

[HIGH COURT OF AUSTRALIA.]

REDMAN APPELLANT;
 DEFENDANT,

AND

HAGE AND OTHERS RESPONDENTS.
 DEFENDANTS AND PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

H. C. OF A. *Will—Codicil—Interpretation—Effect of provision in codicil on gift made by will—*
 1914. *Cutting down prior gift in fee.*

SYDNEY,
 Nov. 16.

Griffith C.J.,
 Isaacs and
 Powers JJ.

A testator by his will, among other gifts, gave certain real property to his wife for life with remainder to his brother in fee. By a codicil he provided as follows:—"At the death of my said wife all property real taken under this or my former will to be devised by her in any way she pleases to all or any one or more of my brothers and sisters she may think proper or on their death to any of their children."

Held, that the provision in the codicil operated upon the gift in the will so as to defeat the gift in remainder to the testator's brother.

Decision of the Supreme Court of New South Wales (*Simpson C.J. in Eq.*), affirmed.

APPEAL from the Supreme Court of New South Wales.

By the will, dated 25th April 1860, of William Redman, a solicitor practising in Sydney, after giving his personal property to his wife, it was provided as follows, so far as is material:—"My interest in Liverpool Street property I devise to my brothers and sisters as tenants in common share and share alike viz. John Joseph and Robert Redman Martha Ironside and Rosamund Yarnton. My real property in George Street North Sydney I devise the same to my said trustees their heirs executors and administrators in trust to permit my said wife and

Martha Ironside equally to enjoy the rents thereof for a period of seven years after my decease after that period to hold the same in trust for John Redman and Joseph Redman during their joint and several lives to receive the rents between them as tenants in common and upon the death of either without issue the deceased's share to go to the survivor and after his death I devise the said George Street property to the oldest male issue them surviving of Joseph Redman and his heirs male and in default then to the heir of Robert Redman his heirs and assigns for ever. My farm at Cook's River of 100 acres Scanlon's Paddock about 33 acres and 8 acres adjoining I devise the same to my said trustees in trust to permit my said wife to enjoy the same free from the debts or control of any future husband and for her sole use without the power of disposition except by seven years' lease or any less period for her natural life and after that estate to the said Robert Redman and his heirs for ever my farm of 49, 50 and 98 acres at Manly I devise to John Redman for his life and at his decease to Joseph Redman his heirs and assigns for ever. My three small farms in all about 45 acres at Balgowlah I devise to my said trustees in trust for Martha Ironside and her heirs for ever for her sole use free from her present or any future husband. The residue of my real property now or hereafter acquired I devise to my said trustees in trust to sell and dispose of the same by public auction and with the proceeds thereof in the first place to pay off a mortgage of £1500 on George Street North aforesaid and to divide the balance equally between my dear wife Adelaide her share to be invested in some real security and free from any husband her sister Isabella and my said three brothers and two sisters as joint tenants."

He made a codicil on 20th September 1862, the material part of which was as follows :—" I give and devise my freehold house and land now occupied by my wife and Mrs. Dwyer to my said wife Adelaide Redman and I specially charge my real property situate at Parramatta Road near Campbelltown with the mortgage money to the Bank due thereon and interest such property to be sold to defray the said mortgage on the said premises devised to my said wife the balance of such sale if any to be

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appropriated towards payment of my property in George Street North Sydney as to my property in George Street North I devise the same between my said wife my brothers Joseph and John and sister Mrs. Ironsides my said wife and sister's share to be free from the debts and control of any husband At the death of my said wife all property real taken under this or my former will to be devised by her in any way she pleases to all or any one or more of my brothers and sisters she may think proper or on their death to any of their children."

William Redman died on 15th September 1882.

An originating summons was taken out by the Permanent Trustee Co. of New South Wales Ltd. and Etela Joseph Redman, the trustees of the will and codicil, for the purpose of having determined the following question (*inter alia*):—"Whether upon the true construction of the will and codicil of the testator the property in the said will described as the testator's 'farm at Cook's River of 100 acres Scanlon's Paddock about 33 acres and 8 acres adjoining' was included in the following direction contained in the said codicil, namely, 'at the death of my said wife all property real taken under this or my former will to be devised by her in any way she pleases to all or any one or more of my brothers and sisters she may think proper or on their death to any of their children.'"

The summons came on for hearing before *Simpson C.J.* in Eq., who answered the question in the affirmative.

From that decision Alice Redman, who represented all persons interested in claiming that the question should be answered in the negative, now appealed to the High Court.

Leverrier K.C. and *Maughan*, for the appellant.

Knox K.C. (with him *J. A. Browne* and *J. D. Fitzgerald*), for the respondent Isabella Hage, who represented all persons interested in having the question answered in the affirmative.

