of prohibition must be discharged. The declaration of forfeiture therefore stands.

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LICENSING COURT (S.A.) v. CUMMINS.

Appeal allowed. Order nisi for prohibition discharged. Declaration of forfeiture to stand.

Solicitor for the appellant, *F. W. Richards*, Crown Solicitor for South Australia.

B. L.

[HIGH COURT OF AUSTRALIA.]

CAMPBELL AND ANOTHER . . . . APPELLANTS; DEFENDANTS,

AND

GLASGOW AND OTHERS . . . . RESPONDENTS. PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Will—Construction—Gift to A for life and after his death to his issue—Words of distribution—No words of limitation—Life estate or estate in tail—Rule in Shelley's Case—Effect of Wills Act—Wills Act 1890 (*Vict.*) (*No.* 1159), *secs.* 26, 27 (*Wills Act* 1915 (*Vict.*) (*No.* 2749), *secs.* 26, 27)—*Real Property Act* 1915 (*Vict.*) (*No.* 2719), *sec.* 62.

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MELBOURNE, *Oct* 21-24; *Nov.* 5.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

Sec. 26 of the *Wills Act* 1890 (Vict.) (sec. 26 of the *Wills Act* 1915) provides 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."

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By his will made in 1900 the testator devised his real estate to trustees upon trust as to certain specified land for his daughter for life and upon her death upon trust for "her lawful issue and if more than one as tenants in common," with a gift over in the event of there being "no lawful issue."

Held, that sec. 26 of the *Wills Act* operated so as to pass the fee simple to the issue of the daughter; that therefore the rule in *Shelley's Case*, 1 Rep., 93b, did not apply, and consequently that the daughter took only a life estate, and on her death without issue the gift over took effect.

Lees v. *Mosley*, 1 Y. & C. Ex., 589, followed and applied.

Van Grutten v. *Foxwell*, (1897) A.C., 658, and *Roddy* v. *Fitzgerald*, 6 H.L.C., 823, distinguished.

Sandes v. *Cooke*, 21 L.R. Ir., 445, distinguished and commented on.

Decision of the Supreme Court of Victoria: *In re Cust*; *Glasgow* v. *Campbell*, (1919) V.L.R., 221; 40 A.L.T., 181, affirmed.

APPEAL from the Supreme Court of Victoria.

Robert Cust, who died on 24th February 1901, by his will dated 23rd August 1900, appointed John Glasgow and John Whyte Adams his executors and trustees. Having made certain bequests to his wife, Matilda Jane Cust, and his son Alfred William Barkly Cust, the testator devised all his real estate to his trustees upon certain trusts in favour of his sons, Alfred William Barkly Cust and Robert James Cust, and his daughters, Rosetta Campbell, Maria Jane Ely and Elizabeth McKay. The trust in favour of Rosetta Campbell was as follows: "Upon trust for my daughter Rosetta Campbell during her life and upon her death then as to the said lands and tenements and the rents and profts thereof Upon trust for her lawful issue and if more than one as tenants in common And if there be no lawful issue then I further direct that one-fourth part of the value of the said lands and tenements in the said trust is hereby devised to the lawful husband of the said Rosetta Campbell should such survive her death and the remaining three-fourths value of the said lands and tenements shall be equally divided between my said son Alfred William Barkly Cust and my daughters then surviving." There were similar trusts in favour of Alfred William Barkly Cust and the testator's other two daughters in respect of other specified parcels of land. The testator left him surviving his widow, who died on 30th August 1918, and his five children named in the will: of whom Rosetta Campbell died on 23rd November 1917

intestate and without issue, leaving her surviving her husband, John Campbell, who became administrator of her estate; Alfred William Barkly Cust never married; Maria Jane Ely was married to George Ely and had two children, of whom one was Robert George Barkly Ely, an infant; Elizabeth Curtis (called in the will Elizabeth McKay) was twice married and had children of each marriage; and Robert James Cust died on 7th September 1918.

An originating summons was taken out by the trustees for the purpose of obtaining from the Supreme Court the determination of the following questions (*inter alia*) :—(1) With respect to the lands devised to or in favour of Rosetta Campbell—(*a*) Did she take an estate tail therein so as to be entitled to the fee simple under the *Real Property Act* 1915, and is her administrator now entitled to a transfer or conveyance thereof; or did she take a life estate or a conditional life estate only therein? (*b*) If she took a life estate or a conditional life estate only therein, do the defendants John Campbell, Alfred William Barkly Cust, Maria Jane Ely and Elizabeth Curtis take an estate in fee simple therein as from her death as tenants in common in the proportion mentioned in the will, or is it the duty of the plaintiffs to sell the said lands and divide the net proceeds between such defendants in the said proportions, or what otherwise is the duty of the plaintiffs as to such lands and the rents and profits thereof?

The originating summons was referred to the Full Court, which answered the questions as follows :—(1) (*a*) Rosetta Campbell deceased took an estate for life only in the lands devised to her or in her favour by the testator. (*b*) It is the duty of the plaintiffs to sell the lands referred to in the answer to question 1 (*a*) and to divide the net proceeds of the sale as follows: one-fourth thereof to the defendant John Campbell and the remaining three-fourths thereof equally between the defendants Alfred William Barkly Cust, Maria Jane Ely and the representative, when appointed, of Elizabeth Curtis (who died after the issue of the summons). Similar questions were asked in respect of the lands devised to or in favour of Alfred William Barkly Cust, Maria Jane Ely and Elizabeth Curtis, and were similarly answered: *In re Cust*; *Glasgow* v. *Campbell* (1).

(1) (1919) V.L.R., 221; 40 A.L.T., 181.

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From that decision John Campbell (on his own behalf and as representing the estate of Elizabeth Curtis) and Alfred William Barkly Cust now appealed to the High Court.

R. E. Hayes, for the appellants. Where there is a devise of lands to a person for life and after his death to the heirs of his body, and if more than one in equal shares, the effect is, by the rule in *Shelley's Case* (1), to create an estate tail in the person named as the life tenant; and that proposition applies to a similar case where the words "lawful issue" are used in place of "heirs of the body" (*Van Grutten* v. *Foxwell* (2)).

[ISAACS J. referred to *Evans* v. *Evans* [*No.* 1] (3).]

The word "issue" is *primâ facie* a word of limitation, and means the descendants in succession, being equivalent to the words "heirs of the body." The case of *Roddy* v. *Fitzgerald* (4), which is an authority for that proposition, is very similar to this case, and should be followed. See also *In re Simcoe*; *Vowler-Simcoe* v. *Vowler* (5); *Pelham Clinton* v. *Duke of Newcastle* (6). It, however, requires a less demonstrative context to give to the word "issue" a meaning different from its *primâ facie* meaning than in the case of the words "heirs of the body" (*Lees* v. *Mosley* (7)).

[KNOX C.J. referred to *Slater* v. *Dangerfield* (8).

[RICH J. referred to *Bowen* v. *Lewis* (9).]

