

FIRST DIVISIONAL COURT.

JUNE 23RD, 1919.

*RE COTÉ.

Will—Construction—Devise to Children—Devise over in Event of Children Dying without Issue—Children Surviving Mother—Estate in Fee—Wills Act, R.S.O. 1914 ch. 120, sec. 33—Power of Executors to Sell Real Estate—Devolution of Estates Act, secs. 13, 14, 19—Death of Executors—Power of Sale Exercisable by Executor of Survivor or by Administrator duly Appointed—Trustee Act, sec. 45—Consent of Official Guardian or Order of Judge.

Appeal by Edward and Yvonne Coté from the order of LATCHFORD, J., 15 O.W.N. 419, determining questions arising under the will of Marie Eliza Coté, deceased.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

C. E. Seguin, for the appellants.

E. C. Cattnach, for the Official Guardian, representing the infants interested.

MEREDITH, C.J.O., read a judgment in which, after setting out the provisions of the will and certain facts with regard to the relatives of the testatrix, he said that Latchford, J., had held that the estate, though absolute, was subject to be divested in the event of the death of the appellants (the two children of the testatrix) leaving issue living at their death, and that, if that last event should happen, the gift over to the father, mother, brothers and sisters of the testatrix, would take effect. The learned Chief Justice agreed with this view of Latchford, J. The testatrix evidently intended to provide for the gift over on the happening of either of the two events that she mentioned—her own death without issue, or her child or children, if she should have any, dying without issue.

The effect of sec. 33 of the Wills Act is, that "dying without issue" means a want or failure of issue in the lifetime or at the time of the death of the child or children, and not an indefinite failure of issue, no contrary intention appearing by the will.

The learned Chief Justice was unable to agree with the conclusion of Latchford, J., that the executors, if living, could not sell the real estate, because it had become "vested in the devisees, and the children can sell only the interest which is vested in them and subject to be divested in the event mentioned." The atten-