R. H. Long Innes and *C. E. Weigall*, for the respondent trustees.

Reference was made during argument to *Redman v. Allen* (1); *Peter v. Shipway* (2); *Hearle v. Hicks* (3); *Randfield v. Randfield* (4).

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GRIFFITH C.J. In this case I agree with the conclusion of the Chief Judge in Equity, and I confess that I am unable to entertain any doubt on the matter. The testator was a solicitor practising in Sydney. By his will, made in 1860, he gave an interest in property in Liverpool Street to three brothers and two sisters as tenants in common; then gave his real property in George Street North to his trustees in trust to permit his wife and one of his sisters to enjoy the rents thereof for a period of seven years after his death, and after that period in trust for two of his brothers and their issue. He then gave a farm at Cook's River, which is the property now in question, to his trustees in trust "to permit my said wife to enjoy the same free from the debts or control of any future husband and for her sole use without the power of disposition except by seven years' lease or any less period for her natural life" with remainder to his brother Robert Redman in fee. He then gave a farm to his brother John Redman for life with remainder to his brother Joseph Redman. Then he gave three small farms to his trustees in trust for one of his sisters absolutely. The residue of his real property he devised to his trustees in trust to sell it by auction and out of the proceeds to pay off a mortgage on the George Street property and to divide the balance equally between his wife, her sister, his three brothers and his two sisters, so that his wife took a one-seventh interest. All his real property was therefore disposed of between his wife, his brothers and sisters and a sister-in-law. Two years afterwards he made this codicil, the construction of which is now in question. By it he first gave a freehold house and land to his wife, and then after charging certain real property with the payment of a mortgage debt and devising property in George Street to his wife, two of his brothers and one of his sisters, he said:—"At the death of my said wife all property real taken under this or my former will to

(1) 5 N.S.W.L.R. (Eq.), 120.
(2) 7 C.L.R., 232.

(3) 1 Cl. & F., 20.
(4) 8 H.L.C., 225.

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be devised by her in any way she pleases to all or any one or more of my brothers and sisters she may think proper or on their death to any of their children."

The question is whether the farm at Cook's River, which by his will he had given to his wife for life, with remainder to his brother Robert, is included in these words.

The appellant contends that the gift to Robert Redman in remainder is a clear and distinct gift which cannot be cut down except by equally clear words. The real question is whether the testator has by his codicil distinctly indicated an intention to revoke the gift to Robert. The first point to be observed is that the testator clearly intended the direction in his codicil to operate upon property taken under his will as well as upon property taken under the codicil. The Supreme Court in 1884 decided that the words in the codicil cut down the wife's interest in the property devised to her by the codicil to a life interest, but that decision did not touch the question as to their effect upon the property now in question.

The next point that occurs is whether the words as applied to property mentioned in the will indicate an intention to give to his wife something more than she would have under the will, or to take away something which he had given to her by the will. Do the words operate in derogation of or in addition to the gift made by the will? There were only three properties mentioned in the will as to which the words could have any effect: first, the gift of the George Street property in which his wife had a half interest for seven years—as to this property it is highly improbable that he could have intended them to operate; secondly, the Cook's River property; and, thirdly, the one-seventh interest in the proceeds of his residuary estate after payment of the mortgage debt of £1,500. In the case I have already referred to the Supreme Court also decided that the direction in the codicil did not apply to that gift. The question now, therefore, is whether the words apply to the Cook's River property given to the wife for life. The words are "all property real taken under this or my former will." It seems to me that the natural interpretation of those words is "all property real of which my wife is in possession under my will or entitled to possession under this

codicil." The description "all property real taken" is, I think, a designation of the specific property upon which the gift is to operate, and has no reference to the quantity of the estate taken.

I agree with the learned Chief Judge in Equity that the words cannot mean all real estate given to anybody by the will or codicil. That is not their natural or reasonable meaning. I think that they must be limited to real property taken by his wife, that is, property of which at the time of her death she had or was entitled to have enjoyment under the will or codicil.

The appeal must be dismissed.

ISAACS J. I agree. I think that according to the rule laid down in *Randfield v. Randfield* (1), especially as stated by Lord *Wensleydale*, you must have reasonably clear words to defeat a prior absolute gift. Applying that rule here you have those reasonably clear words, and for the reason given by the Chief Justice I agree that the appeal should be dismissed.

POWERS J. I concur.

Appeal dismissed. Respondents' costs as between solicitor and client to be paid out of the estate.

Solicitor, for the appellant, *S. M. Stephens*.

Solicitors, for the respondents, *Hughes & Hughes; Minter, Simpson & Co.*

B. L.

(1) 8 H.L.C., 225.

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