[HIGH COURT OF AUSTRALIA.]

ELLEN PEAD AND OTHERS . . . APPELLANTS;

AND

WILLIAM ALFRED PEAD AND THOMAS GEORGE KITCHING . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

PERTH, *Nov.* 6, 7.

Griffith C.J., Barton and Higgins JJ.

Real property—Will—Estate to testator's widow until youngest child attains twenty-one—Intestacy as to remainder—Law of primogeniture—Heir-at-Law—Date of ascertainment.

A testator, who died before the law of primogeniture was abolished, left all his real and personal estate to his widow "for her use absolutely until the youngest child should attain the age of twenty-one years," without any further gift, and there were children living at the testator's death.

Held, per Griffith C.J. and *Barton* J., that the words "youngest child" meant "youngest surviving child," and that there was an intestacy when such child attained the age of twenty-one years.

Held, by all the Court, that the remainder after the determination of the wife's estate vested in the heir-at-law, and that the person entitled to take as such heir-at-law must be ascertained at the death of the testator, and not on the happening of the event causing the intestacy.

Decision of the Supreme Court of Western Australia: *Pead* v. *Pead*, 14 W.A.L.R., 149, affirmed.

APPEAL from the Supreme Court of Western Australia.

Alfred Pead by will dated 6th December 1888 left all his real and personal estate to his wife for her use absolutely until his youngest child should have attained the age of twenty-one years, and made no further gift. He died in November 1892, leaving him

surviving his wife, Ellen Pead, and several children, the youngest of whom duly attained the age of twenty-one years on 9th December 1911. At the time of the testator's death the law of primogeniture had not been abolished in Western Australia.

Under these circumstances an originating summons was taken out by William Alfred Pead, the eldest son of the testator, as plaintiff, for the determination by the Supreme Court of (*inter alia*) the question whether on the coming of age of the youngest child of the testator, all his real estate became vested in his heir-at-law or was divisible amongst his next of kin. The persons named as defendants in that summons were the testator's widow and his children other than the plaintiff. Subsequently, one Thomas George Kitching was added as a defendant on the ground that the testator's widow had conveyed any interest which she had to one Burges, and Burges had executed a conveyance in respect of the same to Kitching.

The Full Court, to which the summons was referred, decided that as to his real estate the testator died partially intestate as to the remainder expectant upon the coming of age of his youngest child, and that such remainder vested at testator's death in the plaintiff, William Alfred Pead, who was his heir-at-law, subject to the right of the widow to dower. And the Court declared accordingly : *Pead* v. *Pead* (1).

From this decision the defendants other than Kitching appealed to the High Court.

Walker, Attorney-General for Western Australia, and *Jenkins*, for the appellants. The testator intended to deprive his heir-at-law of the enjoyment of this property, and to give it to his widow to deal with as she considered best ; she took an absolute fee : *Gardner* v. *Sheldon* (2).

The intestacy did not arise until after the passing of the *Real Estates Administration Act* 1893 (W.A.) (57 Vict. No. 9), and the *Administration Act* 1903 (W.A.) (No. 13 of 1903). By sec. 14 of the latter Act, which repealed the former, the estates of intestates are to be distributed amongst their husbands or wives and their next of kin.

(1) 14 W.A.L R., 149.

(2) Vaugh, 259, at p. 273.

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[HIGGINS J.—The Act is wholly future and applies only to the estates of persons dying after the passing of the Act.]

The testator intended to pass all his interests: *Challis Real Property*, p. 224. If the youngest child had died before attaining the age of twenty-one years the widow would have taken absolutely: *Lethieullier* v. *Tracy* (1). There was no intestacy at the time of the testator's death, and the time for the vesting of the next estate would not be until the happening of the event: *Seymor's Case* (2); *Spencer* v. *Chase* (3); *Goodtitle d. Vincent* v. *White* (4); *Boraston's Case* (5).