The *primâ facie* construction of the will being to give an estate tail to the person named as tenant for life, there is nothing in the will to alter that construction. This proposition is laid down in *Jarman on Wills*, 6th ed., at p. 1944: "Where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally . . . the ancestor takes an estate tail." Here there are words of distribution, "as tenants in common," but there are no words to carry an estate in fee annexed to the devise to the issue. The cesser clause is not sufficient to cut down the *primâ facie* meaning

(1) 1 Rep., 93b.
(2) (1897) A.C., 658, at pp. 661, 684.
(3) (1892) 2 Ch., 173, at p. 189.
(4) 6 H.L.C., 823.
(5) (1913) 1 Ch., 552.
(6) (1902) 1 Ch., 34; (1903) A.C., 111.
(7) 1 Y. & C. Ex., 589.
(8) 15 M. & W., 263, at p. 273.
(9) 9 App. Cas., 890, at p. 925.

of the word "issue," for it is consistent with either a life estate or an estate in tail being given to the first taker. Sec. 26 of the *Wills Act* 1915 does not operate to pass an estate in fee to the issue; for the will must first be construed according to the ordinary rules of construction, and when it has been determined that the word "issue" is a word of inheritance so that under the rule in *Shelley's Case* the ancestor takes an estate tail there is nothing to which the section can attach. Otherwise the section would, with respect to wills made after the Act, put an end to gifts of estates in tail. Sec. 27 of the *Wills Act* does not justify the cutting down of the meaning of "issue." [Counsel also referred to *Crumpe* v. *Crumpe* (1).]

A. H. Davis, for the respondent trustees. It being admitted that "issue" *primâ facie* means "heirs of the body," the main questions are (1) whether by the operation of the rule in *Shelley's Case* an estate tail is created, and (2) what is the effect of the *Wills Act*? As to the first of those questions, the only factors that might tend to show that the technical words of gift to ancestor and issue do not bear their normal meaning are the words of division in tenancy in common, and any inference that may be drawn from the gift over in favour of the issue being restricted to issue living at the ancestor's death. In *Jesson* v. *Wright* (2), *Roddy* v. *Fitzgerald* (3) and *Van Grutten* v. *Foxwell* (4) it is clearly stated that words of division are insufficient to disturb the rule. The choice lies between allowing them to control the main words of gift and rejecting them as inconsistent, and the latter course is adopted if no more appears. But if there are independent words of limitation added to "issue" and also words of division, then the principle of *Lees* v. *Mosley* (5) applies. The same result will follow even without words of division if the gift is to the issue and their heirs. The terms of the gift over in Rosetta Campbell's case involve the idea of survivorship as regards the husband and the sisters, but not as regards the brother; so that no clear intention is to be drawn from the words of survivorship. There is no doubt that the testator may explain the sense in which

(1) (1900) A.C., 127.
(2) 2 Bligh, 1.
(3) 6 H.L.C., 823.
(4) (1897) A.C., 658.
(5) 1 Y. & C. Ex., 589.

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he uses the word "issue" (*Hawkins on Wills*, 2nd ed., p. 229), and he may explain it to mean children or children and grandchildren living at the death of the *præpositus*; but the House of Lords cases show that it must be an "inevitable" conclusion that he intended to designate particular persons, and who those persons are. The difficulty of reaching such a conclusion by mere inference is well illustrated by *Roddy* v. *Fitzgerald* (1). Can the Court say that the words of division, plus the proper inference from the gift over (there being no direct expression of an intention to modify "issue"), clearly show that issue indefinitely was not meant? Or is not the gift over consistent with a failure of issue at any time? If yes, it cannot modify "issue."

[RICH J. referred to *King* v. *Burchell* (2), and to the alienation clause.]

In that case the Court rejected the words forbidding alienation. Such words can hardly be material to define "issue." The reference in the clause to rents and profits cannot be more effective than the original words of gift for life to the ancestor. Mere intention to give a life estate is irrelevant to the definition of "issue," since, by hypothesis, the testator set out to give a life estate to the first taker. It is difficult to find in the devise any words showing a gift of the fee to the issue within *Bradley* v. *Cartwright* (3), even if that case, depending as it does on *Montgomery* v. *Montgomery* (4) (virtually overruled in *Van Grutten* v. *Foxwell* (5)), can be supported. The authorities do not say that the issue take the fee if they merely "can" do so. That would eliminate gift as a fact, and would make a testator constructively do that which he has not done.

[KNOX C.J. Does not sec. 62 of the *Real Property Act* turn an estate tail for all purposes into a fee simple?]

In a sense, yes; but it does not prevent the prior ascertainment of the testator's intention, and when the words of intention, interpreted by the rule of law, create an estate tail the section at once operates by giving the fee to the first taker. Where there are, to start with, words of gift which as a matter of law confer an estate

(1) 6 H.L.C., 823.
(2) 1 Eden, 424; Amb., 379.
(3) L.R. 2 C.P., 511.
(4) 3 Jo. & Lat., 47; 8 Ir. Eq. Rep., 740.
(5) (1897) A.C., 658.

tail, then, unless in the rest of the will words are to be found which actually give the fee to designated persons—as an inevitable conclusion—the rule of law has effect.

As to the second of the above-mentioned questions, the *Wills Act* (putting the matter from the respondents' point of view) is said to supplement the will by defining "issue" as persons living at the death of the first taker (sec. 27) and as giving the fee to those persons (sec. 26), and that result is apparently accepted in *Jarman*, 6th ed., pp. 1950-1951; *Leake on Property*, 2nd ed., p. 140, and in *Hawkins on Wills*, 2nd ed., p. 238, but it is to be noticed that *Hawkins* founds that view solely on *Montgomery* v. *Montgomery*, which at p. 240 he doubts. *Theobald on Wills*, 7th ed., p. 422, apparently draws no distinction between wills before and after the *Wills Act*. If *Jarman's* proposition is correct, it is singular that Lord *Macnaghten*, when dealing in the most general manner in 1897 with the rule in *Shelley's Case*, did not allude to the *Wills Act*. In *Roddy* v. *Fitzgerald* reference is made to the Act, but no conclusion is stated, whilst in *Sandes* v. *Cooke* (1) the Irish Court of Appeal affirms the Master of the Rolls, whose judgment plainly indicates that the *Wills Act* has not made the distinction suggested by *Jarman*. Sec. 27 expressly excludes cases in which an estate tail has been created. To see whether or not sec. 27 applies, the will is to be first construed with the aid of the rule of law, and if, so construed, the will gives an estate tail, there is an end of that section; otherwise sec. 27 would forbid the creation of an estate tail. Sec. 26 uses the word "person," which the *Acts Interpretation Act* expands into "persons." But those persons must be designated. "Issue," being *nomen collectivum*, does not *primâ facie* mean particular persons. So that, to make sec. 26 apply, the same test is required as under the first branch of the argument: Has the testator explained that by "issue" he means children, or descendants living at a stated time? If yes, then sec. 26 supplies the fee, just as in *Lees* v. *Mosley* (2) the words of limitation added to "issue" did, and you have particular donees in fee, so that the rule in *Shelley's Case* is excluded. Hence the case resolves itself into this: Has the testator, by the words of the gift over, explained that "issue" means children or

(1) 21 L.R. Ir., 445.

(2) 1 Y. & C. Ex., 589.

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other descendants living at the death of the first taker? If not, there is an estate tail.

