

The question of title depended upon the power of the executors or of the devisee, or both, under the will of Elizabeth Tyler, to sell and make a good conveyance.

Elizabeth Tyler died on 29th July, 1902, at Toronto, leaving two children, Violet Mitchell Campbell and George William Parker. She also left brothers and sisters surviving her. Mrs. Campbell had at the date of the petition three children, all living; Parker was an unmarried man.

The material parts of the will were as follows:

"1. I give . . . to my daughter Violet Mitchell Campbell . . . all my jewellery (save a diamond ring . . .) and also all my wearing apparel, furs, etc., for her sole and absolute use.

"2. I further give . . . to my daughter . . . \$4,000 to be paid to her by my said son George William Parker within two years after my death, and I hereby charge the payment of the said legacy on the property hereinafter devised to my said son.

"3. All the rest . . . of my real and personal property . . . I give, devise, and bequeath unto and to the sole and absolute use of my said son . . . but charged with payment to my said daughter . . . of the said legacy of \$4,000.

"4. And I hereby direct, and it is my will, that in case of the death of either of my said children without issue, then the whole of my said property and estate is to go to the survivor, and in case of the death of both my said children without issue to go to my brothers and sisters equally."

The executors proved the will. The real estate was incumbered, and it was necessary to sell it to pay off the incumbrances and the \$4,000 legacy.

D. C. Ross, for the vendors.

A. W. Ballantyne, for the purchaser.

BRITTON, J.—Clause 4 of the will is the one occasioning the difficulty, and it is certainly not an easy matter to understand just what Elizabeth Tyler had in her mind at the time she dictated it. The words are in reference to both Violet and George. "Death without issue." Did she mean "death without leaving issue surviving" or did she mean, death without having had any children? Violet at present has three children. Were she to die leaving children, her death would in no way affect the tenure or estate of George in this property. . . . What is the position of George, who at present, under the will, has the beneficial interest in the estate?

O'Mahoney v. Burdett, L. R. 7 H. L. 388, decides that death without issue means without issue surviving the parent,