

It was shewn by affidavit that it was impossible to carry out the wishes of the testatrix in regard to the memorial window, all the windows in the church having been appropriated; and it was proposed to expend \$25 or \$30 in having the testatrix's name engraved upon a monument in the churchyard.

The executor moved for an order determining the following questions:—

- (a) Does the bequest of \$350 to the executor in trust lapse?
- (b) Does it go to the residuary legatee or does it go to the heirs or next of kin equally as on an intestacy?
- (c) Has the executor any power to expend the whole or any portion in having a monument erected or placing an inscription upon a monument?

The motion was heard in the Weekly Court.

Wilson McCue, for the executor and others interested.

LENNOX, J., in a written judgment, said that an executor is not limited to a literal execution of the terms of the will. If literal compliance is impossible, it is his duty to carry out substantially the lawful purposes of the testatrix if this is possible. "Where literal compliance with the condition becomes (or is) impossible from unavoidable circumstances, and without the default of the party, it is sufficient that it be complied with as nearly as it practically can be, i.e., *cy-près*." Wharton's Law Lexicon.

The monument referred to is, no doubt, to the memory of some member of the testatrix's family; there can be no reason why the executor should not expend the moderate sum proposed in having the name, &c., of the testatrix inscribed thereon; and the expenditure of a sum not exceeding \$30 of the \$350, for this purpose, should be sanctioned.

"A general residuary gift includes all interests, not themselves interests in the general residue, which are otherwise undisposed of or which fail in any manner, unless the testator provides otherwise." Halsbury's Laws of England, vol. 10, p. 605, para. 1187.

No contrary intention was to be gathered from the terms of this will. The testatrix intended to dispose of the whole of her estate and effects by her will, and that whatever should be left, after providing for the other purposes set out in the will and codicil, and having regard to conditions as they might arise, should go to her niece Mary Adams.

A sum not exceeding \$30 should be applied in the manner