

sion referred to shall be made by my executors immediately after my decease"—attached to one of said testamentary dispositions—form part of the will, it not forming part of the document above the signature of the testator?

(3) If said clause "sixthly" forms part of the will, does it dispose of the whole residue, including the cash in the bank.

S. H. Bradford, K.C., for the executors.

V. A. Sinclair, for R. H. Smith.

MIDDLETON, J.:—The probate issued by the Surrogate Court conclusively determines what documents constitute the last will and testament of the deceased: *Gann v. Gregory*, 3 D. M. & G. 777; *Re Cuff*, [1892] 2 Ch. 229.

On this application I cannot enter into the questions raised by the first two clauses of the notice of motion. The question suggested by the notice whether the clause "sixthly" was properly included in the probate appears to me important, and one which the parties ought to have an opportunity of agitating if so advised. There being some doubt as to the jurisdiction of the High Court under sec. 38 of the Ontario Judicature Act, this attack can best be made by taking proceedings in the Surrogate Court for the revocation of the probate granted. The executors ought to (and no doubt will) facilitate these proceedings; and all persons interested should be brought before the Surrogate Court so that the question may be finally determined. The executors would have been well advised had they proved the will in solemn form in the first instance—a course ought always to be adopted when there is, as here, a grave question as to what document should be admitted to probate.

The declaration in answer to the first two questions submitted will be that it is not open to this Court upon this application to go behind the letters probate to determine what documents constitute the last will and testament of the deceased.

Upon the third question, assuming that the clause "sixthly" is properly included in the probate, I think that the testator has in effect directed a sale of his chattel property, and that the proceeds thereof shall form part of his residuary estate, as shall also the proceeds of his notes and mortgages, and "the whole," i.e., the whole residuary estate, shall be divided and distributed as therein directed.

The answer to this question will, therefore, be, that the money on deposit in the bank to the credit of the testator, according to