The Legal News.

Vol. V. DECEMBER 30, 1882. No. 52.

MUTILATION OF WILL.

A strange case of admitting the torn fragments of a will to probate has just been decided in England. In *Wells* v. *Waight* (Prob. Div., Nov. 3, 1882), the testator was an engineer on a channel steamer. In 1876 he made his will leaving everything to his wife, and he confided the document to her keeping. Some time afterwards, in the course of a conjugal quarrel, the wife, in a passion, tore the will into shreds, and tossed them into the fireplace. The husband picked them up and placed them in an envelope which he carried in his pocket. He subsequently told his wife that he would get the will put straight again. In June, 1881, the husband died of smallpox in his berth on board the steamer, and the fragments of the will were found in the envelope in his pocket. The Court admitted the will to probate, notwithstanding the opposition of the children. The ground of the decision was, that, though the presumption of law is that if a will be found in a testator's possession in a mutilated condition, it was not intended to be renewed by him (*Lambert* v. *Lambert*, 3 Hagg. 568); yet under the circumstances, the presumption was rebutted by its being shown that the testator had not himself mutilated it, and also that he had no *animus revocandi*.

STAMPS ON PROMISSORY NOTES.

We thought that we had heard the last of a very unpleasant class of cases. But in a recent umber of the *Canada Law Journal* (vol. 18, p. 438) a case of *Bradley* v. *Bradley* is reported, in which the Judge of the County Court of the County of Victoria had to pass upon a very curious difficulty. To an action on two promissory notes, the defendant pleaded want of stamps. The plaintiff replied, alleging double stamping since the passing of 45 Vic. cap. 1. To this reply the defendant demurred, the fourth ground being that 45 Vic. cap. 1, repealing the Stamp Act, took away the right to double stamp, and if the note was void at the time of the passing of that Act there was now no authority to make it good. The County Court Judge maintained this demurrer. The Judge observed: "It is certainly very unfortunate that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said that the last will of a party is to be favorably construed, because the testator is *inops consilii*. That we cannot say of the Legislature, but we must say that it is "*magnas inter opes inops*." So that the repeal of the Stamp Act has had the singular effect of depriving the owner of a note void for want of stamps at the time of the passing of the repealing Act, of the privilege of making it good, by affixing double stamps, as was formerly allowable.

NOTES OF PUBLICATIONS, &c.

The American Law Review, December, 1882, Little, Brown & Co., Boston.

An announcement appears in the December number that the *American Law Review* has been transferred to the publishers of the *Southern Law Review*, St. Louis. The two publications will be merged into one, which will bear the old title of "The American Law Review," and will retain "all the best features of the two Reviews." The *American Law Review*, during the past sixteen years, has occupied a very prominent place in the legal literature of the United States, and has been conducted with marked ability and vigor. The mantle of the departed Review, however, has fallen upon a worthy successor, and we may expect to see the promise of the prospectus honorably fulfilled. But what say the New England bar to this injunction to "go West" for their legal literature?

The Criminal Law Magazine. F. D. Linn & Co., Jersey City.

The November number brings volume III of this publication to a close. The *Criminal Law Magazine* is admirably managed, and keeps the profession well informed with regard to all important criminal decisions, the leading cases being reported in full, and the rest embodied in an alphabetical digest which appears in each issue.

The Quebec Law Digest, by Mr. C. H. Stephens, B.C.L., Advocate.

Part III., which has just been issued, completes the second volume of this useful publication, comprising over 400 pages.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTRÉAL, 31 Octobre 1882.

Coram JETTÉ, J.

C. H. LEMONIER v. E. L. DEBELLEFEUILLE.

Bail—Locateur et Locataire.

