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*May 6, 7.
*June 15.

ABRAHAM ERNST (DEFENDANT).....APPELLANT;

AND

SAMUEL A. B. ZWICKER (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute—Construction of—Estates tail, acts abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—28 V. c. 2 (N.S.)—Will—Construction of—Executory devise over—Dying without issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by will—Conveyance by tenant in tail.

The Revised Statutes of Nova Scotia, 1851 (1 ser.) chap. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112) the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such."

Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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Held, per Taschereau, Sedgewick and King JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder.

Held further, *per* Taschereau, Sedgewick and King JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee.

Held, per Gwynne and Girouard JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banc*, affirming the decision of the trial court in favour of the plaintiff.

The facts of the case and questions at issue are stated in the judgment reported.

C. H. Tupper Q.C. and *Borden* Q.C. for the appellant. If the devise did not, by virtue of the Wills Act independently of the statute abolishing estates tail, amount to a devise in fee simple, it became a devise in fee simple by virtue of that statute. The real estate is devised over, in default of heirs of the first devisee, to ulterior devisees related to the prior devisee so as to be in the course of descent from him. The prior devisee in that case could not die without heirs while the devisee over existed, so the word "heirs" means "heirs of the body," and the estate of the first devisee, by the effect

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of the devise over, is restricted to an estate tail, and the estate of the devisee over, becomes a remainder expectant on that estate. 2 Jarman (5 ed.) 1170, 1175. *Simson* v. *Ashworth* (1). Then by virtue of the statute abolishing estates tail, the estate so acquired became an absolute estate in fee simple; but that statute does not convert a remainder expectant upon an estate tail into an executory devise. The remainder ceased to exist when the estate in fee tail was converted by the statute into an estate in fee simple, as it had no estate tail to support it. *Nottingham* v. *Jennings* (2); *Tyte* v. *Willis* (3); *Morgan* v. *Griffiths* (4); *Harris* v. *Davis* (5); *Doe d. Hatch* v. *Bluck* (6); *Tyrwhitt* v. *Dewson* (7).

The words "lawful heirs" used in the context are sufficient to create an estate tail. *Good* v. *Good* (8). The words "die without having any lawful heirs" import indefinite failure of issue and therefore create an estate tail. A devise for life and "if my son Richard (the eldest) do happen to die without heirs, then my son John shall enjoy my lands," gave an estate tail to Richard. 2 Jarman, "Wills," (5 ed.) 1320 to 1324, and cases cited. *Harris* v. *Davis* (9). *Theobald*, "Wills," (4 ed.) 576, 582. *Goodright* v. *Godridge* (10); *Forsyth* v. *Gault* (11); *Doe d. Forsyth* v. *Quackenbush* (12); *Dawson* v. *Small* (13); *In re Sallery* (14). The word "heirs" in the present case has its usual technical meaning. *Leach* v. *Jay* (15); *Morrall* v. *Sutton* (16); *Lloyd* v. *Jackson* (17). 2 Jarman, "Wills," (5 ed.) 1205 to 1217 and 930. 2 Williams, "Executors," (9 Eng. ed.)

(1) 6 Beav. 412.
(2) 1 P. Wm 23.
(3) Talb. 1.
(4) 1 Cowp. 234.
(5) 1 Col. C. C. 416.
(6) 6 Taun. 484.
(7) 28 Gr. 112.
(8) 7 E. & B. 295.
(9) 1 Col. C. C. 423 and 424.
(10) Willes, 369.
(11) 21 U. C. C. P. 408; 22 U. C. C. P. 115.
(12) 10 U. C. Q. B. 148.
(13) 9 Ch. App. 651.
(14) 11 Ir. Ch. 236.
(15) 6 Ch. D. 496.
(16) 1 Phillips, at p. 541.
(17) L. R. 1 Q. B., at p. 578.

929 and 930. *Smith* v. *Butcher* (1); *Doe d. Comberbach* v. *Perryn* (2); *Hall* v. *Priest* (3).

Wade Q. C. for the respondents. All the contingencies upon which the devise to plaintiff depended having occurred, the plaintiff is entitled to the property unless the devise to him cannot have effect. The executory limitation is in defeasance of the prior estate in fee. *Armstrong* v. *Nason* (4); *Gray* v. *Richford* (5); *Bowey* v. *Ardill* (6); *Parkes* v. *Trusts Corporation of Ontario* (7); *Muskett* v. *Eaton* (8); *Dean* v. *Dean* (9).

The words in the will, "but should my son Jonas die without leaving any lawful heirs" cannot be construed to mean an indefinite failure of issue but must be construed as a failure at the time of Jonas' death. R. S. N. S. (2 ser.) ch. 114, sec. 24. (Same as ch. 89, sec. 26, Revised Statutes of Nova Scotia, 5th series.) Jarman, p. 1320. The devise to plaintiff is therefore not affected by the rule against perpetuities, which allows a devise to a life or any number of lives in being and twenty-one years thereafter. Jarman, pp. 214-215. *Whitter* v. *Bremridge* (10); *Right* v. *Creber* (11); *Haliburton* v, *Haliburton* (12).

The word "heirs" in the sentence, "but should my son Jonas die without leaving any lawful heirs" should be construed as meaning "children" or "issue," or "heirs of the body." This construction is obvious from the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object. Since the plaintiff being a second cousin of Jonas is one of his heirs, he,

(1) 10 Ch. D. 113.
(2) 3 T. R. 484.
(3) 6 Gray, (Mass.) 18.
(4) 25 Can. S. C. R. 263.
(5) 2 Can. S. C. R. 431.
(6) 21 O. R. 361.
(7) 26 O. R. 494.
(8) 1 Ch. D. 435.
(9) [1891] 3 Ch. 150.
(10) L. R. 2 Eq. 736.
(11) 5 B. & C. 866.
(12) 2 Oldright 312.

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the plaintiff, would have to die in order to get the property. By giving "heirs" the meaning of "children" or "heirs of the body" the devise is freed from this absurdity. *North* v. *Martin* (1); *Gummoe* v. *Howes* (2); *Milroy* v. *Milroy* (3); *Doe d. Comberbach* v. *Sir R. Perryn* (4). Jarman, 930, 1229, 1278-9. If the word "heirs" is ambiguous it must be construed so as not to be repugnant to the definite devise to plaintiff. Jarman, 436, 439, 440. The paramount intention of the testator should govern the construction of the will. *Jenkins* v. *Hughes* (5); *Jeffray* v. *Tredwell* (6). That plaintiff was intended to take on death of Jonas without children is indicated by the testator's wish expressed immediately after the devise to plaintiff, that his estates should for a time at least be retained and held by parties bearing his name.

