

KELLY, J.

AUGUST 1ST, 1917.

RE SMITH

Will—Construction—Bequest of Residue to Executor—Whether Beneficially or in Trust—Trustee Act, sec. 51 (1).

Motion by Mary Ann Gallagher, sister of Robert Smith, deceased, for an order declaring that, under the will of the deceased, William G. Woodman, the sole executor named by the testator, took the residue of the estate of the deceased as trustee and not as beneficiary.

By the will, after directing that his just debts and funeral and testamentary expenses be paid "by my executor hereinafter named," the deceased gave, devised, and bequeathed all his real and personal estate which he should die possessed of or interested in as follows: "To my sister Mary Ann . . . \$1,000. To my executor W. G. Woodman the remainder of my estate real and personal after all my just debts are paid by him. And I nominate and appoint W. G. Woodman, of the township of Wolf Island, in the county of Frontenac, merchant, to be the executor of my last will and testament."

The motion was heard in the Weekly Court.

U. A. Buchner, for the plaintiff.

George Bell, K.C., for the defendant.

KELLY, J., in a written judgment, said that the solution of the question did not depend upon sec. 51 (1) of the Trustee Act, R.S.O. 1914 ch. 121; the testator's intention as expressed in the will must be determined.

Reference to the English Act 11 Geo. IV. and 1 Wm. IV. ch. 40; *Williams v. Arkle* (1875), L.R. 7 H.L. 606, 615; *Thorpe v. Shillington* (1865), 15 Gr. 85; *In re Howell*, [1915] 1 Ch. 241.

The words "my executor," immediately preceding the name "W. G. Woodman," in the bequest of the residue, are introduced not as meaning that the bequest of the residue was to Woodman as executor *virtute officii*, but rather as descriptive of the person whom the testator intended to benefit, and whom, in the following clause, he identified by mention of his place of residence and his occupation. The intention of the testator was, that Woodman should take the residue beneficially.

Order declaring accordingly; costs of both parties out of the estate.