

Chan. Div.]

DICKSON v. DICKSON.

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court above (*Ancketell v. Baylis*, Dec. 1), with the result that the objection was overruled, and the Court held that the part of the judgment of Lord Justice Brett, which was relied upon, was not binding upon them, as it was not necessary for the decision of the question before the Court of Appeal. Similar instances might be indefinitely multiplied, all arising from what we venture to think is a great mistake, namely, too great diffuseness on the part of learned judges in delivering their judgments. Whatever appears in a reported judgment of a learned judge is certain to be adopted and acted upon sooner or later, and it is a result which can only be deprecated and deplored when action is taken upon dicta to which sufficient consideration and attention may not have been given, or which, in cases where more than one judge is sitting, would not have been indorsed by the majority of the court had they constituted an opinion on the essence of the case. So long, however, as judgments are delivered which deal with assumptions and facts outside those before the court for decision, so long will general complaint be made, and that not without great and sufficient reason."

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

DICKSON v. DICKSON.

Will—Construction—Restraint on alienation—Estate tail.

A testator, by his will, dated 25th June, 1866, devised to the plaintiff, "and his heirs," a parcel of land, subject to the following proviso: "that he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867.

Held, that the plaintiff was not entitled to an estate in fee simple, nor to a fee tail in possession, but that upon his death his children who should survive him, would be entitled to an estate, either for life or in fee.

Seemle, that the effect of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in

Motion for judgment. The action was brought to obtain a construction of the will of Joseph Hickson, who died in 1867. By his last will, dated 25th January, 1866, he devised to the plaintiff a parcel of land in the following terms: "I also give and bequeath to my son John Dickson (the plaintiff), to his heirs and executors forever, the following premises, namely: the south half of the farm, with the half of the dwelling house, and all the buildings presently on the farm; that is to say, the south half of the south half of Lot number 25, in the seventh Concession of the Township of York and County of York, and that, too, on the following conditions, namely, that he neither mortgage nor sell the place, but that it shall be to his children after his decease." It was admitted that the plaintiff had children living at the date of the will.

The action came on by way of motion for judgment on the pleadings.

J. Bethune, Q.C., and *J. Crickmore*, for the plaintiff. The effect of the will is to give the plaintiff an estate tail general, according to the rule in *Shelley's case*. The word children must be read as "issue of the body." The restraint on alienation is wholly void. *Gallinger v. Farlinger*, 6 C. P., 512; *Ware v. Camm*, 10 B. & C., 433; *Holmes v. Godson*, 8 D. M. & G. 152; 2 Jarm. 14.

T. S. Plumb, for the defendants, children of the plaintiff. The word "children," in this will, is a word of purchase and not of limitation. The plaintiff, consequently, only takes a life estate, with remainder to his children as tenants in common in fee. The only case where the word "children" is construed as a word of limitation is when the devisee has no children living at the date of the devise: *Wild's case*, 1 Tudor, R. P. cases 669, 3rd Ed.; *Guthrie's appeal*, 37 Penn. 9, 5th Am. Ed. Jarman, vol. 3, 174 and 176. It is, in this view, unnecessary to consider whether or not the clause restraining alienation is good as a restraint upon alienation, it is rather to be considered as a clause limiting the estate to be taken by the plaintiff, and its effect is to cut down the estate in fee, apparently given to the plaintiff, to a life estate. *Jeffrey v. Scott*, 27 Gr., is expressly in point.

Bethune, Q.C., in reply. If the plaintiff took a mere life estate, as contended by the other side, then the defendants only take a life estate in the remainder, and there is an intestacy as to