Haynes K.C. and *A. G. Haynes*, for the respondent, William Alfred Pead. The only question for determination is when did the intestacy operate. If it operated at the date of the death of the testator, the heir-at-law took all; if at the time when the youngest child attained the age of twenty-one years, by the law then in force—primogeniture being abolished—the next of kin would take. The *Real Estates Administration Act* 1893 does not apply. Secs. 8 and 13 of the *Administration Act* 1903 are the only ones that affect the question. If the youngest child died before attaining twenty-one years of age, it is submitted that the intestacy would come into operation. There was no intestacy at the death of the testator as he gave all his interest absolutely to his wife: *Marriott* v. *Abell* (6),

Draper K.C. and *Clarke*, for the respondent Kitching. If there is any right to dower, or any other interest remaining to the widow, it belongs to Kitching by virtue of the conveyance of her interest by her to Burges and by him to Kitching.

Sec. 15 of the *Administration Act* 1903 is the first enactment abolishing dower. It is immaterial whether the widow took a life estate terminable when the youngest child came of age or whether she took a lesser estate. The reversion was in the heir-at-law.

(1) 3 Atk., 774.
(2) Tudor's L.C., 4th ed., at p. 193.
(3) 10 Vin. Abr., 203.
(4) 15 East, 174.
(5) 3 Co. Rep., 19a.
(6) L.R. 7 Eq., 478, at p. 484.

GRIFFITH C.J. It was the rule of the common law that upon the death of a person possessed of land his interest in it passed to his heir-at-law, subject to any will he might have made, and so far as the will did not dispose of it. That law is still the law applicable to this case, unless it has been altered. The heir-at-law must under that law be ascertained at the death of the testator. We are invited by the Attorney-General to make the same mistake which had been made inadvertently in *In re Atkinson and Horsell's Contract* (1), a case which lately came before the Court of Appeal in England, where it had been assumed by all parties interested that the heir-at-law was to be ascertained, not at the date of the death of the testator, but at the date of the death of the person on whose death the intestacy became apparent. The only laws in Western Australia affecting the passing of real estate on intestacy were passed after the death of the testator, and only operated as to the future. They have, therefore, no application to this case.

It only remains to construe the will to ascertain whether there was an intestacy as to any part of the estate. The words of the will are very brief:—"I give and bequeath all my real and personal estate of any kind whatever to my wife Ellen Pead for her use absolutely until the youngest child shall reach the age of twenty-one years." Now, whatever the precise nature of the widow's estate may have been, and whatever is the proper conveyancing epithet to apply to it, all parties are agreed that the gift to her did not comprise the whole of the testator's estate in his land. All that was not comprised in his gift to her therefore passed to the heir-at-law. It was argued that the youngest child might never attain the age of twenty-one, and that therefore the widow's estate might last for ever. On that construction she would take the fee, but no one suggested that that was the effect of the gift. The youngest child, in fact, attained the age of twenty-one years in 1911. In my opinion the words "youngest child mean "youngest surviving child." At the date of the testator s death, which was four years after the date of his will, he had a child who had attained the age of twenty-eight years, so that the estate given to the widow was one that must certainly come to an

(1) (1912) 2 Ch., 1.

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end, and could not possibly be a fee simple. The Supreme Court held that the remainder, after the determination of her estate, vested in the heir-at-law, and there can be no doubt that that conclusion was right.

A point was mentioned as to the form of the declaration made by the Court, which was that the interest in the property after the youngest child became of age vested in the heir-at-law, subject to the right of the widow to dower. The question of her right to dower has not been argued, and, having regard to the terms of the will, seems to be not quite free from doubt. I think, therefore, that it would be better to add the words "if any" to the declaration, so as to leave the point open. With this variation, the judgment should be affirmed.

The appellants must pay the costs of the respondent Kitching.

BARTON J. I am entirely in concurrence with the view expressed by the Chief Justice of the Supreme Court, and I need not add to the reasons he expressed, which are sufficient.

