RIDDELL, J. DECEMBER 7TH, 1915.

RE TAYLOR.

Will — Construction — Devise — "Issue" — "In Fee" — Life Estate—Remainder—Rule in Shelley's Case.

Motion by the executors of George Taylor, deceased, for an order determining a question as to the proper construction of a paragraph of his will whereby he gave and devised unto his two daughters Marietta Weller and Jennie Campbell certain described land, "to have and to hold to the use of them the said Marietta Weller and Jennie Campbell for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike."

The motion was heard in the Weekly Court at Toronto.

R. S. Cassels, K.C., for the executors.

A. R. Clute, for the children of Marietta Weller.

RIDDELL, J., said that the sole question was, whether Marietta Weller took an estate in fee, in tail, or for life. Primâ facie, "issue" means "heirs of the body:" Roddy v. Fitzgerald (1855), 6 H.L.C. 823, at p. 872. Had the words been "in fee simple," instead of "in fee," the Court would be bound by King v. Evans (1895), 24 S.C.R. 356, to decide that the devisee took only a life estate. It would be to make too subtle a distinction—always to be avoided if possible—to hold that because the testator used the words "in fee," instead of "in fee simple," the meaning of the will was changed. If such a distinction was to be drawn, it should be by the Supreme Court of Canada or at least the Appellate Division of the Supreme Court of Ontario.

Order declaring that Marietta took only a life estate; costs out of the property in question.