

LENNOX, J., in a written judgment, said that, under the terms of the will of Timothy Tracey, all his estate, for the purposes of administration, was to be treated as personalty. The money in dispute in this action was the share of that estate to which John, Jeremiah, and Mary Tracey became entitled as legatees, at the death of Timothy Tracey, by the terms of his will, if they were then alive. Timothy Tracey made his will on the 5th May, 1893, died on the 20th February, 1904, and his will was admitted to probate on the 17th March, 1904.

Two of the provisions of the will were as follows:—

“Should my estate be insufficient to pay the said legacies in full then the legacy to the Roman Catholic Episcopal Corporation shall be paid in full out of the pure personalty as aforesaid and the other legacies shall as far as necessary be abated proportionately to their respective amounts.”

“Should there be any residue of my personal estate after payment of the above mentioned legacies *in full* I give all such residue to the Sisters of St. Joseph Home in Hamilton.”

There were other legatees in addition to the three above mentioned. The legacy to the Roman Catholic Episcopal Corporation was paid in full. Including the three mentioned, there was not quite sufficient to pay all the individual legatees in full; and the estate, after payment of debts etc. and the legacy to the Episcopal Corporation, was divided proportionately; the shares of the three named legatees were paid into Court; and the share of each other legatee, on this basis, had been actually paid.

The defendant Ellen Walsh, alleging upon oath that the three named legatees died on a certain stated day, subsequent to the death of the testator Timothy Tracey, obtained letters of administration of the estates of these three persons from the Surrogate Court of the County of Huron, and thereupon obtained an order for payment out to her of the moneys in Court aforesaid and the interest thereon, but upon the undertaking that the money would be deposited and remain in a chartered bank until the determination of this action; and the money was in a bank on deposit as agreed.

The three named legatees left this country many years ago, and had not been heard of by their relatives or connections or by any person who would be likely to hear from them, if alive, since they left Canada. The last trace of them that could be found was 10 years or more before the death of Timothy Tracey. The legal inference that these three persons were dead should be drawn.

The description of the plaintiffs in the will was not verbally accurate, but the plaintiff corporation was the institution the testa-