REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

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WILKINS *v.* TAYLOR.

The testator devised the interest of some public stock to his daughter for life; and, at her death, the interest of one fourth of it to each of his grand children; and, at their decease, the principal and interest to be disposed by them to their heirs in such proportion as they by their wills respectively may direct: And in case of the death of grand daughter S. C. without issue, her part to his grand daughter E. C. This was a devise of one fourth of the principal of the stock, after the death of the testator's daughter, to S. C. in absolute property.

H. Cocke, and *Sarah* (formerly *Sarah Clements*) his wife brought a suit in chancery in the county court against *Taylor*, as executor of *Thomas Williamson*, to recover her proportion of the public certificates embraced in the following clause of *Williamson's* will:

"I also give to my said daughter the interest of four thousand pounds in the government funds, during her life; and at her death I give the interest of the above money one fourth to each of my grand children *Sarah Cocke*, *Elizabeth Clements*, *Frances Clements* and *James Clements;* and at their decease the principal and interest to be disposed by them to their heirs in such proportion as they by their wills respectively may direct; and in case of the death of my grand daughter *Sarah Cocke* without issue, I give her part to my grand daughter *Elizabeth Clements*."

The county court decreed payment of one fourth of the certificates to the plaintiffs; and the defendant appealed to the high court of chancery: where, after the death of *H. Cocke*, the decree was reversed. Subsequent to which, *Sarah Cocke* having intermarried with *Wilkins*, they filed a bill, in the high court of chancery, to review the decree of that court, charging that *Goodwyn*, the administrator of *Elizabeth Clements*, had assigned his right to the plaintiff *Sarah;* who afterwards died; and, thereupon, *Wilkins* filed a bill to revive the bill of review. The high court of chancery affirmed its former decree; and *Wilkins* appealed to the court of appeals.

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Call, for the appellant. *Sarah* took the absolute property in one fourth of the certificates. For the word *heirs* has a technical meaning expressive of an inheritance in the ancestor. *Fearne*, 101. It is not like the case of *Tomlinson* v. *Dighton*, 1 Wms. 149; for there the estate was given to the wife for life, and then to be at her disposal, provided it was to any of the *testator's* own children: but here the gift is to the heirs of the parent, who was to make the appointment; and that constituted property in herself; for there is no difference between a bequest to a man, with power to dispose of it among his heirs, and a gift to himself in absolute property. 1 *Leon*, 156. *Fearne*, 360. 2 *Atk.* 309. 1 *Wash.* 266. Adding the power, therefore, will no more destroy the absolute estate, than a power to make leases, or a jointure, will destroy an entail. *King* v. *Milling*, 1 Vent. 214. Besides the limitation is upon *Sarah's dying without issue*, and not upon her failure to appoint; which shews, that the issue, and not the appointment, was the principal object in the mind of the testator; who clearly never intended that the certificates should return to his executors; for, failing issue of *Sarah*, he gave them over to *Elizabeth*. It is a rule that a devise of a personal thing to one and his issue, gives the absolute property, whether the entail is express or implied, *Fearne*, 342, 365. 2 *Atk.* 308, 376; and the implication here was inevitable, as *Sarah* could not die without heirs, while *Elizabeth* lived. Upon any other construction, the issue could not have taken in case of a failure to appoint; which would be manifestly contrary to the intention of the testator, who clearly meant that all of them should succeed to some proportion of the gift. The limitation to *Elizabeth*, upon the death of *Sarah* without issue, was too remote. *Hill* v. *Burrow*, 3 Call, 342, and *Tate* v. *Tally*, 3 Call, 354, in this court. The words, *her part*, relate to the principal; for they have no other correlative, as the interest is given to her for life; and therefore, unless they relate to the principal, they can relate to nothing. But if those words related to the interest only, it would give the

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absolute property; for it would then be the same as a devise of the profits. *Butterfield* v. *Butterfield*, Fearne, 347. *Daw* v. *Pitt*, Ibid.

Randolph. If it were true that the absolute property was first given to *Sarah*, yet the limitation over to *Elizabeth* would be good; and in that view the plaintiff could not be entitled. But *Sarah* had only a life estate, with power to dispose of the remainder. For *Shelly's* case depended upon feudal principles, which do not apply to personal estate. It makes no difference that under our construction the children might have been disappointed; for the testator supposed their parent would not neglect them. The interest only is given to *Sarah;* and consequently there was not such a union of principal and interest as to constitute property, and create that factitious resemblance to descent, which, in England, has been absurdly construed into full ownership.

Cur. adv. vult.

TUCKER, Judge. The question in this cause arises upon the same clause in *Thomas Williamson's* will as is mentioned in the case of *Goodwyn* v. *Taylor*, 2 Wash. Rep. 74. *Wilkins* is the late husband and administrator of *Sarah Cocke* in that devise mentioned.

I conceive that two of the three questions upon this devise have already been decided by this court, in the case of *Goodwyn* v. *Taylor*, viz.

