THE REV. JOHN FERGUSON .....APPELLANT; 1878

AND *Feb'y. 5, 6.
June 3, 4.

DONALD McGREGOR FERGUSON.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Construction—Remoteness—Estate tail—Heir-at-Law.

P. F., senr., proprietor of 180 acres of lot 13, 10 concession of the township of *Drummond, Lanark* Co., by a will, dated 3rd December, 1845, devised as follows: "It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice, I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To *Duncan Ferguson*, my son, I bequeath my family Bible, and five shillings over and above what I have done for him * * * To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State due sand public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it * * * I appoint *Peter McVicar*, my grandson, to take charge of the whole place—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid." The testator died in 1849, leaving two sons, *D.* and *P.*, junr., and three daughters and one grandson, *P. McV.*, being a son of a daughter. When the testator died, the property was subject to a lease, which expired in 1857. *P. F.*, junr., after having gone into occupation, in that year conveyed his interest to *P. McV.* and left the place.

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*PRESENT—Sir William Buel Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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Subsequently the Appellant, son of *D. F.*, and heir-at-law of *P. F.*, senr., took a conveyance from *P. McV.*, and thereupon the Respondent, heir-at-law of *P. F.*, junr., brought an action in ejectment, claiming that under the will his father took an estate tail which descended to him.

The Court of Queen's Bench gave judgment (1) in favor of the heir-at-law, which judgment was reversed by the Court of Appeal for *Ontario* (2).

Held,—On appeal, that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to *P. F.*, junr., any estate or interest independent of, or unconnected with, the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the Plaintiff was not entitled to recover. (*Strong*, J., dissenting).

Per *Ritchie*, J.—Where the rule of law, independent of and paramount to the testator's intentions, defeats the devise the proper course is to let the property go as the law directs in cases of intestacy.

APPEAL from a judgment of the Court of Appeal for *Ontario*, on appeal to that Court from the Court of Queen's Bench.

This was an action of ejectment, and was commenced by writ issued on the 23rd July, A. D. 1875, to obtain possession of lot 13, in the 10th concession of the township of *Drummond*, in the County of *Lanark*.

The Plaintiff claimed title to the premises as heir of entail of *Peter Ferguson*, devisee in tail male under the last will and testament of *Peter Ferguson*, his father, deceased.

The Defendant, besides denying the title of the Plaintiff, claimed the land as heir-at-law of *Peter Ferguson*, senior, his grandfather. The Defendant further claimed title by length of possession and by conveyance from *Peter McVicar*, who derived title as devisee under the will of *Peter Ferguson*, deceased.

It was admitted that *Peter Ferguson* died seized of

(1) 39 U. C. Q. B. 232. (2) 1 App. R. Ont. 452.

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the land in 1849, and that the Defendant was his heir-at-law.

The portion of the will in controversy between the parties reads as follows:—

"It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice, I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To *Duncan Ferguson*, my son, I bequeath my family bible, and five shillings over and above what I have done for him * * * To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it, * * * I appoint *Peter McVicar*, my grandson, to take charge of the whole place—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age, as aforesaid."

When the testator died in 1849, *Duncan* was the elder son, *Peter* was the second son, and *Peter McVicar* was the son of a sister; the land at the time was subject to a lease, which expired in 1857. At the expiration of the lease, *Peter Ferguson*, the son of the testator, went into occupation of the land. On the 24th August, 1857, he conveyed to *Peter McVicar*, the grandson, who is named in the will.

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The Defendant, son of *Duncan Ferguson*, besides being the heir-at-law of the testator, proved a deed to himself of the land from *Peter McVicar*.

Peter Ferguson, junr., died in 1864, leaving as his only child the Plaintiff.

At the trial (Fall Assizes, 1875) before *Patterson*, J., without a jury, a verdict for the Plaintiff was entered on the ground that the devise to *Peter Ferguson*, junr., created an estate tail male in him, that the estate tail had not been barred, and that the Defendant had not made out his defence under the Statute of limitations.

A rule *nisi* was obtained to enter a verdict for the Defendant, which was afterwards made absolute by the Court of Queen's Bench.

The Plaintiff then appealed to the Court of Appeal for *Ontario*, which reversed the judgment of the Court of Queen's Bench.