JUGÉ: 1o. *Que le locateur est tenu de donner une possession complète et utile de l'héritage loué avant de pouvoir forcer le preneur de remplir aucune de ses obligations. Ainsi le locateur ne pourra opposer à son locataire qui demande la résiliation du bail parceque l'immeuble ne lui a pas été livré tel que convenu, que le locataire n'a pas en rentrant en possession garni les lieux tel que le veut la loi;*

2o. *Que dans un bail d'un immeuble cette clause: "Et il est expressément convenu que le dit "bailleur sera tenu: 1o. de faire nettoyer le "puits et d'y poser un appareil pour y puiser "de l'eau," implique nécessairement l'obligation de mettre le puits en question en état de fournir l'eau nécessaire pour l'exploitation de la maison louée, et qu'à défaut de remplir cette obligation, le locataire peut faire résilier le bail et faire condamner le locateur aux dommages en résultant;*

3o. *Que le notaire qui a fait le bail ne peut être examiné pour prouver ce qui s'est passé lors de la confection de l'acte, et qui n'apparait pas par l'acte lui-même.*

Le jugement élaboré qui suit fait suffisamment ressortir tous les faits de la contestation en cette cause.

Autorités pour le demandeur: 1 Pigeau, Procédure du Chatelet, page 337.

Pour le défendeur: 1 Larombière, page 617; Demolombe, Vol. 25, p. 4, No. 4; Laurent, Vol. 24, page 169, Nos. 169, 170, 171; Troplong, Vente, Vol. I, Nos. 310, 312, 314.

PER CURIAM. "La Cour après avoir entendu les parties par leurs avocats sur la réponse en droit des demandeurs à la seconde exception du défendeur et sur le fond du litige mû entre les dites parties, pris connaissance des écritures par elles faites pour l'instruction de leur cause, examiné leurs pièces et productions respectives, entendu et duement considéré la preuve et sur le tout délibéré;

"Considérant que par bail en date du 30 juin 1882, le défendeur a loué aux demandeurs, pour le terme de dix mois, à compter du mois de juillet alors prochain, un immeuble décrit comme suit: "Un emplacement situé au Co- "teau St. Pierre, en la municipalité de la pa- "roisse de Montréal, étant les lots de terre "connus sous les numéros trente, trente et un, "cent quinze et cent seize de la sub-division "du lot numéro cent quatre-vingt-un (No. 181, "30, 31, 115 et 116) du Cadastre de la munici- "palité de la dite paroisse de Montréal; avec "une maison en bois à deux étages, étable et "autres dépendances dessus construites."

"Et que ce bail a été ainsi fait moyennant la somme de $208.33⅓ pour le terme susdit, et que par le dit bail le défendeur s'est expressément obligé de faire nettoyer le puits, se trouvant sur le dit emplacement et d'y poser un appareil pour y puiser de l'eau.

"Considérant que les preneurs au dit bail se plaignent maintenant de ce que bien que le défendeur ait fait nettoyer le puits sus-mentionné et y ait fait poser un appareil pour puiser de l'eau, le dit puits leur est néanmoins complètement inutile, attendu qu'il n'y vient pas d'eau, et que sans eau la maison louée est inhabitable;

"Considérant que les dits preneurs allèguent en outre qu'à raison de cette absence d'eau ils ont perdu la sous-location de la dite maison au prix qu'ils payaient eux-mêmes; qu'ils ont encouru pour leur enménagement des frais s'élevant à $56; et que par la résiliation du bail ils perdront la récolte du terrain loué s'élevant à $200; et qu'à raison de ce que dessus les preneurs concluent à ce que le défendeur soit condamné: 1o. A mettre le puits en question en état de leur fournir l'eau nécessaire; 2o. qu'à défaut de ce faire le bail soit résilié et le défendeur condamné à leur payer $256 pour perte de récolte et frais par eux encourus; et 3o. que si le puits est réparé et mis en état de fournir de l'eau, les demandeurs soient alors déclarés affranchis de tout loyer pendant le temps qu'ils auront été privés d'eau, et le défendeur en ce cas condamné seulement à $3 frais d'un protêt le mettant en demeure de fournir l'eau requise;

"Considérant que le défendeur a plaidé à cette cause:

