

*Privy Council Appeal No. 21 of 1914.*

**W. Gardiner and Company, Limited** - - - *Appellants,*  
v.  
**Peter Henry Dessaix and others** - - - *Respondents.*

FROM

**THE SUPREME COURT OF NEW SOUTH WALES.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 20TH JULY 1915.

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*Present at the Hearing :*

VISCOUNT HALDANE.                                LORD SUMNER.  
LORD PARKER OF WADDINGTON.

[*Delivered by* LORD PARKER OF WADDINGTON.]

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In this case their Lordships have come to the conclusion that the children of the testator interested under the gift contained in his will of his houses and property in the city of Sydney take estates in fee simple and not, as decided in the Court below, estates tail. It is undoubtedly true that an intention on the part of a testator to confer an estate in tail only may be gathered from an examination of the whole of the clauses contained in his will, but in deciding whether such an intention existed their Lordships are of opinion that the first thing to be considered is the language which the testator has used in making the gift upon which the question arises. In the present case the gift consists in a direction to the trustees to pay the rents of the property equally between his seven children—naming them—and his wife, with a superadded direction that his wife is to take for her life use only and

[41.] J. 443. 80.—7. 1915. E. & S.

that after her death her share is to revert back and be equally divided among his aforesaid children or their issue. A contrast is thus drawn between the children and the wife. The children's interest in the rents is not limited to their lives. The wife, on the other hand, takes only a life interest, with a gift over on her death to the children or their issue. The gift of the rents of a property for an undefined period *primâ facie* carries the fee simple in the property, and a gift after a life interest to named persons or their issue *primâ facie* gives the persons named an absolute interest with a substitutional gift to their issue in the event of any of them dying in the lifetime of the tenant for life leaving issue. Their Lordships conclude that under the gift in question the children of the testator take estates in fee simple. It was contended in argument that the words of the gift over of the wife's share were consistent with the children taking estates tail in their original shares and estates tail in remainder in the wife's share, and no doubt if it were clear from other parts of the will that the children took estates tail in their original shares it would be easy to read the gift over of the wife's share to them or their issue as equivalent to a gift over to them and their issue, but in their Lordships' opinion this fact cannot be used as an argument in favour of its having been the testator's intention to create estates tail. This intention must be found, if at all, in other parts of the will.

The clauses relied on to control the *primâ facie* meaning of the words of gift are in effect two only. The testator directs (1) that the property in question shall not be disposed of, mortgaged, or encumbered in any way whatsoever; and (2) that the same shall remain in his family from time to time for ever. With regard to the first direction, it is quite possible that the

testator imagined that the direction would be effectual whatever were the nature of the estates which he was limiting to his children, and in this connection it is to be noticed that as to the hereditaments which he refers to as his country property, and which are undoubtedly given to his children and wife in fee simple, he directs that the same are not to be disposed of without their mutual desire or agreement. With regard to the second direction, it is equally possible that the testator was thinking only of the result which would ensue if the first direction were observed. Further, with regard to the second direction, it is a direction that the property should remain in the testator's family and not in the families of the first takers, and the testator had another child by a former marriage. In those authorities in which importance has been attached to the use of the word "family" as pointing to an estate tail the family referred to has been that of the first taker.

Under these circumstances their Lordships are of opinion that neither of the directions relied on contains anything necessarily inconsistent with the *prima facie* meaning of the words of gift and that the appeal should therefore be allowed. They will humbly advise His Majesty to this effect, and in their opinion the respondents, other than those added by Order of the 27th May 1915, should pay the costs here and below.

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In the Privy Council.

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W. GARDINER AND COMPANY,  
LIMITED

v.

PETER HENRY DESSAIX AND  
OTHERS.

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DELIVERED BY LORD PARKER  
OF WADDINGTON.

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