Owen Dixon, for the respondents Elys. The mother, Maria Jane Ely, in the interests of her children joins with them in contending that she takes a life estate with remainder to issue. The appellants have no interest in attacking the judgment appealed from so far as it relates to the limitations to the Elys. Maria Jane Ely is interested under the limitation over in default of issue in the other gifts, and supports the judgment below declaring that they result in successive estates. In the case of the gift to Rosetta Campbell it is immaterial whether she took for life or in fee simple, because as she died without issue the gift over takes effect in either case. The several limitations in question result in immediate gifts for life to the first takers with remainders to their respective issue living at their deaths, subject to a gift over in default of issue so living. The application of the rule in *Shelley's Case* depends upon two successive devises being attempted, the second being to a denomination of persons who are coextensive with the heirs general or special of the first devisee (*Preston on Estates*, vol. I., pp. 263-265, 282-283). The only inquiry is who are the persons included in the description. The intention of the devisor to use expressions as words of limitation or of purchase is irrelevant (*Preston*, vol. I., p. 283). This inquiry depends upon the ordinary rules of construction (per Lord *Davey* in *Van Grutten* v. *Foxwell* (1)). These include the rule that words of legal import have their *primâ facie* meaning unless controlled by the context. "Issue" is, however, more readily controlled than "heirs of the body," which is a term expressing only a legal concept. "Issue" is not in itself a word of technical import. In a deed it cannot be a word of limitation. It does not include the idea of succession in its ordinary connotation, but in a will, when used in relation to real property, it has acquired that idea because persons comprised within its extended meaning can only take in that way. It is therefore more readily controlled (*Preston*, vol. I., p. 379 ; *Allgood* v. *Blake* (2) ; *Lees* v. *Mosley* (3) ; *Slater* v.

(1) (1897) A.C., at p. 685. (2) L.R. 7 Ex., 339, at p. 354.
(3) 1 Y. & C. Ex., 589.

Dangerfield (1); *Morgan* v. *Thomas* (2); *Ralph* v. *Carrick* (3); per Lord *FitzGerald* in *Bowen* v. *Lewis* (4)). *Primâ facie* the attachment to " issue " of words of distribution rebuts the implication of succession, and shows that a limited class of descendants was meant (*Hockley* v. *Mawbey* (5); *Crozier* v. *Crozier* (6)). To overcome such a result from the attachment of words of distribution, some countervailing consideration must appear from the will. The inability to give to " issue " more than an estate for life if the meaning of that term be limited, together with the existence of a gift over upon an indefinite failure of issue, constitutes such a consideration. It is only where these coexist that words of distribution have been rejected (*Kavanagh* v. *Morland* (7); *Woodhouse* v. *Herrick* (8)). The cases in which words of distribution were first held not to control the *primâ facie* meaning of " issue " turn upon this reasoning. (See *Doe d. Blandford* v. *Applin* (9); *Denn d. Webb* v. *Puckey* (10); *Doe d. Cock* v. *Cooper* (11).) Subsequent cases merely follow them. If upon the whole will a construction of " issue " as including descendants at a particular time or of a particular class only would result in a devise in fee simple to them, the words of distribution prevailed (*Bradley* v. *Cartwright* (12); *Sandes* v. *Cooke* (13)). Since the *Wills Act* 1839 (N.S.W.), which adopted the provisions now contained in sec. 26 of the *Wills Act* 1915, came into operation in 1840, " issue " so construed would always take the fee simple unless an intention to the contrary be disclosed. This is the view of the text-writers *Jarman*, *Leake* and *Hawkins*, and is contemplated in *Roddy* v. *Fitzgerald* (14), by *Watson* B. at p. 845, by *Crompton* J. at p. 857, by Lord *Cranworth* at p. 873, by Lord *Wensleydale* at p. 878; by Lord *Blackburn* in *Clifford* v. *Koe* (15) and in *Bowen* v. *Lewis* (16), and apparently by Lord *Selborne* L.C. in the last mentioned case (17); and by *Jessel* M.R. in *Morgan* v. *Thomas* as reported in the *Law Journal* and the *Law Times* (18).

(1) 15 M. & W., 263.
(2) 9 Q.B.D., 643.
(3) 11 Ch. D., 873, at p. 884.
(4) 9 App. Cas., at p. 925.
(5) 1 Ves. Jun., 143, at p. 149.
(6) 3 Dr. & War., 373, at p. 383.
(7) Kay, 16.
(8) 1 Kay & J., 352, at p. 370.
(9) 4 T.R., 82.
(10) 5 T.R., 299.
(11) 1 East, 229.
(12) L.R. 2 C.P., 511.
(13) 21 L.R. Ir., at p. 465.
(14) 6 H.L.C., 823.
(15) 5 App. Cas., 447, at p. 468.
(16) 9 App. Cas., at pp. 912-914.
(17) 9 App. Cas., at p. 896.
(18) 51 L.J. Q.B., 556; 47 L.T., 281.

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Unless this assumption was made in *Re Loughhead* (1) and *Taylor* v. *Blake* (2), these cases should have been otherwise decided. The construction of issue in the limitation must be controlled, too, by the gift over, which both at common law and under sec. 27 of the *Wills Act* depends upon failure of issue in the lifetime of the first taker. At common law, if there was any indication that the donees under the gift over were intended to enjoy the property given in possession as distinct from taking a future incorporeal interest, the presumption that the failure of issue meant an indefinite failure was rebutted (*Halsbury*, vol. XXVIII., p. 838 ; *Greenwood* v. *Verdon* (3)).

H. Walker, for the respondent McKay. The doctrine upon which the Courts applied the rule in *Shelley's Case* is laid down by *Wood* V.C. in *Kavanagh* v. *Morland* (4), and his decision is quoted with approval by many of the Judges in *Roddy* v. *Fitzgerald* (5) and *Clifford* v. *Koe* (6). In construing a devise to " A for life and after his death to his issue and in default of issue then over " in wills of testators who died prior to the passing of the *Wills Act* 1837 (secs. 26 and 27 of the *Wills Act* 1915), the Courts were obliged to apply the rule in *Shelley's Case* for two reasons : (1) the testator for want of words of limitation had given the " issue " only a life estate ; (2) a gift over in default of issue had always been construed by the Court to mean a gift over on an indefinite failure of issue. The result was that on the true construction of the will the testator had given a life estate to A followed by a life estate to his issue and an alternative contingent remainder in fee simple to persons who could not take until the whole line of descendants had come to an end. And a gift over was, of course, void for remoteness except after an estate tail. As *Wood* V.C. said in *Kavanagh* v. *Morland* (7), " it came back to this, there was a gift over on an indefinite failure of issue, with a gift to the issue too weak in itself to confer more than an estate for life." In these circumstances the Court felt obliged to resort to the rule in *Shelley's Case*, and, by so doing, gave

(1) (1918) 1 I.R., 227, at p. 243.
(2) (1912) 1 I.R., 1.
(3) 1 Kay & J., 74, at p. 81.
(4) 23 L.J. Ch., 41.
(5) 6 H.L.C., 823.
(6) 5 App. Cas., 447.
(7) 23 L.J. Ch., at p. 44.