1o. Qu'il n'a jamais garanti qu'il y aurait de l'eau dans le puits en question, mais qu'au contraire, il a été convenu lors du bail que s'il n'y avait pas d'eau dans le puits les demandeurs construiraient une citerne dans la cave de la maison louée;

2o. Que les demandeurs n'ont jamais garni les lieux loués de meubles suffisants pour en garantir le loyer, et qu'en conséquence n'ayant pas rempli leur part d'obligation ils sont mal fondés à demander au défendeur d'exécuter la sienne ;

3o. Que l'action est vexatoire étant intentée par des étrangers au pays, sans ressources, ni responsabilité ; que d'ailleurs conformément à une autre stipulation du bail le défendeur a fait mettre des dalles et dalleaux au toit de la cuisine et du hangar, pour assurer aux demandeurs l'eau des pluies, et que ceci a suffi à leurs besoins ; de plus qu'il y a une source dans le voisinage suffisante pour leur procurer l'eau nécessaire et qu'ils n'ont souffert aucun dommage ;

4o. Enfin le défendeur est prêt à consentir à la résiliation du bail pourvu que les autres conclusions des demandeurs soient renvoyées.

" Considérant que les demandeurs, tout en niant dans leurs réponses générales les faits allégués par le défendeur, ont spécialement répondu en droit à la seconde exception, disant qu'ils ne pouvaient être tenus de garnir les lieux avant d'en avoir la possession pleine et entière, et en bon état de réparation ; et que par le défaut du défendeur ils ont un droit acquis à la résiliation du bail ; et que cette réponse en droit a été réservée pour adjudication en même temps que sur le fond du procès.

" Adjugeant d'abord sur la réponse en droit ;

" Considérant que les termes du bail susrécité impliquent nécessairement l'obligation pour le défendeur de mettre le puits en question en état de fournir l'eau nécessaire pour l'exploitation de la maison louée ; que tant que cette obligation n'était pas remplie les preneurs n'avaient pas une possession complète et utile de l'héritage loué, et n'étaient pas tenus d'accomplir les obligations par eux prises au dit bail ; et que par suite la demande est bien fondée en droit ;

Maintient la réponse en droit des demandeurs à la seconde exception du défendeur, et en conséquence renvoie la dite exception avec dépens.

" Adjugeant maintenant sur le fond ;

" Considérant que le défendeur n'a pas prouvé la modification par lui alléguée de l'obligation prise au bail au sujet du puits, et que la convention additionnelle, impliquant abandon par les demandeurs de l'obligation de fournir un puits donnant de l'eau, n'a pas été établie ;

" Considérant en conséquence que l'obligation prise par le défendeur reste entière et complète ; qu'il est établi en preuve que le puits en question ne fournit pas d'eau ; que l'usage de l'eau dans toute maison habitée est de première nécessité, et que l'inexécution de l'obligation du défendeur à cet égard donnait en conséquence ouverture au recours exercé dans l'espèce.

" Considérant qu'il est prouvé en outre :

1o. Que les frais du bail, déménagement et protêt encourus par les demandeurs sont de $10.50 ;

2o. Que la récolte de fruits à cueillir sur l'immeuble loué, aurait pû rapporter, prise sur le champ, et déduction faite de tous travaux, une somme de $108.75 ;

3o. Que les demandeurs avaient trouvé à sous-louer la moitié de la maison louée à raison de $100, diminuant ainsi leur loyer d'autant et s'assurant un bénéfice correspondant, mais que cette sous-location n'a pas eu lieu à raison de l'état du puits en question ;

4o. Enfin que par leur occupation de l'autre partie de la maison louée, au taux de location stipulé, les demandeurs auraient retiré du dit immeuble, pour leur propre logement une valeur de $100, et que toutes les dites sommes forment réunies un total de $319.25 que les demandeurs auraient en partie retirée du dit immeuble et qu'ils ont pour l'autre partie dépensé à raison du dit bail ;

