1895

*Mar. 26.

*May 6.

HENRY KING AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

SARAH JANE EVANS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise of life estate—Remainder to issue in fee simple—Intention of testator—Rule in Shelley's case.

A testator by the third clause of his will devised land as follows: "To my son J. for the term of his natural life and from and after his decease to the lawful issue of my said son J. to hold in fee simple." In default of such issue the land was to go to a daughter for life with a like remainder in favour of issue, failing which to brothers and sisters and their heirs. Another clause of the will was as follows: "It is my intention that upon the decease of either of my children without issue, if any other child be then dead the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will."

Held, affirming the decision of the Court of Appeal, that if the limitation in the third clause, instead of being to the issue to hold in fee simple had been to the heirs general of the issue, the son, J., under the rule in Shelley's case, would have taken an estate tail; that the word "issue" though *primâ facie* a word of limitation equivalent to "heirs of the body" is a more flexible expression than the latter and more easily diverted by a context or superadded limitations from its *primâ facie* meaning; that it will be interpreted to mean "children" when such limitations or context requires it; that "to hold in fee simple" is an expression of known legal import admitting of no secondary or alternative meaning and must prevail over the word "issue" which is one of fluctuating meaning; and that effect must be given to the manifest intention of the testator that the issue should take a fee.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of the Divisional Court (2), in favour of the defendants.

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 21 Ont. App. R. 519. (2) 23 O. R. 404.

The question for decision in this appeal turns upon the construction of the will of one Andrew Hamilton the clauses of which bearing upon the matters in issue, are as follows:

Thirdly, I give and devise lot * * * * to my son James for the full term of his natural life, and from and after his decease to the lawful issue of my said son James, to hold in fee simple, but in default of such issue him surviving then to my daughter said Sarah Jane for the term of her natural life, and upon the death of my daughter Sarah Jane then to the lawful issue of my said daughter Sarah Jane to hold in fee simple, but in default of such issue of my said daughter Sarah Jane then to my brothers and sisters and their heirs in equal shares.

Clause two devised other lands in the same way to the testator's daughter Sarah Jane with reversion on default of issue to the son.

The sixth clause is as follows:

It is my intention that upon the decease of either of my children without issue if my other child be then dead, the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will.

The defendants claimed, and Mr. Justice Ferguson held, that under the provisions of clause three the son James took an estate tail by application of the rule in Shelley's case. The Court of Appeal reversed the decision of Mr. Justice Ferguson and held that James took only a life estate with remainder to his issue in fee. The defendants appealed.

Armour Q.C. and *McBrayne* for the appellants. The interpretation put upon the will by the Court of Appeal is that it created an estate for life with an executory devise to grand children. But a devise will never be construed as executory if it can be held to be a remainder. *Carwardine* v. *Carwardine* (1); *Goodtitle* v. *Billington* (2); Fearne on Contingent Remainders (3).

(1) 1 Eden 27.
(2) 2 Doug. 753.
(3) Vol. 1. p. 386.

1895

KING v. EVANS.

A devise to A. for life and after his decease to the male issue of his body and their heirs and in default of issue to other devisees creates an estate tail in A. *Frank* v. *Stovin* (1); and to the same effect are *Denn* v. *Puckey* (2); *Williams* v. *Williams* (3); *Hellem* v. *Severs* (4).

The words "to hold in fee simple" cannot control the meaning of "issue" and make it a word of purchase. *Parker* v. *Clarke* (5); *Roddy* v. *Fitzgerald* (6).

Nesbitt Q.C. and *Bicknell* for the respondent. The rule in Shelley's case is a rule of law not of construction. *Evans* v. *Evans* (7).

The expression "to hold in fee simple" is one of known legal import and must have its legal effect unless from the context it is very clear that the testator meant otherwise. *Doe d. Gallini* v. *Gallini* (8); *Montgomery* v. *Montgomery* (9).

THE CHIEF JUSTICE.—The Court of Appeal in this case reversed the judgment of Mr. Justice Ferguson whereby judgment was directed to be entered for the present appellant.