TASCHEREAU J.—I agree that this appeal should be allowed for the reasons stated in the judgment of Mr. Justice King.

GWYNNE J.—The question involved in this appeal arises upon the will of George Peter Zwicker, who departed this life in 1859, in the county of Lunenburg, in the province of Nova Scotia, having first made his will bearing date the 4th day of April, 1857, whereby among other things he devised as follows :—

I give and bequeath to my grandson, Emanuel Zwicker, who is now absent at sea, a certain piece of land lying in the north-west range, bought from Frederick Nick Lowe, being part of lot number forty-six, letter B, containing twenty-one acres more or less, as will more fully appear by two deeds from said F. Lowe, but should my grandson Emanuel Zwicker not return home, this last mentioned lot to revert and go to my son Jonas, together with all the remainder of my

(1) 6 Sim. 266.
(2) 23 Beav. 184.
(3) 14 Sim. 48.
(4) 3 T. R. 484.
(5) 8 H. L. C. 590.
(6) [1891] 2 Ch. 640.

real estate as well as personal property, cattle, household furniture, &c., which I give and bequeath all to my son Jonas, viz. : my homestead, a lot of land lying in the rear of lot number nine and ten, being part of mill grant ; also part of 300 acre lot number four, letter C, in first division, containing forty-two six-sevenths acres ; also a lot at north-west, letter A, number 42, being that part which joins No. 41 containing 15 acres, but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson Elias Peter, and should my great-grandson Elias Peter die before my son Jonas, or before he comes of age, or should he die without any heirs, then I order, give or bequeath all my real estate to Samuel B. A. Zwicker and his heirs, youngest son of Benjamin Zwicker, Esquire. It being my sincere wish that my real estate should remain in my name, reserving the dower to my daughter-in-law as long as she remains a widow, should she survive my son Jonas.

Having sold in his lifetime the piece of land above devised to Emanuel, the testator by a codicil gave to Emanuel in lieu thereof the money he had received on the sale of such piece of land, so that we have to deal only with the residue of the real property devised to Jonas.

Now Jonas having died without issue, and Elias Peter having also died in the lifetime of Jonas, and under age, and without issue, Samuel B. A. Zwicker has brought the present action in which he has recovered judgment in the Supreme Court of Nova Scotia against the appellant Ernst, who is in possession of the lands so as above devised to Jonas under deeds of bargain and sale executed by Jonas in his lifetime conveying the lands to Ernst in fee simple.

The contention of the appellant in support of this title is that the estates devised by the will of Jonas and Elias Peter respectively, were estates to them and the heirs of their respective bodies successively in fee tail with remainder in fee simple to the respondent, and that the estate tail in the first tenant in tail Jonas has been by the statute law of the province of Nova Scotia

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converted into a fee simple whereby he had right to convey and by the deeds executed by him has conveyed a good title in fee simple to the appellant, whereas the contention on behalf of the respondent is that the estate devised to the respondent Samuel B. A. Zwicker was a fee simple estate by way of executory devise, and that in the events which have happened he is now entitled to recover possession of the lands so devised.

The Nova Scotia statutes upon which the appellant relies are as follows :—

In 1851 it was enacted by a statute inserted as ch. 112 of the consolidated statutes of Nova Scotia (first series) that

> All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail, shall hereafter be adjudged a fee simple, and if no valid remainder be limited thereon shall be a fee simple absolute, and may be conveyed or devised by tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In 1858 this chapter was inserted in the consolidated statutes of that year, the second series, still as ch. 112 and in the identical terms of ch. 112 of the first series.

This statute was in 1864 inserted in the consolidated statutes of that year as ch. 111 (third series) in the terms following :—

> All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In 1865 an alteration was made by a statute of the legislature, 28 Vic., ch. 2, which is in the terms following :—

> All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail, shall hereafter be adjudged a fee simple, and may be conveyed and devised or descend as such.

In the consolidation of the statutes in 1873 (fourth series), ch. 78, and in the consolidation of the statutes in 1884 (fifth series), ch. 88, this chapter 2 of 28 Vict. is inserted verbatim.

The question to be determined is, what estate did Jonas the testator's son, Elias Peter his great-grandson and Samuel B. A. Zwicker, a person who was capable of inheriting as an heir of Elias Peter upon failure of his issue, take respectively upon the decease of the testator in 1859 in the lands devised to Jonas?

The will appears to have been drawn by a person having a slight but by no means an accurate knowledge of the technical language of wills or of the proper use of such language or of the construction put thereon by the courts. In construing wills this is a matter to be taken into consideration by courts when endeavouring to construe an ambiguously expressed will so as best to promote what can be gathered from the will to have been the intention of the testator. *Thelluson* v. *Rendlesham* (1); *Richards* v. *Davies* (2).

The testator's intention in the present case I gather from his will to have been that the lands devised should remain in his name and in the direct line of descent as long as possible; and that Samuel B. A. Zwicker should not take anything until the issue of Jonas and of Elias Peter respectively should be exhausted. He says that he has devised the lands in the manner stated in his will—it being his sincere wish that his real estate should remain in his name—by which I understand him to have meant *as long* as possible, first in the direct line of Jonas so long as it should last, then in the direct line of Elias Peter, and afterwards to Samuel B. A. Zwicker in fee simple. Now if the testator had consulted a person competent

(1) 7 H. L. Cas. 429. (2) 13 C. B. N. S. 87.

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to advise him and had employed him to draw his will, such person would have advised that treating Jonas, his son, and Elias Peter, his great-grandson, as the persons in the direct line whom he desired to benefit before his collateral relative, the respondent, should get anything, the ordinary mode in use for attaining his wish would be to limit an estate tail to Jonas and the heirs of his body with remainder to Elias Peter and the heirs of his body in like manner with remainder over to the respondent and his heirs in fee simple, and he would no doubt have so drawn the will with such limitations plainly expressed. What the testator did, however, was to devise the lands of which he was seized in fee simple to Jonas in language which was sufficient by force of ch. 114 of the first series of the Consolidated Statutes of Nova Scotia if it stood alone, to give to Jonas a fee simple estate but which was qualified by the words

but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson Elias Peter, &c., &c.

