The motion was heard in the Weekly Court at Ottawa.

J. F. Orde, K.C., for the trustees.

J. F. Smellie, for the Official Guardian, representing the unborn children of Mrs. Grey.

Mrs. Grey and Mrs. Creighton were notified, but were not represented.

LATCHFORD, J.:— . . . Thomas Ross did not expressly exercise the power of appointment which, in my opinion, he clearly reserved to himself in the deed of settlement in the event of there being no issue of the marriage. . . . He had, in the circumstances, the power to appoint in any manner he might think proper. He exercised that power by the general devise or bequest in his will. Even prior to the enactment in 1873 (36 Vict. ch. 26, sec. 24, Imperial Act 1 Vict. ch. 26, sec. 27) of what is now sec. 29 of the Wills Act, a bequest had been held to be a valid exercise of a power: Deedes v. Graham, 19 Gr. 167.

It has also been held in the province of Quebec by a single Judge that a general residuary legacy operates as an execution of a power of appointment: Gemley v. Low, 2 Mont. L. R. 311. But, whether that decision is good law or not—and Mr. Wright (a Quebec advocate) in his affidavit suggests that it is not—there can be no doubt, upon Mr. Wright's evidence, that the will of Thomas Ross would be recognised by the Quebec Courts as having full force as a testamentary disposition, and would be construed there in accordance with the laws of construction in force at the place of the testator's domicile at the time of his death. The marriage settlement was valid under the laws of Ontario; and, although not in what is called "authentic form" by art. 1264 of the Civil Code, art. 7 declares that acts and deeds—including marriage settlements—made and passed out of Lower Canada are valid if made according to the forms required by the country where they were passed and made.

There will be judgment declaring that, in the opinion of the Court, Mrs. Clayton is not entitled to the whole of the capital fund settled . . . ; that the settlor reserved to himself a power of appointment over such fund to the exclusion of Mrs. Clayton; that he effectively exercised such power; and that the trustees should hold the capital subject to the trusts expressed in the will. . . .

Costs of all parties out of the estate.