Mr. *MacLennan*, Q.C., and Mr. *Burdett*, for Appellant:

There was no great grandson at the death of the testator, so the will is void either as a lapsed devise or for remoteness. The will reads as follows:—"To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to *occupy the farm*, and answer State dues, &c., and the lawful male offspring of his body until the proper heir are come of age, &c." These are the words relied on by the Respondent as giving to his ancestor the estate tail. The central object of the testator was to give the estate to his great grandchild and the other directions were merely ancillary to, and not in substitution for, the principal devise, the one having failed the other necessarily failed along with it. The effect of this is that the testator died intestate. If the child had been in being when the testator died, he would have taken the estate as a vested estate in fee; not having been born, however, the devise was execu-

tory, to take effect when the child was born: *Jarman* on Wills (1). It is not limited to take effect during or at the determination of the supposed estate tail. Suppose the alleged estate tail to terminate to-day, the child's estate would not arise because he is not yet in being, but the estate, if good, must wait till then and be tied, and we have an estate infringing the rule of perpetuities and incapable of being barred. It follows that the estate to the child is void.

Moreover, the devise to the grandson being a *present* gift, it follows that there can be no present gift to *Peter Ferguson*, otherwise there would be two gifts of the same property to the same person to take effect concurrently, which is impossible and repugnant.

The provisions with respect to *Peter Ferguson* and *Peter McVicar* are made upon the supposition that the gift to the grand child has taken effect, which makes it clear that these persons were to take no estate, but were to be made guardians or caretakers of the property of another during his minority. To hold that the devise to the grandson is executory, is to change and invert the whole frame and structure of the will, to invert and re-arrange its parts to contradict the plainly expressed intention, and to put a fanciful construction upon it.

The Appellant contends, therefore, that the result is that testator's scheme with regard to his property has fallen, and the subsequent provisions in the will, being solely to carry into effect the main object of the will, cannot be given primary importance, so as to make a will the testator never intended. The learned counsel referred to *Christie* v. *Gosling* (1); *Countess of Harrington* v. *Earl of Harrington* (2); *Marcon* v. *Alling* (3); *McKidd* v. *Brown* (4); and *Shaver* v. *Jamieson et al* (5).

(1) Vol. 1, p. 820 (Ed. 1861).
(2) L. R. 1 H. L. 279, 295.
(3) L. R. 5 H. L. 87, 99.
(4) 5 Grant 562.
(5) 5 Grant 633.
(6) 25 U. C. Q. B. 156.

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Mr. *Bethune*, Q.C., for Respondent:

A mere presence of a doubt in the minds of the Court will not justify them in holding a will void, they should struggle against an intestacy. It is clear the testator did not intend an intestacy. The paramount idea was to keep the property in his family as long as possible.

Now, the devise to the great grandson is either void for remoteness, or gives an executory devise to such great grandson, and, for the purpose of determining who should succeed in this action, it matters not which view is adopted. In either view the proper construction is that, an estate tail was given to *Peter Ferguson*. *Tudor's* L. C. R. P. (1); *Jardine* v. *Wilson* (2); *Re Shaver* (3); It must be assumed that the testator intended to devise his whole estate, *Con. S. U. C.*, ch. 82, sec. 12. This construction will best effectuate the intention of the testator, as it may happen that from *Peter* may issue the first great grandson of his sons. In any case it will more nearly effectuate it than any other construction, and upon the doctrine of *cyprès*, the Court will give effect to it. *Stackpoole* v. *Stackpoole* (4); *Tudor's* L. C. R. P. (5).

The deed from *Peter Ferguson* to *Peter McVicar* was not operative to bar the entail, because it was not registered within six months after the date of execution. *Cons. S. U. C.*, ch. 83, sec. 31 The deed does not profess to operate upon anything more than the estate and interest of *Peter Ferguson*, the grantor, and so would not operate under the statute to bar the entail.

The term "offspring," used in describing the gift to *Peter*, is synonymous with *heirs of the body*. *Thompson* v. *Beasley* (6); *Jarman* on Wills (7); *Allen* v. *Markle* (8).

(1) Pp. 531, 536.
(2) 32 U. C. Q. B. 498.
(3) 3 Chy. Chamber's Rep. Ont. 380.
(4) 4 Dr. and War. 350.
(5) Pp. 344, 426.
(6) 3 Drew. 7.
(7) 2 Vol. p. 89.
(8) 36 Pen. R. 117.

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There is nothing to show that the whole estate was to be withdrawn from *Peter*; on the contrary, the terms used, coupled with the absolute bequest of the chattels to *Peter*, shows an intention to vest some beneficial enjoyment in *Peter*. Is there an estate tail to *Peter*? If so, it does not matter what the nature of devise over is.

Mr. *MacLennan*, Q. C., in reply.

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RITCHIE, J. :—

The Plaintiff claims title to the premises in controversy in this suit as heir of entail of *Peter Ferguson*, deceased, who, he alleges, was devisee in tail male under the last will of *Peter Ferguson*, his father, also deceased, who died seized in 1849.

