ORDE, J. OCTOBER, 2ND, 1920.

RE NESBITT AND NEILL.

Will—Construction—Devise of Land to Son—Executory Devise over at his Decease to another Son "or his Heirs" if the first Son does not Marry—Words of Limitation—"Or" Read as "and"—Fee Simple Vested in two Sons—Conveyance to Purchaser, both Joining—Application under Vendors and Purchasers Act—Costs.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that he can make a good conveyance of the land to the purchaser.

The motion was heard in the Weekly Court, Ottawa.
F. S. Dunlevie, for the vendor.
J. E. Caldwell, for the purchaser.

ORDE, J., in a written judgment, said that John Nesbitt (the vendor) and his brother Robert were devisees of the land under the will of their father, the gift being in these words: "To my son John I bequeath the north half of lot No. 23 in 2nd con. R.F. Township of Nepean, but if he does not marry again then at his decease it shall become the property of my son Robert or his heirs." Robert was willing to join in the conveyance to the purchaser or to execute a conveyance to John, but the purchaser objected to the title on the ground that the words "or his heirs" were substitutional and not words of limitation. The vendor contended that "or" should be read as "and," which would make "or his heirs" words of limitation.

The devise to Robert, being limited upon a determinable fee, gave him an executory interest. The fee simple given to John was determinable upon his death without having married again. If he married, the determinable fee was enlarged into an absolute fee simple. If he died without having married, Robert would take the fee by way of executory devise. This would be the case whether the words "or his heirs" were added or not. The testator might have intended that, if Robert predeceased John, and the latter died without having married, Robert's heirs should take. That a devise of land to "A. or his heirs" is to be read as a devise to "A. and his heirs," and so as a devise of the fee, is settled law, notwithstanding the doubts that have arisen by reason of those provisions of the Wills Act whereby a devise of land without words of limitation passes the fee, whereas formerly it passed merely a life-estate: Re Ibbetson (1903), 88 L.T.R. 461. Reference to