

"4. It is my will that if either of my said children shall die during the lifetime of their said mother or without making any will or without any lawful issue, then the share or interest of the child so dying shall pass to and become vested in the child surviving, and that if both my said children shall die before their said mother or without having made any will or without leaving issue lawfully begotten, then and in such case said real estate shall become vested in, pass to, and belong to the said Eliza McDonald, her heirs and assigns forever."

The testator was never married, but had two illegitimate children by . . . Eliza McDonald . . . the children being described in his will as Mary Chandler and John Chandler.

By the 2nd paragraph of his will, he devised the said real estate, being the farm in question, to . . . Eliza McDonald for life; and she is now deceased. The daughter . . . now Mrs. Foraker, is living, and has several children, and she has conveyed her interest in the real estate to her brother, John Chandler, who is still unmarried, and he has agreed to sell the farm to . . . Holmes; and the question is, whether, under the will, he is able to make a title thereto in fee simple.

I think it is manifest that while the testator desired to convey the fee simple in his real estate in remainder to his said two children, it was also manifestly his desire that in no event, owing to their illegitimacy, should there be an escheat to the Crown of either interest, to prevent which he creates an executory devise over to Eliza McDonald, and her heirs, in the event of both the children dying intestate and leaving no issue surviving either of them.

I think it is quite clear that he intended that, if they had issue, the issue should get the benefit of the devise to the parents; and, therefore, I think the word "or" between the words "without having made any will," and the words "without leaving issue," etc., must be construed as "and." It would be, I think, contrary to his intention to hold that in the event of . . . both dying intestate the executory devise over should take effect, notwithstanding issue surviving; and, therefore, I think it is a case in which . . . "or" must be construed as "and."

It has long been settled that in a devise of real estate to A. and his heirs, and in case of his death under 21, or without