

TRIAL.

FENDAL v. WILSON.

Executors and Administrators—Claim of Widow of Intestate to Share in Estate—Notice Disputing—Action by Widow to Establish Marriage—Declaratory Judgment—Administration.

Action by Harriet Fendal against the administrator of the estate of David Fendal, deceased, to establish her marriage with David Fendal and for a declaration that she is entitled as widow to a portion of his estate.

David Fendal died at Brantford on the 12th December, 1902, intestate. The defendant obtained letters of administration. The plaintiff gave notice that she was Fendal's widow. Defendant refused to recognize her as such, and caused a formal notice to be served upon plaintiff disputing her claim. The notice purported to be given under R. S. O. 1897 ch. 129, sec. 35. The plaintiff was not a creditor. She made no claim otherwise than as widow, and shortly after the receipt of the notice she brought this action. Defendant in his statement of defence disputed the marriage. At the trial plaintiff proved that she was duly married to the deceased at Brantford on the 14th January, 1877, and that she and the deceased lived together at Brantford as husband and wife. Defendant made no attempt to controvert this evidence, but he stated that a person, whom he named, had asserted that David Fendal on 14th January, 1877, had a former wife who was then living. No proof was adduced.

W. C. Livingston, Brantford, for plaintiff.

E. Sweet, Brantford, for defendant, argued that plaintiff should have paid no attention to defendant's notice, but should have waited, and after the expiration of a year taken proceedings for administration.

BRITTON, J.—It does not appear that defendant would not, at the expiration of a year as well as now, dispute plaintiff's marriage, and it is not open to defendant now to say that plaintiff should not have acted upon the notice formally given. This action cannot bar the rights of any persons not parties, if such rights exist; but, without prejudice to these, plaintiff is entitled as against defendant as administrator to a declaration that she is the lawful widow of the