

M. Wilson, K.C., and J. B. O'Flynn, Chatham, for plaintiff.

A. B. Aylesworth, K.C., for defendant.

The Judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Section 59 of the Surrogate Courts Act provides that in the case of a person who has died intestate, where it appears to be necessary or convenient, by reason of the insolvency of the estate of the deceased or other special circumstances, to appoint some person to be the administrator of the property of the deceased or of any part of it, other than the person who but for the provision of the section would have been entitled to a grant of administration, it is not to be obligatory upon the Court to grant administration to the person who but for the section would have been entitled to the grant, but the Court is empowered in its discretion to appoint such person as the Court thinks fit to be the administrator.

The cases decided on the analogous provision of the English Court of Probate Act, 1857 (20 & 21 Vict. ch. 77), have given a somewhat narrow construction to it, and it is possible that on the facts of this case the English Probate Court might not have exercised its discretion in favour of making the grant to the respondent.

By the provisions of sec. 41 of the Surrogate Courts Act, it is only the next of kin resident in Ontario who are required to be cited or summoned where the application is made by a person not entitled to the grant as next of kin of the deceased.

The Surrogate Court, therefore, had before it all those who are required to be cited or summoned, and the consent and request of all of them that the respondent should be appointed administrator, and, having regard to the nature of the property left by the deceased, which consisted of a farm as well as of considerable personal property which required to be looked after, and the age of Mary Payne and her illiteracy, it cannot be said, I think, that the learned Judge exercised his discretion improperly in directing the grant to be made to the respondent.

The practice of the Surrogate Courts of this Province appears to be to apply the provisions of sec. 59 more liberally than do the English Courts the corresponding provision of the English Probate Act, and I see no reason why the more liberal practice which has been adopted in this Province should not be continued.

Fraud and misrepresentation being out of the case, and the Surrogate Court having exercised its discretion in