eccleciastical or lay,* unless under and by "virtue of our express permission, conveyed by our letters "patent, to be registered in our Superior Councils of the said "Colonies, in the form which will be hereafter prescribed."

"Art. II.—We forbid the making of any bequest by last "will or Testament for the foundation *fondation of* any new "establishment, such as those mentioned in the preceeding "article, *or for the benefit of any persons who might be intrusted* "*with the formation of* any such establishment, the whole under "pain of nullity [*à peine de nullité*]: which shall be observed "*even when the bequest is made upon the condition* [*à la charge*] *of* "*obtaining our letters patent.*"

Art. IX.—"We declare to be null all establishments of the "kind described [*de la qualité marquée*] in the first article, which "shall not have been authorized by our letters patent, registered "in our said Superior Councils, [*Conseils Superieurs*], as also all "dispositions and acts made in their favor, directly or indirectly, "notwithstanding any prescriptions or consents expressed or "implied [*exprès ou tacites*] which might have been given at or

" to the execution of any such dispositions or acts, by the parties " interested, their heirs or assigns."

3rd.—That when the definitive treaty of peace was concluded between Great Britain and France on the tenth day of February one thousand seven hundred and sixty three, under which Canada with all its dependencies (including this Province of Quebec), was ceded by the crown of France to the crown of Great Britain, the said Edict or declaration was unrepealed, unaltered and in full force and vigor:

4th.—That by the Imperial statute passed in the 14th year of the reign of his late Majesty, King George the Third, Chapter 83 commonly known as the Quebec act, it was amongst other things enacted:

" That all His Majesty's Canadian subjects, within the " Province of Quebec, the religious orders and communities only " excepted, may also hold and enjoy their properties and posses- " sions, together with all customs and usages relative thereto " and all other their civil rights: * * * * * that in all " matters of controversy relative to property and civil rights, " resort shall be had to the laws of Canada, as the rule for the " decision of the same and all causes that shall hereafter be " instituted in any of the Courts of Justice shall with respect " to such property or rights, be determined agreably to the said " laws and customs of Canada, until they shall be varied or " altered viz in the due course of legislation."

CONSIDERING.

5th.—That the only laws or statutes subsequently passed or enacted which could affect either directly or indirectly the said edict or ordinance of the twenty fifth day of November, one thousand seven hundred and forty three or any of its provisions relating to Testamentary bequests to any of the persons or corporations therein mentioned are the following:

1st.—The tenth section of the precited Imperial statute passed in the fourteenth year of his late Majesty George the Third, by which it was enacted as follows:

"That it shall and may be lawful to and for every "person that is owner of any lands, goods or credits in "the said Province, and that has a right to alienate the said "lands, goods, or credits, in his or her lifetime by deed or sale, "gift or otherwise, to devise or bequeath the same, at his or her "death, by his or her last will and Testament; any law usage "or custom, heretofore or now prevailing in the Province, to the "contrary, whereof in any wise notwithstanding; Such will "being executed either according to the laws of Canada, or "according to the form prescribed by the laws of England."

2nd. The Provincial Statute of Lower Canada, passed in the forty-first year of His said late Majesty George the third, for the purpose of removing doubts and difficulties which had arisen touching the said last mentioned Imperial Act.

By this Provincial Act it was amongst other things enacted:

"That it shall and may be lawful for all and every person "or persons of sound intellect and of age, having the legal "exercise of their rights, to devise and bequeath by last will and "Testament, whether the same be made by husband or wife, in "favor of each other or in favor of one or more of their children, "as they shall seem meet, or in favor of any other person or "persons whatsoever, all and every his or her lands, goods or cre- "dits whatever be the tenure of such lands, and whether they be "*propres acquets* or *conquets*, without reserve restriction, or "limitation whatsoever, any law usage or custom to the contrary "hereof in any way notwithstanding,—Provided always, that "it shall not be lawful for a husband or wife, making such last "will or Testament, to devise or bequeath more than his or her "part or share of their community or other property and Estate, "which he or she may hold, or thereby to prejudice the rights "of the survivor, or the customary or settled dower of the "children.

"Provided also that the said right of devising as above spe- "cified and declared, shall not be construed to extend to a devise "by will and testament in favor of any corporation or other

" persons in mortmain, unless the said corporation or persons be " by law entitled to accept thereof."

