

It is not suggested that any new material facts could be brought out on the trial of an issue. . . . There is no doubt that the testatrix was corresponding with Margaret. Maria says she also received letters from her aunt.

An order must go for payment out to Maria, but it is a case in which, I think, costs of both parties should be paid out of the fund, and I fix the costs of Margaret Baxter at \$25.

BRITTON, J.

NOVEMBER 21ST, 1904.

CHAMBERS.

RE MAYBEE.

Will—Devise to Stranger and Heirs—Remainder over in Default of Heirs—Devise Voided by Devisee Witnessing Will—Acceleration of Remainder.

Application under Rule 938 by the executor of the will of Angeline E. Maybee, deceased, for the opinion and direction of the Court as to the person or persons entitled to the estate under the will.

J. W. Gordon, Brighton, for executor.

A. R. Clute, for John Heber Fogarty.

BRITTON, J.—The will is dated 16th November, 1899, and the testatrix died on 7th February last, leaving a farm of 100 acres in the township of Murray, but no personal estate so far as appears.

The clause in the will occasioning the difficulty is the following: "I hereby bequeath to my adopted daughter Elizabeth Leavis the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease, without heirs, I further direct that whatever may remain of my real and personal estate shall go to my nephew John Heber Fogarty for his sole use and disposal."

Elizabeth Leavis, unfortunately, was one of the witnesses to the will, and so the gift to her is void under sec. 17 of the Wills Act of Ontario.

Under the authority of *Aplin v. Stone* [1904] 1 Ch. 543, the will must be construed before sec. 17 is applied.

The decease of Elizabeth Leavis does not, in this case, mean her death before the death of testatrix. The will contemplates the entry by Leavis into possession of the property and such user of it as she pleases during her life. "Without heirs" in this case means "without children lawfully begotten" or "without heirs of the body." There is no gift to children or "heirs" if there should be such born to Leavis, but in that case, had the gift to Leavis been good, then the