1. That the legacy to the four grand daughters was an absolute bequest of the testator's whole property therein; and not a bequest for life only (as was the case in *Target* v. *Gaunt*, 1 Wms. 432) with a power to appoint who should take the property after the legatees' deaths.

2. That it was a bequest both of principal and interest in the certificates.

It remains to consider,

3. What is the effect of these words, which are applicable only to *Sarah Cocke*, and not to any other of the tes-

tator's grand children; and consequently have not yet received the interpretation of this court, viz. "And in case of the death of my grand daughter *Sarah Cocke, without issue*, I give her part to my grand daughter, *Elizabeth Clements*."

The case of *Target* v. *Gaunt* was relied on to shew that this was a good limitation over to *Elizabeth Clements*, in the event of *Sarah Cocke's* death without issue. But the court have already decided, in the case of *Goodwyn* v. *Taylor*, that this case is not like that, "A limitation to the first taker for life only, with a power of appointment by her will; and in case of a dying without issue, then a devise over."

But the question is, Whether a limitation over of a personal thing, after the death of the first taker, *without issue* generally, is a good limitation?

It has been allowed, that if taken so as to exclude issue *in infinitum*, then the limitation over is void as to real, but a difference has been attempted as to personal chattels.

In the case of *Beauclerk* v. *Dormer*, 2 Atk. 302, in which this question was made upon these words in general *Kirk's* will: "Miss *Dormer* I make my sole heir and executrix; if she dies *without issue*, then to go to *George Beauclerk;* he to pay lady *D. B.* £500, to *Betty Gibbs* and her grand daughter £100 each, and Miss *Dormer* to keep the old woman, &c." Lord *Hardwicke* said, "This is the very first time when it has been contended, that a limitation over of a personal thing is to receive such a construction by the court as to mean a dying without issue at the death of the party, notwithstanding there are no words in the will that indicate this to be the testator's intention," *p.* 312.

And he further observes in the same case, "The general argument that the sense of the words, *dying without issue*, must, according to common parlance, mean without issue at the time of his death, is taken in, as an auxiliary in arguing these sort of cases; and that he does not know one in-

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stance, where the determination has turned singly upon this particular point," *p.* 313.

He decided accordingly, that the construction contended for in behalf of the plaintiffs, that this was a good limitation over to lord *George Beauclerk*, was not supported by any case whatever; that the words of that will being general and unrestrained, the limitation over was void, and could not be confined to Miss *Dormer's* dying without issue living at the time of her decease, *p.* 315.

The limitation over, and the contingency of dying without issue, appear to me to be described perfectly in the same manner in this case, and in the case of Miss *Dormer*.

If it be said, that we are to infer that it must be a dying without issue living at the time of *Sarah Cocke's* death, because the limitation over is to *Elizabeth Clements*, and not to her and her heirs; we may answer, the limitation over to lord *G. Beauclerk* is precisely the same; and the limitation to lady *D. B.*, *Betty Gibbs* and her grand daughter might be relied on to shew that such was the testator's intention. Besides the word, *then*, in general *Kirk's* will might have been construed as still further explaining this intention, and at first created some doubts with lord *Hardwicke*. But he said that though, in a grammatical sense, this is an adverb of time, yet in limitation of estates, and framing contingencies, it is a word of reference, and relates to the determination of the first limitation. The words, *and in case*, may be construed in the same manner, and cannot be referred to any precise period of time.

In the case of *Theebridge* v. *Kilburne*, lord *Hardwicke* disregarded the word "immediately;" and said, that to lay such a stress upon that word, as to make it heirs of the body living at the time of her death, would be to make these limitations very precarious, from uncertain words thrown in by the drawer of the conveyance; there being no difference in saying *immediately* after, and from and after her decease. 2 *Ves.* 236.

But the case of *Higginbotham* v. *Rucker*, 2 Call, 313, in this court, in which the jury found that the plaintiff, in 1793, gave his daughter, the wife of the defendant, certain negroes to her and the heirs of her body, and in case she died without issue, that is children of her body, the said negroes to return to the plaintiff; and that she died without issue; is certainly a strong case against the authority in *Beauclerk* v. *Dormer*. But as that was the case of a living thing, which at that time was real estate, and was to *return* to the donor in his lifetime at furthest, I presume the court were influenced by these circumstances in the construction of the verdict of the jury.

But the case of *Dunn and wife* v. *Bray*, 1 Call, 338, has been relied on, by the counsel for the appellee, as a parallel case to the present. The words of which are, "But in case my said son *Winter* should die, and *leave no issue*, then I give, &c." This is precisely like the case of *Forth* v. *Chapman*, in which lord *Hardwicke* said, that lord *Macclesfield* laid a particular stress upon the penning of the will. "If either of his nephews *William* or *Walter* should depart this life, and *leave no issue* of their respective bodies." These words he said must relate to the time of their deaths. 2 *Atk.* 313. And so this court have determined in the case referred to.

But here are no such expressions; but a mere *dying without issue*, generally, and without restriction.

On the authority of this decision in the case of *Beauclerk* v. *Dormer*, and of the former decision of this court, upon this very clause, I conceive the appellant is entitled to the legacy as administrator of *Sarah Cocke*, his late wife.

