

will would be to give her the power to transfer it to someone outside the family, which seems to us to be the very contingency the testator wished to avoid.

We are aware of the general rule that when property is devised or bequeathed by will to heirs or next of kin, they are to be ascertained as of the date of the testator's death. *Simes v. Ward*, 78 N. H. 533. However, it is equally true that this general rule must yield to the intent of the testator. *Burpee v. Picard*, 94 N. H. 307, 309. Here the impression produced by the will as a whole, construed in the light of the surrounding circumstances, is that the testator desired his heirs to be determined as of the date of the death of his daughter Bertha, the life tenant.

At the time of her death, the heirs of the testator were all his grandchildren, and standing in equal degree of relationship to him, they should therefore inherit equal shares. *Remick v. Merrill*, 80 N. H. 225, 230.

It follows that the proceeds of the sale of the disputed property are to be distributed one-quarter to the plaintiff and one-quarter to each of the three defendants.

Remanded.

All concurred.

Hillsborough,
No. 4819.

ANGUS M. MACNEIL

v.

JEAN LATHE, *Justice of the Municipal Court of Brookline & a.*

Argued February 1, 1960.

Decided February 29, 1960.

[REDACTED]

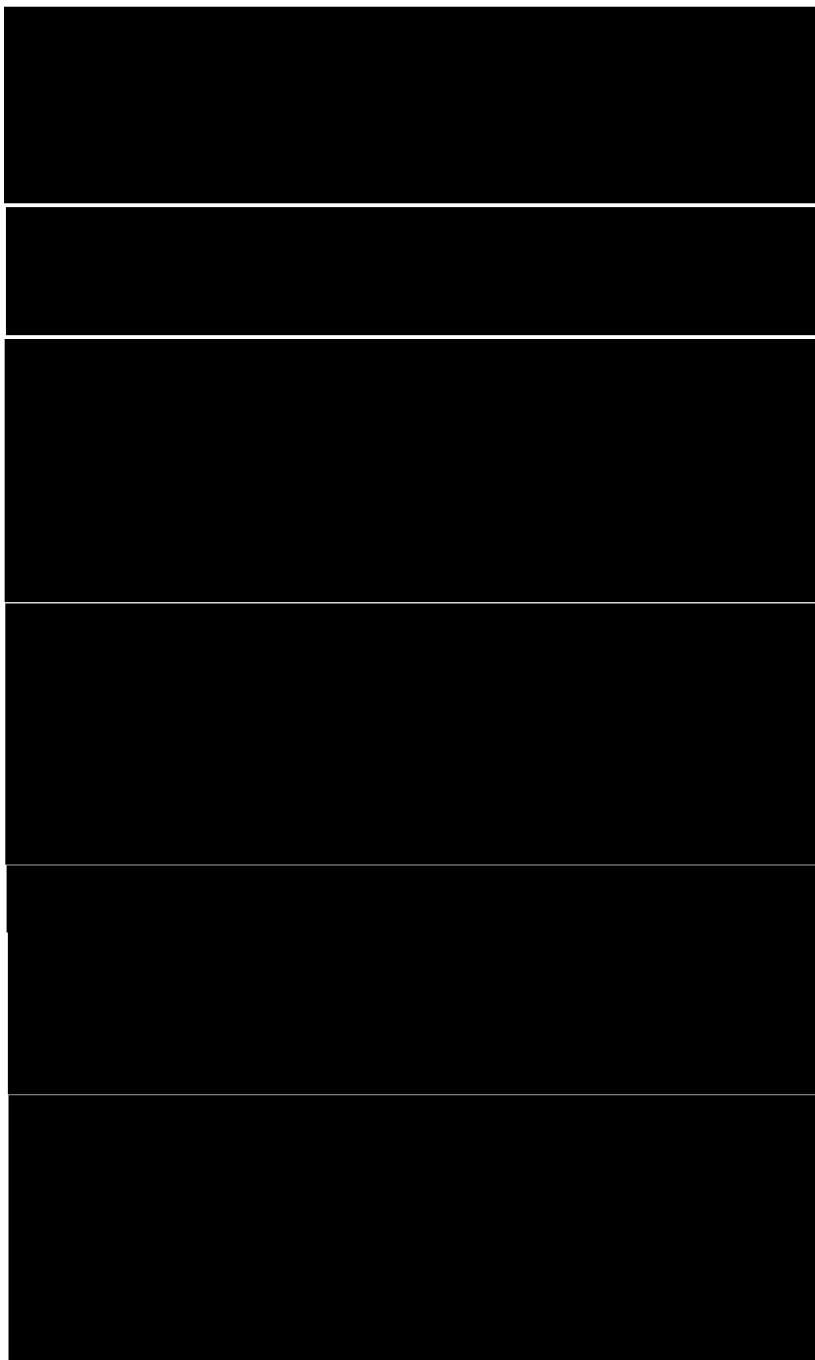
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Angus M. MacNeil (by brief and orally), *pro se*.

Edward F. Smith and James M. Riley, Jr. (Mr. Smith orally),
for defendant Lathe.

LAMPRON, J. Defendant first argues that the "Findings, Rulings and Decree," of the Court were premature. We agree with this contention.

"As a general rule, notice and an opportunity to be heard are basic essentials of a judicial proceeding . . . The requirement of notice and hearing need not be observed in matters which are formal, clerical or uncontested . . . and special circumstances may demand the issuance of court orders without initial notice or hearing as in the case of injunctions . . . As a matter of practice notice and hearing represent the general rule and the denial of a hearing is the exception." *DiPietro v. Lavigne*, 98 N. H. 294, 295; *In re Poulin*, 100 N. H. 458, 459.

It is true that a motion was properly disposed of on the allegations thereof when that "form of proceeding was accepted by both parties without objection." *Kusky v. Laderbush*, 96 N. H. 286; *Rosenblum v. Company*, 99 N. H. 267, 270. It was also proper to decide a claim in a receivership on the statements of counsel without the offer of testimony when that form of proceeding was accepted by the parties. *Wein v. Arlen's*, 98 N. H. 487, 489. However there was no such agreement in this case. The defendant did not agree to plaintiff's pleadings, there was no agreed statement of facts, nor was any testimony offered. There is nothing in the record to indicate that defendant waived her right to a hearing. On the contrary the record shows that defendant insisted on all her rights.

Even RSA 597:33 on which the Trial Court relies in its decree for taking jurisdiction of plaintiff's petition states that "The

superior court may render judgment . . . after hearing." The Trial Court's decree is set aside because it was made without the hearing to which the defendant Lathe was entitled. *DiPietro v. Lavigne, supra*. In view of this result it is unnecessary to decide whether RSA 597:33 confers jurisdiction on the Superior Court in this case or whether MacNeil was subject to arrest.

Plaintiff's claim that the municipal court of Concord was without jurisdiction to set bail in a case returnable to the municipal court of Brookline was transferred by the Trial Court without ruling.

RSA 597:5 provides that "Every court and justice may require a person accused of an offense in which he is authorized to receive bail to recognize, with sureties, to appear at a future time before himself or any other competent tribunal." The offenses with which plaintiff was charged were not within the offenses described by RSA 597:4 which are bailable by the Superior Court only. The municipal court of Concord therefore had jurisdiction to set bail in this case and this is especially so when, as here, it is done at the demand of and without objection from the plaintiff.

Decree vacated; remanded.

All concurred.

Grafton,
No. 4736.

ROY E. PATTEN *v.* ROLAND W. NEWTON.

Argued March 1, 1960.

Decided March 31, 1960.