It may be admitted that the testator in using this language was ignorant of its effect, but the courts in order that the testator's manifest intention to benefit his great-grandson, Elias Peter, should not be defeated by the testator's ignorant use of legal terms construe the words "without leaving any lawful heirs" so used as meaning "heirs of the body of Jonas," and give effect to them as if the limitation had been expressed to be to Jonas and the heirs of his body, and *then*, that is on the termination of that estate, to Elias Peter. The word "*then*" in the sentence "then I order," &c., must be construed as relating to the determination of the first limitation of the estate to Jonas and the heirs of his body. *Beauclerk* v. *Dormer* (1). The rule that a devise to

(1) 2 Atk. 308.

A. in language sufficient to convey the fee simple followed in a subsequent part of the will or in a codicil by a limitation over if A. should die "without leaving lawful heirs," here meaning heirs of the body of the donee, must be construed as a fee tail, is so imperative that it cannot be departed from unless there be language in the will itself which unmistakably shows the testator's intention to be that the limitation over should take effect upon the death of the first taker without leaving issue him surviving. The authorities upon this point are numerous and unequivocal. *Nottingham* v. *Jennings* (1); *Nanfan* v. *Legh* (2); *Tenny* v. *Agar* (3); *Jones* v. *Legg* (4); *Coltsmann* v. *Coltsmann* (5); *Ex parte Davies* (6); *Doe d. Comberbach* v. *Perryn* (7). That the words "without leaving," &c., &c., in a devise of realty will not have that effect is now well established upon the authority of *Forth* v. *Chapman* (8), notwithstanding the contrary opinion expressed by Lord Kenyon in *Porter* v. *Bradley* (9); but in the case of a devise of personalty these words will be construed as relating to the death of the preceding donee. *Crooke* v. *DeVandes* (10); *Doe d. Comberbach* v. *Perryn* (7); *Fornereau* v. *Fornereau* (11); *Dansey* v. *Griffiths* (12); *Daintry* v. *Daintry* (13); *Simpson* v. *Ashworth* (14); *Morgan* v. *Morgan* (15); *Slattery* v. *Ball* (16).

In *Porter* v. *Bradley* (9), the devise over was if the first taker should die "leaving no issue *behind* him." These last words were considered sufficient to make

(1) 1 P. Wm. 23.
(2) 7 Taunt. 85.
(3) 12 East 252.
(4) 9 Mod. 461.
(5) L. R. 3 H. L. 121.
(6) 2 Sim. N.S. 114.
(7) 3 T. R. 484.
(8) 1 P. Wm. 663.
(9) 3 T. R. 143.
(10) 9 Ves. 197, 203.
(11) 2 Doug. 487.
(12) 4 M. & S. 61.
(13) 6 T. R. 307.
(14) 6 Beav. 412.
(15) L. R. 10 Eq. 99.
(16) 36 Ch. D. 508.

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the limitation over an executory devise instead of a remainder on an estate tail. In *Mortimer* v. *Hartley* (1), a testator who died in April, 1826, devised certain of his real estate to his son John with a declaration that neither he nor his heirs to the third generation should have power to sell or mortgage any part of the devised property, but that if it should happen that his son John die without leaving lawful issue, the testator's daughter Ann should have his share subject to the same restrictions, limitations and exceptions under which John had it, and if it should please God to take away both Ann and John under age or without leaving lawful issue, then he gave and bequeathed the same lands to his, the testator's, brother Joseph, his heirs and assigns forever. The question was what estate Joseph took, namely, whether by way of executory devise or remainder in fee, and it was held that the limitation to him was of an estate in remainder in fee expectant upon an estate tail. See also *Biss* v. *Smith* (2). In *Coltsmann* v. *Coltsmann* (3), Lord Chancellor Cottenham and Lords Cranworth and Chelmsford show very clearly that language sufficient to justify the construction that the words "dying without lawful issue" in a case like the present should be applied to the time of the death of the donee of the precedent estate must be found in the will itself. Lord Cottenham there says that although he cannot admit that the words

"die without heirs of the body" are necessarily inflexible, still that they are technical words, and they are very strong words, but they are words the technical meaning of which may on construction be controlled by *the context*. A gift over if A. shall die without heirs of the body *at his death* or *living at his death* would imply a failure of heirs of the body at that *punctum temporis* only, and the question in this case is: Does *the context* limit the words "heirs of the body"?

(1) 6 Ex. 47; 3 De G. & S. 316. (2) 2 H. & N. 105.
(3) L. R. 3 H. L. 121.

in the same way, and it was held that the context did so limit the words and made the gift over an executory devise instead of a remainder expectant upon an estate tail, the judgment being rested expressly upon the fact that the words "at his death" were found in direct connection with the limitation over. The testator by his will had devised a property called Flesk Castle which he held in fee simple to his son John, precisely as in the present case. He afterwards made a codicil to his will in which he said:

If it should happen that my son John Coltsmann die without heirs of his body lawfully begotten, etc., in that case and in default of such heirs, I do hereby devise that my lands, etc., (now subject to certain charges) *shall at my son's death* descend and be transferred to my grandson Daniel Cronin, his heirs forever,

and it was held expressly upon the construction of the words "shall at my son's death descend, &c." that the devise was of an estate to John Coltsmann, in fee with an executory devise over to Daniel Cronin in the event that happened of John Coltsmann dying without heirs of his body *living at his death.*

That case is precisely similar to the present case only in the crucial point that the will in the present case has not any such words as "shall at my son's death," or any words qualifying in any respect the construction which the law attaches, in the absence of qualifying language to the words

but should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas revert and fall back to my great-grandson, Elias Peter, &c.

The judgment in *Exparte Davies* (1), had proceeded upon the same grounds as that in *Coltsmann* v. *Coltsmann* (2). In *Gray* v. *Richford* (3), the devise was to the testator's son John, his heirs and assigns for ever:

but if my said son John should die without leaving any issue of his body lawfully begotten, or the children of such issue *surviving him*—

(1) 2 Sim. N. S. 114. (2) L. R. 3 H. L. 121.
(3) 2 Can. S. C. R. 431.

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then he devised the said lands to his son Thomas, his heirs and assigns, to have and to hold the same *at the death of John.*

Nothing could be more express than this language that the time when the limitation over was to take effect *at the death of John without leaving issue, that is an heir of his body him surviving.*

In *Armstrong* v. *Nason* (1), after a devise by testator of certain land to one of two daughters and of other land to the other, the words used were:

and be it understood that if either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the *surviving daughter.*

This word "surviving" so used plainly indicated the intention of the testator to be that the limitation over should take effect in the survivor *immediately upon the decease of the other* without leaving issue her *surviving*, for if the deceased daughter should leave a child her surviving, being her lawful issue, the surviving sister of the deceased would take nothing under the will even though the child of the deceased sister should die in infancy and unmarried.