" Considérant en conséquence que les dites sommes forment pour le cas de résiliation du bail susdit un chiffre de pertes et dommages s'élevant à $319.25 comme susdit, mais que de ce chiffre il convient de déduire le montant du loyer payable par les demandeurs, savoir : $208.33⅓, ce qui ne laisse en faveur des demandeurs qu'une balance de $110.90 courant, qui est la seule créance que les demandeurs puissent éventuellement réclamer du défendeur ;

" Considérant enfin que les allégations de la troisième exception du défendeur ne sont pas prouvées ;

" Renvoie les exceptions et défenses du dit défendeur et en conséquence le condamne à faire faire sous 15 jours de la présente sentence les travaux nécessaires pour mettre le puits creusé sur le dit emplacement loué par lui aux

demandeurs en état de fournir à ces derniers l'eau nécessaire pour les besoins de l'occupation de la maison louée, et à défaut par le défendeur de se conformer au présent jugement dans le délai susdit, déclare le dit bail passé entre les parties résilié et cassé à toutes fins que de droit, et condamne le défendeur à payer aux demandeurs à titre de dommages leur résultant de l'inexécution des obligations du dit bail par le défendeur la somme susdite de $110.90 avec intérêt de ce jour; mais dans le cas d'exécution par le défendeur des travaux sus-ordonnés, déclare simplement les demandeurs libérés à titre d'indemnité pour les dommages soufferts de tout loyer échu de la date du dit bail à celle de l'exécution et accomplissement des dits travaux, et ne condamne le défendeur en ce cas qu'au paiement de la somme de $3 frais du protêt à lui signifié; mais le condamne dans tous les cas aux dépens distraits à Messieurs Barnard, Beauchamp & Creighton, avocats des demandeurs."

Barnard, Beauchamp & Creighton, pour les demandeurs.

DeBellefeuille & Bonin, pour le défendeur.

(J.J.B.)

SUPERIOR COURT.

SWEETSBURG, April 23, 1881.

Before PAPINEAU, J.

EMILY C. CUPPLES v. H.A. MARTIN et al.

Legacy to children born and to be born.

A legacy to a person and her children born and to be born of her marriage is valid, even ast regards children born of that marriage, that were neither born nor conceived at the time of the death of the testator.

The late John Irish made his will the 11th February, 1854, by which he instituted his sister Emily Irish, wife of John Cupples, and her children born and to be born of her marriage with said Cupples, his universal residuary legatees, and died on the 5th December, 1855, leaving a farm which under his will became the property of his said legatees.

The plaintiff, issue of the marriage of Emily Irish and John Cupples aforesaid, was born 27th September, 1857, about three years after the decease of the testator.

In the year 1863, Emily Irish, authorized by her husband, sold the said farm to defendant H.A. Martin, who is now in possession of it.

This action, which is *en partage*, was brought by the plaintiff to recover her share therein as legatee under said will, as well as one of the heirs at law of two, brother and sister, who had previously died without issue and *ab intestat.*

The defendant H.A. Martin met plaintiff's *demande* with, among other pleas, an *exception en droit*, alleging that the plaintiff was neither born nor conceived at the time of the testator's demise, and could not recover.

G. B. Baker, Q.C., for defendant H. A. Martin, cited Toullier and the commentators of the French Code.

The plaintiff demurred to this *exception en droit;* and *Amyrauld*, for plaintiff, cited C.C., art. 838; Codifiers' Reports, vol. 2, page 170, art. 90; Guyot, verbo Légataire, pages 44-46 and 53; Denizart, vo. Legs Caducs, No. 2; ib. vo. Partage, No. 70; Institutes, Justinien, Vol. 3, page 302; Beaubien, Lois Civiles, Vol. 2, pages 123 and 159; Pothier, Substitution, sec. 2, art. 2; Pothier, Donations, chap. 2, art. 5.

