

JANUARY 15TH, 1912.

*KENNEDY v. KENNEDY.

Will—Construction—Gift for Maintenance of Residence—Perpetuity—Intestacy—Trust—Discretion of Trustees—Bona Fides—Power to Sell Lands—Conveyance Free from Charge of Annuity—Charge on Proceeds of Sale—Deed Poll—Setting aside.

Appeal by the defendant James H. Kennedy from the judgment of TEETZEL, J., 26 O.L.R. 105, 3 O.W.N. 924.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

E. D. Armour, K.C., for the appellant.

J. Bicknell, K.C., for David, Robert, and Joseph H. Kennedy.

A. J. Russell Snow, K.C., for Madeline Kennedy.

W. A. Proudfoot, for E. W. J. Owens.

T. P. Galt, K.C., for Georgie Peake.

GARROW, J.A. (after setting out the facts):—The residuary clause . . . has already given rise to more than one action, with the result that one of the defences now raised is estoppel by res judicata.

In Kennedy v. Kennedy, 13 O.W.R. 984, the first of these actions, the plaintiff was a son of the testator, and was the devisee of the Foxwell estate. . . . He claimed to be a pecuniary legatee within the meaning of the residuary clause, owing to his failure to obtain the Foxwell estate devised to him. He also asked that the will might be interpreted and the rights of all parties declared. But all that was adjudged and determined by Riddell, J., was, that the then plaintiff had no right at that time to interfere with the estate; and the action was dismissed without construing the will.

Under these circumstances, it is clear that no estoppel arises by reason of the judgment in that action.

In Kennedy v. Kennedy, 24 O.L.R. 183, the plaintiff was a pecuniary legatee, but not one of the next of kin. And what was determined by Latchford, J., was, that the bequest in the residuary clause to pecuniary legatees was void under the rule against perpetuities, and that the plaintiff could not, for that reason, maintain the action. The plaintiff also sought to set up a claim apparently obtained after action brought, as the as-

*To be reported in the Ontario Law Reports.