The motion was heard in the Weekly Court, Toronto.
L. A. Landriau, for the executor.
R. McKay, K.C., for Bridget McDonald.

SUTHERLAND, J., in a written judgment, said that the testator bequeathed $10,000 to his wife, Bridget McDonald; also all his household furniture; also the right to occupy free of rent the testator's dwelling-house during the remainder of her life or so long as she desired, "excepting as hereinafter provided." He then devised and bequeathed the "balance" of his estate, both real and personal, including all policies of life insurance, to his five children, naming them, to be divided equally among them—"If my executor deems it advisable at any time after my death to sell the property in which I am residing," that is, the dwelling-house first referred to, "he is to do so, and my widow is to give up immediate possession without any claim for dower, and the proceeds of the sale are to be divided equally between my five children above mentioned."

The first question was, whether the taxes on the dwelling-house should be paid by the widow or by the estate. The learned Judge said that it seemed clear that a tenant for life—unless the testator clearly indicated the contrary—must pay the "usual outgoings" such as land taxes: Jarman on Wills, 6th ed. (1910), p. 1214; and, if the widow was a life-tenant, she would be liable for the taxes. But her interest could not properly be called a life-interest. It was a mere right to occupy the property until a sale should be had, and there might be a sale whenever the executor deemed it advisable to sell. The taxes, therefore, should be paid by the estate.

The second question was, whether the widow was entitled to interest on her legacy of $10,000 before the expiration of one year from the death of the testator. It appeared that at the time of the testator's death there was no ready cash available from which to pay the legacy. The widow having represented to the executor that she had no money to live on, he began paying her interest on the legacy, monthly, at the rate of 5 per cent., during the first year. The testator died in July, 1915. Since that time he had been paying the legacy in instalments and paying interest on the balance thereof from time to time remaining unpaid.

The executor could not have been compelled to pay interest to the widow before the expiration of one year from the death of the testator: In re Whittaker (1882), 21 Ch. D. 657. It was contended, however, that the executor having paid interest expressly as interest, he could not now recover it from the recipient—he did not pay it under a mistake either of law or fact: Maskell v. Horner, [1915] 3 K.B. 106, at p. 117.