A an estate tail. This made the gift over good, and testator's whole estate was disposed of. The rule in *Shelley's Case*, so far as it applies to wills, is stated in precise terms by Lord *Davey* in *Van Grutten* v. *Foxwell* (1), and he points out at p. 685 that the rule is a rule of law and not a rule of construction. For the purpose of construing the testator's gifts the rule must not be taken into consideration. "Issue" may mean (1) "the whole of the descendants to the most remote generation"; (2) heirs of the body, *i.e.*, a selected number taking as special heirs in succession; (3) all the descendants born before a certain point of time; (4) children. If the Court is judicially satisfied that the words are used in a limited or restricted sense (as in the third and the fourth above), the premises for the application of the rule in *Shelley's Case* are wanting, and the rule is foreign to the case (see *Van Grutten's Case* (2), per Lord *Davey*). The question for the Court to determine is what is the proper interpretation to be placed on the words "for my daughter Rosetta Campbell during her life and upon her death . . . upon trust for her lawful issue and if more than one as tenants in common and if there be no lawful issue then . . . between my said son Alfred William Barkly Cust and my daughters then surviving." The words of distribution conclusively show that testator meant the objects of the second gift to take concurrently and not successively. The words of the gift over are equally strong for the same purpose. The words in that gift "to my daughters then surviving" show that he was not referring to an indefinite failure of issue. Apart from that language the gift over must now be construed in accordance with sec. 27 of the *Wills Act*, which places on the words "if there be no issue" the meaning "if there be no issue at the death of the life tenant." For those reasons the Court should be judicially satisfied (to use Lord *Davey's* words) that testator used the word issue "in a restricted sense." The next question is: What estate has the testator purported to give to the objects of the second gift? Under our present law it must be either a life estate or a fee simple. In the light of sec. 26 of the *Wills Act* it must be a fee simple. It follows, therefore, that upon the true interpretation of his will the testator has purported to make a gift

(1) (1897) A.C., at p. 684. (2) (1897) A.C., at p. 685.

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of a life estate followed by a contingent gift to the life tenant's issue living at the death of the life tenant for an estate in fee simple as tenants in common followed by an alternative contingent gift on failure of issue at the death of the life tenant to other persons. According to a long line of decisions (*Lees* v. *Mosley* (1); *Greenwood* v. *Rothwell* (2); *Slater* v. *Dangerfield* (3); *Golder* v. *Cropp* (4); *Bradley* v. *Cartwright* (5)) the rule in *Shelley's Case* has no application to such gifts. If it be kept clearly in mind that the rule of law in *Shelley's Case* must not be entertained until the language of the testator has first been interpreted according to the ordinary canons of construction, including secs. 26 and 27 of the *Wills Act*, there can be no difficulty in this case.

R. E. Hayes, in reply, referred to *Crabbe on Conveyancing*, 5th ed., vol. II., pp. 1369, 1373; *Jarman on Wills*, 6th ed., vol. II., pp. 1958 *et seqq.*

Cur. adv. vult.

NOV. 5

The following judgments were read :—

KNOX C.J. AND GAVAN DUFFY J. The substantial question for decision on this appeal is whether a devise of real estate contained in the will of Robert Cust, deceased, conferred on Rosetta Campbell an estate for life only or an estate tail.

The relevant portions of the will are in the following words :— " I devise all my real estate unto and to the use of my said trustees upon the following trusts that is to say . . . as to all that piece or parcel of land " (then follows a description of certain parcels) " Upon trust for my daughter Rosetta Campbell during her life and upon her death then as to the said lands and tenements and the rents and profits thereof Upon trust for her lawful issue and if more than one as tenants in common And if there be no lawful issue then I further direct that one-fourth part of the value of the said lands and tenements in the said trust is hereby devised to the lawful husband of the said Rosetta Campbell should such survive

(1) 1 Y. & C. Ex., 589.
(2) 5 Man. & G., 628.
(3) 15 M. & W., 263.
(4) 5 Jur. (N.S.), 562.
(5) L.R. 2 C.P., 511.

her death and the remaining three-fourths value of the said lands and tenements shall be equally divided between my said son Alfred William Barkly Cust and my daughters then surviving notwithstanding the bequests herein contained as regards my daughter the said Rosetta Campbell the same shall be subject to the condition that my wife the said Matilda Jane Cust shall during her life have the right to the free use and occupation of the house and ground known as 'Glencoe' in Timor Street Warrnambool and also the rents and profits of the coach factory property in Fairy Street Warrnambool during her life as herein provided . . . Providing always and I do hereby expressly declare and direct that if any of my said sons or daughters shall do or suffer any act or thing whereby his or her interests in the rents and profits of the lands hereinbefore mentioned shall be alienated or encumbered or shall by any means vest in any other person or persons other than such son or daughter to whom I have directed the same to be paid then the trusts hereinbefore contained in favour of such son or daughter shall as to the rents and profits which shall so vest in or become payable to any other person or persons thenceforth absolutely cease and the said rents or profits shall during the remainder of the life of such son or daughter be applied in the same manner as if such son or daughter were dead I devise my residuary estate to my said trustees upon trust to sell the same and pay the proceeds of such sale to my said son Alfred William Barkly Cust and my said daughters equally."

The testator died on 24th February 1901, and Rosetta Campbell died on 23rd November 1917 intestate, without having had issue, leaving her brother Alfred William Barkly Cust and her sisters Maria Jane Ely and Elizabeth Curtis surviving her. The will was made after the passing of the *Wills Act* 1890, sec. 26 of which is reproduced in sec. 26 of the *Wills Act* 1915. That section is as follows: "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." The words are identical with those of sec. 28 of the English *Wills Act*.

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Knox C.J. Gavan Duffy J.

By the order of the Supreme Court against which this appeal is brought it was declared that Rosetta Campbell took an estate for life only in the lands so devised in her favour. This decision was arrived at by a majority of the Judges sitting in the Full Court —the decision of *Hodges* and *Cussen* JJ. prevailing over that of the Chief Justice, who held the view that Rosetta Campbell took an estate tail under the devise in question. For the appellants it was contended that in this devise " issue " must be construed as " heirs of the body," that the rule in *Shelley's Case* is applicable, and that by force of that rule Rosetta Campbell took an estate tail. For the respondents it was contended that as words of distribution were attached to the gift in remainder to the issue of Rosetta Campbell, and as such issue, if taking as purchasers, would take an estate in fee simple by virtue of sec. 26 of the *Wills Act*, the case fell within the reasoning of the decisions in *Lees* v. *Mosley* (1) and *Bradley* v. *Cartwright* (2), and that the rule in *Shelley's Case* did not apply, and Rosetta Campbell took only a life estate. For the appellants reliance was placed on the statements of the law contained in the speeches of Lord *Macnaghten* and Lord *Davey* in *Van Grutten* v. *Foxwell* (3), particularly those found at pp. 667, 668, 684, 685; on the similarity of the devise in the present case to that which was the subject of decision in *Roddy* v. *Fitzgerald* (4); and on the observations on the effect of the *Wills Act* in such cases made by *Porter* M.R. and *Naish* L.J. in *Sandes* v. *Cooke* (5). With regard to these arguments it may be observed that in *Van Grutten* v. *Foxwell* (3) the words used were " heirs of the body," and that the will was made before the *Wills Act*; that in *Roddy* v. *Fitzgerald* the will was made before the *Wills Act*, and there were no words of limitation attached to the word " issue "; and that in *Sandes* v. *Cooke* there were no words of distribution among the issue. This distinction appears to us to be important, because the use of words of distribution applied to the issue, though not in itself sufficient to disturb the *primâ facie* meaning of " issue " as a word of limitation, does tend to show that the testator had in mind not

