

MIDDLETON, J.

MARCH 30TH, 1912.

RE IRWIN.

*Will—Construction—Annuities Charged on Income—Insufficiency of Income—Right to Encroach upon Corpus—Priority of Annuities—Increase of Annual Income by Realisation of Unproductive Property—Method of Dealing with Deficiency and Surplus before Period of Distribution—Apportionment of Proceeds of Non-productive Properties upon Realisation—Rights of Life Tenants—Fund Subject to Trust Settlements—“Family”—Grandchildren—Income from Trust Fund—Marshalling of Securities—Insurance Moneys—Apportionment—Declarations by Will in Favour of Classes—Validity—Predecease of Preferred Beneficiary—Distribution of Share among Survivors—Insurance Act, R.S.O. 1897 ch. 203, sec. 159(8).*

Originating notice to determine questions arising upon certain trusts of the will of James M. Irwin, who died on the 8th October, 1908.

On the 26th November, 1891, a separation agreement was come to between the testator and his wife, Annie Irwin, by which he agreed to make certain payments to her while she should live separate from him.

On the 29th February, 1896, the testator executed a deed poll in favour of A. H. Marsh, assigning certain securities to him as trustee for the purpose of securing the payments to Annie Irwin, and, subject to these payments, for the benefit of his children as he might appoint by will.

A further agreement was made between the testator, his wife, and Marsh on the 5th July, 1898, modifying the separation agreement and supplementing the trust fund.

After the death of the testator, a question was raised as to Annie Irwin's right under these instruments; and an order was made by Boyd, C., on the 22nd March, 1910, declaring that the trust created by these instruments ceased on the death of the testator.

In the meantime, the testator had obtained a divorce (the validity of which was not in question) from Annie Irwin, and had married Sherife MacDonald.

By his will the testator gave all his property, save his household effects, etc., to his executors, with power to convert into money at such times as they in their unlimited discretion should think fit, and to invest the proceeds, holding the fund