Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Penny (in formâ pauperis) v. The Commissioners for Railways and Others, from the Supreme Court of New South Wales; delivered 21st July 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY STRONG.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal turns entirely upon the construction of the will of James Williams of Queanbeyan in New South Wales.

The testator when he made his will and when he died had a wife, four stepsons named Penny and one son of his own. He owned about 1,515 acres of land. His will is dated the 22nd March 1857 and he died on the 25th December in the same year. His wife died in 1898. Two of his stepsons viz. William Penny and Henry Penny predeceased her. The Appellant is heir to both of them and claims as devisee the property which they would have taken if they had survived their mother. This claim is opposed by the surviving stepsons and son who assert that they are entitled to the whole property.

Since the testator's death two portions of the testator's property have been taken by the Railway Commissioners of New South Wales and after settling the claims of the widow they

12179. 2.—7/1900. [46] A

paid into the Supreme Court two sums 382*l.* 2*s.* and 209*l.* 17*s.* 2*d.* in respect of the lands so taken. The Appellant claims two-fifths of these sums but his claim has been disallowed first by Mr. Justice Walker and again by the Supreme Court of the Colony. Hence this Appeal.

The will is badly drawn and is in some respects whimsical. It does not clearly provide for the events which have happened; and if the events clearly provided for had happened questions of considerable difficulty would have arisen. The devisees would have found themselves much perplexed if they desired to dispose of the property given to them in favour of their own widows and children.

The following statement of the will taken from the Appellant's case contains all that is material for consideration :—

"The said James Williams by his Will dated the 22nd day of "March 1857 (which is fully set out at page 9 of the Record) "appointed his wife Sarah Williams and Andrew Morton exe- "cutors and trustees thereof and gave devised and bequeathed "all his real estate to his said wife during her life and after "her decease upon trust that his said executors and trustees "should stand possessed of the same in trust for William "James Penny Francis Penny Thomas Penny and Henry "Penny sons of his said wife by a former marriage and his "son James Williams or such of them as should be living at "the time of the decease of his said wife and who should "attain the age of 21 years and in case the said William James "Penny Francis Penny Thomas Penny and Henry Penny and "his son James Williams should all be living at the decease of "his said wife and who should attain the age of 21 years then "he gave and bequeathed to William James Penny a certain "parcel of land containing 320 acres specifically described in "the said Will to the use of the said William James Penny and "his assigns during his life and he gave and bequeathed unto "Francis Penny another parcel of land containing 320 acres "also specifically described to the use of the said Francis "Penny and his assigns during his life and he gave and be- "queathed unto Thomas Penny another parcel of land "containing 320 acres also specifically described to the use of "the said Thomas Penny and his assigns during his life and "he gave and bequeathed unto Henry Penny another parcel of "land containing 320 acres also specifically described to the "use of the said Henry Penny and his assigns during his life "and he gave and bequeathed unto his son James Williams

" another parcel of land containing 235 acres also specifically " described being the residue of the Testator's land to the use " of the said James Williams and his assigns during his life " and he declared that in case of the death of any of the before- " mentioned persons then he gave and devised the share to " which he would have been entitled to the use of the person " or persons who should then answer to the description of heir " general to such person so dying as aforesaid her or their " heirs and assigns for ever if more than one as tenants in " common and upon to or for no other trust intent or purpose " whatsoever."

In describing the parcels specificially devised the testator refers to each portion so devised as the land of the devisee but the word share is not to be found in the will except in the last clause above set out.

The specific devises to the stepsons and son for their lives never took effect for they were not all living when the widow died. The clauses which have to be considered are (1) the clause which immediately follows the devise to the wife for life and (2) the last clause of all. But, although this is so, the existence of the series of specific devises for life must not be ignored; for the last clause not only follows them but applies as well to them as to the first devise to the stepsons and son. The series of specific devises did in effect give each devisee a defined share of the testator's real estate; and their Lordships see no justification in so construing the last clause as to make it either inapplicable to the shares so specifically devised or applicable to them alone. The last clause appears to have been inserted to provide for the event of any devisee dying in his mother's lifetime or if he survived her for the event of his dying under 21. The Court of Appeal and Mr. Justice Walker also appear to have treated the last clause as confined to the specific devises and as having no application to the first clause; but this view is only arrived at by giving no effect to the important words in the last clause "the share to which he

"would have been entitled." Their Lordships cannot regard any construction satisfactory which fails to give effect to these words. The key to the proper construction of this will is in their Lordships' opinion to be found by attending to the 1st clause and reading the last clause as applying as well to it as to the series of specific devises interposed betwen these two clauses.

The form in which the first devise to the stepsons and son is expressed is a very common form and its effect is well established. It is not equivalent to a simple devise to such of the devisees as shall survive the widow and attain 21. The effect of the clause is to give to all the devisees vested interests in fee subject to be divested as regards each devisee, in the event of his death in the lifetime of the testators' widow in favour of those devisees (if any) who survive her and attain 21. If there are none such the divesting clause fails, the original vested gifts remain and all the devisees take absolutely. This was settled by *Sturgess* v. *Pearson*, 4 Mad. 411 as regards bequests of personal estate and in this respect there is no difference between personal estate and real estate (*see* 1 Jarman Wills 827, ed. 4). The last clause in the will now in question modifies the first by saying in effect that if any devisee dies in his mother's lifetime and under 21 his share *i.e.* the share to which he would have been entitled if he had survived her and attained 21 shall go not to the survivors but to his heir as a purchaser in fee. It is true that the last clause says only in the case of his death and does not say at what time. Death in the testator's lifetime may be meant; but it can hardly have been exclusively meant. Death before attaining a vested interest is covered by the words and cannot be rejected as not intended by the testator. The event of death being inevitable a gift to one person in the event of the

death of another is only treated as a gift in remainder where the first taker takes for life only. A gift over of property given to a person absolutely in the event of his death is always construed as a gift over in the event of his death before the period of distribution or vesting unless some other period is indicated by the context. (See the cases collected in Hawkins on Wills 254 *et seq.*) This being in their Lordships' opinion the true construction of the will it follows that the gifts over on the deaths of the two stepsons who died in the wife's lifetime took effect and that the Appellant as their heir is entitled as devisee to two-fifths of the money in Court; and that the whole does not belong to the two stepsons and the son who survived the wife as decided by the Supreme Court.

Their Lordships will humbly advise Her Majesty to allow the Appeal and to reverse the orders* appealed from and to remit the petition to the Supreme Court with a declaration that according to the true construction of the testator's will and the events which have happened the Appellant James Penny is entitled to two-fifths of the sums of 382*l.* 2*s.* and 209*l.* 17*s.* 2*d.* in the petition mentioned and to two-fifths of any interest or dividends which may have accrued in respect of those sums since the payment thereof into the Supreme Court and to direct that the costs of the original petition be borne as ordered by the order† of 8th September 1898 and the costs of the Appeal to the Supreme Court be borne by the Respondents other than the Railway Commissioners. The costs of the Appellant of the Appeal to this Board will also be borne by the same Respondents and will be taxed on pauper scale. But the Railway Commissioners must bear their own costs.

* Mr. Justice Walker's Order, p. 12. Order on Appeal, p. 15.

† Record, p. 12.