PER CURIAM. — "Considérant que le testateur nommé dans la demande, feu John Irish, a donné et légué, après certains legs particuliers, l'universalité et résidu de ses biens, meubles et immeubles à Dame Emily Irish, sa sœur, épouse de John Cupples et aux enfants nés et à naître du mariage de la dite Emily Irish avec le dit John Cupples, qu'il institua légataires universels du résidu de ses biens pour par eux en jouir, user, faire et disposer en pleine propriété en vertu de son testament en date du 11 février 1854, et que le dit testateur est décédé le 4 décembre 1855.

"Considérant que le dit legs est fait à personnes capables quant à la dite Emily Irish et aux enfants nés du dit mariage ou seulement conçus lors du décès du dit testateur, et que par le décès de ce dernier ceux qui étaient capables de recevoir ce legs ont été saisis légalement des biens légués, mais qu'ils n'en ont été saisis qu'à la charge de restituer à chacun des enfants à naître du dit mariage à mesure qu'il en naîtrait sa portion virile des biens légués et à la charge de partager avec ces derniers.

"Considérant qu'il est allégué dans la demande que la demanderesse ainsi que ceux dont elle réclame les droits sont nés du dit mariage, et que le dit testament doit avoir son effet plein et entier, et que l'espèce de substitution tacite créée en leur faveur par le dit testa-

ment n'est pas illicite, et que la demanderesse et ceux qu'elle représente existaient au temps où le dit legs a pris effet en leur faveur.

"Considérant que si depuis la promulgation de notre Code Civil, il peut se faire qu'on exprime du doute sur le droit de la demanderesse, à raison de la rédaction de l'article 838 du dit Code, ce doute n'était pas possible dans notre pays avant le Code, particulièrement dans le cas où le legs était fait à des enfants déjà nés, ainsi qu'à d'autres à naitre;

"La Cour maintient la réponse en droit faite par la demanderesse à l'exception péremptoire en droit plaidée par le défendeur Henry A. Martin, produite en cette cause, et fondée sur la prétention que la demanderesse et ceux dont elle réclame les droits en vertu du dit testament n'étaient pas nés ni même conçus lors du décès du testateur John Irish, et rejette la dite exception avec dépens distraits à Messrs. Lynch, Amyrauld & Fay, avocats de la demanderesse."

Lynch, Amyrauld & Fay, attorneys for plaintiff.

Geo. B. Baker, Q.C., attorney for defendant, Martin.

(T. A.)

SUPERIOR COURT.

MONTREAL, Nov. 25, 1882.

Before TORRANCE, J.

LORANGER, Atty. Gen. P.Q., v. THE MONTREAL TELEGRAPH CO.

Action against corporation for forfeiture of charter —Provincial Attorney-General—C. C. P. 997.

Held, that the Attorney-General for the Province of Quebec had a right to petition, under C. C. P. 997, *to have it declared that the Montreal Telegraph Company had forfeited its charter.*

This was a petition by the Attorney-General, under C. C. P. 997, praying that the defendants, for reasons given, should be declared to have forfeited their charter. The case was before the Court on the merits of an *exception à la forme* made by defendants on the ground that the proceeding should have been in the name of the Attorney-General of the Dominion of Canada, and not of the Attorney-General of the Province of Quebec.

PER CURIAM. By the Confederation Act of 1867, sec. 130, it was enacted that "until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces, shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties as if the union had not been made." So far, it would seem that the Attorney-General of the Province had authority to sue. We have next the Statute of Canada of 1868, Cap. 39. Section 3 enacts that the Attorney-General of Canada "shall have the regula- "tion and conduct of all litigation for or against "the Crown or any public Department, in res- "pect of any subjects within the authority or "jurisdiction of the Dominion." It is now to be remarked that the first statutes creating or extending the powers of the defendant, were provincial, passed by the late Province of Canada, and the chief office of the Company was at Montreal. Since confederation, two or three acts have been passed by the Dominion Parliament extending the powers of the company over other Provinces of the Dominion.