(1) 1 Y. & C. Ex., 589.
(2) L.R. 2 C.P., 511.
(3) (1897) A.C., 658.
(4) 6 H.L.C., 823.
(5) 21 L.R. Ir., 445.

the whole succession of his descendants but a more limited class. Moreover, the fact that *Porter* M.R. does not refer in his judgment to the opinions expressed in *Jarman on Wills* and *Hawkins on Wills*, which we refer to later, leads to the conclusion that those statements had not been brought to his notice, and they do not appear to have been cited in the Court of Appeal. It is, in our opinion, settled by the authorities that, although the *primâ facie* meaning of the word "issue" in a devise to A and his issue is "heirs of the body," "issue" is a more flexible word than "heirs of the body," and that its *primâ facie* meaning as a word of limitation yields more readily to the context of the will than that of the more technical term "heirs of the body." It seems that the reason for construing "issue" as "heirs of the body" was that in the case of wills made before the *Wills Act* a gift to "issue," without words of limitation attached, passed no more than a life estate, and consequently the only way of construing such a will so as to confer an estate which might pass to the whole issue in succession was to construe "issue" as "heirs of the body." Accordingly, if in a will made before the *Wills Act* the word "issue" had attached to it words of limitation such as "and their heirs" as well as words of distribution such as "as tenants in common," the reason for construing "issue" as equivalent to "heirs of the body" and applying it as a word of limitation no longer existed, for the words of distribution tended to show that the whole line of issue was not intended to take, and the words of limitation were sufficient to carry the fee simple to the issue if taking as purchasers, and consequently in such a case the operation of the rule in *Shelley's Case* was ousted. This appears to be the ground of the decision in the case of *Lees* v. *Mosley* (1), and the rule to be deduced from that decision may be stated thus: "Where words of distribution, together with words which are capable of carrying an estate in fee, are annexed to a gift to issue following a gift for life, the ancestor does not take an estate tail but an estate for life only."

But in the devise now under discussion there are no words of limitation attached to the word "issue," and consequently the rule in *Lees* v. *Mosley* (1) is not applicable unless the provisions of

(1) 1 Y. & C. Ex., 589.

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sec. 26 of the *Wills Act* can be used to supply the omission. It is suggested in the judgment of the Chief Justice that this cannot be done without violating the rule that before determining the legal effect of a devise the will must be construed according to established canons of construction, but we cannot agree that any canon of construction is violated by placing on the word "issue," when used in a devise contained in a will made since the *Wills Act*, the same meaning as would have been given to the expression "issue and their heirs" in a will made before the *Wills Act*. It cannot, we think, be disputed that, in order to ascertain whether words contained in a devise are capable of carrying an estate in fee to the devisees, regard must be had to the state of the law existing at the relevant time. Sec. 26 of the *Wills Act*, and the earlier enactments in the same terms which it replaced, in effect provide that in wills made after the passing of the original Act containing that provision a devise to a person without words of limitation shall be as effective to carry an estate in fee as would a devise to such person and his heirs if contained in a will made before that Act. Although the question now under consideration appears never to have been raised for decision, the view taken by us of the effect of sec. 26 of the *Wills Act* is supported by the opinions expressed in leading text-books (see *Jarman on Wills*, 6th ed., pp. 1950-1951, a passage which appeared originally in the 2nd edition published in 1855, and has been repeated in successive editions ever since; see also *Hawkins on Wills*, 2nd ed., pp. 235-236; and *Leake on Property*, 2nd ed., p. 140). Moreover, the inference may fairly be drawn, from the emphasis laid by Lord *Cranworth* in *Roddy* v. *Fitzgerald* (1) on the fact that the will then under discussion was made before the *Wills Act*, that he took the same view as that expressed in the text-books referred to above, and the statement of Lord *Wensleydale* in the same case at p. 883, commenting on the decision in *Kavanagh* v. *Morland* (2), points in the same direction. In our opinion considerable weight should be attached to the fact that although this opinion has been expressed in the leading text-book on wills ever since the year 1855, no case raising the question has come up for decision,

(1) 6 H.L.C., at p. 873.

(2) Kay, at pp. 24-25.

and the only expressions of opinion to the contrary to which we have been referred are those contained in *Sandes* v. *Cooke* (1) and in *Theobald on Wills*, 7th ed., p. 422. For these reasons we are of opinion that the rule which we have described as the rule in *Lees* v. *Mosley* is applicable to the devise now under consideration, and that, applying that rule, the result is that Rosetta Campbell took only an estate for life under the devise in question. It was suggested that the decision in *Lees* v. *Mosley* could not be relied on since the decision of the House of Lords in *Van Grutten* v. *Foxwell* (2), but we can see no ground for this suggestion. In the will under consideration in *Van Grutten* v. *Foxwell* the expression used was "heirs of the body" and not "issue," and there were no words of limitation attached to that expression. There was no reason for dealing with the decision in *Lees* v. *Mosley* in that case, and we cannot see that the authority of the earlier decision was in any way impeached by the later.

Whether the effect of the *Wills Act* would be the same in the case of a will in which the expression used was "heirs of the body" and not "issue" is a question on which we think it is unnecessary to express an opinion at present. The decision being that Rosetta Campbell took only an estate for life, and the fact being that she died without having had issue, it is unnecessary to decide what persons would take under the gift to her issue. It is also unnecessary, in view of the opinion expressed above on the construction of this will, to decide what has been the effect of sec. 62 of the *Real Property Act* 1915 upon the construction of a devise to a person for life and on his death to the heirs of his body, or to a person for life and on his death to his issue.

In our opinion the appeal fails, and should be dismissed. The parties have agreed to the costs of all parties of this appeal being ordered to be paid out of the estate of the testator, and we see no objection to an order being made to that effect.

The order will be that the appeal be dismissed and the costs of all parties of the appeal be paid out of the estate of the testator, as between solicitor and client. Costs to be raised as ordered in Court below.

(1) 21 L.R. Ir., 445.

(2) (1897) A.C., 658.

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ISAACS J. Whether Rosetta Campbell took in law an estate in fee simple, or merely a life estate, under her father's will depends on whether those who, according to the verbal terms of the gift, were remaindermen, were intended by the testator to take by descent or by purchase. That is the question in every case where the rule in *Shelley's Case* is involved. The crucial passage in the will refers to them as "her lawful issue," and the problem is: What did the testator mean by that expression? Did he mean the "heirs of her body" or her descendants in a particular sense? If the former, then Rosetta had an estate of inheritance; if the latter, she had an estate for life only.