3rd. The following articles of the Civil Code of Lower-Canada, now the Province of Quebec, promulgated on the first day of August one thousand eight hundred and sixty-six, article 366, respecting the disabilities of corporations, which reads as follows: " The disabilities arising from the law are:

" 1st. Those which are imposed on each corporation by its " title, or by any law applicable to the class to which such cor- " poration belongs."

" 2nd. Those comprised in the *general laws of the country* " *respecting mortmain and bodies corporate, prohibiting them from* " *acquiring immoveable property, or property so reputed, without* " *the permission of the Crown, except for certain purposes only,* " and to a fixed amount and value;

" 3rd. Those which result from the same general laws impo- " sing, for the alienation or hypothecation of immoveable pro- " perty, held in mortmain or belonging to corporate bodies, " particular formalities not required by the common law."

ARTICLE 831.

" Every person of full age, of sound intellect, and capable " of alienating his property may dispose of it freely by will, " without distinction as to its origin or nature, either in favor " of his consort or of one or more of his children, or of any other " person capable of acquiring and possessing, and without re- " serve restriction or limitation, saving the restrictions, prohibi- " tions and causes of nullity mentioned in this code, and all " dispositions and conditions, contrary to public order and good " morals."

ARTICLE 836.

" Corporations and persons in mortmain can only receive by " will such property as they may legally possess."

ARTICLE 838.

" The capacity to receive by will is considered relatively to " the time of the death of the Testator."

" Persons benefitted by a will need not be in existence at " the time of such wills, nor be absolutely described or identi- " fied therein. It is sufficient that at the time of the death of " the Testator they be in existence or that they be then con- " ceived, and subsequently born *viable*, and be clearly known to " be the persons intended by the Testator."

ARTICLE 864.

" The property of a deceased person which is not disposed " of by will, or concerning which the dispositions of his will are " wholly without effect, remains in his ab-intestate succession " and passes to his lawful heirs."

ARTICLE 869.

" A Testator may name legatees who shall be merely fidu- " ciary or simple Trustees for charitable or other lawful pur- " poses within the limits permitted by law, he may also deliver " over his property for the same object to his Testamentary " Executors or effect such purposes by means of charges imposed upon his heirs or legatees."

CONSIDERING.

6th. That the said Provincial Statute of the forty-first year of His late Majesty King George the Third was enacted for the triple purpose of explaining extending, and modifying the Imperial Act above cited, which must be construed in connection therewith, and that in and by its last proviso, it excepted from the otherwise unlimited power of bequest, all devises and bequests by will and Testament, in favor if any corporation or persons in *mortmain* unless the said corporation or persons were by law entitled to accept thereof.

That the Legislature of Canada, by the Articles of the Civil Code of Lower-Canada, above quoted (which are merely declaratory of the pre-existing laws, in so far at least as the said Edict or Ordinance of the twenty-fifth day of November, one thousand seven hundred and forty-three, the said Imperial Act 14th George III, and the said Provincial Statute 41st George III

concern this case), hath expressly excepted from the otherwise unlimited power of bequest, *all persons incapable of acquiring and possessing*, hath excluded all bequests contrary to law, or contrary to the prohibitions, restrictions and causes of nullity mentioned in that code, and all dispositions and conditions contrary to Public order; hath decreed that corporations can receive by will, only such property as they may legally possess, and that a Testator may name Fiduciary or simple Trustees for charitable or other purposes only within the limits permitted by law; hath acknowledged the existence of a law or laws respecting mortmain, and prohibiting them and bodies corporate, from acquiring immoveable property without the permission of the Crown; and hath declared conformably to our Common Law.

* * * * * * * * * * * * * * * * * * *

"That the property of a deceased person which is not dis-
" posed of by will, or concerning which the dispositions of his
" will are wholly without effect, remains in his ab-intestate suc-
" cession and passes to his lawful heirs."

CONSIDERING.

7th. That the said Edict or Ordinance of 1743 was and is a law of public policy, of Public order, *Loi d'ordre public*,—that its validity and efficacy has been acknowledged by the Jurisprudence of the Courts of Lower-Canada; *that it is the only law relating to mortmain, or to the acquisition of immoveable property through bequest, or otherwise, by bodies corporate without the permission of the Crown*, ever promulgated in this country, and that it was at the time of the making of the will and Testament of the late Hugh Fraser, mentioned in the declaration of the Plaintiff's and at the time of the decease of the Testator, as it is still unrepealed, unaltered, and in full force and vigor.

