

The first part of clause "secondly" relates entirely to the income. Upon the death of any son without issue the daughter is to be permitted to share with the surviving sons on the same terms, i.e., is to receive such part of the income as the trustees may deem proper. Upon the death of all the sons without issue the daughter is the sole beneficiary, and this benefit is aptly said to be for the daughter, her heirs and assigns. If any of the sons die leaving issue, the issue are to receive a share of the income during minority, and on such issue attaining majority one-third of the then remaining estate is to be set apart and divided between such issue.

Here the testator stops. He has made no provision for the events which have happened. One son has died leaving issue—so that it cannot be said *all* have died without issue, in which event only is anything, beyond a share in the income, given the daughter, and there is an intestacy as to one-third of the estate, and if the surviving son dies without issue (he is 84 and unmarried) there will be an intestacy as to two-thirds.

I agree with counsel that the executors have not now a power of sale, and as all agree that an advantageous sale of the lands in question can now be made, an order can be issued under the Settled Estates Act for sale. The other tenant in common of the lands is ready, it is said, to join in a sale and the details can be worked out on the settlement of the order.

To clear the title the surviving son should be appointed to represent any possible issue.

It must not be forgotten that the interest as to which there is an intestacy vested in the testator's heirs upon his death.

Costs out of estate.

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MIDDLETON, J.

MAY 19TH, 1911.

TOFFEY v. STANTON.

*Mortgage—Assignment—Covenant—"Good and Valid Security"  
—Verbal Warranty—Whole Agreement in Written Document.*

Appeal by the defendant from the report of the local Master at Brockville.

G. F. Henderson, K.C., for the defendant.

J. A. Hutcheson, K.C., for the plaintiff.

MIDDLETON, J.:—Only one matter (outside of costs) was discussed on this appeal. The Master has charged the defendant