

BOYD, C.

MAY 26TH, 1906.

CHAMBERS.

RE JOHNSON AND SMITH.

*Will—Construction—Absolute Estate in Fee—Limitation—  
“Die without Issue”—Vested Estate on Birth of Child.*

Petition by vendor under the Vendors and Purchasers Act for an order declaring that she could make a good title to property under a devise.

Shirley Denison, for the vendor.

No one for the purchaser.

BOYD, C.:—The words used in this will “dying without issue” or “children” are of flexible or ambiguous character, as is the expression “die unmarried:” In *re Chant*, [1900] 2 Ch. 345; In *re Booth*, [1900] 1 Ch. 768. In *re Hambleton W. N.* 1884, p. 157, the words “die without children” were construed by Bacon, V.-C., as signifying “die without having had a child.” This case is noted in *Theobald on Wills*, 6th ed., p. 678. Whereas in *re Booth* the same words were read by Mr. Justice Byrne as meaning “dying without leaving children.” In that case there was a gift over to persons named, who were indicated as the objects of the testator’s bounty. In the present case there is no gift over, but a declaration that if the adopted daughter (the vendor), to whom the property has been previously given for her own sole use and benefit forever, “die without issue, all her interest shall lapse.” Byrne, J., admits that the construction is of difficulty, and is open to two considerations, to one of which he does not give effect. That is, that there is a general rule in favour of making an absolute vesting as soon as possible, especially when it is intended to enable the parent to make some provision for the family: p. 770 of [1900] 1 Ch. That consideration appears to me to outweigh the other construction in construing this will, which contains no gift over. I would read this will as giving an absolute estate in fee to the adopted daughter upon the child being born, which happened after the will was made and after the death of testatrix in 1903. This construction is favoured by *Jaffray v. Connor*, 28 Beav. 328; and see *Weakley v. Rugg*, 7 T. R. 326.