The motion was heard in the Weekly Court at Toronto.

A. M. Denovan, for the executors.

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

M. H. Ludwig, K.C., and A. C. Heighington, for execution creditors.

F. W. Harcourt, K.C., for infants.

MIDDLETON, J., in a written judgment, said that the widow was not put to her election under the will. The more recent cases establish the necessity for some clear indication that the wife is to be deprived of her dower if she takes under the will; neither a direction to sell and realise nor the formation of a blended fund is a sufficient indication of the testator's intention to deprive the wife of her right to dower if she accepts the benefits given by the will: Leys v. Toronto General Trusts Co. (1892), 22 O.R. 603; Re Shunk (1899), 31 O.R. 175; Re Hurst (1905), 11 O.L.R. 6. These cases are not overruled by Re Ouderkirk (1913), 5 O.W.N. 191.

The widow claimed priority over the creditors upon the theory that, the fund being an appointed one, the creditors could have no greater right than that given to them by the will, and that under the will their right was made subordinate to that of the wife. That, however, was not the meaning of the will. The fund from the father's estate cannot be resorted to until there is realisation of the father's estate. As and when it falls in, it will probably be found possible so to arrange as to enable some scheme for the payment of the creditors to be devised which will not bear too hard upon the widow.

Costs of all parties out of the estate.