HIGGINS J. I am of the same opinion that there was an intestacy as to the remainder, and that the remainder vested in the heir-at-law who was heir-at-law at the death of the testator. There has been a great deal of unnecessary labour over this will. The parties have plunged themselves into a jungle of technicalities as to the law of real estate, before addressing themselves to the meaning of the words used.

The first thing is to find the meaning of the words used; and there is nothing ambiguous as to the meaning. There is a gift of all the property for a limited time to the wife—until the youngest child reaches twenty-one years of age—and there is no gift after that time. The youngest child has attained twenty-one years of age, the time has expired, and there is an intestacy as to the remainder. As the death of the testator took place before the law of primogeniture was abolished, the heir-at-law is entitled to the land; and, to find him, we must find the heir-at-law at the time of the testator's death. The words of the will begin: "I give and bequeath all my real and personal estate of any kind whatever to my wife Ellen Pead for her use abso-

lutely"—that is, in the ordinary sense of the English language, that she is to use it as she likes without restraint. She can use it "until the youngest child" attains twenty-one, but she cannot part with or sell the property.

Then the Attorney-General refers, very properly, to sec. 28 of the *Wills Act*, which is:—"That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

But there is a contrary intention here—an obvious contrary intention. If it were simply a case of "I give and bequeath all my estate, real and personal, to my wife for her own use" then sec. 28 would operate fully and give her the fee simple; but the will says she shall have it merely until the youngest child attains twenty-one years. These words qualify the gift; and that kind of estate is well known to the law—it is an estate for life determinable before death upon some previous event. It is sufficient to refer to *Tudor's Leading Cases*, from which the Attorney-General quoted in his argument. In the 4th ed., at p. 97, the following appears:—"An estate for a person's own life may be either *absolute*, as upon a conveyance or devise to A. for life; or its duration may be limited to some *uncertain* period included in such life; as, for instance, if an estate be conveyed to a woman as long as she remains single or during widowhood, or to a man and woman during coverture, or so long as a person dwell in a particular house, or so long as he pay a certain sum, or until he be promoted to a benefice, or for any like uncertain time; in all these cases an estate for life is conferred, determinable upon the happening of a particular contingency."

So that I concur in the confirming of this judgment. With regard to the formal affirming, I should like to strike out the words—if I had my way—"subject to the dower," because from what Mr. *Draper* has shown us the widow had no right to dower, and it might clear the title a good deal for future dealings if it were made clear that the heir-at-law had an absolute interest in the remainder after the operation of the will had ceased. However,

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I think that that matter is of little importance so long as we show by the insertion of the words "if any," as my colleagues propose, that we do not commit ourselves to the view that there is any dower.

Appeal dismissed. Judgment affirmed with variation of order by adding "if any" after "right of the widow to dower." Appellants to pay respondent Kitching's costs of appeal.

Solicitor, for the appellants, *Arthur G. Jenkins*, Perth.

Solicitors, for the respondent Pead, *R. S. Haynes & Co.*, Canning.

Solicitors, for the respondent Kitching, *Parker & Parker*, Perth.

N. McG.

[HIGH COURT OF AUSTRALIA.]

WILSHIRE AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

THE GUARDIAN ASSURANCE COMPANY LIMITED . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912. PERTH, *Nov.* 5, 6, 11. Griffith C.J., Barton and Higgins JJ.

Appeal—Practice—Fact—Undisputed questions of—Unreasonable finding of jury—Duty of Court of Appeal—Supreme Court Rules 1909 (*W.A.*), *Order XXXVIII., r.* 10.

If upon the undisputed facts a jury, properly understanding the case, could not reasonably have found a verdict for the plaintiff, it is the duty of the Court of Appeal under Order XXXVIII., r. 10, of the *Supreme Court Rules* 1909 (W.A.) to enter judgment for the defendant.