In *Bowey* v. *Ardill* (2), the devise over was to testator's wife of a farm to have and to hold *until* testator's daughter E. E. should arrive at the age of 21 years, after that to his said daughter and her heirs for ever, and should his *said daughter die before attaining the age of twenty-one years*, then he devised the farm to his wife and to her heirs for ever. So in *Parkes* v. *The Trusts Corporation* (3), a testator devised a farm to his executors in trust for his grandson, with power to sell and to apply the proceeds for his benefit, and in case he died *before attaining twenty-one* they were to transfer the land, or if sold, the balance of the proceeds to his father. The father died before his son, who also

(1) 25 Can. S. C. R. 263. (2) 21 O. R. 361.
(3) 26 O. R. 494.

died before attaining twenty-one without issue; the land was not sold, and it was held that the grandson took a vested estate in fee simple subject to being divested upon the happening of a certain event which had become impossible. It is obvious that with these two last cases cited by the learned counsel for the respondent we have nothing to do whether they be well or ill decided, for they have no bearing upon the question raised in the present case. So also *Whitter* v. *Bremridge* (1), also cited in behalf of the respondent, has no bearing on the present case. There, testator devised his residuary, real and personal property upon trust to sell and invest, and pay the said property and the interest arising therefrom to his godson *on his attaining the age of twenty-four years*, but *in case of his not* attaining that age or leaving male issue, then over. The question in the case was whether the infant legatee was entitled to maintenance during his minority, which depended upon the question whether the gift was of a *vested interest* or wholly *contingent* upon his attaining twenty-four. The contention upon behalf of the infant was that he took a vested interest liable to be divested in the event of *his not attaining the age of twenty-four* or of his dying *under that age* without having male issue, and Vice Chancellor Wood, delivering judgment, said: "It will be sufficient for the decision of the point to declare that the infant is absolutely entitled to the testator's residuary estate under the trusts of the will liable to be divested in the events in the will mentioned."

So neither has *Muskett* v. *Eaton* (2), also cited upon behalf of the respondent, any application in the present case. There the devise was of land

to one C. M. for life and in the event of his having a son, *born, or to be born in due time after his decease who should live to attain the age of*

(1) L. R. 2 Eq. 736. (2) 1 Ch. D. 435.

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twenty-one, then to such son and his heirs *if he should live to attain twenty-one* with *remainder* over, and it was held that on the death of C. M. his infant son took a *vested* estate in the devised property subject to be divested *if he should die under twenty-one*. So neither has *Dean* v. *Dean* (1) any application. The devise was to A. for life and after the decease of A. unto and to the use of such child or children of A. *living at his decease*, and such issue *then* living of the child or children of A. then deceased as either before or after the death of A. should *die under that age* and leave issue. The learned counsel for the respondent has furnished us with a list of many other like cases, but none of them cast a shadow of a doubt upon the judgment in *Coltsmann* v. *Coltsmann* (2), and cases of that class which are those which apply in the present case. It has been argued here that a subsequent clause of the will whereby the testator declared his will to be that certain personal property should be equally divided between his son John, his daughter Elizabeth and his "three great-grandchildren, the heirs of his grandson, Elias Zwicker," has the effect of limiting the time when the limitation over of the real estate to Elias Peter should take effect, to be the time of the death of Jonas *without leaving any child him surviving*, and so in like manner the time of the limitation over to Samuel B. A. Zwicker taking effect, to the death of Elias Peter without his leaving a child *him surviving*, and *Right* v. *Creber* (3) is cited as in support of this contention. But it is obvious that neither the language in the clause relied upon in the will now under consideration, nor that used in the will under consideration in *Right* v. *Creber* (3), which relate to gifts of personalty and to the designation of the persons to take

(1) (1891) 3 Ch. 150.
(2) L. R. 3 H. L. 121.
(3) 5 B. & C. 866.

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under such gifts have any bearing upon the construction of limitations of freehold property or as to the *time when* those limitations take effect with which subject limitation clauses in a will bequeathing personalty have no connection whatever and have no relation to the rule as laid down in *Coltsmann* v. *Coltsmann* (1), and cases of that class.

In *Right* v. *Creber* (2), a testator had devised lands to trustees in trust to the use of his daughter Joan for life, and from and after her death he devised the property in which she had an equitable estate for life unto the heirs of her body *share and share alike*, their heirs and assigns for ever. At the time of the testator's death his daughter Joan had one child, a son, living, but after testator's death she had eleven others and the question was whether the child of Joan who was living at testator's death took the whole as a vested remainder in fee to him and his heirs forever to the exclusion of all the other children of Joan.

Bayley J. giving judgment says:

Here there are the words *share and share alike* which show that the testator did not mean the property to go to the eldest male issue only, which he must have intended if the words "*heirs of the body*" be taken in a strict legal sense

Then again:

If the words *heirs of the body* were not used in a strict legal sense the first question is, in what sense were they used? I think they were used in a sense similar to that expressed by the words *descendants*, *children* or *issue*. That being so, *if the testator had used the words children or issue* which are words apt and proper to express the sense in which he used the words *heirs of the body*, then, according to *Doe* v. *Perryn*, the estate limited to the children was a contingent remainder in fee which on the birth of each child vested in that child, subject to open and let in those who were born after. It is a settled rule that wherever a remainder can be construed to be a vested remainder it is to be considered vested and not contingent.

Then again he says:

(1) L. R. 3 H. L. 121. (2) 5 B. & C. 866.

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Where it can be collected *from expressions in the will* that those words, (*heirs of the body*) are used in a different sense (from their strict legal sense, viz.,) as a designation of a person, then the remainder vests notwithstanding the general rule that *nemo est hæres viventis.*

Then he says:

I think there is * * * *sufficient on the face of the will* to show that the words "heirs of the body" were used to denote children, and therefore that it was the intention of the testator that the remainder should *vest* in the *first born* child subject to open and let in the *other children* as soon as they came into esse,

and so it was adjudged.

Holroyd J. in the same case, says:

It has been said that the testator meant those children only who were living at the death of *Joan* Creber, there is *nothing in the will to show* that that was his meaning, the words *share and share alike* and their heirs *and assigns* show that the words *heirs of the body* were not used in their strict legal sense.

