

I think the principle to be applied in dealing with this will is at one with that stated by the learned Chancellor in *Re Hamilton*, 27 O.L.R. at p. 447, and that the right of the beneficiary can only be defeated by "making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary." In this he follows *In re Johnston*, [1894] 3 Ch. 204.

Where it has been held that the fund does not go to the beneficiary, it is because the destination of the fund is controlled in one or other of those ways. See *Re Nelson*, 12 O.W.R. 760; *Re Rispin*, 25 O.L.R. 633, 46 S.C.R. 649; *Re Hamilton*, 27 O.L.R. 445, 28 O.L.R. 534; *Re Collins*, 4 O.W.N. 206.

In no case that I have been able to find has the mere interposition of a trustee to hold and to expend the moneys been held to defeat the vesting of the gift where otherwise no controlling discretion is vested in him.

There should be a direction that the trustee should pay over the balance of the fund to Angela Crotty, after payment of any moneys properly expended by her thereout and of her commission and the costs of this motion; the account to be taken by the Master at London.

Costs of all parties out of the fund; those of the trustee as between solicitor and client. This motion was properly made in Court.

BRITTON, J.

OCTOBER 31ST, 1913.

RE OUDERKIRK.

Will—Construction—Provision for Widow—Dower—Election between—Lien on Whole Estate for Annuity—Deficiency of Income to be Made up out of Corpus—Maintenance of Infant—Duty of Executors.

Application by the executors of the will of John Ouder Kirk, deceased, upon originating notice, for an order determining certain questions arising upon the construction of the will in relation to the administration of the estate and for the opinion and advice of the Court upon certain matters connected with the estate.

The will was dated the 26th November, 1910; and the testator died on the 18th February, 1911, leaving an estate of the value of about \$6,500.