There emerged from the argument three distinct contentions supporting the view that by "issue" the testator meant particular descendants. As this is, so far as I know, the first case in which two of those contentions have called for direct decision, I propose to deal with them separately. They are: first, that upon the language of the will itself—apart from any reference to the *Real Property Act*, sec. 62, or to the *Wills Act*, secs. 26 or 27, the word "issue" ought to be construed in the less comprehensive sense; next, adding to the actual words of the lawyer-drawn will the well-known effect of sec. 62 of the *Real Property Act*, the same result is attained; third, failing the other contentions, the combined effect of the tenancy in common and sec. 26 of the *Wills Act* is to confer an estate in fee simple on particular descendants, and make them the stock of a new descent, leaving Rosetta a mere tenant for life. In considering all these contentions, it cannot too constantly be borne in mind that the inquiry always is: What is the testator's expressed intention? He may have expressed his intention in specific terms, or he may have expressed it elliptically; but, whether explicit or implicit, the intention given effect to must be the fair meaning of his own words.

1. In dealing with the first contention, it is said that, when the whole will is read and reasonable effect is given to the various parts of it, the true meaning of "issue" is seen to be not "heirs of the body" but particular descendants. That leads me to observe that the trite observation that the whole of the will must be read in order to be sure of the meaning of each part of it must be properly

applied. It does not mean that the general intention is the touchstone, and that when that is ascertained all particular expressions must yield to it. That notion was corrected by Lord *Redesdale* in *Jesson* v. *Wright* (1), by both Lord *Cranworth* L.C. and Lord *Wensleydale*, and particularly the latter, in *Roddy* v. *Fitzgerald* (2), by Lord *Macnaghten* both in *Van Grutten* v. *Foxwell* (3) and again in *Foxwell* v. *Van Grutten* (4); and it was definitely laid down that technical words or words of legal import must have their legal effect given to them unless it is very clear that the testator meant otherwise—that is, that the judicial mind must be satisfied that the testator meant them to be used in some other sense which he has indicated. In the same year, 1897, a few months earlier than *Van Grutten* v. *Foxwell*, the Privy Council, speaking by Lord *Davey*, authoritatively pronounced the law in these terms :—" There are two cardinal principles in the construction of wills, deeds, and other documents . . . . The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is, to use Lord *Denman's* language, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense: *Doe d. Gallini* v. *Gallini* (5)" (*Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (6)).

The word " issue " in a devise is now settled to be a word of legal import unless the contrary is clearly shown. Lord *Wrenbury* (then *Buckley* J.), in *Pelham Clinton* v. *Duke of Newcastle* (7), says: —" As regards the word ' issue ' it has been said that a devise to A and his issue is the aptest way of describing an estate tail according to the Statute: see per Lord *Thurlow*, *Hockley* v. *Mawbey* (8). *Primâ facie*, I think, ' issue ' is a word of limitation equivalent to heirs of the body, and not a word of purchase." And at page 40 he adds: " It is, I think, therefore to be presumed that the word

(1) 2 Bligh, 1.
(2) 6 H.L.C., 823.
(3) (1897) A.C., 658.
(4) 82 L.T., 272, at p. 273.
(5) 5 B. & Ad., 621.
(6) L.R. 24 Ind. App., 76, at p. 85; I.L.R. 24 Calc., 834.
(7) (1902) 1 Ch., at p. 39.
(8) 1 Ves. Jun., at p. 149.

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'issue' has been used by the testator as meaning 'heirs of the body' and it is for the parties seeking to give it another meaning to show clearly from the context of the will that the testator intended to give it a different meaning." *Romer* L.J., in the Court of Appeal (1), says it is a word of well known legal import and one peculiarly apt and proper to create an estate tail. The judgments of those two learned Judges were approved in the House of Lords (*Pelham Clinton* v. *Duke of Newcastle* (2)). Unless, therefore, the judicial mind can be satisfied that in the will before us it is used in some sense other than "heirs of the body," that meaning must be given to it.

An excellent argument was presented by Mr. *Dixon* as to the inherent meaning of "issue" as contrasted with the inherent meaning of "heirs of the body," and reliance was placed on the observations in *Lees* v. *Mosley* (3) that "it requires a less demonstrative context to show . . . intention, than the technical expression of 'heirs of the body' would do," and in *Slater* v. *Dangerfield* (4), where *Parke* B. said: "The Courts have been less reluctant to narrow the *primâ facie* meaning of the word 'issue' than of the words 'heirs of the body.'" No doubt "issue" is a term that does not *per se* convey the notion of heirship. In ordinary parlance it has a different meaning. In a bequest of personalty it *primâ facie* repels that notion. Even in a deed it is a word of purchase. In a direction to settle lands by way of executory trust it is not necessarily a word of limitation. Its presumed and therefore primary import in a devise is an acquired and not an inherent meaning. It may, therefore, consistently be considered more naturally susceptible of receiving its original meaning than is the inherently scientific term "heirs of the body" susceptible of receiving the wholly unusual import of children or particular descendants. The case of *Roddy* v. *Fitzgerald* (5) seems, so to speak, to have somewhat hardened the primary legal meaning of "issue" in a devise, and Lord *Wensleydale*, who, as *Parke* B., was a party to the decision in *Lees* v. *Mosley*, placed it practically on a level with "heirs of the body." Lord *Wensleydale*, in *Roddy* v. *Fitzgerald* (6),

(1) (1902) 1 Ch., at p. 51.
(2) (1903) A.C., 111.
(3) 1 Y. & C. Ex., 589.
(4) 15 M. & W., at p. 273.
(5) 6 H.L.C., 823.
(6) 6 H.L.C., at p. 882.

said : " Sitting in the Court of Error, and considering the immense practical importance of laying down fixed rules of construction, I cannot advise your Lordships that you ought to require a less demonstrative context than such context as brings satisfaction to your minds, that the word was used by the testator in a different sense than its proper one, and also clearly shows what that sense was . . . *practically, the same degree of certainty in the context to alter the meaning of both expressions is required.*"

Then in the Privy Council, in *Edyvean* v. *Archer*; *In re Brooke* (1), Lord *Macnaghten* speaking of the word " issue," after indicating that, even if the word " issue " were found in another part of the will with a more limited meaning, it would still not be safe to rely upon that as decisive in altering the primary meaning of the word as used in such a connection as that in which it was there found, says this :—" A sounder, or at any rate a safer, rule is to be found in the observations of *Knight Bruce* V.C. on the meaning of this very word 'issue.' 'Before I can restrain that word,' said the Vice-Chancellor in *Head* v. *Randall* (2), 'from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense' ; and then he goes on to observe that the language of Lord *Eldon* applied to property in *Church* v. *Mundy* (3) might well be applied to persons in a case like that before him. Lord *Eldon's* words were these : 'The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like demonstration plain to the contrary.' "

Now, reading the will as a whole in order to gather the meaning of the crucial passage, and applying, on the doctrine of *Lees* v. *Mosley* (4), a less stringent standard of demonstration with respect to " issue " in a devise than with respect to " heirs of the body," but remembering at the same time the cautionary observations of Lord *Wensleydale* in *Roddy* v. *Fitzgerald* (5), I find nothing which demonstrates that the word " issue " in this will means anything less than its presumed legal import, so long as I confine my attention

(1) (1903) A.C., 379, at p. 384.
(2) 2 Y. & C.C.C., 231, at p. 235.
(3) 15 Ves., 396, at p. 406.
(4) 1 Y. & C. Ex., 589.
(5) 6 H.L.C., 823.