The judgment in this case in fact appears to be rather in support of the contention of the appellant than that of the respondent as being confirmatory of the rule laid down in *Coltsmann* v. *Coltsmann* (1), and cases of that class, namely, that when words are used in a will which have a strict legal sense they will be construed in such sense unless it be *apparent from expressions in the will itself used in connection with those words that they are used by the testator in a sense different from their strict legal sense.*

Then there is the case of *Richards* v. *Davies* (2), where a testator devised real property to trustees and their heirs to the use of his daughter for life and after her decease in trust for such one or more of her children or his, her or their issue in such form, etc., as his daughter should by will appoint, and in default of appointment, in trust for all and every of her children and the heirs of their body or bodies lawfully begotten in equal shares and pro-

(1) L. R. 3 H. L. 121.

(2) 13 C. B. N. S. 69.

portions; and in case of the death of his said daughter *without leaving any child her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for his own right heirs forever;* and it was held that upon this will the children of the testator's daughter, tenant for life, were made tenants in tail with cross remainders between them, and that the limitation to the right heirs of the testator was barred by a disentailing deed which had been executed by the tenant for life jointly with a son of hers in his lifetime who, however, had died in the lifetime of his mother.

ERLE C.J. there says:

The general scheme of the will, as it seems to me, is that the daughter was to take an estate for life with remainder to issue intact and in the event of her leaving no issue then the estate was to go to the right heirs of the testator. Although this construction enables a child of the first taker to defeat the limitation over it as an invariable rule in the construction of wills that the testator is not to be supposed to have in his contemplation the possibility of his intentions being frustrated by the exercise by a tenant in tail of his disentailing power. If that power had not been exercised in this case the whole intention of the testator would have been carried into effect by the construction which I put upon the whole will—the line of the daughter having failed, the limitation over to the testator's right heirs would have taken effect.

Then there is the case of *Doe d. Blesard* v. *Simpson* (1), where testator by his will devised certain copyhold lands to his son, his heirs and assigns for ever, followed by the words:

but if it shall happen my said son shall die *without leaving any child or children*, in that case I give, devise and bequeath all the before mentioned estates, &c., unto my five children (who were illegitimate, naming them) their heirs and assigns forever, to be equally divided among them share and share alike, and if any of my said five children should die before they come of age, without issue, such share of him, her or them so dying shall go equally among the survivors.

(1) 3 Man. & G. 929.

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Now there the words "*without leaving any child or children*" were expressly used as it is contended on behalf of the respondent that the words "*without leaving any lawful heirs*" in the will now under consideration should be construed as having been used, and yet it was held in the above case that if the lands had been freehold the testator's sons would, under the will, *have taken an estate tail* with remainder over to the testator's five natural children, as the words *child or children* were used in the sense of *issue generally*, but that the lands being copyhold and not being capable of being entailed, the testator's son took a fee simple conditional on which no remainder could be limited, and further, that the lands being copyhold lands and so incapable of being entailed, afforded no ground for construing the devise to the five natural children to be an executory devise to take effect in the event of the testator's son *dying without any child living at his death.*

Haliburton v. *Haliburton* (1) was also relied upon by the learned counsel for the respondent, but as the conclusion arrived at in that case is expressly based upon the judgment in *Right* v. *Creber* (2), which, as already observed, has no application in the present case, we cannot recognize the judgment in *Haliburton* v. *Haliburton* (1), either as of any authority in the present case.

Many other cases were cited by the learned counsel for the respondent showing that the word "heirs" in a will, will in some cases be construed as if the word "children" had been used instead. It is not necessary to refer to those cases further than has been already done, for it is not questioned that the word "heirs" will be so construed when it is plain from the context in which the word is used that is intended by it to designate that the persons who are intended to take are

(1) 2 Old. (N. S.) 312.

(2) 5 B. & C. 866.

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to take as purchasers, but such cases have no bearing upon the present case. There is one case, however, cited by the learned counsel for the respondent the judgment in which although not affecting the judgment to be rendered in the present case is very instructive as a guide in the construction of wills. It is the case of *Jeffray* v. *Tredwell* (1). There a testator directed his trustees to pay the income of a trust fund to his wife during her life *or until she should marry again*, and from and after her marrying again he directed his trustees to pay her an annuity of £2,000 during her life, *and from and after the death of his wife* he directed them to levy and pay certain legacies, all which although payment was postponed until after the decease of his said wife he directed should be taken as *vested immediately upon his own decease.* The testator's wife survived him and married again—the question was whether the legacies were payable upon the life estate to the wife being determined by her second marriage or not until her decease.

Lord Justice Lindley delivering judgment says at p. 653:

> There is no ambiguity in the will at all. There is no expression which gives rise to any doubt or difficulty. But we are asked to look out of the will into authorities, and I protest against having recourse to authorities for the purpose of raising a difficulty. I understand having recourse to authorities for the purpose of grappling with a difficulty when it arises, but it appears to be a misuse of cases on construction to depart from a plain instrument and *to find from authorities something which you do not find in the instrument itself, and which you import from the authorities into the instrument, and thereby raise a doubt, and then have recourse to the same authorities for the purpose of seeing how the doubt is to be met. It appears to me that is fundamentally erroneous, and I think our duty is upon a plain will to adopt the construction which the words require.*

In the will before us, to construe the estate vested in Jonas by the will to be an estate in fee simple with

(1) [1891] 2 Ch. 640.

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an executory devise over to the testator's great-grandson Elias Peter, in the event of Jonas dying without leaving a child or children living at the death of Jonas, would have the effect of wholly defeating the devise over to Elias Peter in the event, which was a quite possible one, of Jonas dying and leaving a child or children his lawful issue him surviving, which issue should die in infancy and unmarried. In that event neither Elias Peter nor his issue who might continue for many generations would take anything, and the testator's manifest intention of benefiting Elias Peter and his issue would be defeated, as likewise would be the devise over to the present respondent. As then there is not a single expression in the will to qualify the construction which the law of England puts upon the word "heirs" in the context in which they are used in the present will, there can be no doubt that in 1859, upon the death of the testator, if the above ch. 112 of the first series of the Statutes of Nova Scotia had never been passed, the estate devised to testator's son Jonas must have been adjudged to be an estate in fee tail, and so likewise that the limitation over to Elias Peter, the testator's great-grandson, must have been adjudged an estate in fee tail upon default of issue of Jonas, and the limitation over to the respondent to have been a remainder in fee simple expectant upon the termination of the estates tail vested in Jonas and Elias Peter respectively.

