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*June 5.

*June 15.

MARY HARTE THOMPSON AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

JOSEPH SMITH, MAUD BRIGHAM AND EUGENIA FLORENCE REIFFENSTEIN (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction of—Words of futurity—Life estate—Joint lives—Time for ascertainment of class—Survivor dying without issue—"Lawful heirs."

A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator.

APPEAL from the judgment of the Court of Appeal for Ontario (1), which reversed the decision of the Chancery Division (2), in favour of the plaintiffs.

A sufficient statement of the case appears in the judgment reported.

McCarthy Q.C. and *Wyld* for the appellants. The rule that the "heir" means the "heir at the testator's death" is subject to the qualification "unless a contrary intention appear." Here a contrary intention does appear, for a life estate is expressly given to the daughter and this is important in construing the devise. *Morgan* v. *Thomas* (3). The fact that his daughter was his only heir points to the conclusion that by the words "my lawful heirs," the testator meant persons

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

(1) 23 Ont. App. R. 29. (2) 25 O. R. 652.
(3) 9 Q. B. D. 643.

other than the daughter. The peculiar context distinguishes the present will from that presented for decision in *Re Ford, Patten* v. *Sparks* (1); *Wrightson* v. *McCauley* (2); and *Bullock* v. *Downes* (3). The following are in point: *Gibbons* v. *Gibbons* (4); *Coltsmann* v. *Coltsmann* (5); *Ex parte Davies* (6); *Parker* v. *Birks* (7). The law is compendiously stated in Watson's Equity at p. 735. We also refer to the following cases as to the intention: *Brennan* v. *Munro* (8); *Keeler* v. *Collins* (9); *Clow* v. *Clow* (10); *Evans* v. *King* (11); *Re Ferguson, Bennett* v. *Coatsworth* (12); *Leader* v. *Duffey* (13); and to Challis on Real Property, (2 ed.) p. 154. As to the words "my lawful heirs" excluding the daughter, the sole heir, see *Jones* v. *Colebeck* (14); *Clarke* v. *Hayne* (15); *Lees* v. *Massey* (16); *Doe d. King* v. *Frost* (17); *Say* v. *Creed* (18).

Even if the daughter took a life estate only, the respondents are not entitled to a lien for improvements as directed by the judgment of His Lordship the Chancellor. The improvements of a life tenant, however substantial or lasting, are not chargeable against the inheritance. *Re Smith's Trusts* (19). The daughter having an interest in the land when the improvements were made is not entitled to compensation therefor. *Beatty* v. *Shaw* (20). But even if entitled to compensation for improvements, the judgment should be varied by directing the respondents to account for

(1) 72 L. T. N. S. 5.
(2) 14 M. & W. 214.
(3) 9 H. L. Cas. 1.
(4) 6 App. Cas. 471.
(5) L. R. 3 H. L. 121.
(6) 2 Sim. N. S. 114.
(7) 1 K. & J. 156.
(8) 6 U. C. Q. B. (O. S.) 92.
(9) 7 U. C. Q. B. 519.
(10) 4 O. R. 355.
(11) 21 Ont. App. R. 519.
(12) 25 O. R. 591.
(13) 13 App. Cas. 294.
(14) 8 Ves. 38.
(15) 42 Ch. D. 529.
(16) 3 De G. F. & J. *per* Campbell L. C. at pp. 121, 122, and *per* Turner L. J. at p. 124.
(17) 3 B. & Ald. 546.
(18) 5 Hare 580.
(19) 4 O. R. 518.
(20) 14 Ont. App. R. 600.

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the rents and profits from the time the testator's daughter regarded herself as owner in fee. She could not claim to be at once owner in fee and life tenant, and is only entitled to compensation for improvements, if at all, as being made under the belief that she was owner in fee. *McCarthy* v. *Arbuckle* (1); *Munsie* v. *Lindsay* (2); *Niagara Falls Park Commissioners* v. *Colt* (3).

Robinson Q.C. and *O'Gara* Q.C. for the respondents. The rule of law is clear that unless a will contains a clear intention to the contrary, or "demonstration plain" as explained by Baron Parke, estates vest in interest at the earliest possible period after the death of the testator in order that the right of families may be ascertained, and that the property may be properly looked after, which would not be done if the owner was not ascertained. *Wrightson* v. *McCauley* (4); *In re Rawlin's Trusts* (5); *Mortimer* v. *Slater* (6). Words of futurity in the devise do not postpone the vesting of the remainder, but refer only to the enjoyment, the rule being that where the testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift and not as designed to postpone the vesting. 1 Jarman (3 ed.) 758, 764 *et seq.* Theobald, 'Wills" (3 ed.) 264; *Wharton* v. *Barker* (7). Gifts to the "lawful heirs," or "right heirs," when they occur in wills without any other explanation from the context

(1) 31 U. C. C. P. 405.
(2) 11 O. R. 520.
(3) 22 Ont. App. R. 1.
(4) 14 M. & W. 214.
(5) 45 Ch. D. *per* Bowen L. J. at p. 307.
(6) 7 Ch. D. *per* Thesiger L. J. at p. 329.
(7) 4 K. & J. 483.