My conclusion is that the Provincial Attorney General has a right to petition as he has done, and that the exception should be overruled. It may be competent to the Attorney-General of the Dominion to intervene in this suit. Perhaps he should do so, but the power of the petitioner to present his petition should not be questioned.

Exception dismissed.

J. E. Robidoux for petitioner.

Abbott, Tait & Abbotts for defendants.

SUPERIOR COURT.

MONTREAL, Dec. 16, 1882.

Before TORRANCE, J.

O'SHAUGNESSEY et al. v. HARVEY et al.

Liquidation of Mutual Building Society—Distribution of Assets.

In the liquidation of a mutual building society, a resolution passed at a meeting of the borrowing members, to discharge those who within three months should pay 80 *per cent. of their indebtedness, the overplus after paying the non-borrowing members in full, to be divided between the borrowing members, does not bind non-borrowing members who did not acquiesce in the resolution.*

This was a petition by five members of St. Bridget's Mutual Building Society, who set forth that they had all paid money into the Society previous to June, 1879; that at that date the Society went into liquidation; that the defendants were appointed liquidators and accepted the office; that the liquidators had in great measure realized the assets of the Society, and had in hand $3,000; that by law the liquidators were bound from time to time to distribute said assets, and the only persons entitled to share therein were petitioners, and Andrew Cullen, John Curran, George Crutchlow; that the liquidators had not performed their duty in such distribution; wherefore, a mandamus directed to them, ordering that such distribution be made among said parties, was prayed for.

The plea of the liquidators said that if the parties indicated were entitled to share, they were not the only ones entitled to share in said assets; that the statutes providing for liquidation, 42 Vict. cap. 48, Canada, and 42-43 Vict. cap. 33, contained no enactment constraining the borrowing members or other debtors of the Society to pay back their loans or debts before maturity under the terms of the obligations entered into by such members or debtors; that section 4 of the Canada Statute, and section 18 of the Quebec Act, 42-43 Vic. c. 32, authorized the liquidators to dispose, either by private sale or by auction of the moveable and immovable property of the Society, including the debts due to it, and to compound and compromise with the Society's debtors, and to do whatever they might deem to be advisable in order to the liquidation on the most advantageous terms; that defendants called a meeting of borrowing members or debtors for the 11th August, 1879, and at that meeting it was agreed by resolution, to discharge the borrowing members who, within three months from that date, should pay 80 per cent. of the balance due by them, under the condition expressly contained in the resolution: "that should there be any overplus, after paying all the non borrowing members, dollar for dollar, as that was all they wanted, it (such surplus) would be divided amongst the borrowers, provided the borrowers would all pay up within three months from date, but if not paid up within three months from date, then the non-borrowers would receive bankable interest (four per cent.) on their amounts, and the balance, if any, divided between the borrowers." That said resolution was a contract between the Society and the borrowing members; that a sufficient number of borrowing members paid to enable the defendants to pay the non-borrowing members who claimed to be paid, the amount of the money by them invested and paid, dollar for dollar, with interest from the date of entering into liquidation, at the rate of four per cent.; that said agreement with the borrowing members did not require the consent of the other members to be valid; but it was generally accepted and adhered to by the generality of the non-borrowing members, who accepted their money with four per cent. interest, the petitioners and said three members alone remaining unpaid of a balance of 15 per cent. of their money with interest as above; that the fund in the hands of the defendants in excess of said 15 per cent. and interest was held in trust for the borrowing members whose it was.

The plaintiffs demurred to a large portion of the plea on the ground that the resolution was passed at a meeting of the borrowing members only, and it did not appear that petitioners assented thereto, and it would not bind the Society. The petitioners also answered specially.