The only difference between the devise of Jonas and that to Elias Peter, is that in the latter case the words used are: "And should my great-grandson Elias Peter *die before my son Jonas, or* before he becomes of age, *or* should he die without any heirs, then &c." But in *Mortimer* v. *Hartley* (1), the words in the will after the devise to testator's son John were:

(1) 6 Ex. 47; 3 De G. & S. 316.

If it should happen that my son John die *without leaving lawful issue* it is my will that my daughter Ann have his share, subject &c., &c., and—if it should please God to take away both Ann and John *under age*, or without *leaving lawful issue*, I give and bequeath to my brother Joseph and his heirs for ever, all, &c., &c.

Ann survived her father and died *under age and unmarried;* John also survived his father *and attained the age of twenty-five years*, leaving two surviving children who died in infancy. John by will devised all his real estate to the defendant. The question was whether (John having reached the age of twenty-five leaving children him surviving, who, however, had died in infancy,) Joseph the testator's brother or the devisees of John took the real property devised to John and Ann, and it was held that the word "or" in the clause "if it should please God to take away both Ann and John, *under age, or without lawful issue*, must be read in its ordinary sense in the disjunctive and not as the copulative *and*. Baron Parke giving judgment says:

If we change "*or*" into "*and*" for the purpose of effecting the conjectural intention, to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat *the clear and manifest intention to give the remainder to Joseph on failure of issue of John and Ann*, and cause an intestacy as to that remainder, a circumstance which ought to be avoided.

And it was judged that notwithstanding that John had passed the age of twenty-five, yet upon failure of the issue of John and Ann, that is upon the termination of the estates tail, Joseph took the lands under his estate in fee in remainder upon the determination of the estates tail. Here, however, it is of no importance whether the word "*or*" be read in the disjunctive or as "*and*" for the estate tail to Elias Peter was determined by his death, under age and without issue, in the lifetime of Jonas.

It remains only to consider what effect, if any, ch. 112 of the first and second series of the Consolidated

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Statutes of Nova Scotia, or any other of the above cited subsequent statutes, have upon the construction which in the absence of these statutes must, I think, have been put upon the will under consideration.

In the matter of *The Estate of Simpson* (1), the Supreme Court of Nova Scotia in 1863 held that the above mentioned ch. 112 absolutely abolished all estates tail both past and future, both those where a reversion in fee remained in the settler or donor and those whereon a remainder was limited.

The then Chief Justice of that court, the late Sir William Young, in his elaborate judgment in that case shews that the terms "fee simple *absolute*" and "*valid* remainder" as used in ch. 112 and the sentence in which they are found were taken from a statute of the State of New York *without their context in that statute*, which shews the sense in which they were there used, and he proceeded as we must also now do to construe the sentence as it stands in the ch. 112, wholly apart from the omitted part of the New York statute. There can, I think, be no doubt that the ch. 112 did abolish all estates tail then existing where the reversion in fee remained in the heirs of the settler or donor, and converted the estate tail into an estate in fee simple as effectually as a fine and recovery could have done or a disentailing deed executed under the Nova Scotia statute, 55 Geo. 3, ch. 14, which was thenceforth expunged from the statutes of Nova Scotia, not being thereafter contained in the Consolidated Statutes.

It is certainly difficult to understand upon what principle a remainder in fee expectant upon the determination of an estate tail should be more respected than a reversion, and it was no doubt because the Supreme Court of Nova Scotia could see no good reason

(1) 1 Old. (N. S.) 317.

for it, that they held *all* estates tail, including those whereon a remainder was limited, to be abolished, and the estate of the tenant in tail converted into a fee simple equally as if a disentailing deed had been executed. The expunging from the Statutes of Nova Scotia of the disentailing Act 55 Geo. 3, ch. 14, as in that case no longer necessary, certainly favoured that conclusion, but with the greatest deference to the judgment of that court I cannot concur in that conclusion. The construction which I think must be put upon what the learned Chief Justice in the above case in very moderate terms designates the "ambiguous and inartistic sentence" which forms the ch. 112, is that only estates tail whereon no remainder was limited were abolished notwithstanding the first words in the sentence. It was argued in the case before us that the meaning of that *ambiguous and inartistic sentence* was to abolish the estates tail whereon a remainder was limited equally as all others, but nevertheless to preserve the remainder as valid notwithstanding the destruction of the estate tail whereon the remainder was limited; but as the remainder could not be preserved in accordance with the principles of the law of England upon the subject without preserving the estate tail whereon the remainder was limited until its determination for the want of heirs to inherit, it was then argued that what the ch. 112 effected was to convert the estate tail into a fee simple with an *executory devise* over in fee in the event of the person who was formerly tenant in tail dying *without leaving issue him surviving*, an heir or heirs competent to have inherited the estate tail if it had not been abolished and converted into a fee simple. As to this construction it is sufficient, I think, to say that the language used warrants no such violent construction, and that such a construction could not be maintained without the

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establishment of some new canons for the construction of statutes. Now whatever the draftsman of this obscure statute, ch. 112, contemplated by framing into a statute what Chief Justice Sir William Young has shown to be an imperfect extract from a statute of the State of New York, it is plain, I think, that the legislature of Nova Scotia did not by it abolish estates tail *having a remainder limited thereon*, whatever may have been their reason, if any was considered, for preserving them. That the creation of such estates tail in the future was not prohibited or declared to be ineffectual appears sufficiently from ch. 114 of the same first series of the Consolidated Statutes, by the 26th sec. of which chapter it is enacted that:

Where any person to whom any real estate *shall be devised for an estate tail, or for an estate in quasi entail shall die in the lifetime of the testator leaving issue, who would be inheritable under such entail if such estate existed* (that is if the tenant in tail had not died before the testator), *and any such issue shall be living at the time of the death of the testator, such devise shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator*, unless a contrary intention shall appear by the will.

This enactment is repeated and consolidated in the second and also in the third series of the Consolidated Statutes of Nova Scotia, in which third series, enacted in 1864, immediately after the judgment of the Supreme Court of Nova Scotia *in re Simpson's Estate* (1), the ch. 112 of the first and second series is consolidated as ch. 111 in language which must, I think, be construed as giving the true construction of the said ch. 112, as follows:—

All estates tail *on which no valid remainder is limited are abolished*, and every such estate shall hereafter be adjudged a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In the following year, A.D. 1865, the legislature of Nova Scotia passed the statute 28 Vict. ch. 2, whereby it was enacted as follows:—

(1) 1 Old. (N. S.) 317.

