

FIRST DIVISIONAL COURT.

MAY 19TH, 1919.

*RE THOMPSON.

Will—Construction—Direction to Executors “to Pay off the Mortgage upon my Real Estate” out of Specified Part of Estate—Mortgage Existing when Will Made Paid off by Testator and New Mortgage Substituted—Will Speaking from Immediately before Death—“Contrary Intention”—Wills Act, sec. 27 (1).

Appeal on behalf of all persons other than James E. Thompson interested in the estate of James Thompson, deceased, and cross-appeal by James E. Thompson from an order of LATCHFORD, J., in the Weekly Court, Ottawa, declaring the construction of the will of the deceased in respect to a charge and the amount of a legacy.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

W. N. Tilley, K.C., and C. J. Foy, for the appellants.

R. McKay, K.C., and R. J. Slattery, for James E. Thompson, respondent and cross-appellant.

HODGINS, J.A., reading the judgment of the Court, quoted a portion of the will as follows: “I give devise and bequeath all my estate both real and personal unto my executors . . . under the following trusts namely: first to convert the same into cash and the proceeds thereof to divide into four parts so that three of such parts shall be equal and the fourth part shall be \$5,000 less than the other three parts; secondly to pay off the mortgage upon my real estate in the town of Perth out of the said fourth part and should the same not be sufficient for that purpose then the deficiency shall be taken equally from the other three parts and should the said fourth part prove more than sufficient to discharge said mortgage then upon trust to pay the surplus of such part to my son James.”

The will was dated the 30th January, 1905, and there were three codicils in 1905 and 1908 not directly affecting these appeals. The testator died on the 28th October, 1912. At the date of the will, a mortgage existed upon the real estate of the testator in Perth for \$4,233.33 to the Mohr executors. This mortgage was afterwards paid off and discharged, the testator obtaining the money which he paid partly from a new mortgage for \$3,600 upon the same lands to one Spence and partly from his own resources. Upon the Spence mortgage the testator paid \$300 in 1910 and \$300