TAYLOR *v.* MANLEY.

Opinion delivered February 13, 1922.

WILLS—CONSTRUCTION.—Where a will conveyed all the testator's real property to a devisee "during her life and at her death to be equally divided between her brothers and sisters, I mean her legal heirs", the intention was to convey a life estate to the devisee with remainder to her brothers and sisters, and not to issue of the devisee subsequently born.

Appeal from St. Francis Chancery Court; *A. L. Hutchins,* Chancellor; affirmed.

Mann & Mann, for appellants.

The intention of the testator must be ascertained from the language of the whole instrument taken together, rather than from any particular form of words, and the will should be so construed as to give effect to that intention, so long as it violates no rule of law. 111 Ark. 54; 112 *Id.* 527; 126 *Id.* 53; 104 *Id.* 439. Tested by this rule, it is manifest that it was the purpose of the testator to give a life estate to Lorena Utley, with remainder over to her legal heirs. When the will was drawn and at the death of the testator, the legal heirs of Lorena Utley were her brothers and sisters; but afterwards she married and children were born to her. They are her legal heirs. Words & Phrases, vol. 5, p. 4064.

Walter Gorman, for appellees.

By the use of the words "I mean her legal heirs" the devise was brought within the rule in Shelley's case, which is a rule of law and not of construction, and vested a fee simple title in the lands designated in the will. 58 Ark. 303; 105 *Id.* 558; 138 *Id.* 362; Washburn on Real Estate, 5th Ed., 651 and 653; Bouvier, vol. 4, p. 3057; L. R. A. 2, p. 455, and notes.

WOOD, J. On the 11th day of July, 1889, E. C. Hughes executed his last will and testament, which, omitting the opening and closing paragraphs, contained the following provisions:

"I give and bequeath to my beloved wife, Martha Malvina, all my real estate and all my personal prop-

erty after paying my just debts, to have and to hold as her property as long as she lives. After her death, I give to each one of my nieces and nephews ten dollars.

"I give to my brother, J. J. Hughes, ten dollars.

"The balance of my personal property and all my real estate, consisting of the Linden farm, Jones place, the Casteel place, all in St. Francis County, Arkansas, I give to Lorena Utley during her life, and at her death to be equally divided between her brothers and sisters, I mean her legal heirs."

This action was begun by Mattie Alva Taylor in her own name and as next friend of W. R. Taylor, Jr., and Alice R. Taylor, minors. The complaint set out the will and alleged that Martha Malvina Hughes, who was the wife of E. C. Hughes at the time he executed the will, died before the said testator, E. C. Hughes, and at the time the said E. C. Hughes executed the will and at the time of his death the next of kin of Lorena Utley, who was made defendant in the action, consisted of her mother, Mattie Hughes, her brother of the whole blood, John William Utley, her two brothers of the half blood, Freeman Easkey Patrick Hughes and Thomas Miers Hughes, and one sister of the half blood, Mary Elizabeth Hughes, now the wife of Enos Altman, all of whom are now living and of full age; that several years after the death of Martha Malvina Hughes, the testator, E. C. Hughes, married Lorena Utley, one of the devisees named in the will, and died September 13, 1897, without issue of either of his marriages; that, after the death of E. C. Hughes, the testator, Lorena Utley Hughes, became the wife of W. R. Taylor. Of this marriage three children were born, to-wit: Mattie Alva Taylor, Walter R. Taylor, Jr., and Alice R. Taylor, the plaintiff.

The plaintiffs alleged that Lorena Taylor had sold to A. T. Manley, Jr., who was also made a defendant, the standing timber on the lands described in the will for the sum of $1.000, and that the said A. T. Manley, Jr., is now engaged in cutting and removing the timber from

the land; that the defendants were insolvent, and that the cutting of the timber will greatly damage the farm, to the plaintiffs' irreparable loss. The complaint further alleged that the will devised only a life estate to Lorena Taylor, and that plaintiffs, who were her children, became her legal heirs and entitled to the fee in said lands. They prayed for an injunction and all proper relief. The defendants interposed a demurrer to the complaint, which was by the court sustained. The plaintiffs elected to stand on the complaint. The court thereupon entered a decree dismissing the complaint, from which the plaintiffs below appeal.

