O'REILLY, ... APPELLANT.
BARONESS SEMPILL, ... RESPONDENT.

1855.
May 24th and 25th.

Construction.—Words held insufficient to cut down a fee into a liferent.—Where by a codicil to the will of the testatrix an estate in fee-simple was constituted in A.,—a subsequent codicil, merely saying that B. should be the successor of A., was held not to cut down into a liferent the fee-simple of A.

This case is given at great length in the Second Series of the Court of Session Reports (*a*).

The testatrix, Miss Collins Austin, by a codicil dated Sept. 1840, directed her trustees and executors "to pay and make over the whole residue of my estate and effects to my dear cousin, the Right Honourable Lady Sempill, *and her heirs and assignees*, who I hereby appoint to be my sole residuary legatee."

By a further codicil, dated 22d July 1841, she thus expressed herself:—"As there is no prospect now of my dear cousin, the Right Honourable Lady Sempill, having a child, I depone and bequeath as her successor my grandniece, Collins S. O'Reilly, youngest daughter of the late William P. O'Reilly, surgeon, to succeed the said Right Honourable Lady Sempill in all my landed property, plate, furniture, &c., always to be understood with the burden of all my annuities, also legacies, if not already paid, and debts I may be due."

The question was whether the fee given to Lady Sempill by the first codicil was cut down to a life-rent by the second. The Court of Session had decided in the negative. Hence this Appeal.

The *Solicitor General* (*b*) and Mr. *Anderson* for the Appellant.

Mr. *Rolt*, Mr. *George Patton*, and Mr. *Fleming* for the Respondent.

(*b*) Vol. xv. p. 789. (*a*) Sir R. Bethell.

The LORD CHANCELLOR:

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Lord Chancellor's opinion.

My Lords, this is a case which I think admits of no reasonable doubt; though perhaps it is too much to say so since two of the learned Judges (*a*) in the Court of Session were of a contrary opinion. It is said on the part of the Appellant, that if the words which the testatrix had used were to be construed in their technical sense, there would have been no doubt that Lady Sempill had been made an unlimited fiar; but then it is also said, that when the words were used by the testatrix, not in their technical sense, a different rule of construction applies. It is no doubt true, that in some cases where a testatrix acts as her own conveyancer, a somewhat different rule of interpretation is applicable from that which is acted on when she is making a less formal instrument. But the doctrine, even then, is always this, that where a testator has used words which are not ambiguous, you must give to such words their natural meaning, unless you find from other parts of the will that he intended an opposite meaning to be given to such language. Now, in the present case, though one might no doubt conjecture that the sense in which the testatrix used the words in these codicils, was not their technical sense, still, at best, that can only be a conjecture upon which no Court can safely rely.

By the first instrument, viz., that of September 1840, the testatrix clearly makes Lady Sempill an absolute owner of the residuary estate; and under that absolute ownership she might, for example, have worked the mines of the land, which as a mere life-rentrix she could not do. There is no dispute about that. Then afterwards, in the codicil of 22d July 1841, the testatrix used these words: "As there is no prospect now of my dear cousin, the Right Honourable Lady Sempill, having a child, I depone and bequeath

(*a*) Lord Justice Clerk Hope and Lord Cockburn.

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as her successor, my grandniece Collins S. O'Reilly, youngest daughter of the late William P. O'Reilly, to succeed the said Right Honourable Lady Sempill in all my landed property, plate, furniture, &c., always to be understood with the burden of my annuities, &c."

It is said that the effect of this is, that Miss O'Reilly is appointed legatee of the residue, and that Lady Sempill is only to have a life estate. But that is not the meaning of the language which she has used. According to the law of Scotland, those words are capable of a strict interpretation, and amount simply to this, that whereas by the former instrument the heirs of Lady Sempill would have succeeded to the estate on her death, by the latter instrument Miss O'Reilly is substituted as the person to succeed instead of those heirs. But then that only means that if Lady Sempill shall do no act to defeat the destination of the property, Miss O'Reilly will be the next taker; it was a mere *spes successionis* in Miss O'Reilly, which may or may not be of much value; it no doubt always is of some value, but it did not prevent Lady Sempill from exercising all the rights of ownership with regard to the property. I can see no reason whatever for holding that the testatrix meant anything else than what the language in its technical sense clearly imports. I therefore move your Lordships, that the interlocutors in the Court below be affirmed.

Lord Brougham's opinion.

The Lord BROUGHAM:

My Lords, I have no doubt as to this case any more than my noble and learned friend. I must say that I cannot go along with the two learned Judges in the Court below in holding that the meaning of the testatrix was to give to Lady Sempill only a life estate. I think it is quite conceivable that she might mean just what the words in their technical sense import. I think it would be a very dangerous thing for the law of

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Scotland, and also for the law of England, if we were to put any other construction on these three instruments than that which has been put upon them by the Court below; and I differ altogether from my right honourable and learned friend the *Lord Justice Clerk*, when he says, as he does at the commencement of his opinion, "This is a case entirely by itself, and the decision of it cannot affect any other." On the contrary, I think it is by no means a case by itself, and if we were to decide against the opinion of the majority of the learned Judges in the Court below, I think we should soon hear of other cases being litigated which would show that it would by no means be so understood by the profession.

Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

My Lords, I also agree with my noble and learned friends, and have no doubt that the Court below came to a correct conclusion. The *Lord Justice Clerk* seems to me not to have accurately defined what the interest was which he conceived Miss O'Reilly to take under the instrument of 1841, and what was the interest which Lady Sempill was to take under the same instrument. He appears not to have followed the other judge in that respect, considering that the fee originally given to Lady Sempill was cut down to a mere liferent. But he did not, as I understand his judgment, define what the interest clearly was that she was to take, and therefore it would be one of the greatest difficulties which this House would have to contend with if they decided that what Lady Sempill took was not an absolute right, but that there was a substitution created by the second codicil. That difficulty arose in this House and was very much considered in the case of *Wright* v. *Atkyns* (*a*). In that

(*a*) 3 Geo. Coop. Ca. in Chan.; 1 Turn. & Russ. 165; and 17 Ves. 263, note.

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case there was a devise to Mrs. Atkyns in fee, with a hope and confidence which was held to amount to a trust that after her disease she would dispose of the estate to the testator's family. Sir William Grant held that that cut down the fee into a life estate, and he therefore granted an injunction against Mrs. Atkyns cutting timber. That case after some years came before Lord *Eldon*, and he affirmed that decision. After it had been acquiesced in for some years, it was brought before this House, and the House held that it was impossible to say that Mrs. Atkyns had not all the rights of a person entitled to a fee, even if she were bound at her death to dispose of the fee to the family according to the direction of the will, and therefore they reversed the order and sent it back to the Court of Chancery. Lord *Eldon*, upon the new bill filed by the persons who were the heirs at law, then gave her leave to cut timber as tenant in fee, but she was to account for the timber, paying the produce into Court or giving security. Now, upon that what is exceedingly unusual took place: there was a second Appeal in the same Session upon that second decision of Lord *Eldon's*, and it was reversed; and Mrs. Atkyns' right to cut timber was declared by the House, which right she exercised. That is one difficulty that you have to avoid, that where you attempt to cut down an actual fee-simple to a lesser estate, you must take care that you do not infringe upon rights which, as incident to the estate in fee, the grantor intended the grantee to have, or the devisor intended the devisee to have. For although there may be a disposition over, yet it may not be a disposition over which would cut down the previous estate to a mere life estate, impeachable as common life estates are.

In this case there was a clear technical fee given to Lady Sempill. It embraced the whole estate; and the ground upon which the case was argued in the

Court below could not hold for a moment in the discussion here, that upon some technical words the trustees were to retain the property, and then a certain interest was to arise over. There is no such technicality as that to govern the rights of the parties. By the first instrument, the trustees who took the entire estate were directed to pay and hand it over to Lady Sempill, the consequence of which was that they must have denuded themselves altogether of the estate upon her requisition, and she must have taken the entire estate.

Then comes the second instrument. It is singular enough that that is dated only a year after the first. By the first instrument the estate was given to Lady Sempill, her heirs and assigns; and then the second instrument proceeds upon this ground, that all hope of issue has ceased in the view of the testatrix as regards Lady Sempill. It was rather quick to come to that conclusion between the end of one year and the beginning of another. But that conclusion she came to, and for that reason she does not revoke the gift to Lady Sempill; but she proceeds to deal with the such cession to that estate. What does that mean? Does not it mean that she knew that a child of Lady Sempill's would take the estate or what was given to the heirs and assigns? She said, there will not be a child to take; then I myself will appoint a successor. A successor to what? Why, to the interest that Lady Sempill had. And what was that interest? Why, the entire interest. It was the right of succession. The estate was not removed out of Lady Sempill; the fee was not cut down in that way, but what a child would have taken in the contemplation of the testatrix, that was to go to Miss O'Reilly, as the successor, in the place of the child. How was she to take it? Why, just as the child, would have taken it. And how would the child have taken it? Why, simply as the instru-

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ment pointed out to be the intention of the testatrix, and subject to the disposition of Lady Sempill herself It is as plain as possible. What is the objection which is raised? The objection to it is, that it does not amount to a certainty of gift to Miss O'Reilly. How can it do so according to the Law of Scotland? It is the case of every common substitution, and, therefore, if you are not at liberty to say that in every case of common substitution, there must be an absolute settlement by fetters and prohibitions, which we do not find here, how are you to cut it down in this case? There were two circumstances, neither very unlikely to happen, in which it would have been effectual. If Lady Sempill had died in the lifetime of the testatrix, Miss O'Reilly would have taken the estate; or if Lady Sempill had thought fit not to alter the destination she would have taken it. The gift, therefore, was not ineffectual. There cannot be a greater error than to argue that this is a case in which there was no gift. There was an effectual gift, as effectual as the law of Scotland could make it. Then that gift is subject, by the law of Scotland, to be defeated by the testator, just as a tenant in tail in this country may defeat those in remainder. And what then? It is a consequence of the law, and incident to the estate which is given. I am of opinion, therefore, that this case admits of not the slightest doubt, and that the decision of the Court of Session should be affirmed.

Interlocutors affirmed with Costs.

MAITLAND AND GRAHAM.—DEANS AND ROGERS.