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to the words of the will itself, unassisted by any Statute. In other words, having regard to the testator's own personal directions alone, there is no word or phrase of his which a Court is at liberty to regard as restricting that import, because, having regard to settled rules of construction in such cases, there is nothing inconsistent with it, and nothing which so perfectly clearly shows that that import was departed from in the testator's mind as to amount to demonstration that he used the word " issue " in a more limited sense.

2. Then I come to the second contention. Sec. 62 of the *Real Property Act* is as follows : " Where any limitation which would previous to the passing of the Act No. 872 have limited to any person an estate tail whether legal or equitable in any land is made after the passing of the said Act, such limitation shall be deemed to give to such person an estate in fee simple (legal or equitable as the case may be) in such land." From this arises the question whether, since for fifteen years before the will was made (Act No. 872 having been passed in 1885) it was common knowledge in the legal profession, and therefore within the knowledge of the solicitors who prepared the will, that it was no longer possible to create estates tail in Victoria, the testator's words should, if possible, be construed as not intended to create such an estate in this instance. Then it is urged that " issue " is sufficiently flexible to yield to the force of this consideration, particularly when the rest of the will is looked at. But the answer is this : Sec. 62 is nothing more than an automatic statutory bar of the entail. It lies in wait, so to speak, for any limitation which apart from its provisions would create an estate tail, and then only it operates. It cannot operate unless there be such a limitation, which it presupposes, but it does not alter the legal import of any technical term that may be used to create such limitation. It alters the effect. At most it affords some evidence for supposing that a testator would not attempt an impossibility, and in some instances that consideration might be of importance. But it raises no inconsistency with the technical meaning of " issue," and does not even when added to the factors relevant to the first contention give rise to the demonstrative force needed to restrict the word " issue."

3. The third contention is of great and general importance. It

is that in view of the distributive words, and of sec. 26 of the *Wills Act*, there is conferred on the "issue" an estate in fee simple, unless a contrary intention be discoverable from the will, and as this is inconsistent with an estate tail, "issue" can no longer mean "heirs of the body." It follows, it is urged, that the "issue" do not take by descent but by purchase, and that Rosetta's estate was for her life only.

The all-important consideration to bear in mind is that the quest in relation to this third contention is precisely the same as before, namely, the true meaning of the word "issue"; and it will be found in the end that the principal guide is found in the two cardinal principles stated by Lord *Davey* in the Indian case referred to, though in their application a subsidiary common law rule of construction of vital importance has to be applied.

Sec. 26 of the *Wills Act* is itself a statutory rule of construction. It occurs in Part II. of the Act under a general heading "Construction of Wills," and it declares 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," &c., "unless a contrary intention shall appear by the will." Of course, the conditions predicated by the section must be satisfied; and whether or not they are satisfied is the real contest on this branch of the case. There is, in the first place, no inherent objection to the use of the word "issue" or even "heirs of the body" as indicating a "person" within the meaning of the section, because such devisees are individuals and therefore natural "persons" (*Wills* v. *Palmer* (1); *Cholmondeley* v. *Clinton* (2); and see *Garland* v. *Beverley* (3)). In *Jesson* v. *Wright* (4) Lord *Eldon* L.C. says: "'Heirs of the body' mean one person at any given time; but they comprehend all the posterity of the donee in succession." In *Foxwell* v. *Van Grutten* Lord *Macnaghten* says (5): "Heirs of the body who take by descent are just as much human beings and just as much individuals as heirs of the body who take by purchase." The remainder, as observed in *Challis on Real Property*, 3rd ed., at p. 152, if taken

(1) 5 Burr., 2615.
(2) 2 Mer., 171, particularly at pp. 343-344.
(3) 9 Ch. D., 213, at p. 222.
(4) 2 Bligh, at p. 53.
(5) 82 L.T., at p. 274.

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by the heirs as purchasers, would be a contingent remainder of *Fearne's* fourth class, being a limitation in remainder to a person not yet ascertained or not yet in being ; and see in that connection the judgment of *Bayley* J. in *Doe d. Bosnall* v. *Harvey* (1) and the observation of Lord *Macnaghten* in *Foxwell's Case* (2), as to the first in the line carrying off the whole estate or the whole share, as the case may be, leaving nothing for those who come after. Indeed, but for the rule in *Shelley's Case*, "heirs," it is conceded, would take by purchase even if the instrument be the same. But if the instruments be different, as if an estate for life be limited to A with remainder to the heirs of B, and A grant his estate to B, the heirs take by purchase. And if even by the same instrument the ancestor's estate be equitable, the trustees having the legal estate, but remainder to the heirs of A, the heirs take by purchase. These are commonplaces (*Watkins on Descents*, pp. 198, 202), but they show that "heirs of the body" are "persons." Then, do the "issue" take a devise so as to satisfy sec. 26 of the *Wills Act*? If "issue" retains its legal import, they do not. They take nothing in that case by purchase : the whole estate is in the ancestor, and there is nothing on which sec. 27 of the *Wills Act* can operate. But if on the true construction of the will "issue" has not that meaning, then the ancestor has only a life estate and there is a devise to the "issue." The question then is, has "issue" in this will a restricted meaning ?

The decisions already referred to establish that words of distribution alone will not restrain the force of either the word "issue" or the term "heirs of the body." The reason is that, so long as those terms on a proper construction retain their primary import, the law requires descent and in succession, and any personal provision or direction to the contrary is repugnant, and therefore void, and must be disregarded (per Lord *Macnaghten* in *Foxwell's Case* (*Second Appeal*) (2)). If, however, inconsistent expressions are found which, on a true reading in accordance with accepted methods of construction, alter the meaning of the terms themselves, so that they no longer retain their primary import, the matter is changed. Nothing could more clearly or forcibly contrast the two positions than the luminous

(1) 4 B. & C., 610, at p. 622. (2) 82 L.T., at p. 275.

judgment of *Cockburn* C.J. in *Jordan* v. *Adams* (1). So long as "the fatal words," as he terms them, remain, *the law* inexorably fastens on them its own consequences, regardless of the testator's personal intention; but if, by some explanatory context, the testator clearly shows he did not mean those words in a "fatal," but in a popular, sense, that intention is given effect to.

But while this statement of the position is perfectly clear, it presupposes that the Court has determined whether the terms in question are or are not to have their primary meaning, notwithstanding the presence of the inconsistent expressions; and the real difficulty here arises as to the principle to be applied in distinguishing the cases where they should, and those where they should not, be allowed to alter the primary import of the term used. A clue is found in the reason for making the word "issue" in a devise the *primâ facie* equivalent of "heirs of the body." *Wood* V.C., in *Jackson* v. *Calvert* (2), and Lord *Parker* (then *Parker* J.), in *In re Coulden*; *Coulden* v. *Coulden* (3), state that reason. Once the Court found the testator's main purpose was to benefit the whole line of issue, then, notwithstanding the absence of any words of limitation which would give effect to it, the Court, to effectuate that predominant intention, read the word "issue" as itself a word of limitation, and so gave to the ancestor an estate in fee tail. This was, indeed, nothing more than applying to the word "issue" the same consideration as, in adopting the rule in *Shelley's Case*, had been applied to the word "heirs" or "heirs of the body"—namely, the controlling influence of the main purpose of the testator at a time when in no other way that purpose could have been effectuated (see *Challis*, at p. 167, note). But though the reason affords a clue, it does not completely solve the problem. So far the word "issue" was, by virtue of the principle of "main purpose," placed as high as "heirs of the body." So far the word "issue" is elevated quite apart from and unaffected by any words of modification, and the two expressions are *primâ facie* on precisely the same level, and are words of limitation.

