

As to costs, while . . . all creditors and shareholders have the right to appear upon the motion, they should do this at their own peril unless they are served with notice of motion. There may be cases in which it would be proper to award them their costs against an applicant failing, but this is not one of such cases. The curator is alone entitled to his costs under this order.

LATCHFORD, J.

JANUARY 20TH, 1911.

KENNEDY v. KENNEDY.

*Will—Construction—Direction to Apply Fund for Maintenance of Residence—Provision for Distribution of Fund if Residence Sold—Executory Interest of Distributee—Rule against Perpetuities—Status to Maintain Action—Summary Judgment on Pleadings—Application for Leave to Amend—New Cause of Action.*

Motion by the defendant James H. Kennedy for judgment under Con. Rule 616 upon the pleadings, or for an order under Con. Rule 261 striking out the statement of claim as against the applicant, on the ground that it did not disclose any reasonable cause of action, inasmuch as the plaintiff had no interest in the estate of the late David Kennedy, whose will the plaintiff desired to have interpreted.

E. D. Armour, K.C., for the applicant.

A. J. Russell Snow, K.C., for the plaintiff.

LATCHFORD, J.:—The plaintiff was left \$5,000 by the testator. She alleges that this legacy, and all other pecuniary legacies; and the debts of the testator, have been paid by the acting executor, the defendant now moving. One of the other executors named in the will was not of age at the time probate was granted, and the third, who was of age, renounced her right to probate.

The plaintiff is not one of the next of kin of the testator, but since this action was brought she has, it would appear, obtained an assignment from her father—who is one of the next of kin—of any interest he may have in certain residuary estate of the testator, as to which there may be, it is alleged, an intestacy.

Apart from the assignment referred to, the right, if any, of the plaintiff to maintain this action depends upon whether she