1902

*Dec. 2,3,4.

*Dec. 12.

CHARLES C. GRANT (DEFENDANT) ...APPELLANT;

AND

W. S. FULLER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Devise for life—Remainder to devisee's children—Estate tail.

Land was devised to D. for life "and to her children if any at her death," if no children to testator's son and daughter. D. had no children when the will was made.

Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the plaintiff at the trial.

The only question decided on this appeal was what estate passed under the following clause, in the will of Matthew Dunham, executed in 1852.

"I devise and bequeath to Emma Dunham, my daughter, forty acres of land, the same being composed of the north part of the east half of lot No. 24, 4th concession, in the Township of Plympton, County of Lambton, Province of Ontario, during the term of her natural life and to her children if any at her death, if no children, then the said property to be equally divided between my son, Matthew Henry Dunham, and my daughter, Harriett Dunham, if living, or to their heirs in the same manner." The words "children if any" were interlined to replace the word "heirs" erased.

The defendant, claiming title through the son of Emma Dunham, contended that she took an estate tail under the rule in *Wild's Case* (1) as she had no

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Mills JJ.

(1) 3 Coke 16 *b*.

children when the will was made, and the words "children if any" meaning "issue," and being equivalent to "heirs of her body." The courts below held that she took an estate for life and her children the fee. The plaintiff claimed through her daughter.

Other questions were raised on the appeal but, as pointed out in the judgment of the court, they were all disposed of during the argument.

John A. Robinson and *M. J. O'Connor* for the appellant. No estate in fee passed by the devise to Emma Dunham and her children. *Bowen* v. *Lewis* (1); *King* v. *Evans* (2).

If the interlineation is not a part of the will Emma Dunham took an estate tail. Jarman on Wills, (5 ed.) pp. 1247-56. And if it is she takes the same estate as the word "children" means "issue." *Clifford* v. *Koe* (3); *Roddy* v. *Fitzgerald* (4).

Riddell K.C. and *Cowan K.C.* for the respondent. *Wild's Case* (5) does not apply to a case of this kind. Jarman on Wills (5 ed.) p. 1246.

Under the Wills Act (6) Emma Dunham could not take an estate in tail. *Doe d. Ford* v. *Bell* (7); *Re Chander* (8); *Re Hamilton* (9).

The judgment of the court was delivered by

DAVIES J.—This was an appeal from the judgment of the Court of Appeal for Ontario confirming a judgment in favour of the plaintiff given by the trial judge Mr. Justice Lount. The action was one for the partition of 40 acres of land in the Township of Plympton. It was common ground that the lands were, at Matthew

(1) 9 App. Cas. 890.
(2) 24 Can. S. C. R. 356.
(3) 5 App. Cas. 447.
(4) 6 H. L. Cas. 823.
(5) 3 Coke 16 *b*.
(6) R. S. O. [1897] ch. 128.
(7) 6 U. C. Q. B. 527.
(8) 18 O. R. 105.
(9) 18 O. R. 195.

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Dunham's death, vested in fee simple in one David Dunham and that he had by his will devised the same to his daughter Emma for her natural life and after her death to her children, if any, with a devise over, in default of children, to his son Matthew and his daughter Harriet. But it was strongly contended that under the wording of the will Emma Dunham took an estate tail, and not an estate for life. Emma was married twice. By her first marriage she had one son through whom the appellant claimed title, and by her second marriage one daughter Flora, who subsequently married a man named Haight. The appellant's main contention was that the act abolishing primogeniture did not affect estates tail, and that therefore Emma's eldest son at her death became her sole heir, and that in any event Emma's second marriage was void on the ground that the man Lewis she intermarried with had a wife living at the time he went through the form of marriage with her. A great many other questions were raised as to the wrongful exclusion of evidence at the trial offered to shew Flora's illegitimacy, and as to the existence of a champertous agreement between the plaintiff and Flora Haight, but these were all disposed of at the argument and the only question that remained was the proper construction of the will. It was contended that the devise in question contained an important erasure and interlineation and that in the absence of evidence to the contrary the presumption was that this alteration and interlineation were made after the will was completed and that it must be read as if they were non-existent. But it was plain that the appellant by his complete silence at the trial on the point when if it had been raised the plaintiff might have given satisfactory evidence in explanation, and his continued silence in the Court of Appeal where the point was not taken at all as well

as by his statements and admission in the case on appeal to this court, could not now for the first time raise such a question, and therefore that the will must be read and construed as it had been in the courts below with the erasure and interlineation forming parts of it. The devise in question reads as follows:

I devise and bequeath to Emma Dunham, my daughter, forty acres of land, the same being composed of the north part of the east half of lot No. 24, 4th concession, in the Township of Plympton, County of Lambton, Province of Ontario, during the term of her natural life and to her children if any at her death, if no children then the said property to be equally divided between my son, Matthew Henry Dunham, and my daughter Harriett Dunham, if living, or to their heirs in the same manner.

The will was dated in 1852 and was recorded in the year 1857 the testator having died in the meantime. The chief argument pressed upon us was that at the time the will was made the Legislature of Ontario had not incorporated in the Wills Act the 29th section of the Imperial Act 1 Vict. ch. 26, defining the construction of the words "die without issue" or words of similar import; that the word "children" in the devise must be constructed as meaning "issue," and that under the rule in *Wild's Case* (1) and in consequence of the gift over in default of children the devisee, Emma Dunham, took an estate in tail and her eldest son alone became entitled at her death. Mr. O'Connor pressed his argument upon us on this point at great length and cited a great many cases which he submitted supported his contention. I am unable however to see that there can be any doubt upon the point. I fully agree with the learned judges of the Court of Appeal that the rule in *Wild's Case* (1) has no application to this devise. The estate given to Emma was explicitly for her life. The gift to the children was not "immediate," and the word children

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cannot be construed as a word of limitation. The gift to the children did not take effect till after the death of their mother, who had first the life estate devised to her, and the rule therefore in *Wild's Case* (1) is not applicable. As the testator died in 1852 the Wills Act was in force, and by virtue of the 30th section, although there were no words of limitation in the devise to the children, they took the fee simple on their mother's death. The fact of there being a devise over in default of children can have no effect whatever in altering the proper construction of the gift to them. It does not in any way indicate any intention to give them a less estate than the fee, and under the Wills Act the children take under this devise the same estate as if the devise had been to them and their heirs.

The question is very fully discussed by the present Chief Justice Moss of the Court of Appeal for Ontario in the case of *Chandler* v. *Gibson* (2), and in the conclusions at which he arrived in that case as well as in the one at bar I fully concur.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John A. Robinson.*

Solicitors for the respondent: *Cowan & Towers.*

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(1) 3 Coke 16 *b*.

(2) 2 Ont. L. R. 442.