IN THE MATTER OF THE TRUSTEES ACT

AND

IN THE MATTER OF THE ESTATE OF R. H. SIMPSON

1928

*Feb. 7, 8.
*Apr. 24.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

*Will—Devise—Construction—"Children"—"Sons and daughters * * * per stirpes"—Rule in Shelley's case (1 Rep. 93b).*

A testator devised his estate to trustees and made, amongst others, the following dispositions: "To my niece * * * I give and devise a life estate in the * * * and after her death to her children in equal shares *per stirpes*"; and also "* * * I direct that * * * the proceeds derived from such sale be divided among the sons and daughters of my brother * * * in equal shares *per stirpes*."

Held, that the words "to her children in equal shares *per stirpes*" are words of designation and denote persons of the first degree of descent only; and that the presence of the words "*per stirpes*" does not

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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impart to the phrase "sons and daughters" a meaning embracing the whole line of descendants capable of inheriting.

No opinion is expressed as to whether or not the rule in *Shelley's case* ((1581) 1 Rep. 93*b*) is in force in the province of Alberta, as, assuming it to be in force, it does not apply to the above provisions.

Judgment of the Appellate Division ([1927] 3 W.W.R. 534) aff.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Clarke J.A. (2) upon an application by a trustee for an order interpreting certain clauses of a will.

The deceased, a bachelor, possessed of a considerable estate, made his will on the 21st of September, 1926, disposing of almost the entire estate to his nephews and nieces and their children. He having subsequently died and the executor, the Imperial Canadian Trust Company, being in doubt as to the legal effect of certain of the dispositions, it applied to the court for an interpretation of the terms of the will in question.

The dispositions in question to the nephews and nieces, of whom there are seven mentioned, are with one slight exception all in the following terms: "To my niece * * * I give and devise a life estate in the * * * and after her death to her children in equal shares *per stirpes.*" The one exception is the gift of a life estate to two nephews "as tenants in common" and after their deaths to their children "in equal shares *per stirpes.*"

After the specific devises appears the following provision: "In the event of any of the persons to whom I have devised a life estate in the land herein, dying without issue, I direct that my trustee sell the land so devised to such person and the proceeds derived from such sale be divided among the sons and daughters of my brother Frank Simpson in equal shares *per stirpes.*"

H. S. Patterson, for five nephews, nieces, devisees.

L. E. Ormond, for two nieces, licensees.

A. Macleod Sinclair K.C. for the official guardian and for a daughter of F. Simpson.

John W. Moyer for the executor.

(1) [1927] 3 W.W.R. 534. (2) [1927] 2 W.W.R. 107.

The judgment of the court was delivered by

DUFF J.—The questions in controversy on this appeal concern the construction of the will of the late Robert H. Simpson, and, admittedly, the decision of them turns upon the application or non-application of the rule in *Shelley's Case* (1) to the provisions in dispute.

The following paragraph is typical of the clauses to be construed:—

> To my niece Fern McDaniels, wife of Chester McDaniels, of Carmangay, in the province of Alberta, I give and devise a life estate in the east ½ sec. 3-13-24-W 4 and after her death to her children in equal shares *per stirpes*.

There is also a gift over to be considered in these words:—

> In the event of any of the persons to whom I have devised a life estate in land herein, dying without issue, I direct that my Trustee sell the land so devised to such person and the proceeds derived from such sale be divided among the sons and daughters of my brother Frank Simpson in equal shares *per stirpes*.

If the rule in *Shelley's Case* (1) governs, Fern McDaniels takes an estate tail, which, by statute, is in effect an estate in fee: if not, she takes a life interest only. The Appellate Division in Alberta has held that the rule in *Shelley's Case* (1) has not the force of law in Alberta. The learned judge of first instance, Clarke J., held that the rule applies. It is unnecessary, in my view, to consider whether or not the rule is in force in Alberta. I have come to the conclusion that, assuming it to be in force, it does not apply.

The precise question is this: Are the words "to her children in equal shares *per stirpes*," words of designation or words of limitation; do these words, "include the whole line of succession capable of inheriting"? (*Foxwell* v. *Van Grutton* (2).) *Prima facie*, the word "children," in such a context, denotes persons of the first degree of descent, and therefore is a word of designation. There is another proposition, which I will state in the words of Lord Cairns in *Bowen* v. *Lewis* (3):

> I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death

(1) (1581) 1 Rep. 93*b*. (2) [1897] A.C. 658, at p. 677.
(3) (1884) 9 A.C. 890, at p. 905.

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without issue, those words pointing to death without issue are to be construed referentially, and to have the explanation from the gift to the particular individuals that you have had before.

This proposition, which Lord Cairns gives as the result of the authorities, and about which he says there was no dispute in the House of Lords, would suffice at once for the determination of the dispute before us but for the presence of the phrase *per stirpes* in the clause in question, upon which the appellant's counsel largely builds his argument.

The argument is that the phrase *per stirpes* is insensible as applied to a division among children in the restricted *prima facie* sense, and, therefore, that "children" should be read in such a sense as to conform to the terminology of the gift over, that is to say as "issue." In examining that argument, you must look at the whole of the will. (*Per* Lord Cairns) (1).

The words in which the gift over is expressed are significant. On the death of the life tenant without issue, the trustee is to sell the land, and the proceeds are to be divided among "the sons and daughters of my brother Frank Simpson in equal shares *per stirpes*." Whatever may be said about the word "children," it would require a very demonstrative context—a context having the force and value of an interpretation clause—to impart to the phrase "sons and daughters" a meaning embracing the whole line of descendants capable of inheriting; especially so when employed in describing the destination of a gift of money. Here there is no such demonstrative context. "Sons and daughters" must be read, I think, according to the primary import of the words. It follows that, whatever be the effect he ascribed to them, the testator did not regard the words "*per stirpes*" as meaningless when applied to a direction for distribution among descendants of the first degree—among children in the primary sense of the word. So read, moreover, the terms of the gift over, the nominated beneficiaries being of the first generation only, seem to give evidence of an intention that it was to take effect not on an indefinite failure of issue, but on the death of the life tenant, without having had a child in whom an interest could vest under the terms of the devise to the child-

(1) 9 A.C. 890, at p. 906.

ren. I cannot therefore agree that the phrase *per stirpes* has the effect contended for, and it follows that the gift to the life tenant takes effect according to the intention declared.

The appeal should be dismissed. In view of the differences of judicial opinion, it seems to be a case for directing that the costs be paid out of the estate as between solicitor and client.

Appeal dismissed.

Solicitor for certain appellants: *H. S. Patterson.*

Solicitors for certain appellants: *Ormond & Millard.*

Solicitor for the executor: *John W. Moyer.*

Solicitors for the official guardian: *Adams, Fitch & Arnold.*

Solicitor for Mrs. F. A. Olmstead: *A. Macleod Sinclair.*