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All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple, and may be conveyed or devised or descend as such.

This statute has been continued in every series of the consolidated statutes since enacted. Now in view of all those statutes it is impossible, in my opinion, to construe the above ch. 112 in the first series as having abolished estates tail having a remainder limited thereon, and in view of the enactments contained in sec. 26 of ch. 114 of the said first series consolidated in ch. 112 of the third series of the Consolidated Statutes of Nova Scotia, and in view of the above statute, 28th Vict. ch. 2, we cannot hold otherwise than that such estates tail remained in existence in full force until they were abolished and converted into estates in fee simple in the tenants in tail in possession at the time of the passing of the last mentioned Act, and that therefore upon the sale and conveyance long after the passing of the said last mentioned Act by Jonas Zwicker, the tenant in tail in possession at the time of the passing of that Act, to the appellant Ernst and his heirs, an estate in fee simple in the lands in question was vested in Ernst and his heirs, and therefore this appeal must be allowed with costs, and judgment must be ordered to be entered for the defendants in the action in the court below with costs.

SEDGEWICK J. was of opinion that the appeal should be allowed for reasons stated in the judgment of His Lordship Mr. Justice King.

KING J.—The plaintiff in this action (and respondent here) claims the land in question as devisee under the will of Peter Zwicker.

The defendant claims under conveyance from Jonas Zwicker, a son of the testator to whom the property was devised, with certain limitations over, and the

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question is as to the nature and extent of Jonas Zwicker's interest under the will.

The will was made in 1857. After devise of a certain lot to his grandson Emanuel Zwicker, who was then at sea, the testator goes on as follows:—

> But should my grandson Emanuel Zwicker not return home, this last mentioned lot to revert and go to my son Jonas, together with all the remainder of my real estate as well as personal property, cattle, household furniture, etc., which I give and bequeath to my son Jonas. * * * But should my son Jonas die without leaving any lawful heirs, then I order that all my real estate now made over to my son Jonas, revert and fall back to my great-grandson Elias Peter, aforesaid, and should my great-grandson Elias Peter die before my son Jonas, or before he becomes of age, or should he die without any heirs, then I order, give and bequeath all my real estate to Samuel B. A. Zwicker and his heirs, youngest son of Benjamin Zwicker, Esq. It being my sincere wish that my real estate should remain in my name, reserving the dower to my daughter-in-law as long as she remains a widow, should she survive my son Jonas. * * * I also order that my son Jonas keep and maintain my sick son John in a kind manner and give him good treatment out of my real and personal property, made over to my son Jonas, during his life.

The testator died in 1859. The learned trial judge has found that Emanuel never returned home, but was lost at sea, and that Elias Peter died before he reached the age of twenty-one (21) years, and during the lifetime of Jonas without ever having been married. Jonas died in 1894, having in 1891 conveyed the land in question to the appellant.

Samuel B. A. Zwicker, who is a son of a cousin of the testator, claims that, in the events that have happened, he is entitled to the property.

Mr. Justice Meagher, who tried the case, decided in his favour upon the ground that Jonas took an estate for life merely.

The Supreme Court of Nova Scotia, on appeal, maintained the judgment in plaintiff's favour, but upon another ground, viz., that Jonas took an estate in fee

simple with executory devises over, which, upon the events that happened, divested the fee simple out of Jonas and vested it in Samuel B. A. Zwicker.

In 1851 an Act was passed relative to the abolition of estates tail (1), which appears in identical terms in the revision of 1858 (2), and is as follows:—

> All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple, and if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple.

In *Re Simpson* (3), (1863), a case where the devise was made long anterior to the Act, the Supreme Court of Nova Scotia decided that the Act absolutely abolished all estates tail, even although a valid remainder be limited thereon.

In the opinion of that court the expressions of the Act, "all estates tail are abolished," "and every estate which would hitherto have been adjudged a fee tail, shall hereafter be adjudged a fee simple," are too comprehensive and precise to admit of the exclusion of estates tail with remainder expectant on their termination, by inference, and simply because the effect of the general clause upon one of the classes of estates tail, viz., that where there is a reversion upon the termination of the estate tail, was alone particularized. In their view the like consequences followed, by law, in the other class of cases where there was a valid remainder expectant upon the termination of the estate tail.

Bliss J., while agreeing that every estate tail was abolished and converted into an estate in fee simple, considered that the effect of the latter part of the section was this: that where there was no valid re-

(1) R. S. N. S. (1851) ch. 112. (2) R. S. N. S. (1858) ch. 112.
(3) 1 Old. (N. S.) 317.

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mainder limited on the estate tail, the fee simple was to be a "fee simple absolute," while, if there be such a remainder, the estate tail is none the less converted into a fee simple, but it is a fee simple *conditional* within the common law signification of the term.

Practically there was no substantial difference between a fee simple conditional at common law and an estate tail under the statute *de donis* (1), but they were, however, none the less, different estates.

In the view of all the learned judges, therefore, estates tail were abolished and converted into fees simple, and there was no longer such a thing as a valid remainder expectant on the termination of an estate tail.

It is unnecessary to decide between these two views, the divergence between which does not practically affect the question before us. It seems to me sufficient to say that we should follow the judgment of the Supreme Court of Nova Scotia upon the construction of a statute affecting the tenure of real property, which was long ago pronounced, and which has not since been questioned in the courts of Nova Scotia.

In 1864 the legislature substituted for the then existing enactment, one which in terms was confined to estates tail on which no valid remainder was limited. This Act had a very short life, and was repealed the next year by an Act which plainly and in terms abolished all estates tail, and converted every estate which theretofore would have been adjudged a fee tail into a fee simple, without any declaration as to the effect of there being no valid remainder limited thereon.

In all these enactments the body of law relating to the creation of estates tail prior to the abolition of them is recognized in the expression, repeated in the successive statutes, "every estate which would

(1) 4 Kent. Com. 12.

hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple." The courts, therefore, are required to interpret an instrument as before, and if, in the state of the law prior to the abolition of such estates there would have been adjudged to be an estate tail, it is by force of the statute to be converted into an estate in fee simple. But, equally as a result of the view of Bliss J. as of the majority of the court, there could be no valid remainder expectant on an estate tail after 1851, because there could be no valid estate tail to support such remainder. As to estates created before 1851, the remainder expectant on the termination of the estate tail was a vested estate, and at the time of the Act was a valid remainder.

