

STREET, J.

FEBRUARY 25TH, 1902.

CHAMBERS.

RE GARDNER.

*Will — Construction — Distribution of Estate — “Heirs” — “Next in Heirship” — Period of Ascertainment.*

Motion for order declaring the construction of the will of Robert Gardner, deceased.

The will was dated 18th October, 1870; the testator died 25th November, 1870; and the widow died 31st December, 1901.

The clause of the will in question followed a gift to the widow of the real and personal estate for her life, and was as follows:—“I will and bequeath that my whole estate (after the death of my wife . . . ) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Watkins, and my deceased sister Mrs. Sarah A. Hutchinson’s children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship.”

A. McKechnie, Brampton, for executor.

F. W. Harcourt, for infants.

J. A. Wright, J. H. Moss, and R. E. Heggie, Brampton, for adults interested.

STREET, J.—The persons entitled in the first place are all the children of Luke, Joseph, Catharine, and Sarah, living at the testator’s death, or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The testator intends that if any one of those entitled should die in the lifetime of his widow, the share should go to the issue of the one dying. It is necessary, therefore, to construe the words “children or their heirs” as meaning “children or their issue,” and as giving the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The result is that the shares of the children entitled to share become vested at once; but in the event of any child dying in the lifetime of the widow leaving issue, the share of that child is divested, and goes to such issue, and vests at once and finally in the issue, who then become the stock of descent. The words “should no heirs of the above be alive, that it go to the next in heirship,” have served their purpose