Defendant claims the land as heir-at-law of *Peter Ferguson*, senior, his grandfather.

The only question for our consideration, in the view I take of this case, is, did *Peter Ferguson* take an estate tail under the will of *Peter Ferguson*, senior, his father? If this is answered in the negative, then the Defendant, being the heir-at-law of *Peter Ferguson*, senior, cannot be disturbed in his possession of the premises.

It is not to be wondered at that the very extraordinary will of this apparently eccentric testator should have given rise to litigation. The clause of the will we have to consider is in these words:

Secondly, It pleased the Lord to give me two sons equally dear to my heart; *to give them equal justice*, I leave all *my land to the first great grandson descending from them by lawful ordinary generation in the masculine line*, to him I bequeath it, and to him I will that it pass free of any encumbrance except the burrying ground and the quarter of acre for a place of worship. To *Duncan Ferguson, my son*, I bequeath my family bible and five shillings currency, over and above what I have done for him, with my blessing and prayer for him that by grace he will be able to make the best use of his portion, &c.

*The Chief Justice was absent when judgment was delivered.

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To *Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm,* and answer state dues and public burdens himself, *and the lawful male offspring of his body until the proper heir are come of age to take possession,* but *Peter* himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind off the land or bringing any other family on to it but his own. But if he leaves *a situation* so advantageous and cannot maintain himself upon it—painful and humbling thought of him failing—but in case this happening, I appoint *Peter McVicar,* my grandson, *to take charge of the whole place*—farm, and all that pertains to it—and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions *until the heir be of lawful age as aforesaid.*

Peculiar as this devise may be, I do not think it is unmeaning or incomprehensible, and I have not much difficulty in arriving at a conclusion as to what the testator desired to accomplish, but the difficulty I find in the way of giving effect to his wishes is, that the law will not allow him to carry his intentions into effect in the manner in which he has sought to do it, or, in other words, to do what he desired to do and thought he was doing, inasmuch as his devise cannot be brought within the rules of law. He violated the rule against perpetuities, and his devise to the first great grandson of his sons is, in my opinion, consequently of no effect, being void for remoteness.

Mr. Justice *Cresswell,* in *Lord Dungannon* v. *Smith* (1), states the rule:—

> It is a general rule, too firmly established to be controverted, that an executory devise to be valid must be so framed that the estate devised must vest, if at all, within a life or lives in being and 21 years after; it is not sufficient that it may vest within that period, it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and 21 years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so.

Concurred in, as accurately expressed, by the Master of the Rolls in *Merlin* v. *Belgrave* (2).

(1) 12 Cl. & F. 563.

(2) 25 Beav. 133, 134.

In construing a will, and more particularly one written by an unskilled person (and this will bears conclusive internal evidence that it did not come from the hands of a lawyer, but was the testator's own production,) reading the will as indicated on the rule laid down by the Lord Chancellor in *Young* v. *Robertson* (1) that:—

> The primary duty of a Court of Construction in the interpretation of wills is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give words employed in the vocabulary of ordinary life an artificial, secondary, and technical meaning,

the first inquiry naturally is what was the idea uppermost in the mind of the testator? What was the primary and principal object he was seeking to accomplish as indicated by the language he has used?

I think it certainly was not in this case to create and vest in *Peter* an estate tail, and, contingent and dependent thereon, to give to the first great grandson of *Duncan* and *Peter* an estate by way of executory devise. If we take his own words in their ordinary signification, his primary object was to give equal justice to the two sons which it had pleased God to give him equally dear to his heart That equal justice appears to have been to deprive both sons of the property, and to alter the regular course of descent, and select from the descendants of his sons the person who should become his "proper heir" to inherit his estate, and having made such selection, under the impression, doubtless, that he could legally do so, he used plain and unambiguous language, which I cannot doubt he supposed capable of accomplishing his purpose; and having named an heir so remote, his second and subsiduary object seems naturally enough to have been to make provision for the occupancy and care of the estate until the heir so selected

(1) 4 Mac Queen, House of Lord's cases, 325.

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should arrive at lawful age to take possession. These, I think, were the primary and secondary considerations operating on the mind of the testator when he drew the will. Had he selected his grandson *Peter Mc Vicar* (then 14 years old, named in the will) as his proper heir, he would have accomplished his object; the devise to him would have been good; the provisions for occupancy and care of the property would have been reasonable, and could have taken effect without repugnancy and without any necessity for transposing a sentence or for eliminating one word from the will. In such a case, what pretence could there have been for contending that the devise should be transposed, and that *Peter*, the son, should take an estate tail and *Peter*, the grandson, only a contingent estate. To have so held would simply have been to put it in *Peter's*, the son's, power to deprive *Peter*, the grandson, of his inheritance, and so frustrate the testator's intentions. Does this not show that the language of the will is capable of a consistent construction without any transposition or elimination, and was capable, by giving effect to all the language of the testator as used by him, of carrying into effect his obvious intentions, provided always the law would allow him to do what he desired to effect.