Next, as to the construction of the will: Does it purport to give to Jonas an estate tail with remainders over as claimed by appellant, or an estate for life only with remainders over as held by Mr. Justice Meagher, or an estate in fee simple with executory devises over, as held by Mr. Justice Henry speaking for the rest of the judges?

The devising clause to Jonas is to him without any words of limitation. Under the Wills Act this carries the entire interest of the testator, unless a contrary intention appears by the will. The will goes on to direct what disposition is to be made in case Jonas should die without leaving any lawful heirs. In that event it is to go (in the first instance) to the testator's great-grandson.

There appears to be no more settled rule applicable to the transmission of real property by devise than that expressed by the following passage from Jarman on Wills (1).

> Where real estate is devised over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so

(1) 2nd Vol. (5 ed.) p. 1175.

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as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word "heirs" is construed to mean heirs of the body, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate. This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

See also other cases cited for the appellant. *Simson* v. *Ashworth* (1); *Harris* v. *Davis* (2); *Morgan* v. *Griffiths* (3); *Doe d. Hatch* v. *Bluck* (4).

Here Elias Peter and Samuel B. A. Zwicker, the two named devisees over, are persons who might take in course of descent from Jonas Zwicker, and so the words "lawful heirs" in the limitation over are to be read as if they were "heirs of his body," *i. e.*, of the body of Jonas; and accordingly the estate of Jonas is, by the effect of the devise over, restricted to an estate tail, and the devisee over has an estate in remainder expectant on the termination of the estate tail. The rule of law is stated by Kent (5), to be established by a series of cases in the English law uniform from the time of the Year Book down to the date of his writing.

Mr. Justice Meagher, who recognized the rule, felt pressed by the declaration, in the will, of the testator's wish that his real estate should remain in his name, to limit the interest of Jonas under the will to a life estate, as the most efficacious way of accomplishing this object. But it would hardly seem that so general a declaration of intention could vary the sense in which words having such a settled meaning are used. The learned judge's view would also make a partial

(1) 6 Beav. 412.
(2) 1 Col. C. C. 416.
(3) Cowp. 234.
(4) 6 Taunt. 484.
(5) 4 Kent Com. 276.

intestacy in the event of Jonas dying leaving heirs of his body. The provision as to providing during the life of John for his support, out of the real and personal property made over to him, is also against such view.

Then, as to the contention that Jonas took an estate in fee simple with executory devise over. We are not to stop at a certain point and say: "Here is what would, if taken by itself, make an estate in fee simple," and then give effect to this as if it stood alone, and then go on to construe the devise over independently. The whole is to be taken together, the words of devise and the devise over in default of leaving lawful heirs. The question is: What does the whole import, each part being allowed its fair weight, alone and together with the other?

Here again comes in the rule of law already referred to, unless there is something on the face of the will showing a manifest intention that the words are used in a different sense.

If the words were "die without leaving lawful heirs him surviving," this would point to a definite failure at the date of Jonas' death, and we might have an executory devise. So, if the words were "die without leaving issue," or "die without issue," or "have no issue," or other like terms, for by statute R. S. N. S. (1854) c. 114, sec. 24, these words would *primâ facie* mean a want or failure of issue in the lifetime or at the death of Jonas. But the words "die without leaving lawful heirs," or "die without leaving heirs," are not within the statute and import an indefinite failure, and in connection with a devise over, have a fixed and technical operation in restricting the prior estate in fee simple to an estate tail. That fixed and technical meaning is imperative unless, from something else in the will, it is evident that the words are used in a different sense, or there is some repugnancy,

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Here there is nothing having this effect. The word "issue" is a more flexible term than "heirs," and yields to a secondary meaning more readily.

Under a like Imperial Act (1), a devise over in case the prior taker "should die without heirs male of his body lawfully begot" was held to refer to an indefinite failure of heirs male.

In *Dawson* v. *Small* (2), Sir W. M. James, L.J., there says:

> Mr. Chitty argued that section 29 of the Wills Act applied, and that the gift over was in the event of John Small Lowther dying without leaving heirs male living at his death; but I am of opinion that the Act has no reference to such a case. The legislature there deals with "die without issue," "die without leaving issue," and similar ambiguous expressions; but here there is no ambiguity, the gift over is on failure of heirs male of the body.

Then, supposing that the limitations here were to be treated as executory devises; the first (to Elias Peter) would be void as against the rule as to perpetuities, inasmuch as the contingency on which it is to become vested is the indefinite failure of heirs of the body, and this being so, the limitation might *possibly* not take effect within the lifetime of any person in being at the testator's death or within twenty-one years thereafter.

Treating this then as void, how is it with the subsequent limitation in favour of the respondent? If it is an executory devise and is dependent upon the coming into existence of the prior limitation, the rendering void of the first would also invalidate the second. But if the one is not dependent on the other, or on like condition, then the nullity of the first would cause the second limitation to operate as if the void demise had never been made. In this state of things the devise to the respondent would depend upon these contingencies, viz., the death of Elias Peter in the

(1) 1 Vict. c. 26, sec. 29. (2) 9 Ch. App. 651.

lifetime of Jonas, his death under age, or his death without leaving heirs. As to this last contingency, it would equally be obnoxious to the rule against perpetuities, but the avoiding of this would not avoid the limitation so far as it is made dependent upon the other two contingencies. Per Lord Chelmsford in *Evers* v. *Challis* (1).

The other two contingencies, viz., the death of Elias Peter in Jonas' lifetime, or under age, would of course necessarily be determined during lives in existence at the testator's death. But we then should have the fee simple in the testator's son Jonas defeated during his lifetime, or notwithstanding that he had heirs of his body, and the estate in fee simple passing to Samuel B. A. Zwicker, in the event of Elias Peter dying in the lifetime of Jonas or under age.

This is a result that would seem opposed to what one would say must have been the real intention with regard to Jonas, viz., to give him an estate which might pass to the heirs of his body.

Upon the whole, therefore, I think that the estate devised to Jonas purported to be an estate tail, which, by operation of the statute, has been converted into an estate in fee simple, and that therefore the appeal should be allowed.

GIROUARD J. concurred for reasons stated in the judgment of His Lordship Mr. Justice Gwynne.

Appeal allowed with costs.

Solicitor for the appellant: *Charles W. Lane.*

Solicitors for the respondent: *Wade & Paton.*

(1) 7 H. L. Cas. 555.