

HON. MR. JUSTICE MIDDLETON. DECEMBER 5TH, 1912.

RE PRIESTER.

4 O. W. N. 456.

Will—Construction—Devise to A. and to His Children Equally as Heirs—Estate Tail.

MIDDLETON, J. held that a devise of lands to an unmarried infant "as long as he may live and after his death I will that the said real estate be divided equally between his children as heirs," passed an estate tail.

Atkinson v. Featherstone, 1 B. and Ad. 944, and
Van Grutten v. Foxwell, [1897] A. C. 664, referred to.

Motion for construction of will of Barbara Priester.

V. A. Sinclair, for the executors.

T. J. Agar, for Orville Priester.

J. R. Meredith, for the Official Guardian and also appointed to represent the unborn issue of Orville Priester.

HON. MR. JUSTICE MIDDLETON:—Orville Priester being of age the other children of Frederick Priester have no claim.

"The money there may be left" forms no part of the residuary estate and is an absolute trust for the repair of the house. The discretion given the executors is only as to the mode of user. The only question of moment is the devise of the lands to Orville Priester; these are given to him "so long as he may live and after his death I will that the said real estate be divided equally between his children as heirs." At the date of the will and death the devisee was an unmarried infant and this makes it easier to regard the word "children" as equivalent to "heirs of the body." The will using the words "as heirs" affords the key to the interpretation and Orville takes an estate tail.

The words "divided equally between" the children do not negative this. *Atkinson v. Featherstone*, 1 B. & Ad. 944, and *Van Grutten v. Foxwell*, [1897] A. C. at 664.

This being so the executors may, with the consent of Orville, spend the small sum on hand in improvements on the farm more urgently needed than repair on the house. Costs out of the estate.