Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lewin v. *Killey and Others, from the High Court of Justice of the Isle of Man (Staff of Government Division); delivered July 27th*, 1888.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR JAMES HANNEN.
MR. S. WOULFE FLANAGAN.

[*Delivered by Lord Hobhouse.*]

THE question in this case arises on a gift by the testator, James Lewin, of a house, No. 4 Marina Terrace, and the gift is of this nature: The house was subject to a rent payable to one Maria Stewart, but that may be thrown out of consideration because Maria Stewart is dead. Subject to that rent the testator gave the house to trustees upon trust to permit his wife to receive half of the rents and profits for her life, and his daughter Grace the other half. Upon the decease of the wife the trustees were directed to transfer and convey the house to Grace, her heirs and assigns, for ever. Then follows this direction: "And it is my will and "desire, that if any of my said children shall "die without leaving lawful issue them surviving, "that the property hereby devised and bequeathed "to each of my said children shall be equally "divided amongst my surviving children." The events that have happened are, that the wife has died, Grace survived the wife many years, and she

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has died without leaving lawful issue her surviving. The question is whether the property goes to her heir, or is governed by the proviso that has just been read, and is carried over to the surviving children. The Appellant, David Duncan Lewin, is the only surviving child. He contends that Grace having died without leaving lawful issue, the proviso must be read according to the most general and literal effect of its terms, and that the property is carried over to him. The principal Respondent, who is the heir of Grace, contends that the event of dying without leaving lawful issue surviving is confined to death before the time at which the testator contemplated that the absolute interest was to take effect.

Their Lordships think, although such provisos as these are capable of a great deal of argument, and in some cases present points very difficult to decide, that in this case the scheme of the will does not permit of any reasonable doubt. The testator had a number of houses, and as to one he made an immediate absolute gift to one of his sons. The others he gave to trustees, and he contemplated that the trustees should for a period pay the rents to, or permit the rents to be received by, some person—some of his children, or his widow, child, or grandchild, as the case may be, for life; and when that period came to an end, then the trustees were to transfer and convey the house in question to the person for whom it was designed. They were to divest themselves completely of their trust and vest the property completely in the persons for whom the house was designed. When the period arrived at which they were to transfer and convey, they might find themselves in the presence of a change of circumstances. If the person for whom the house was designed was then dead without leaving lawful issue, they were to convey the property among the surviving

children. But if the person for whom the house was designed was living, or had issue, then the conveyance would be to that person, or the heirs and assigns of that person. Their Lordships think that that is the whole scheme of the will, and that this testator did not design that the property should be absolutely conveyed by the trustees to any one of his children, and yet at that child's death, if he happened to die without leaving issue, there should be a defeasance of that conveyance, so that the property should pass to the surviving children.

Now two arguments have been put forward to contravene that view of the scheme of the will. One is that in the case of one house—a house in Great Nelson Street—it is given to three successive life owners; that is to say the trustees are to permit those three persons to receive the rents and profits of the house for their lives, and then upon the decease of the third, who is the grandson of the testator, they are directed to transfer and convey the said house "unto such of my children as shall be then alive." The argument is that as the conveyance was to be to the children alive at the death of the grandson George Macdonald, it is impossible to apply to the case of all the gifts the principle that the time of death without leaving lawful issue should be confined to the life of the widow. It may be so, but the principle is that the time of dying without leaving lawful issue is confined to the time during which the absolute interest has not been conferred, but when that is once conferred the trust and the period of suspense is closed, and the possession is not to be disturbed. According to the contention of the Appellant, the trustees would have to convey the house in Great Nelson Street to the children alive at the time of the death of George Macdonald, and yet if

any of those children died without leaving issue, then there would be a defeasance of the conveyance, and the house would go over to the surviving children. That raises in fact just the same question as their Lordships have to decide in respect of the house No. 4 Marina Terrace, and it appears to them that precisely the same scheme of disposition applies to both cases.

Another argument was that the gift to Robert Kerr Lewin, which is the only gift of a house expressed to take effect absolutely at the death of the testator, is subject to the same gift over as those other houses which are given to trustees in the first instance, and only given absolutely through the medium of the directions to convey; and it would be absurd to apply to the gift to Robert Kerr Lewin, the principle that the time of dying without leaving lawful issue was the death of the widow. Their Lordships think that there is no reason to hold that the gift over applies to any property excepting that which was given to trustees, and which they were to hold for a time for persons for life, with a direction to convey and transfer absolutely when those life estates ended. It would be extremely absurd and unreasonable to suppose that the legacies of shares, the legacies of money, and the gifts of the residue—which would fall within the general words of the proviso in question just as much as the house given to Robert Kerr Lewin would fall to him—it would be very absurd and unreasonable to suppose that he intended all those gifts to be suspended as to the full enjoyment of them until the death of the legatee to whom they were given, and until the ascertainment of the question whether or no he died without leaving lawful issue. Their Lordships think therefore that their views as to the scheme of the will are not at all displaced by those two particular

contentions; on the contrary they are strengthened by the examination of the nature of the gift of the house in Great Nelson Street.

All they have to say with respect to the authorities which were cited before them is that they conceive the present decision to be entirely in accord with them, and that the judgement of the First Deemster took the right view of the authorities, and rightly applied them to the construction of this will.

The result is that this Appeal fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.