

TEETZEL, J.:—The clause of the will to be construed is as follows:—"It is my will that upon the death of my wife Mary the whole of my real estate above described and the whole of my personal estate then remaining shall belong to my sons George and James conjointly, to have and to hold the same for their use during their lifetime, and at their death to their children, their heirs and assigns forever. But if my sons George and James both die without issue, then the said real and personal estate shall be equally divided among my grandchildren then living share and share alike."

James died in 1897, after the testator, a bachelor and intestate. George died in 1902, leaving a widow and five children.

Two questions arise: first, whether the estate given to George and James is a joint estate tail or a joint life estate only; second, whether, if the latter, after the death of both life tenants the children of George take the whole estate or only one-half, leaving the other half undisposed of.

As to the first question, I think the testator's intention was to give the sons a joint life estate only, with remainder to their children, if any, in fee, and failing children his other grandchildren would take under the executory devise in their favour in the second sentence above quoted.

This construction was placed upon a devise in similar words in *Chandler v. Gibson*, 2 O. L. R. 442, approved of in *Grant v. Fuller*, 33 S. C. R. 34.

The words "their children" are a specific description of individuals who are to take the fee upon the death of the surviving life tenants, and are not intended as a general term including all who could inherit at that time, so that the rule in *Shelley's case* does not apply.

The words "without issue" in the second sentence do not, I think, referentially control the word "children" in the previous sentence in such a way as to make it equivalent to "issue" or "heirs of the body," and thus make the rule applicable. . . .

[Reference to *Jarman on Wills*, 5th ed., pp. 1298, 1307; *Theobald*, 5th ed. pp. 617 and 652; *Underhill & Strachan*, p. 154 et seq.]

As to the other question, I think the gift of the remainder to the children of George and James was a gift to such children as a class, who take the whole estate per capita.