Considering, (in view of the arguments urged against the validity of the said Edict and Ordinance of 1743, on the ground that it never was enforced under the *Ancien-Regime*, and that it is opposed to the policy of the *new*.)

8th. That laws are made not to be violated, but to be observed: Therefore the fact that no judgment was ever pro-

nounced, for a violation of the Edict in question, if true, merely tends to prove, either the wisdom of the law, or the law-abiding temper of the people for whom it was enacted, if not both:

That the law *is what is*, and Courts of Justice, so long as it remains unreapealed, and unaltered, *whether it is or is not what it should be*, are bound to interpret and administer it, according to the true intent and meaning of the legislator by whom it was enacted, without regard to its policy, either at the time when it was promulgated, or when the Judge is required to apply it.

CONSIDERING.

9th. That the mode of manifesting the will of sovereign power, under the absolute monarchy of France by letters patent, in all such matters as those contemplated by the said Edict or declaration of 1743 was and is superseded under our system of constitutional monarchy, by special acts of our Legislature.

CONSIDERING.

10. That by his last will and testament, executed before J. C. Griffin & H. J. Meyer, Notaries Public, at Montreal, on the twenty-third day of April, one thousand eight hundred and seventy, the said Hugh Fraser therein described as of the City of Montreal, Esquire, Merchant, after making several special bequests therein enumerated, did nominate and appoint the Hon. John J. C. Abbott, and John Cowan, two of the Defendants in this cause, his Executors for the purpose of carrying out the provisions of his said will and did divest himself in their hands, of his moveable Estate and Effects, to the end that they should pay the said legacies, and should immediately afterward transfer the balance of the moveable Estate to a certain fund vested by the will in certain proposed fiduciary legatees and trustees, in terms which in so far as they affect the issue raised are as follows:

17th Clause. "I nominate and appoint the said Honorable John J. C. Abbott, and John Cowan, my Executors for the purpose of carrying out the provisions, of this my will, and I divest

myself in their hands of my moveable Estate and Effects to the end that they may pay the foregoing legacies, raising the necessary funds therefor in the most convenient manner without any unnecessary sacrifice, and immediately thereafter to transfer over the balance of my moveable Estate to the fund which by the provisions of this, my will, is vested in my Trustees, and fiduciary legatees hereinafter named."

18 Clause. "I give devise and bequeath the whole of the "rest and residue of my Estate, real and personal moveable "and immoveable of every nature and kind whatsoever to the "said Honorable John J. C. Abbott, and to the said Honorable "Frederick Torrance, hereby creating them my universal resi- "duary fiduciary legatees, and it is my will and desire that "they do hold the same in trust for the following intents and "purposes, namely, to *Establish, at Montreal, in Canada, an "institution to be called "The Fraser Institute," to be composed of "a Free public Library, Museum and Gallery, to be open to all "honest and respectable persons whomsoever, of every rank in life,* "without distinction, without fee or reward of any kind . . . . ". . . . . and for that purpose to procure such charter or act "of Incorporation as my said Trustees may deem appropriate "to the purpose intended by me; . . . . . and so soon as the "requisite charter shall have been obtained, containing all the "powers necessary to carry out my design herein contained, I "desire that the residue of my Estate and Effects, after de- "duction of the expenses of the management thereof, shall be "forthwith conveyed over to the Corporation to be thereby formed, to be called the "Fraser Institute" for the purpose herein declared, &c., &c.

CONSIDERING.

11th. That the Codicil made to his said last will and Testament by the said late Hugh Fraser, at Montreal, on the second day of May, one thousand eight hundred and seventy, has no bearing upon the issue raised in this cause;

CONSIDERING.

12th. That the object of the said last mentioned intended bequest, in the said last will and Testament, of the said Testator (the annulment of which is sought by the action of the Plaintiff's), being to devise the residue of all his Estate, real and personal, moveable and immoveable for the establishment or foundation "*fondation*" of a lay corporation, having at the time of the execution of his said last will and Testament, and at the time of his decease no existence, either under letters patent from the Crown, or by virtue of any act, or Charter of the Legislature of this Province, the said intended bequest was made in direct violation of the said Edict or declaration of the twenty-fifth day of November one thousand seven hundred and forty-three, and therefore was, and is, illegal, null and void.