The appeal involves the construction of the will. The appellants contend that the appellee, Lorena Utley, only acquired a life estate under the will. On the other hand, the appellees contend that she acquired an estate in fee simple. Construing the two paragraphs of the will above set forth, we are convinced that the testator intended to devise to the appellee, Lorena Utley, a life estate with the remainder over to her brothers and sisters. The testator, at the time of the execution of his will, was making a final disposition of all of his property to the devisees named therein with reference to the status and relationship they then sustained to him. The allegations of the complaint show that at the time the will was executed the testator's then wife was Martha Malvina, and to her he gave his entire estate, real and personal, for life, and at her death he gave to each one of his nieces and nephews ten dollars and to his brother ten dollars; and all the balance of the estate, real and personal, he gave to Lorena Utley, whose mother married the testator's brother, and at her death to her brothers and sisters who were her legal heirs. The testator used the words "legal heirs" not in the sense of describing her children, the heirs of her body—her heirs or lineal descendants—but to describe those who would be her heirs were she to die unmarried and without issue before the testator's death when the will took effect.

It occurs to us that the testator at the time of his will was making provision for his then wife and for his nieces and nephews and Lorena Utley, and that he did not have in mind at all any prospective heirs that might be born to Lorena Utley in the event she married and died before his death. It seems to us that it is unreasonable to conclude from the language of the will that the testator contemplated that Lorena might afterward marry and have children, and in the event that she did marry and children were born to her, he desired to provide for them. We are convinced that the more reasonable construction is that he intended for Lorena to have a life estate, and in the event of her death that the estate should go to her brothers and sisters, who, both at the time of the execution of the will and at the time of the testator's death, when the will took effect, were the next of kin or legal heirs of Lorena Utley. The clause in the will, to-wit: "I give to Lorena Utley during her life and at her death to be equally divided between her brothers and sisters, I mean her legal heirs", has the same meaning as if it had been written as follows: "I give (the estate named) to Lorena Utley during her life and at her death to her brothers and sisters who are her 'legal heirs' to be divided equally between them." In other words, the term "legal heirs" was intended to describe her brothers and sisters at the time of the execution of the will. It was the evident purpose of the testator, we believe, to provide for those who were in being at the time of the will, and not for those who were then unborn.

In *Healy* v. *Healy,* 39 Atl. 793, one of the clauses of the will was as follows: "I give and bequeath to my brother John Healy the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to his legal heirs." There were other similar clauses in the will and the Supreme Court of Connecticut said: "It is therefore certain that he (the testator) here uses the words 'legal heirs' in the popular sense, as indicating the persons entitled to inherit if his brother were dead."

In *Kaiser* v. *Kaiser,* 3 Howard Practice, N. S., at page 104 it is said: "The phrase 'legal heirs', although generally a term of description, has a well-defined meaning, and, whether applied to real estate or personalty, it includes only next of kin or relatives by blood, and excludes the widow."

In *Mull's Executors* v. *Mull's Admr.,* 81 Penn., p. 393, the testator gave the yearly interest of a son to his wife for life, and the will specified that after her death "the principal shall be equally divided among all my children, or their legal heirs, if any of my children should die before such mentioned period doth arrive." The court held that the words "or their legal heirs" were not used to individuate grandchildren, but to supply a legal succession, and these words mean legal representatives.

In construing this will we must find out, if possible, what was the intention of the testator from all the language of the will and give effect to that intention. *Webb* v. *Webb,* 111 Ark. 54; *Booe* v. *Vinson,* 104 Ark. 439; *Archer* v. *Palmer,* 112 Ark. 527; *Harrington* v. *Cooper,* 126 Ark. 53. Applying this familiar rule of construction, we have reached the conclusion, as above stated, that the will did not at the death of the testator vest a fee simple estate in Lorena Utley; that she only took an estate for life. No question as to who were proper or necessary parties to the suit was raised in the court below, and, inasmuch as the rights of the brothers and sisters are not involved and not affected adversely by the conclusion we have reached, we find it unnecessary to give any directions concerning them. They were not made parties. The trial court erred in finding that the will vested the fee simple title in Lorena Utley, but, notwithstanding such finding, ruled correctly in sustaining the demurrer to the complaint and in entering a decree dismissing same, because it fails to state a cause of action in favor of appellants. This decree is therefore affirmed.

HART and SMITH, JJ., dissenting.