

The motion was heard in the Weekly Court, Ottawa.

E. R. E. Chevrier, for the widow.

Henri St. Jacques, for the administrators with the will annexed of the estate of the testator and for the testator's children.

KELLY, J., in a written judgment, said that what was to be determined was whether the testator's widow took, under the will, an absolute interest in his estate or only a life-interest. The testator gave, devised, and bequeathed to his wife "the free use of all my estate both real and personal for her lifetime."

Had this been the only reference to the interest given her, doubt would not have arisen; but this provision in her favour was immediately followed by this other: "After my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, and bequeath to my four children, to be divided among them in equal shares."

The testator evidently contemplated his wife "using" and "spending" the estate at her discretion and without restriction as to amount or the purposes for which she was empowered to use or apply it. Reading the two provisions together, the true construction seemed to be that, given this unqualified right to use and spend the estate, the interest she then acquired was not a mere life-interest or a life-interest with power of appointment over the corpus, but an unrestricted and absolute interest. What the four children would, on their mother's death, take, was, in view of the above disposition in her favour, too uncertain to create an enforceable trust in their favour.

The learned Judge said that there were many reported decisions on the construction of wills, in language nearly but not altogether similar to that employed here; but he could find none binding him to an opinion different from that expressed.

On the argument an affidavit of the person who, on the testator's instructions, drew his will, was offered in evidence to shew what was his intention. That evidence was not admissible and was not accepted. The question was not what the testator intended, but what his intention, expressed in and to be derived from the will itself, was.

Order accordingly; costs of the motion out of the estate.