PER CURIAM. It appears to me to be a weak point in the defence that they should reserve a large portion of the funds for the benefit of the borrowing members and ignore the claims of the non-borrowing members. The resolution agreed to by the borrowing members may be binding on them, *conventio facit legem*, but it could not bind the Society generally, without its consent, which, so far as the petitioners are concerned, has not been given. The powers given to the liquidators are very large, and in this liquidation, I have nothing to say against the wisdom which inspired the settlement with the borrowing members, but it appears that they are themselves borrowing members, and are interested to maintain the settlement against the petitioners. The proper course, it appears to me, is to order a distribution of the funds not for the exclusive benefit of the petitioners, but according to the rights of all, for the benefit of all who are still members of the society.

Mandamus granted against defendants.

Doherty & Doherty for petitioners.

Doutre & Joseph for liquidators.

SUPERIOR COURT.

MONTREAL, Dec. 13, 1882.

Before TORRANCE, J.

McGIBBON es qual. v. ABBOTT es qual.

Will—Power to divide among children—Exercise of power.

Where an estate was devised to A in trust, with power to divide among A's children in such proportion as A should appoint by his will, and in default of such appointment the estate to go to the children share and share alike; Held, that an appointment by will to certain of the children, to the entire exclusion of one, was not a valid exercise of the power, and the child excluded became entitled to an equal share.

This was an action by the tutor of the minor child of the second marriage of John Octavius Macrae, to recover from the tutor of the children of his first marriage, one-fifth share of the estate left to said John Octavius Macrae. William Macrae, by the 12th clause of his will, declares as follows: "I give and bequeath unto my execu-

s, hereinafter named, for the use, benefit, and behalf of the children, issue of the present or any future marriage of my son John Octavius Macrae, one-third of the residue and remainder of my estate and succession, to have and to hold the same upon trust, firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and re-invest the same, and during the life of my said son John Octavius Macrae, to pay the rents and revenues derived therefrom to my said son for his maintenance and support, and for the maintenance and support of his family; and secondly, upon the death of the said John Octavius Macrae, then the capital thereof to his children, in such proportion as my said son shall decide by his last will and testament; but in default of such decision, then share and share alike, as their absolute property for ever." William Macrae died in 1871, and John Octavius Macrae made his own will, so far as the present case is concerned, in the following words: "I will, bequeath, direct and appoint that my son John Ogilvy Macrae, and my three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, shall be entitled equally share and share alike to the trust fund over which I have a power of appointment under my father's will." John Octavius Macrae departed this life in 1881, and left not only the four children mentioned in his will as above, being the issue of his marriage with Dame Victoria St. George Ritchie, but also a fifth child, issue of his second marriage with Dame Mary Ann Jenaway. The pretension of the plaintiff was that by the above recited clause of the will of the late Wiliam Macrae, a fiduciary substitution was created in favor of all the children by the first or any subsequent marriage of the said John Octavius Macrae, and John Octavius Macrae had merely the power and right under the said will, to decide by his last will in what proportion the capital thereof should be divided among the said children, but had no right to exclude any one or more of the children from the benefits of the said substitution to which all were entitled. That the said John Octavius Macrae did not by his will make any proper division or distribution of the capital of said bequest, but decided that the same should be divided between the children of his first marriage alone, and neglected and failed to allot or give any share whatever in the said capital unto Humphrey G. E. Macrae, the fifth child, although the latter was well entitled to a share thereof, under the substitution created by the will of William Macrae. That in consequence of said illegal exclusion of Humphrey G. E. Macrae from the benefits of said disposition, the pretended division in the will of John Octavius Macrae was null and of no effect, and the said capital should by reason of the default of any valid decision in accordance with the terms of the will of William Macrae, be divided share and share alike, among all the children of John O. Macrae, and the plaintiff *es qualité*, should receive one-fifth thereof, as the share of Humphrey G. E. Macrae.