But should the court be of a different opinion, and affirm the chancellor's decree as to this point, I think it should be without prejudice to the appellant's claim under any assignment of *Elizabeth Clements's* interest, which he may be able to establish hereafter.

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ROANE, Judge. Previous decisions in this court, and in the case of *Goodwyn* v. *Taylor*, on this very will, make the present case a short one.

In *Goodwyn* v. *Taylor*, the grand daughter *Elizabeth* was held to take an absolute property in the £ 1000 certificates bequeathed to her. Although the bequest to *Sarah Cocke* (wife of the appellant) is supposed to be reduced to an estate tail by the restrictive words preceding the limitation over of her portion, to *Elizabeth Clements*, it is still the same thing, as an estate tail in things personal gives the absolute dominion.

There is then only one question remaining in the cause; and that is, Whether the extent of the gift to *Sarah* is restrained by the limitation over to *Elizabeth?* In other words, Whether the limitation be good?

After the repeated discussions and decisions in this court on this point, and particularly in the cases of *Hill* v. *Burrows*, *Tate* v. *Talley*, *Pleasants* v. *Pleasants*, and *Higginbotham* v. *Rucker*, I need not waste words to say, that a limitation over in remainder to *A.* after the death of *B.* without issue, is void, as being too remote.

This court has never questioned the rule as laid down in *Beauclerk* v. *Dormer*, and referred to by *Fearne* as affording the standard; but, in the above mentioned cases, have supposed that circumstances necessarily importing restriction existed, which brought them within the reason of the cases considered as exceptions to that rule, and as abridging the extent of the words "without issue," so as to bring the commencement of the remainder to an event within a legal and reasonable period. But this is a mere naked case, and no restrictive circumstance appears to limit the extent and operation of the words "death without issue." The general rule must, therefore, prevail.

My opinion is, that the decree of the high court of chancery ought to be reversed, and a decree entered for the appellants.

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FLEMING, Judge. The only difference between this case and that of *Goodwyn* v. *Taylor*, is the limitation over to *Elizabeth Clements* upon *Sarah Cocke's* dying without issue. Those words are general; and there is no expression in the will to shew, that the testator meant to confine it to issue living at her death. The words must therefore be construed to mean dying without issue generally; and then all the authorities shew that the contingency is too remote, and that the limitation over cannot be supported. I think, therefore, that the decree of the high court of chancery should be reversed.

CARRINGTON, Judge. Upon revising my notes in *Goodwyn* v. *Taylor*, I am perfectly satisfied with the decision in that case; and I see little, or no difference, between the two cases, except that the words "in case of the death of *Sarah Cocke without issue*," makes this a stronger case in favour of the appellant, than that was in favour of *Goodwyn*. I am therefore of opinion, that the decree of the high court of chancery should be reversed, and that of the county court affirmed.

LYONS, President. I think the case of *Goodwyn* v. *Taylor* was rightly decided; and that questions, of this sort, ought to be at rest. All the authorities prove that a limitation of personal estate, after an indefinite failure of issue, is void; and that the first devisee takes the whole, as property of that kind ought not to be locked up, and kept from the commerce of mankind; especially as it is liable to fluctuation and uncertainty, and difficult to be ascertained at a distant period. The devise is of one fourth of the interest to each of the daughters for life, with power to dispose of the principal and interest at their deaths, among their respective heirs; which, if the testator meant heirs general, necessarily gave the whole property, to each daughter in her own fourth; for a power to give to one's heirs is ownership in effect: And it comes to the same thing, if he meant heirs

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of the body; because that would have created an estate tail in lands, and consequently gave the absolute property in a personal thing. But the present limitation is particularly favourable to the first devisee: For the words are, "In case of the death of my grand daughter *Sarah Cocke* without issue, I give her part to my grand daughter *Elizabeth Clements*." Which, according to all construction, gave the absolute property to *Sarah Cocke*, as the words, "*without issue*," would have created an estate tail in lands, and therefore transferred the absolute property in personalty. This construction is plainly most agreeable to the intention of the testator, who could not mean that the property should go over, if *Sarah* had children: and, as there is no time fixed for her issue to fail, the contingency was too remote to make it operate as an executory devise; for, to produce that effect, the contingency must be limited to a reasonable period; but this is indefinite; and, consequently, the devise over is void. I concur, therefore, with the rest of the court, that the decree of the high court of chancery should be reversed, and that of the county court affirmed.

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CARTER'S *ex'or* *v.* CURRIE.

In a suit against a mercantile firm, the executors of the deceased partners, ought to be made parties.

Carter and *Trent*, were partners in trade. *Carter* died, leaving *Carter* his executor. *Currie* filed a bill in chancery against *Trent*, as surviving partner, and *Carter*, the executor, for relief concerning a lost bill of exchange. Pending the suit, *Trent* died. *Carter's* answer stated that *Trent* had agreed to pay the partnership debts; and that the plaintiff might have made his debt out of the partnership effects. The plaintiff demurred as well as replied to the answer,