The sole question for determination is the construction of the will of Andrew Hamilton. The date of this will was the first of April, 1869. It was therefore made before the passing of the Ontario Wills Act (10) and is unaffected by that statute. By the third clause of his will the testator devised the lands in question in this cause as follows:—

To my son James for the full term of his natural life and from and after his decease to the lawful issue of my said son James to hold in fee simple, but in default of such issue him surviving then to my

(1) 3 East 548.
(2) 5 T. R. 299.
(3) 51 L. T. N. S. 779.
(4) 24 Gr. 320.
(5) 6 DeG. M. & G. 108.
(6) 6 H. L. Cas. 823.
(7) [1892] 2 ch. 184.
(8) 5 B. & Ad. 621.
(9) 3 J. & La.T. 47.
(10) R. S. O. Cap. 109.

daughter said Sarah Jane for the term of her natural life, and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane to hold in fee simple, but in default of such issue of my said daughter Sarah Jane then to my brothers and sisters and their heirs in equal shares.

By the second paragraph the testator devised other lands to his daughter Sarah Jane in the same terms as those upon which by the third clause he devised the lands now in question to his son James, with similar devises over in favour of James and his issue, with a like ultimate gift over in favour of the testator's brothers and sisters.

The sixth paragraph was as follows:

It is my intention that upon the decease of either of my children without issue, if any other child be then dead, the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will.

Mr. Justice Ferguson was of opinion that by the operation of the rule in Shelley's case the testator's son James took an estate tail which had been effectually barred by a disentailing assurance executed by the devisee. The Court of Appeal on the other hand have held that James took an estate for life with remainder to his children in fee.

The rule in Shelley's case, as is well known, is a rule not of construction but of law. Before applying it, however, it is requisite to ascertain, by the application of settled rules of construction, what was the testator's meaning by the language in which he has expressed himself.

The word "issue" is no doubt well settled to be *primâ facie* a word not of purchase but of limitation equivalent to heirs of the body; it will, however, be interpreted as meaning "children" when that interpretation is required either by the context or from superadded limitations. The same may indeed be said of the more technical expression "heirs of the body,"

1895

KING v. EVANS.

The Chief Justice.

which may be read as children, if the testator has sufficiently expressed his intention that that shall be done. The word "issue" is, however, said to be a more flexible expression than "heirs of the body" and will more readily be diverted by force of a context or superadded limitations from its *primâ facie* meaning than the term "heirs of the body."

Lord Brougham in *Fetherston* v. *Fetherston* (1), where the question was whether a gift to W. F. and his heirs male could by force of the subsequent words be cut down to an estate for life in W. F., thus states the rule:

> So again if a limitation is made afterwards, and is clearly the main object of the will—which never can take effect unless an estate for life be given instead of an estate tail—here again the first words become qualified and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been.

In the case before us the controversy has turned on the effect of the words "to hold in fee simple" following the gift to the issue of James. Mr. Justice Ferguson held that the words should have the same effect as if there had been a limitation to the issue and their heirs in which case the learned judge was of opinion that James would have taken an estate tail.

That a limitation to the heirs general of the issue would have that effect is, I think, clear upon the authorities. In *Montgomery* v. *Montgomery* (2), Sir Edward Sugden, L. C. of Ireland, says in his judgment:

> Thus far it appears to be clearly settled that a devise to A. for life with remainder to his issue with superadded words of limitation in a manner inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. This is established by a series of cases from *Doe d. Cooper* v. *Collis* (3) to *Greenwood* v. *Rothwell* (4)

(1) 3 Cl. & F. 67.
(2) 3 J. & LaT. 47.
(3) 4 T. R. 294.
(4) 6 Scott N. R. 670.

with which it may be found difficult to reconcile the decision in *Tate* v. *Clark* (1). But I say this with hesitation and with great respect for the learned judge who pronounced the latter decision.