Every will must be construed according to the intention of the testator, and I cannot escape the conclusion that the intention of the testator was to base the occupancy by *Peter*, his son, on the previous devise to the first great grandchild of his sons, that is to say, to make it ancillary thereto, and consequently dependent thereon; and I can discover no intention to give to *Peter Ferguson* any estate or interest, independent of, or unconnected with, the devise to the great grand child.

No doubt, in this case the testator did not intend to die intestate, but it is not enough that the will exhibits

an intention to disinherit the heir-at-law, there must be a valid dispostion of the property in favor of some other party. Here the testator has attempted to make such a disposition, but has failed, simply because such a devise as he made could not take effect, the law not sanctioning or sustaining such a disposition. It is clear, then, that the intention of the testator cannot be carried into effect, because the first great grandson descending from his sons cannot be what the testator calls the "proper heir." As to the final disposition of the property, the testator appears to have had only one intent, and that was that this "first great grandson" should be the "proper heir to it," and he appears to me to have made, as I have said, the other provisions subordinate thereto, viz.: that the property should be taken charge of until such "proper heir" came of age to take possession, and for remunerating the person to whom the charge is so confided, authorizing him to occupy the same for his own benefit and advantage until such heir be of proper age, but restraining and prohibiting whosoever may be so occupying and in charge "from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on it but his own;" and, in case of the first person named to whom such charge was confided "leaving a situation so advantageous and unable to maintain himself upon it," appointing another in his place under the same restrictions and conditions, language indicating, in my opinion, an occupation or employment in connection with the property as caretaker, rather than the idea of ownership of, or title to, or a disposing power over, the property, and therefore these conditions seem to me consistent only with the idea of the testator's dealing with the estate for the sole purpose of vesting it in, and preserving it for, the first great grandchild as the proper heir.

But the devise to the great grandchild being void, as

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was said by the Master of the Rolls in *Ring* v. *Hardwick* (1), in respect to certain clauses in the will he was considering, "they are accessories to that which is void, and cannot therefore alter the construction." To hold that the testator intended that *Peter Ferguson* should take an estate tail, is to my mind a strained construction, supported by artificial reasoning, and would produce results never contemplated by the testator, and instead of making the legal consequences depend on the construction, make the construction depend on the legal consequences. If the law allowed a devise under the circumstances to a first great grandchild to take effect, then testator's intentions might have been carried out without any repugnancy, or without rejecting any regulations or conditions imposed by the testator. It is attempted to establish the tenancy in tail by transposing the devise to *Peter*, and reading it as if it preceded the devise to the first great grandchild, and rejecting or eliminating from the devise the restrictions and conditions imposed on the occupancy of *Peter Ferguson* as being inconsistent and incompatible with an estate tail, the estate it is sought to confer. While no doubt words and limitations may be transposed, if warranted by the immediate context or the general scheme of the will, they may not be merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument (2). On the contrary, the obvious intent of the language must be adhered to, even though it renders the will inoperative, unless, indeed, the transposition brings out the true intent of the testator, and thus renders what was before obscure clear, for if the transposition leaves the same uncertainty, only giving a different import, it is not allowable. Mr. *Redfield* (3) says :—

(1) 2 Beav. 359.

(2) 18 Ves. 368, 19 id. 652; 2 Mer. 25.

(3) Vol. 1, p. 432.

If, however, it gives effect to all the provisions of the will, and renders them all harmonious and consistent both with each other and with the general purpose and intent of the will, it affords very satisfactory ground of presumption that it reaches the source of the difficulty and explains the mode in which it arose.

In *Chambers* v. *Brandsford* (1) the Lord Chancellor says :—

Lord *Hardwick* (2) lays down the rule for the construction of wills thus, that the words are often transposed to make sense of a will, otherwise insensible, and to make it take some effect rather than be totally void, but in no case where the words are plain and sensible is a transposition made in order to create a different meaning and construction, much less to let in different devisees and legatees.

Here, it is clear, the transposition proposed and construction contended for, not only fail to give effect to the evident primary object of the testator, but render quite inoperative provisions and restrictions which the testator, no doubt, deemed substantial and necessary to carry out his views in favor of the object of his bounty, the proper heir.