It is in the further use of the principle, when it is sought to depose

(1) 9 C.B. (N.S.), 483, at pp. 499-500. (2) 1 J. & H., 235, at p. 237.
(3) (1908) 1 Ch., 320, at p. 324.

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the word " issue," that I think the real key to the problem is found. And if it is the key as to " issue," it must be as to " heirs of the body," which for this purpose is interchangeable. After the Courts had accepted " issue " as equivalent to " heirs of the body " whenever by the use of that word the testator's main purpose of benefiting the issue indefinitely appeared in a will—that is, whenever the word " issue " was used without any explanatory context showing clearly it was used in a more restricted sense than the whole line of descent—the Court, true to the principle it had adopted, disregarded any repugnant but minor provision (see *Doe d. Blandford* v. *Applin* (1)). As Lord *Redesdale* said in *Jesson* v. *Wright* (2) : " It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed." And see *Doe d. Bosnall* v. *Harvey* (3). The main purpose being that the whole line of descent should take, that must be preserved ; the minor purpose, namely, taking concurrently, being impossible, must give way, because unless it gave way the main purpose could not stand.

Lord *Kenyon*, in *Doe d. Candler* v. *Smith* (4), where the phrase " heirs of the body " was used, says : " It is a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of *Robinson* v. *Robinson* (5) first in this Court and afterwards in the House of Lords, that where it appears in a will that the testator had a general intention and also a secondary intention, *and they clash*, the latter must give way to the former." In *Jarman*, 6th ed., at p. 1891, the principle is thus stated : " To make expressions of this nature the ground of such an interpretation " (that is, to cut down the legal import of the expression " heirs of the body ") " is to sacrifice the main scope of the devise to its details." The principle of *Candler's Case* establishes for this class of case what I may call the line of demarcation. Where even before the *Wills Act* the major purpose could stand along with the minor purpose of the testator, effect was given to both. That is

(1) 4 T.R., at p. 88.
(2) 2 Bligh, at p. 57.
(3) 4 B. & C., at pp. 620-621.
(4) 7 T.R., 531, at p. 533.
(5) 1 Burr., 38.

the basis of the cases which establish that where in addition to words of distribution there are found words of limitation carrying the fee to the issue, the issue then take as purchasers. In *Roddy* v. *Fitzgerald* (1) *Crompton* J., with whom Lord *Wensleydale* agreed, said: "It is still necessary for the purpose of vesting such estate in the issue that there should be some such words" (that is, "to the issue and their heirs" or "estate") "or necessary implication as, in the construction of a will, can by the rules of law vest the fee in the issue." But before the *Wills Act*, in the absence of some words of limitation or their equivalent, the issue as purchasers could not take the fee. They would take for life only. And, said *Wood* V.C. in *Kavanagh* v. *Morland* (2): "In looking at a will of this kind" (similar to the present will), "*I must first consider whether, by the original gift to the issue, they take an absolute interest*; in which case there would be no necessity to imply an estate tail in the parent in order to prevent the gift over taking effect until a complete failure of the issue." The *Wills Act*, sec. 26, however, completely alters the situation. Where it applies, the will is to be "construed," that is, it is to be read as meaning, just as much as if the testator expressly said so, that the fee simple should pass to the devisee.

If then the "issue" or the "heirs of the body" can be regarded as "persons" (and I have shown that they can), and if there be no contrary intention—that is, if the will itself expressly or (apart from the debatable construction in controversy) impliedly makes no other disposition of the fee simple, so that the "issue" can take it if the section be applied, and if there be words of distribution which are repugnant to the ordinary incidence of an estate tail, as there are in the present case—then in the case supposed there is no reason, so far as I can see, why the Court, for the very purpose of deciding whether or not "issue" has its primary import, should not consider whether, as Lord *Kenyon* says, there is a "clash" of intention, general and secondary, or whether a possible construction should not be adopted by which effect is given to the full intention of the testator, both his main intention and his subordinate intention, on ordinary principles of interpretation.

The effect of the section was common knowledge when the will

(1) 6 H.L.C., at p. 855. (2) Kay, at p. 26.

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was made, and that is a material aid to arriving at a testator's intention. In this respect the present case is the converse of *Foxwell's Case*; and a few words of Lord *Macnaghten* on the second appeal (1) are very much in point. He said:—"At the date when this will was made a gift of lands, tenements, and hereditaments to a designated person was a gift for life merely, and not a gift in fee. It is difficult to suppose that the person who drew the will was ignorant of an elementary rule of law which at that time was common knowledge with all lawyers, good, bad and indifferent." And the learned Lord regarded this as an aid to the construction of the will.

So here, the same reasoning, with the circumstances and, therefore, the effect reversed, assists in gathering the intention of the testator. But his intention as to what? Simply as to the meaning he attached to the word "issue."

That this is a legitimate consideration equally applicable whether the expression be "issue" or "heirs of the body" appears clearly from the direct references by various Judges to the *Wills Act* in *Roddy* v. *Fitzgerald* (2) and indirectly by *Jessel* M.R. in *Morgan* v. *Thomas* (3), and by Lord *Macnaghten* in the passage above cited from *Foxwell's Case* and by Lord *Davey* in the same case (4).

I agree with what the learned Chief Justice has said as to the importance of the observations in *Jarman* for so long a period. Applying the section, as I have stated, I simply read its provision into the will for the purpose of construction, as well as of legal effect, as if the testator had said the "issue" should have the fee simple, and then, considering the effect of that provision together with the words of distribution, I arrive at the conclusion as a matter of interpretation of the word "issue." In accordance with the Privy Council rule I ask myself whether I am judicially perfectly clear—by the demonstrative force of the context—that "issue" is not used in its primary legal sense, but in a restricted sense indicated by the testator. I answer that it is restricted, and means the particular descendants existing at the death of Rosetta Cameron, and that the gift to them is an original gift and not a gift by descent, and that she took a life estate only.

(1) 82 L.T., at p. 273.
(2) 6 H.L.C., 823.
(3) 9 Q.B.D., 643.
(4) 82 L.T., at p. 276.

I therefore agree that this appeal should be dismissed.

RICH J. I have had an opportunity of reading the judgments just delivered by the Chief Justice and *Isaacs* J., and agree with them.

Appeal dismissed. Costs of all parties to the appeal to be paid out of the estate of the testator as between solicitor and client. Costs to be raised as ordered in the Court below.

Solicitors for the appellants, *A. G. Proudfoot & Turner*, for *J. S. Tait*, Warrnambool.

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B. L.