Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William Charles Hill and another v. *Elizabeth Brown from the Supreme Court of New South Wales; delivered 24th January* 1894.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

(*Delivered by Lord Macnaghten.*)

IT is common ground that the testator's will must be construed as an English will in the same terms would have to be construed in this country under the old law.

As the law stood before the present Wills Act, 1 Vict. c. 26, which was adopted in the Colony in 1840, a testamentary gift of so much land by an absolute proprietor as a general rule carried only a life estate, unless the devise contained words of limitation.

To this Rule, which probably in almost every case must have disappointed the wishes of the testator, there were certain exceptions. One was that the fee would pass if the testator used the word "estate," or any equivalent expression capable of describing the extent and sum of the testator's interest, as well as the substance of the gift. But this exception was subject to the qualification that the expression must be found in the operative part of the devise in order to have the effect of enlarging the gift. These propositions, in regard to which it is only necessary for the purpose of this case to refer to *Doe* v. *Clayton* (8 East 141), and *Burton* v. *White*

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were not disputed at the Bar. The real contest was whether in the present case the operative part of the devise could properly be construed so as to include the expression upon which the appellants relied as enlarging a gift which it was admitted primâ facie carried only a life estate.

The testator's will seems to have been written into a skeleton form, intended to be made applicable either to a will in short general terms, referring to a schedule for the names of the beneficiaries and the particulars of the property given to each, or to a will complete in itself, the reference to a schedule in that case being struck out. The testator appears to have attempted to combine the two forms. After a preamble to which it is not necessary to refer, the will begins with the words "I do give and bequeath." Those words occur once and once only. They are carried on and apply to all the devises, which are seven in number, and all in the same form—gifts of so many acres of land to such and such a person without more. At the end of these devises occur the following words: "and whose names are in the schedule named and property specifically mentioned to each of their respective names." The left hand margin of the paper on which the will is written is headed "Schedule" and under the word "Schedule" are written the names of the devisees. But the schedule does not contain the particulars of any property given to the devisees named in the will.

The question then is—do the words which have been read, properly speaking, belong to the operative part of the devise or not? They are evidently not intended of themselves to pass anything. They refer to gifts already made. They refer to the schedule as containing or recapitulating the names of the beneficiaries, and they refer either to the schedule as recapitulating

the particulars of the property left to each beneficiary, or to the previous part of the will which contains those particulars. In either case it seems to their Lordships that the words in question, though they occur before the testator comes to a full-stop, are, properly speaking, words of reference and not words of gift. If they are taken to refer to the schedule for the particulars of the devises the schedule in this respect is a blank, and it is impossible to guess what the testator would have written in it. If they refer to the previous part of the will, which is perhaps the view most favourable to the Appellants, it is difficult to see how apt words of reference, the office of which is to carry the reader's mind to gifts to be found somewhere else, can have the operation of enlarging those gifts; and it is admitted that upon the authorities the word "estate" or the word "property," used as a word of reference, cannot be treated as explaining a previous gift which *primâ facie* carries only a life estate.

The other points referred to in the argument—the fact that one of the devisees was the heir-at-law, and the fact that each devisee took an absolute interest in some personal property—are not of themselves sufficiently substantial to affect the question.

Their Lordships therefore will humbly advise Her Majesty to affirm the judgment of the Supreme Court discharging the Rule *Nisi;* to direct the verdict entered by consent for William Miller Thorley to be entered for the Respondent, Elizabeth Brown; and to order the Appellant to pay to William Miller Thorley his costs of this appeal incurred in the Supreme Court, and to pay to Elizabeth Brown her costs of this appeal incurred in England.