Upon this passage there has been much criticism. Some text writers have insisted that the Lord Chancellor did not mean to apply his remarks to a case where the additional limitation was to the heirs general of the issue; others have thought differently, and have considered that the proposition was an erroneous statement of the principle to be deduced from the authorities. In the notes to Shelley's case in Tudor's leading cases on the law of Real Property (2) it is said:

> Nor will a limitation to heirs general superadded to the word issue convert it into a word of purchase; and the rule in Shelley's case (as we have formerly seen is the case where a similar limitation comes after the limitation to the heirs of the body) will still take effect.

In Jarman on Wills (3), the law is laid down as follows:

> It is also established that the addition of words of limitation to the heirs general of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation.

And in a subsequent page (4), the editor of the last edition of that work referring to *Montgomery* v. *Montgomery* and the passage already extracted from that judgment says:

> Lord St. Leonards is sometimes cited as if he had laid down a contrary rule; but what he says is "a devise to A. for life with remainder to his issue with superadded words of limitation in a manner inconsistent with a descent from A. will give the word 'issue' the operation of a word of purchase."

thus pointing out that what Sir Edward Sugden referred to was a subsequent limitation changing the course of descent which is sufficient to convert even "heirs of the body" into words of purchase (5).

(1) 1 Beav. 100.
(2) 3 ed. p. 618.
(3) 5 Eng. ed. p. 1265.
(4) P. 1269.
(5) Ed. 3 Tudor's L. C. 613 citing *Doe d. Bosnall* v. *Harvey* 4 B. & C. 610 *Hamilton* v. *West* 10 Ir. Eq. Rep. 75. *Dodds* v. *Dodds* 10 Ir. Ch. Rep. 476; 11 Ib. 374.

1895

KING v. EVANS.

The Chief Justice.

Mr. Hawkins in his treatise (1) says:

But under a devise to A. for life with remainder to his issue and their heirs without a gift over on failure of issue of A. it has been laid down by Lord St. Leonards in *Montgomery* v. *Montgomery* that the words of limitation exclude the rule and that the issue take by purchase.

He afterwards adds:

It may perhaps be doubted whether *Montgomery* v. *Montgomery* is on this point an authority at the present day.

Theobald on Wills lays it down very distinctly that the addition of a limitation to the heirs of the issue does not prevent the operation of the rule; the learned author says (2):

Words of limitation in fee or in tail superadded to the word "issue" where there is a limitation in default of issue in cases before the Wills Act will not make it a word of purchase, provided they do not change the course of descent.

It is clear that in the case of an estate limited to the heirs of the issue there is no change of descent, as there would be if there was a limitation to the "heirs male" of the body, or "heirs female" of the body, of the issue, (3) inasmuch as heirs is restrained so as to mean the same class of heirs as the word issue itself imports, thus leaving the latter to operate as a word of limitation.

In *Parker* v. *Clarke* (4), Lord Cranworth said:

I quite agree with the general rule which has been advanced in the argument that when the gift is to one for life and after his death to the issue of his body and the heirs of such issue for ever, there, by the addition of the words of limitation the testator is merely using words which are idle and which shall not prevail to convert the word "issue" into a word of purchase.

In that case as Alderson B. had already said in *Lees* v. *Mosley* (5):

(1) P. 195 2 Am. Ed.
(2) 4th ed. p. 355.
(3) See Tudor's L. C. p. 613 and cases cited supra.
(4) 6 De G. McN. & G. 109.
(5) 1 Y. & C. (Ex.) p. 589.

The word "heirs" would be first restrained to "heirs of the body" and then altogether rejected as unnecessary.

The case of *Parker* v. *Clarke*, supported as it is by a great number of decided cases (1), is therefore conclusive of the question which had thus far been the subject of consideration. It is however a very different thing from holding that the general word "heirs" may be restricted to "heirs of the body" in order to conciliate it with the previous limitation to say that the words "to hold in fee simple" should, without any context, be translated as meaning "to hold in fee tail," or be altogether rejected.

