

direct that in the event of either of my sons dying before coming of age the surviving son shall receive the share of his deceased brother. Fourth, . . . my executors shall have the power . . . to sell . . . my real estate or personal property, and the proceeds shall be invested and held in trust for the use of my heirs as hereinbefore provided, and said proceeds shall be subject to the same conditions as hereinbefore provided."

W. Proudfoot, K.C., for the executors and widow.

F. W. Harcourt, for the infants.

STREET, J., held, following *Laidlaw v. Jackes*, 22 Gr. 171, 25 Gr. 293, 27 G. R. 101, that the terms of the will are not such as to put the widow to her election, and she is entitled to the benefit of the provisions of the will in her favour and also to her dower. The benefits under the will have come to an end by her marriage, but she is not to be taken to have deprived herself of her right to dower by her having taken them prior to her second marriage. There is an intestacy as to one-third of the real estate, and, subject to the widow's dower, it belongs to the two sons in equal shares absolutely, as it was not required apparently for payment of debts. The discretionary power to sell did not effect a conversion of the realty into personalty. Order declaring accordingly. Costs out of the estate.

FEBRUARY 4TH, 1903.

DIVISIONAL COURT.

DEACON v. WEBB.

Payment on Mortgage—Appropriation on Principal though Interest Overdue—Subsequent Attempted Variation.

Appeal by defendant from judgment of County Court of Frontenac, in favour of plaintiff for \$304.25 in an action upon the covenant for payment contained in a mortgage deed. The defence was payment.

J. J. MacLennan, for defendant, contended that the plaintiff had made an application of a payment upon principal, instead of, as he might have done, upon overdue interest, and was bound by that appropriation, having notified the defendant of it, and having in this action made her claim upon the basis of that appropriation, citing *Fraser v. Locie*, 10 Gr. 207; *Hooper v. Kay*, 1 Q. B. D. 178; *Leake on Contracts*, 4th ed., p. 652; *Addison on Contracts*, 9th ed., p. 149.

W. E. Middleton, for plaintiff, contended that it was not a case of appropriation of payments, but a mistake in making