

MIDDLETON, J.

SEPTEMBER 30th, 1918.

## RE OSBORNE AND CAMPBELL.

*Deed—Construction—Power of Appointment—Exercise by Will—Validity—Wills Act, sec. 30—Claim to Dower—Application under Vendors and Purchasers Act—Service on Dowress—Rule 602—Title to Land.*

• Motion by vendors, under the Vendors and Purchasers Act, for an order declaring invalid an objection taken by the purchaser to the vendors' title to land which they had agreed to sell.

The motion was heard in the Weekly Court, Toronto.

H. R. Frost, for the vendors.

R. B. Beaumont, for the purchaser.

MIDDLETON, J., in a written judgment, said that on the 30th May, 1912, the land in question was conveyed to M. "in fee simple," "to have and to hold unto the said M., his heirs and assigns forever, to such uses as he shall by deed or deeds in writing or by his last will and testament appoint and in default of appointment to the use of him and his heirs absolutely."

M. died on the 22nd April, 1915, and by his will gave all his property to his executors in trust to convert and divide the proceeds.

The executors had now contracted to sell, and objection was taken by the purchaser to the title. M. was married, and it was said that his wife would be entitled to dower. Notice was served on her, under the provisions of Rule 602, and she had not appeared to assert any claim.

The vendors' contention was that, under the Wills Act, the will operated as a due execution of the power, and the estate passed by virtue of the exercise of the power.

That this was the effect of sec. 30 of the Act, R.S.O. 1914 ch. 120, was plain from the decision in *In re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313.

In the absence of any claim on the part of the wife, the difficult question as to the true construction and effect of this deed, suggested in Mr. Armour's note (*Real Property*, 2nd ed., p. 114), should not be considered. See per Draper, C.J., in *Lyster v. Kirkpatrick* (1866), 26 U.C.R. 217, 228: "It appears to have been settled ever since *Sir Edward Clere's Case* (6 Co. 18a.) that a power over the inheritance may co-exist with a fee in the same person;