

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McCormick v. Simpson and others, from the Court of King's Bench for the Province of Quebec (Appeal Side); delivered the 31st July 1907.

Present at the Hearing:

LORD ROBERTSON.

LORD COLLINS.

SIR ARTHUR WILSON.

SIR HENRI ELZÉAR TASCHEREAU.

SIR ALFRED WILLS.

[*Delivered by Lord Collins.*]

The question on this Appeal is as to the construction of the will of one James Cooper, who died at Montreal in 1866 possessed of real and personal property. The will was made at Montreal, and is dated August 20th, 1863. The material parts are as follows:—

“I give devise and bequeath to my beloved wife Phœbe Mountford . . . the use, usufruct and enjoyment during the term of her natural life, of all and singular my real and personal moveable and immoveable property, estate and effects, stock-in-trade, household furniture, moneys, stocks, funds, securities for moneys, debts and actions to whatever the same shall amount or wherever found, and to me belonging at the day of my death, without any exception or reserve To have and to hold use, receive and enjoy the same and every part thereof unto and to the use of my said dear wife, during the term of her natural life as aforesaid, and at her death the same to go to and be and become the property of John Cooper, of the said City of Montreal, gentleman, my son, issue of my marriage with the said Phœbe Mountford, and also to be held by him *en usufruit* during the term of his natural life, subject to the payment, within ten years after the decease of his said mother, of the following bequests, without interest, and for which the real estate which may belong to me at my death shall be charged and encumbered in favour of the legatees following, to wit: To my daughter Mary Cooper, wife of Mr. William M'Cormick, of Montreal aforesaid, clerk, the sum of Eight hundred

Dollars currency ;—To my daughter Phœbe Cooper, wife of Mr. James Lewis, of the said City of Montreal, Bricklayer, the like sum of Eight hundred Dollars, said currency, and to my son James Cooper, at present residing in the City of Toronto, clerk, the like sum of Eight hundred Dollars, said currency, said bequests not to be in any way, nor shall the same be seizable or liable to be attached, taken in execution or in any wise appropriated for the debts of the said Mary Cooper, Phœbe Cooper, James Cooper, or John Cooper, or of the husbands of my said daughters, the same being expressly meant and intended to be for their maintenance and alimentary support, nor shall the same be subject to the marital control of any husband of my said daughters—The said John Cooper to have no power to sell or mortgage any part of the said real estate, nor shall the same be subject or liable to seizure or attachment for any debts he may contract, and I desire that said hereby bequeathed premises at the death of the said John Cooper do go to and be and become the absolute property of his eldest son lawfully begotten, failing such son then the same to be and become the property of my son the said James Cooper or of his eldest son lawfully begotten, and in case of the death of the said James Cooper without such male issue as aforesaid, then to the eldest son of my said daughter, Mary Cooper, wife of said William M'Cormick, whose name is James Cooper M'Cormick, subject always to the payment of said legacies or such portion thereof as may remain unpaid."

The dispute arises in respect of the real property left by the testator, of which the Appellant claims to be the donee under the will. The Court of first instance and the Court of Appeal have both disallowed his claim. Their Lordships are of opinion that their decision was right. It is quite clear that the estates given to the wife and to the testator's eldest son, John Cooper, are not absolute, but for life only, and are given in terms showing that the draftsman clearly understood the difference between usufruct and absolute property. Then comes the gift to the eldest son of John, which is to become "the absolute property" of such eldest son, and would have defeated all subsequent contingent gifts had such a son come into existence and lived to attain a vested interest. But John never having had a son and having pre-deceased the testator, it has to be seen what the will provides in such event. The words are "the same to be and

“ become the property of my (the testator’s) son
“ the said James Cooper, or of his eldest son.”
There are here no words to indicate that the gift
was intended to be other than absolute, and though
the word “absolute” is not used, yet contrasting
the terms employed with those of the previous—
usufructuary—gifts, it cannot, in their Lordships’
opinion, be doubted that they do in their context
import that one of the two named, if either survives
to take an interest in possession on the failure of
the previous limitation, will become the absolute
proprietor in his own right, and thus defeat the
contingent gift over. In point of fact both James
and his son were alive at the death of the widow,
and therefore James became proprietor in his
own right. It is true his son predeceased him,
but this did not qualify or divest the estate
which had become vested absolutely in his father.
Then there comes the gift over under which the
Plaintiff claims, “and in case of the death of
“ the said James Cooper without such male issue
“ as aforesaid” then to the Appellant. Read in
its context, this clause must mean death in the
life-time of the testator or widow, for the pre-
vious gift to James or his son on the failure of
the former limitation is absolute if either lives
to take an interest in possession. In the language
of Curran J., “it was only in the event of neither
“ James Cooper junior nor his son taking
“ possession as proprietor that Plaintiff was to be
“ benefited under the terms of the testator’s
“ will.”

Their Lordships will therefore humbly advise
His Majesty that the Appeal be dismissed. The
Appellant will pay the costs of all the
Respondents. Their Lordships consider two sets
of costs should be allowed.