In the older cases a rule was applied which was generally stated as one which required that the particular intent should give way to the general intent, and although probably some traces of it still linger in the rule just referred to, that a limitation to heirs following a gift to issue shall be confined to heirs of the body, this rule is universally treated by modern authorities as exploded. In *Doe d. Gallini* v. *Gallini* (2), Lord Denman referring to this old rule says:

> The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late as being, as a general proposition, incorrect and vague and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the rule in Shelley's case, and it has since been laid down in others where technical words of limitation have been used and other words showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows have been rejected; but in the latter cases the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense, and so it is said by Lord Redesdale in *Jesson* v. *Wright* (3). This doctrine of general and par-

(1) See authorities collected Tudor's L.C. p. 618.

(2) 5 B. & Ad. 640.

(3) 2 Bligh 57.

1895

KING v. EVANS.

The Chief Justice.

ticular intent ought to be carried no further than this, and thus explained it should be applied to this and all other wills.

Were we to give effect to the appellants' contention in the present case we should not only be reviving the old and exploded rule of the general intent overriding the particular intent, but applying it in a manner much stronger than any of the cases, decided in times when it was generally approved of, afford a single instance of. We have here not a word like "heirs," but in the words "to hold in fee simple" an expression of "known legal import" which can admit of no secondary or alternative meaning. Then we have the inconsistent word "issue," and as we cannot reconcile the two, except by reading "issue" in its secondary meaning as equivalent to children, that must be done.

As to the word "issue" we find it laid down in the authorities over and over again that it is a flexible word which will yield its primary meaning more readily than "heirs of the body." As Alderson B. puts it in *Lees* v. *Mosley* (1):

> But the authorities clearly show that whatever be the *primâ facie* meaning of the word "issue" it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do.

We have already seen that even the words "heirs of the body" themselves will have to give way if there is a change in the course of descent.

Then can it be doubted that when we have this word of fluctuating meaning "issue" coupled with the unyielding words "to be held in fee simple" that the latter are to prevail over the former, and that we must refuse either to strike out the words "to hold in fee simple" or, in defiance of the testator's expressed intention, to alter his will by reading them as meaning

(1) 1 Y. & C (Ex.) 589.

something entirely different, namely, "to hold in fee tail." I think there can be no doubt but that we must give effect to the manifest intention of the testator. The question is whether he meant the issue of his son to take in fee simple, and in so many words he said that he did. Would it be anything short of setting aside the will were we on technical grounds to hold that "fee simple" did not mean "fee simple," or to reject it as altogether meaningless?

Three modern cases of the highest authority, *Abbott* v. *Middleton* (1), *Grey* v. *Pearson* (2), and *Roddy* v. *Fitzgerald* (3), have now settled the general rule of construction to be that every word which the testator has used is to be given effect to and nothing is to be rejected if it is in any way possible to reconcile and give a consistent meaning to the terms in which the testator has expressed himself.

I have not adverted particularly to the sixth clause, but I may say generally that so far from detracting from the construction before indicated that part of the will greatly strengthens it.

The judgment of the Court of Appeal was entirely right and must be affirmed and the appeal dismissed with costs.

TASCHEREAU J.—I am of the same opinion

GWYNNE J.—I cannot entertain a doubt upon reading the second, third and sixth clauses of the testator Andrew Hamilton's will, that the testator, by the terms "to hold in fee simple," as used in the second and third clauses, and the expression "shall at once take the fee simple of the devise mentioned in the second and third clauses," as used in the sixth clause, meant to

(1) 7 H. L. Cas. 68. (2) 6 H. L. Cas. 61.
(3) 6 H. L. Cas. 823.

1895

KING
v.
EVANS.

Gwynne J.

devise exactly what the words express, namely, an estate in fee simple and not a fee tail, and there is no rule of law which can override a testator's intention plainly expressed. The estate devised to the testator's son James, to which alone the question submitted in the case relates, is an estate for life only and the appeal must be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for the appellants: *Teetzel, Harrison & McBrayne.*

Solicitors for the respondent: *Nesbitt & Gould.*