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must be interpreted, according to their strict sense, as devises to the person who would succeed in case of intestacy. 2 Jarman, p. 55. *Baldwin* v. *Kingstone* (1); *Wrightson* v. *McCauley* (2); *Doe d. King* v. *Frost* (3); *Smith* v. *Butcher* (4). If there was no devise of the remainder the daughter, as heir-at-law, would be entitled at the death of the testator. No reason can be adduced why she should be deprived of the devise to the "lawful heirs" if she answers that description at the death of the testator. In *Miles* v. *Harford* (5), see remarks by Lord Jessel at page 698. The language used must determine the meaning and not surmise as to general intent. *King* v. *Evans* (6). The true construction of a will depends on what the testator has said. *Re Rawlin Trusts* (7).

The judgments of Hagarty C.J. and Osler J. in the Court of Appeal for Ontario maintain the contention of the appellants. They point to *Re Ford, Patton* v. *Sparks* (8); and *Brabant* v. *Lalonde* (9) which were decided since the Chancellor's judgment.

However, should the appellants be declared entitled to the lands, the respondents are entitled to a lien for the enhanced value by reason of the permanent improvements made, as was decided by the Chancellor. R. S. O., c. 100, sec. 30. *Fawcett* v. *Burwell* (10); *McGregor* v. *McGregor* (11).

The judgment of the court was delivered by:

SEDGEWICK J.—On the 4th of August, 1853, one Charles Palmer Thompson made his will, the clauses in question upon this appeal being as follows:—

(1) 18 Ont. Ap. R. 63.
(2) 14 M. & W. 214.
(3) 3 B. & Ad. 546.
(4) 10 Ch. D. 113.
(5) 12 Ch. D. 691.
(6) 24 Can. S. C. R. *per* Strong C. J. at p. 365.
(7) 45 Ch. D. 307.
(8) 72 L. T. N. S. 5.
(9) 26 O. R. 379.
(10) 27 Gr. 445.
(11) 27 Gr. 470.

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I further will and desire that the profits of and the interests in any residue of the property or estate, real or personal, that I may be possessed of at the time of my decease shall be enjoyed solely by my beloved wife Lissy Thompson and my beloved daughter Mary Anna Thompson, the profits and interests thereof and therein to be equally divided, share and share alike between my said beloved wife Lissy Thompson and my said beloved daughter Mary Anna Thompson during their natural lives.

I do further will and desire that in the event of the death of either of the above named Lissy Thompson or Mary Anna Thompson, the residue of my property, real or personal, shall be enjoyed by and go to the benefit of the survivor.

I do further will and desire that at the decease of both the said Lissy Thompson and Mary Anna Thompson, the said residue of my real and personal property shall be enjoyed and go to the benefit of my lawful heirs.

The effect of this was to give to his wife and daughter a life estate during their joint lives, and an estate for life to the survivor with remainder in fee to the heirs of the testator whoever they might be.

Both devisees survived the testator, the widow dying in 1878, and the daughter in 1893, she having married the defendant Joseph Smith, but dying without issue.

The controversy is between the nephews and nieces of the testator claiming the property as his heirs, and the defendant Joseph Smith claiming it as the devisee of his wife, the only daughter of the testator, and the question is: Did the deceased intend to exclude and did he succeed in excluding his daughter from the class described in the will as "my lawful heirs"? The contention of the plaintiffs is that those only were his "lawful heirs" who would have been so had he survived his wife and daughter.

I take it to be reasonably clear that this contention cannot prevail. The rule established in *Bullock* v. *Davies* (1), is that where in a case like the present the

(1) 9 H. L. Cas. 1.

testator uses the word "heirs," he must be taken to mean heirs at the time of his death unless the contrary contention is apparent from the will. This rule was subsequently followed and applied in *Mortimore* v. *Mortimore* (1), and in *Re Ford; Patten* v. *Sparks* (2).

I do not see in this will any intention expressed or implied to exclude the daughter from the class entitled to the fee. The testator's object seems to have been to provide immediately for his wife and daughter during their lives, leaving the property upon the death of the survivor to descend to his heirs whoever they might be as in the case of intestacy.

There is not any indication of an intent to exclude his daughter, or to prefer his collateral relatives to her. On the contrary he seems intentionally to have been silent as to the particular persons who were to take upon the determination of the life estates.

On the whole I am of opinion that the appeal should be dismissed and with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bradley & Wyld.*

Solicitors for the respondents: *O'Gara, MacTavish & Gemmell.*

(1) 4 App. Cas. 448.

(2) 72 L. T. N. S. 5.