The provisions of the will are, it seems to me, entirely inconsistent with this idea of the creation of an estate tail, and first the devise to the first great grandson—"to him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground and the quarter of an acre for a place of worship," is quite inconsistent with a devise of an estate in tail male to *Peter*, and the bequest to *Peter* of "the implements belonging to my farm," but as to the farm itself, simply "to occupy the farm." The restricting and prohibiting the supposed tenant in tail from giving any wood or timber of any kind away off the land, or bringing any other family on it but his own, admittedly inconsistent to sustain the construction, must all be eliminated; so the condition, that in case *Peter* abandons the occupation, or, in the words of the testator, "leaves a situation so advan-

(1) 9 Ves. 652. (2) 2 Ves. 74.

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tageous and cannot maintain himself upon it," he is to lose his situation; that is to say, in case he leaves the situation, the appointment of *Peter Mc Vicar*, his grandson, "to take charge of the whole place and occupy the same for his own benefit and advantage, according to the same restrictions and conditions until 'the heir' be of lawful age," being also inconsistent, it is said, must likewise be cast aside.

The prominent fact that, at all events, there should be a proper heir who should have the estate and the possession of it when he came of age, taken in connection with the fact that *Peter*, if he was tenant in tail, could dispose of the property absolutely and bar the entail, and so make the disposition equivalent to a devise to himself absolutely, and enable him to prevent the possibility of the property ever reaching the proper heir, supposing he could take by way of executory devise, is certainly also inconsistent with the testator's intention of establishing his own proper heir, though I am free to admit that if there was a plain expression of intention, we ought to disregard altogether the legal consequences which may flow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself (1), and construe the will without reference to the possible contingency of carrying that intention into effect. But again, if *Peter* should not bar the entail, and he had lawful male offspring, and his brother *Duncan* had the same, and the first great grandson was *Duncan's* offspring, the offspring of *Peter* would take, as heir of entail, to the exclusion of the testa tor's "proper heir," the devise to whom, by way of executory devise, being equally void for remoteness. All this would be entirely inconsistent with the testator's declared intent. Again, I think the will should not be alter-

(1) *Scarborough* v. *Saville*, 3 A. & E. 897; adopted by Lord Chelmsford in *Atkinson* v. *Holtby*, 10 H. L. 330.

ed and mutilated so as to justify a construction which would give an estate tail to *Peter*, because the intentions of the testator would by no means be thereby accomplished, for never, except, so far as I can discover, in the event of one most remote and most uncertain contingency, could the estate ever come to the "proper heir," and that is, if *Peter* had children and only one great grand-child, and *John* had no great grand-child older than *Peter's*, and the estate had not been barred in the meantime—then the estate would certainly vest in the eldest great grand-child of the two sons, but then, as tenant in tail, and not as the proper heir of the testator, in which right it was the testator's evident wish and intention he should take, and not necessarily when he should come of age. These considerations convince me that the testator never contemplated the creation of an estate from which such consequences would flow; and if the creating an estate will not necessarily effect the object the testator sought to accomplish, the construction that creates such an estate cannot, I think, be the right one.

There was, no doubt, an intention to disinherit the heir-at-law, but it was not, in my opinion, by giving an estate tail to *Peter*, the younger son, which would be anything but equal justice to the brothers, even with the curious views of equal justice entertained by the testator, but the intention was to exclude the heir-at-law only for the purpose of substituting another in his place, and this the testator attempted to do by providing in substitution of the heir-at-law the first great grandson of his, the testator's, two sons as "the proper heir," and as he failed to substitute one whom the law would allow to take, we should, if we adopted a construction that will give to *Peter* an estate tail, to use the words of Lord *Cranworth* in *Hall* v. *Warren* (1):

(1) 9 H. L. 433.

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Be acting in contravention of the well-known rule that the heir-at-law is not to be disinherited, except when the property of his ancestors has been clearly and unambiguously given away from him. We cannot make a new will for the testator simply because the rules against perpetuity prevent his will from being carried out.

And as was aptly remarked by the Vice Chancellor in *Mannery* v. *Bevoy* (1),

> The rules of construction cannot be strained to bring a devise or bequest within the rules of Law.

The fact that the testator did not foresee all the consequences of his disposition is no reason for varying it. I do not think this or any other court has a right to re-cast the will and give effect to it by creating an estate the testator, I think, never intended should exist; because, by so doing, the intentions of the testator may, on the one hand, by possibility, be approximately realized, while, on the other hand, the estate may, with much more probability, go in a direction wholly at variance with the intentions of the testator, and this, too, to the disinheriting of the heir-at-law, who is not to be disinherited without an express devise or necessary implication. We are not to make a will for the testator, but simply to expound the will he has made, and this will, so made, must be construed according to the plain meaning and intention of the testator, notwithstanding that the result of so construing it may be to defeat the object which he had in view. This was exemplified in the case of *Cunliffe* v. *Brancker* (2), in which case, *Jessel*, M. R., says:—

> All I have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be. I am sorry to say—for it disappoints in this case the intention of the testator—that I cannot bring myself to doubt what the meaning of this will is. The only point in contest, is whether the legal fee in an undivided moiety of freehold land is, or is not, vested in certain trustees. Now, apart from

(1) 8 Hare 48.

