

MEREDITH, C.J.C.P.

SEPTEMBER 22ND, 1909.

RE VIRTUE.

Will—Construction—Division of Residue among Children of Testator — Subsequent Clause Giving Discretion to Executors as to Participation by one Child—Vested Interest—Repugnancy.

Motion under Con. Rule 938 for the determination of certain questions arising upon the will of Matthew Virtue.

Paragraphs 7, 8, and 9 of the will provided:—

“7. It is my wish that if the majority of my executors in their judgment see proper that they give to my son Matthew Virtue the sum of \$1,000.

“8. All the rest residue and remainder of my estate both real and personal and wheresoever situate I give devise and bequeath unto my executors hereinafter named for the following purposes: to collect and convert into money any portion or the whole of the remainder of my said estate and to reinvest the same . . . and to give to my beloved wife Mary Virtue the income or proceeds of same half-yearly during the term of her natural life and after her death to divide the same equally share and share alike among my children the child or children of any deceased child of mine to take the share of its or their parent share and share alike.

“9. I hereby leave it to the discretion of the majority of my executors hereinafter named as to whether my said son Matthew Virtue does or does not participate in the division of the residue of my estate referred to in the 8th paragraph of this my will.”

A majority of the executors determined not to give to Matthew Virtue the \$1,000 mentioned in paragraph 7, and exercised the discretion conferred on them by paragraph 9 by deciding to exclude him from participating in the division of the residue.

The Imperial Bank of Canada, judgment creditors of the son Matthew Virtue, having obtained a receiving order in respect of what, if anything, he was entitled to under the will, contested the right of the executors to exclude him from participation in the residue.

G. F. Mahon, for the executors.

W. M. Douglas, K.C., for adult residuary legatees.

Peter McDonald, for Matthew Virtue:

J. Bicknell, K.C., for the Imperial Bank of Canada, contended that an absolute vested interest in an undivided share was given to