ESTHER WOLFF (DEFENDANT)..... APPELLANT; 1899

AND *Mar. 24.
*June 5.

GEORGE SPARKS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—14 & 15 *V. c.* 6 (*Ont.*)—*Will*—*Devise to heirs.*

The Ontario Act 14 & 15 Vict. ch. 6, abolishing the law of primogeniture in the province, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. Judgment of the Court of Appeal (25 Ont. App. R. 326) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Rose at the trial.

The appeal in this case involves a single question of law as to the construction of a will, namely, who would take by a devise to heirs under the Act 14 & 15 Vict. ch. 6, abolishing primogeniture in Ontario. The nature of the contentions of the respective parties are stated in the judgment of the court.

O'Gara Q.C. and *Wyld* for the appellant, relied on *Tylee* v. *Deal* (2), and *Baldwin* v. *Kingstone* (3).

A. E. Fripp for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—George Sparks, in his lifetime of the Township of Gloucester, in the Province of Ontario,

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

(1) 25 Ont. App. R. 326. (2) 19 Gr. 601.
(3) 18 Ont. App. R. 63.

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departed this life in the month of November, 1867, having first duly made his last will and testament in writing bearing date the 15th day of October, 1867, whereby among other things, he devised certain real property in the will mentioned situate in the said Township of Gloucester, to his wife Sarah Sparks, for the term of her natural life, or until she should marry again, and upon her decease or marrying again, he gave and devised the said property to his son Frederick Sparks, if he should be living at the happening of either of the said contingencies, and to his heirs and assigns forever. And if the said Frederick Sparks should not be living when either of the said contingencies should happen, then he gave and devised the same property unto the heirs of the said Frederick Sparks, their heirs and assigns forever. Frederick died unmarried in 1882, in the lifetime of the devisee for life, who died in 1887, without having married again. The sole question is, who upon the decease of the tenant for life became entitled to the property under the above devise to "the heirs of the said Frederick Sparks, their heirs and assigns forever"? The plaintiff claims that it passed to all the brothers and sisters of Frederick, of whom there were several, and of whom the plaintiff is one and the defendant another, while on the contrary the defendant, the now appellant, claims that it passed to Abraham Sparks alone as being the eldest brother of Frederick and who was his heir if 14 & 15 Vict. ch. 6 of the statutes of the late Province of Canada had never been passed, by title derived from whom the plaintiff claims. The contention of the defendant is that the words in the will "the heirs of the said Frederick Sparks" in the event which has happened *must* by force of the 19th section of the above Act be construed to be the person who would have been the heir-at-law of Frederick if

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that statute had never been passed. This contention, if sound, involves the necessity of construing the 19th section of the Act as putting a legislative and therefore a peremptory interpretation on the word "heirs" wherever occurring in a devise of real property, and so equally when occurring in a deed, for the words of the section are, "nor shall the same effect any limitation of any estate by deed or will," but there is not an expression in the Act which warrants a surmise that the legislature entertained any idea of putting a legislative interpretation upon the word "heir" or "heirs" when occurring either in a will or in a deed. The interpretation of those instruments is unaffected by the Act which deals not with their interpretation at all; that is left to the rules of law established for the purpose, namely, that the intention of the testator or grantor is to be ascertained from the language used by him, such language being construed in its ordinary acceptation unless there be something to show that a special technical signification was intended. The Act provides for a wholly different purpose, namely, the purpose of abolishing the right of primogeniture in the succession of real estate held in fee simple or for the life of another. This is the only matter with which it professes to deal. The statute in its sections numbered from 1 to 18 inclusively, prescribes how after the 1st day of January, 1852, real estate which a person shall die seized of, for an estate in fee simple, or for the life of another without having lawfully devised the same shall descend or pass by way of succession. Then follows the 19th section which enacts *ex abundanti cautelâ*, 1st, that the estate of a husband as tenant by the curtesy, or of a widow as tenant in dower shall not be affected by any of the provisions of the Act, nor, 2ndly, shall the same affect *any limitation* of any estate by deed or will; nor, 3rdly, any estate