(2) 46 L. J. Ch. Div. 128; L. R. 3 Ch. Div. 393; 35 L. T. N. S. 578.

the rule of law about the failure of contingent remainders, I think I may venture to say that no human being who understood anything about real property law would entertain a doubt about the meaning of this will. How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity—but I do not see that, because, in the opinion of the judge, the one rule of law is reasonable and the other unreasonable, the rules of construction are to be altered.

On appeal, *James*, L. J., speaking of contingent remainders, says:—

That is the Rule of Law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade that rule. We must construe the words just as if there were no such rule of law, and then, having thus ascertained the construction, apply the rules of law to the instrument so construed.

In *Gordon* v. *Gordon* (1), The Lord Chancellor (Lord *Hatherley*) said :—

I am aware that if there be a doubtful construction of a will the circumstances of the case may be used to guide our choice; but we must not (as has been done in another class of cases with reference to the vesting of portions) first make the construction, which is clear in itself, doubtful, in order to make what we think a more reasonable will for the testator. It is not enough that a will may admit a forced construction. Of course, if it would not, no circumstances could alter the words; but the first course of construction is to read the will in its natural grammatical sense, and then only, if that fail to produce a clear meaning, to look out for some other possible sense. Where a meaning is plain and clear, grammatically, no other should be sought for.

Lord *Chelmsford*:—

I admit, of course, the canon of construction that you are in the first place to determine the natural and ordinary meaning of the words employed; and to this you must adhere, unless other parts of the will, or the general scope and object of it, plainly manifest that the testator meant them in a different sense.

(1) L. R. 5 H. L. 271.

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Lord *Cairns*, page 284 :

I take the law on this subject to have been expressed with much accuracy and felicity by Lord *Cranworth*, than whom no judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott* v. *Middleton* (1), before this House, Lord *Cranworth* speaks thus :—

"Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable."

The Lord Chancellor in *Dungannon* v. *Smith* (2) :

If we were to adopt this construction for the purpose of getting out of the difficulty arising out of the law of perpetuities, we should be, in fact, as I consider, making a perfectly new will for the testator; we should be, in the first instance, translating the actual will into a new form, and we should be putting upon that will a construction which, I admit, if the will had been in that form, would have been the true and just construction. I never can lend myself to a measure of this kind, to the process of altering the frame of a will and the phraseology of a will for the purpose of framing, as it were, a new will, in order to put a construction upon it to obviate the difficulties arising out of the law against perpetuities.

Brett, J. :—

The primary rule of construction is to give effect, if possible, to the whole will. If there is a construction which will so operate without doing violence to any part of the will that construction ought to be adopted.

I agree with *Montague Smith*, J., in *Gravenor* v. *Watkins* (3) :

That the will must be read as a whole, and that effect is to be given to all the words as far as it is possible to do so. The intention of the testator can only be arrived at by considering all the language he has employed.

(1) 7 H. L. C. 89. (2) 12 C. & F. 625.
(3) L. R. 6 C. P. 508.

And endeavoring (as he did in that case) to reach the mind of the testator through the words which he has used, I have come to the conclusion, when a testator makes such an absurd will as this that no reasonable or legitimate construction can be put on it, which will even indirectly or remotely effect what a fair reading of the language used leads to the conclusion the testator desired to do, and the rule of law, independent of, and paramount to, the testator's intentions, defeats the devise, if the testator's selected "proper heir" cannot get the property, I can discern nothing in the will to justify the conclusion that the testator intended the property to go to *Peter* and his children; but the exact opposite.

I adopt the language and ruling of the learned Chancellor, Lord *Campbell*, in *Hall* v. *Warren* (1), and say that:—

> Where there is uncertainty whether the property has been devised or bequeathed away from the heir-at-law or next of kin, the wise course has been to let the property go as the law directs in cases of intestacy.

The judgment of the Court of Queen's Bench was, I think, correct, and should be confirmed, and the judgment of the Court of Appeals should be reversed, and this appeal allowed with costs.

STRONG, J.:—

I am of opinion that the proper construction of this will is that which has been placed upon it by the Court of Appeal, namely: That *Peter Ferguson* took an estate tail, subject to an executory devise over in favour of the first great grandson of the testator in the line of either of his sons. The principal object of the testator was manifestly to give the estate in question to his first great grandson. The other provisions of the will, relating to the disposition of the land until the estate should

(1) 9 H. L. 427.