CONSIDERING MOREOVER

13th. That under the rule of our common law (declared and confirmed by the 838th Art. of the Code herein above recited), as quaintly expressed by the old French maxim "*Le mort saisit le vif*" the right of property cannot remain in suspence; Some person, some power, some body corporate competent to receive it, must become seized thereof, simultaneously with the demise of the owner.

If there be no will it passes to the heir at law, or to the Crown in case of *Escheat*; if there be a will it devolves by bequest on some person or some body corporate actually in existence and capable of receiving it:

Whereas if the bequest impugned in this cause were confirmed, the right to the property which the Testator intended to bequeath to a Corporation "*in posse*" not "*in esse*," never having been vested in the said trustees or fiduciary legatees, who for a certain remuneration in money, were intended to act *solely* as instruments for the purpose of conveying the same to such contemplated Corporation, would remain floating in void until the creation of such Corporation;—depending for its final resting-place upon the doubtful will of the Legislature; So that

even if the said Edict or Declaration of 1743, had never been promulgated, the bequest in question would have been equally illegal, null and void :

CONSIDERING.

(In view of the pretention that the said intended Trustees or fiduciary legatees were entitled to act as mandataries of the Testator for the purpose of vesting the property in the said "Fraser Institute" when incorporated).

14thly That no mandate can be created to take effect after the death of the Mandator :

That the mandate expires with the mandator, except in so far as the mandatory is obliged after the extinction of his mandate by the death of the Mandator to complete business which is urgent and cannot be delayed without risk of loss or injury.

15thly. *Consideriny* for all these reasons, that in the judgment appealed from there is error.

This Court doth reverse, set aside and annul the same; and proceeding to pronounce the judgment which the Court below should have rendered;

This Court doth dismiss the exceptions and pleas of the Defendants, and maintaining the action of the Plaintiffs, (except in so far as by the conclusions thereof, compensation in money is demanded, in the event of the executors failing to render to the Plaintiff's an account of the Estate of the said late Hugh Fraser, the value whereof has neither been proved by the Plaintiff's, nor admitted by the Defendants), doth declare that all that part of the said will of the said Hugh Fraser, wherein the said Testator orders this said Executors to transfer over the balance of his moveable Estate after payment of the legacies therein mentioned, to the trustees and fiduciary legatees therein named, with the intent of devising and bequeathing the rest and residue of his Estate real and personal, moveable and immoveable to the said Honorable John J. C. Abbott, and Frederick Torrance, to establish at Montreal an Institution "*fondation*," to be composed of a free public Library, Museum and Gallery, under the name

of the "*Fraser Institute*," and all and every the dispositions connected therewith together with the proposed establishment of the said trust, and of the said fiduciary legacy, is and are illegal, null and void, and is and are hereby set aside and cancelled;

Doth further declare that the said Plaintiff's (including George Chapman, in his capacity of Tutor to the minor children issue of his marriage with the late Catherine Fraser,) as heirs at law of the said late Hugh Fraser, were at the time of the institution of this action, and still are the sole owners and proprietors of all the property real and personal, moveable and immoveable, belonging to and left by the said late Hugh Fraser, at the time of his decease, except such parts thereof as are covered by the bequest made by him in his said last will and Testament, which are not included in the intended legacy, impugned in this action, and hereby declared to be null and void; doth order the said Hon. John J. C. Abbott, and John Cowan, in their capacity of Executors of the said last will and Testament of the said late Hugh Fraser, within two months of the service upon them, of this judgment to render a true and faithful account of the Estate of the said late Hugh Fraser, and of all the rents, issues and profits accrued therefrom, and of their administration thereof, and to deliver up, and to abandon to the Plaintiff's, all the rest and residue of the Estate real and personal of the Testator, after deduction of the said unimpugned bequests.

And this Court doth further order, that in the event of the said account not being rendered and filed in this Court, within the delay above granted, the Plaintiffs may take such further conclusions as to law, and justice may appertain, the whole with costs against the Respondents, in both Courts, whereof distraction is awarded to the Appellants Attornies.

Dissentientibus.—The Honorable Mr. Chief Justice Duval, and Mr. Justice Badgley.

True Copy,

[*Signed*]

C. DE GRANDPRÉ.

Deputy Clerk of Appeals.