The pretension of the defendant was, that under the will of William Macrae, the executors received the one-third of the residue of the estate and succession of William Macrae upon trust, among other things, to pay, upon the death of John O. Macrae, the capital of said residue to the children of John O. Macrae, in such proportions as he should decide by his will; that by his will, said John O. Macrae, did decide upon the proportions in which the capital of said residue should be paid over to his children, to wit: in the proportions mentioned in plaintiff's declaration, and that John O. Macrae, according to the

true intent and meaning of said will of William Macrae, had the right to decide upon such pro portions in manner and form as he did so decide by his last will. That John O. Macrae was not bound or obliged under the terms of the will of William Macrae, and according to the true intent and meaning of the testator, to appoint, grant or bequeath by his last will, any portion of said capital to Humphrey G. E. Macrae, who is not entitled to any share or proportion thereof.

PER CURIAM. The construction to be put upon such a power as that given by the will of William Macrae to John Octavius Macrae has frequently been considered in England, and it was agreed that where power was given to appoint property, real or personal, among several objects, no one of the objects could be excluded, or some one or more of the objects of the power could not be excluded by the donee of the power from a share of such property, but it was also agreed that it was not necessary to give a substantial share of such property to each object of the power. This was the construction on the 30th July, 1874, and it frequently happened that instruments intended to operate as executions of such powers, were invalid in consequence of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others of such objects, and the law was accordingly amended by the Imperial statute 37 & 38 Vic. c. 37. This enacted that no appointment which from and after the passing of this act should be made in exercise of any power to appoint any property among several objects, should be invalid, on the ground that any object of such power had been altogether excluded, but every such appointment should be valid and effectual notwithstanding that any one or more of the objects should not thereby or in default of appointment take a share or shares of the property subject to such power. The construction put upon such powers in England is not binding upon us, but as written reason, such construction is of the highest value. The question before us is one of pure construction, and I cannot do better than cite the words of Farwell's work on Powers, published in 1874. At p. 294 we read, "Each case must depend on the "intention expressed in the particular instru- "ment creating the power; no general rule can "be laid down, except that the words 'all' "and 'every' are mandatory, and make it ne- "cessary that each object should have a share, "and that 'such' authorises exclusion, unless "a contrary intention appears." Jessel, M. R., in Veale's Trusts, 4 L. R. Chan. Div. 65, says: "I have no doubt that is the law."

Looking then at the words employed by the testator, he made the bequest to the children of John Octavius Macrae, which may be regarded as the same as "all" the children, and he did not use the word "such" of the children as John Octavius Macrae might select. *Stotworthy* v. *Sancroft*, in 10 Jur. N. S., 762, is in point, and it is approved by Redfield on Wills, Vol. 1 of 4th edition, A.D. 1876.

The plaintiff will have judgment.

R. D. McGibbon for plaintiff.

D. Girouard, Q.C., Counsel.

H. Abbott for defendant.

CIRCUIT COURT.

MONTREAL, March 15, 1882.

Before JOHNSON, J.

THE BURLAND LITHOGRAPHIC CO. v. BILAUDEAU.

Recall of judgment.

Judgment of nonsuit obtained through the absence of plaintiff's attorney when the case is called, will be revoked on motion, if such absence be due to cas fortuit; but such motion must be made without delay.

The motion to recall set up that the absence was unavoidable, and through no fault or negligence; that plaintiff's attorney reached the Court-room at 10.40 by the clock; that the cause was fourteenth on the roll; and the witnesses, &c.. had been ready. Affidavit specializing the grounds accompanied the motion.

The COURT, after *délibéré*, expressed disapproval of the current practice of "snapping judgments." After conference with other judges, and reference to a motion of a similar kind granted in the February term by Rainville, J., and more especially to a recent decision in Review, it appeared clear that nothing existed in our own law, nor in the analogies of France and England, to prevent the revocation asked for, and therefore the conformability of the request to general principles of justice makes it admissible. The form falls under 21 C.C.P. One objection alone presents itself. Judgment was rendered on the 18th—why had not the plaintiff moved the Court next morning?

Upon explanation that one clear day's delay had been given for the sake of strict form:

Motion granted, the plaintiff paying the costs of the day.

W. D. Lighthall for plaintiff.

Mercier & Co. for defendant.

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