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vest in a great grandson, are subsidiary to that leading intention.

It is a cardinal rule of construction "that all the parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole."

The estate limited to the great grandson is an executory devise, and not a remainder, since it is limited to take effect in abridgment or defeasance of the prior estate or interest given to the testator's son, *Peter Ferguson*.

Then, the only possible way in which effect can be given to the testator's intention of giving the property to his great grandson is by holding the preceding estate to *Peter Ferguson* an estate tail. An estate cannot be limited by way of executory devise to a person not in esse at the testator's death, unless it must, of necessity, vest within a life or lives in being and twenty-one years afterwards.

This is now the established rule against perpetuities, as finally settled by the House of Lords in the case of *Cadell* v. *Palmer* (1). The only exception to that rule is when an estate, which would otherwise be too remote, is limited to take effect immediately on the determination of an estate tail, "because the power which resides in the owner of the estate tail to destroy all posterior limitations, executory as well as vested, by means of a disentailing conveyance, takes the case out of the mischief of, and consequently out of the rule against, perpetuities." The devise to the great grandson must, therefore, be held void for remoteness, unless the provision of the will directing the occupation by *Peter Ferguson*, the testator's son, can be held to give him an estate tail. That provision is in these words:—

To *Peter Ferguson*, my son, I bequeath my implements belonging to my farm, and to occupy the farm and answer State dues and

(1) 1 C. & F. 372.

public burdens himself, and the lawful male offspring of his body until the proper heir comes of age to take possession, but *Peter* himself and all are restricted and prohibited from giving any wood or timber of whatsoever kind away off the land, or bringing any other family on to it but his own.

I think these words confer an estate tail on *Peter Ferguson*. A gift of the beneficial occupation of land is, of course, sufficient to confer an estate in the land on the devisee (1); and when such a beneficial occupation is devised to a man and the heirs of his body, the estate so conferred must be an estate tail. Then a devise to A and his offspring is synonymous with a devise to A and his issue (2); and in the latter form of devise, "issue" is to be construed as a word of limitation and as equivalent to heirs of the body (3). I read the will as though the testator had said: "I devise the occupation and enjoyment of the farm to my son, *Peter Ferguson*, and the heirs of his body, until my first great grandson comes of age," which would have been a clear gift of an estate tail.

Then, what would have been the effect, if superadded to such a devise as I have just propounded, there had been added the provisions regarding personal occupation and restricting the devisee in the use of the timber. Clearly they would have been rejected as repugnant, and so, equally, in the present case are they, in my judgment, to be rejected for the same reason.

I can think of no other construction to put on the word "offspring," used in this connection, than to treat it as a word of limitation equivalent to "heirs of the body." If we are to give effect to the words introducing the gift over to *Peter McVicar*, no doubt clearly implying a personal occupation by *Peter Ferguson*, as indicating that the word "offspring" is not to be read

(1) *Rabbeth* v. *Squire*, 19 Beav. 70.
(2) *Thompson* v. *Bearly*, 18 Jur. 973.
(3) *Slater* v. *Dangerfield*, 15 M. & W. 263.

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as a word of limitation, and so requiring that the interest of *Peter Ferguson* shall be cut down to an estate for life, we should be departing from the *primâ facie* construction of the testator's language for the purpose of defeating the whole scheme of the will. In other words, we should be resorting to the secondary meaning of words with the result of defeating the whole will, whilst the *primâ facie* construction of these same words would give effect to the will to the sacrifice only of some of the minor and subsidiary provisions. Then, referring to Mr. *Jarman's* book, I think this is a case eminently proper for the application of two of his rules:

The rules of construction cannot be so strained as to bring a devise within the rules of law, but when the will admits of two constructions that is to be preferred which will render it valid (1).

And again:

Limitations may be rejected when unwarranted by the general scheme of the will (2).

Here *Peter Ferguson* either takes an estate tail, which the words are amply sufficient to give, and the will stands subject to the rejection of the provision requiring personal occupation and restricting his dealing with timber, or, he takes a life estate, and the will wholly fails; between these two constructions we have to choose, and I am of opinion that both principle and authority require that that construction should be preferred which gives effect to the primary meaning of the words and renders the will valid, rather than that which reads words in a secondary sense and destroys the will, and makes the testator in effect die intestate.

I am of opinion, that the order of the Court of Appeal should be affirmed and this appeal be dismissed with costs.

TASCHEREAU and FOURNIER, J. J., concurred with RITCHIE, J.