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which although in fee simple or for the life of another is so held in trust for any other person, but all such estates shall remain, pass, and descend as if this Act had not been passed. It is not very clear to my mind what the precise object and intent of the draftsman was in inserting in this 19th section the sentence that the provisions of the Act "shall not affect any *limitation* of any estate by deed or will." What is said shall not be *affected* by any of the provisions of the Act is "*any limitation*" of any estate by deed or will. Now the expression "limitation" of an estate is a word used for determining how long estates conveyed by deed or will shall last—for limiting the duration of such estates. Thus, if real property be conveyed by deed or will to A. for life, then to B. in tail male, with remainder to C. in fee simple, the instrument passing such estates contains limitations of, 1st, an estate for life, 2ndly, an estate in fee tail, and, 3rdly, an estate in fee simple. Now how the fact of the estate in fee simple upon the decease of the tenant thereof intestate passing to several persons as his heirs instead of to one person as sole heir could be said to "affect the *limitation*" of the estates conveyed by the deed or will, I do not, I confess, clearly perceive. The "limitations" of the estates as expressed in the deed or will would remain the same, namely, for life, in fee tail, and in fee simple, whether those to take in succession to the tenant in fee simple or on his dying intestate should consist of many or of one person only.

I rather incline to think that the expression was used without full consideration of its aptness, and that what was intended was to leave limitations of estates by deed or will *then existing* under the operation of 4 Wm. IV. ch. 1, which deals with such estates, and the words "that all such estates shall *remain*, etc., etc," as pointing to something then

having existence seems to me to support this view. But whatever may have been the precise object and intent of the expression used we can, I think, confidently assert that it does not say, nor can it be construed as saying, that all estates in fee simple or for the life of another whether created by a deed or a will already executed or which should at any time be created by any deed or will to be at any time thereafter executed, and of which any person should at any time die seized and intestate should descend to the common law heir of such person, and that those only which a deceased intestate had inherited should pass by way of succession under 14 & 15 Vict. ch. 6. If such should be held to be the law then an estate which in one generation should pass under the provisions of the Act might in a subsequent generation, a deed or will intervening, bring the property back to the old common law heir and thus complicate the law of succession to real property and defeat the main object of 14 & 15 Vict. ch. 6 which was to abolish primogeniture. However all that we are at present concerned with is to determine who are the parties to whom the testator has devised the land in question under the designation of the heirs of Frederick Sparks and their heirs and assigns forever.

The will was made in the Province of Ontario relating to property situate therein and fifteen years after the coming into operation of the Act 14 & 15 Vict. ch. 6. At that time the words "heirs of Frederick Sparks" in their ordinary acceptation denoted the persons who by the laws of the Province of Ontario would have succeeded to such real property, if any, as Frederick Sparks died seized of and intestate. Such being the ordinary acceptation of the terms used we must hold that the testator used them in that sense in the absence of anything to show a contrary

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or different intent. The Court of Appeal for Ontario in so holding have followed the case of *Tylee* v. *Deal* (1), and *Baldwin* v. *Kingstone* (2), where similar words in wills made before the passing of the Act were held to mean the heir at common law for the same reason and upon the application of the same rule of construction of wills as in the present case necessitates the same words to mean the statutory heirs.

It was argued that the Ontario statute, 43 Vict. ch. 14 s. 2, passed on the 5th March, 1880, amounts to a statutory declaration that up to the passing of that Act the word "heirs" in a will meant the heirs at common law. The following is the section:

> 2. Where any real estate is devised by any testator dying after the passing of this Act to the heir or heirs of such testator or of any other person and no contrary or other intention is signified by the will the words "heir" or "heirs," shall be construed to mean the person or persons to whom such real property would descend under the law of Ontario in case of intestacy.

That section expresses an accurate enunciation of the result of the rule of law applicable independently of the statute to the construction of a will made subsequently to the passing of 14 & 15 Vict. ch. 6 in the Province of Ontario, in relation to property situate therein; but the section seems to go further and to apply that rule to *all* wills *wherever* or *whenever* made affecting property in Ontario, provided only that the testator should die after the passing of the Act. Consequently if a case similar to *Tylee* v. *Deal* (1), in which the will was not only made before the passing of 14 & 15 Vict. ch. 6, but in England, or similar to *Baldwin* v. *Kingstone* (2), where the will was made in Canada, but before the passing of the Act, should again arise, if only the testator should die after the passing of 43 Vict. ch. 14, it would seem to be necessary in compli-

(1) 19 Gr. 601.

(2) 18 Ont. App. R. 63.

ance with 43 Vict. ch. 14 to hold that the word "heirs" as used in these wills meant the statutory heirs and not the common law heirs. That statute gives a legislative interpretation of the word "heirs" which the statute 14 & 15 Vict. ch. 6 did not do or purport to do.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *O'Gara, Wylde & Gemmill.*

Solicitor for the respondent: *A. E. Fripp.*