

The English practice grew out of historical reasons. Until the Probate Court Act of 1857, 20 & 21 Vict. ch. 77, there was no jurisdiction to admit a will of land to probate. The only mode of testing the validity of such will was by an action of ejectment between the heir and the devisee. But in our practice the probate of a will includes realty and personalty: realty is becoming more and more assimilated to personalty: with us the unique distinction of heir-at-law never obtained, for all children shared equally. All the reasons which necessitated (almost) a jury trial as against the heir-at-law in England never existed here; and our practice is settled, whether the contest be in the lower Court or upon the removal of the contention to the High Court, that the trial of fact by jury is a matter for the sound discretion of the Court or a Judge; R.S.O. 1897 ch. 59, sec. 22 (now 10 Edw. VII. ch. 31, sec. 28) and sec. 35. These sections are conclusive as against any vested and absolute right of the heir to insist on a trial by jury.

The practice was well settled by a very careful Judge in 1885, *Re Lewis*, 11 P.R. 107, and I see no reason to doubt the correctness of the order of the Chief Justice of the King's Bench or to doubt that he wisely exercised his discretion, having regard to the issues raised and their magnitude and the complexity likely to arise in trying to sever the methods of trial in investigating the facts of this controversy.

I disallow leave to appeal; and costs of executors and other beneficiaries opposing should be paid out of the estate.

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SUTHERLAND, J.

MARCH 25TH, 1912.

RE CROWE.

*Will—Construction—Devise—Life Estate—Intestacy as to Remainder—Time at which Heirs of Intestate to be Ascertained.*

Motion by the executors of the will of Thomas Crowe, deceased, for an order, under Con. Rule 938, determining questions as to the construction of the will.

T. A. O'Rourke, for the executors.

A. Abbott, for the heirs at law and next of kin of Thomas Crowe, the testator.

D. C. Ross, for the heirs and next of kin of his widow.