

The motion was heard in the Weekly Court, Toronto.

G. Keogh, for the applicants.

M. H. Ludwig, K.C., for the children of Sarah Murdoch, Anne Boeckh, and Charles Smith, deceased children of the testator.

D. O. Cameron, for Neil J. Smith and others, living children of the testator.

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

SUTHERLAND, J., in a written judgment, said that the questions stated for the opinion of the Court were: (1) What persons, in the events that had happened, were entitled under the will to share in the capital sum of which the testator's daughter Mary Forster received the income during her lifetime? (2) Do the children of the sisters and brother of Mary Forster who predeceased her share in the said capital or the income thereof?

The testator had six daughters and four sons, all of whom survived him. Mary Forster died on the 19th June, 1919, intestate and without issue; two of her sisters and two of her brothers predeceased her, three of them leaving issue; three sisters and two brothers survived her.

There was no appointment of any child by deed or will prior to his or her decease.

The will was a long one. The provision which gave rise to the questions stated was one giving a power of appointment to each child of the testator over his or her share, and in default of appointment to the issue of any child who died without exercising the power, and if no issue then "in trust for my other children in equal shares."

The precise point was, whether the words "my other children" meant children living at the death of the testator or at the date of the death of the children of the testator thereafter, and thus, in so far as the present motion was concerned, at the death of Mary Forster.

The learned Judge was of opinion that the words "my other children" applied to all the children living at the death of the testator. He had shewn in other clauses of the will that his intention was that only children who were living at a certain time should benefit in remainder; but his intention in the clause under discussion appeared to be to include under the words "other children" any one who might die after him. The class was to be ascertained at the death of the testator, and not at the death of the life-tenant or even of any one child. If the words had been "my next of kin," instead of "my other children," the next of kin would, according to the cases, have to be ascertained as at the death of the testator, and the words "my other children" must be