(1) Vol. 2 p. 679, Rule 14. (2) Ubi sup., Rule 19.

HENRY, J.:

Both parties to this controversy claim under the title of one *Peter Ferguson*---the Respondent as heir of entail, as devisee in tail male, under his last will and testament, and the Appellant as his heir-at-law. It is admitted that the testator died seized in 1849—also, by the Respondent, that the Appellant is the heir-at-law of the testator.

The Respondent claims as the son of *Peter Ferguson*, who, it is alleged, took under the will an estate in tail male. The sole question then is, did *Peter*, the father of the Plaintiff, take such an estate.

After the devise of a burying ground and a quarter of an acre of land for a church, the testator in his will says :—

Secondly, it pleased the Lord to give me two sons equally dear to my heart; to give them equal justice, I leave all my land to the first great grandson, descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free from any encumbrance, except the burying ground and the quarter of an acre for a place of worship.

Then, after a devise of a bible and five shillings to his other son, *Duncan*, he bequeathed to *Peter* the farm implements,

And to occupy the farm, and answer state dues and public burdens himself, and the lawful male offspring of his body, until the proper heir are come of age to take possession.

Then follow a restriction and prohibition against *Peter* or any one giving any wood off the land, or bringing any other family on it but his own; and, with this condition, that if *Peter* ceased to occupy the land, he appointed *Peter McVicar*, his grandson,

To take charge of the whole place—farm and all that pertains to it, and occupy the same for his own benefit and advantage according to the forementioned restrictions and conditions until the heir be of lawful age as, aforesaid.

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The first, and, as I think, the only devise in the will of the lands in question is to a great grandson, not in being, or who might never exist. There is, therefore, no one to take or hold the title, and, if there were nothing further contained in the will, the title would on the death of the testator devolve on the heir-at-law. He could only be divested by a good devise to operate in favor of some other capable of holding. Was there, then, such a devise to *Peter* and his heirs? The will does not contain such, as I read it. The testator, no doubt, intended and so ordered, that on certain conditions and with certain restrictions *Peter* was to *occupy*, but not for his life, but only so long as he resided upon the property. With that condition annexed to his right, not to *own*, but merely to *occupy*, it surely could not be construed as placing him in a position to sell and give a good title immediately on the death of the testator. If he were a tenant in tail he could do so. If he could, where then would be the restrictions and prohibitions of the will against the continuance of his occupancy. The right of occupancy of *Peter Mc Vicar* was based on the failure of *Peter* to reside on the property, and it was to be on exactly the same terms. Suppose *Peter*, the son, died without male offspring before the testator, and that *Mc Vicar* took his, *Peter's*, position as occupant of the property, could he for a moment withstand the right of the heir-at-law? No one will contend that he could. He was to occupy (if he lived so long) "until the proper heir be of lawful age, as aforesaid." He could not, for a moment, be said to have an estate in fee tail, and still his *occupancy* was to endure as long as that of *Peter* and his male offspring *Peter* had no life estate under the will, for the devise, if any at all, determined his occupancy and all claim upon the happening of an event mentioned in the devise, during his lifetime. The testator limited, as he had power to do, the oc-

cupancy of *Peter*, and when the event happened (as it did in this case) which was to determine it, we cannot say the testator should have ordered and willed differently. If the will gave him clearly an estate for life with a valid remainder over, we need not enquire as to the validity of the devise to the great grandson. The latter is void, amongst other reasons, because there is no legal provision for the holding of the title from the death of the testator. The intention of the testator is clear and plain, but he cannot do what the law forbids, keep the title of his property in abeyance for an indefinite period after his death. To give effect to the will in one respect would be completely to frustrate its object in every other. I cannot perceive what benefit it would be for the Respondent were we to transpose the clauses of the will as suggested, for unless provisions and words are also added, I fail to see how the transposition would alter the construction favorably for the Respondent. If the will first gave the *occupancy* merely under conditions and prohibitions to *Peter* and his heirs, until the proper heir was of age, and, pointing out the heir, made a devise to him, as is done by the will, it would not, I think, better the position. The defect is substantially in the reference to *Peter* and the lands. It cannot be construed into a devise of a fee of any kind, for the words to make it such are not in the will; and because the devise to the great grandson is inoperative, we cannot, for that reason alone, create by our judgment an estate in *Peter's* heir which the will does not create. One controlling reason is, that our doing so would not only not be in accordance with, but diametrically opposed to, the clear intentions of the testator. I am, therefore, of opinion the judgment appealed from should be reversed, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitors for Appellant: *Mowat, Maclennan & Downey.*

Solicitors for Respondent: *O'Gara, Lapierre & Remon.*