[HIGH COURT OF AUSTRALIA.]

GUTHEIL . . . . . APPELLANT;
DEFENDANT,

AND

THE BALLARAT TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 23, 24; *May* 15.

KNOX C.J., ISAACS AND HIGGINS JJ.

Will—Construction—Gift of absolute estate to son—Gift over in event of son dying under 21 *to "next of kin" excepting sisters of testator—Whether son excluded from next of kin—Defects in proceedings.*

A testator by his will made a specific bequest of his jewellery, &c., to his only son, a bequest of £1,000 to that son on his attaining the age of twenty-one years, and a bequest of his furniture, &c., to his wife for life or until her remarriage, and after her death or remarriage to his son absolutely. He then gave, devised and bequeathed the residue of his real and personal property to his trustees upon trust for conversion and investment, and to hold the investments upon trust to pay out of the income an annuity to his wife for life or until her remarriage, and to accumulate the balance of the income; and after her death or remarriage upon trust to transfer and hand over the residuary estate to his son absolutely, provided that if his wife should die or remarry before his son attained the age of twenty-one years, his residuary estate, with the exception of a certain sum per week to be applied to the maintenance and education of his son, should be accumulated until his son should attain the age of twenty-one years, and then be transferred and handed over to his son. The will then proceeded: "in the event of my son dying before attaining the age of twenty-one years upon trust for my next of kin save and except my two sisters," naming them.

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Held, by *Knox* C.J. and *Higgins* J. (*Isaacs* J. not assenting), that the words "my next of kin" should be construed as "my nearest blood relations at my death other than my son."

Isaacs J. doubted on the grounds (1) that the expression "my next of kin," being technical, must receive its technical meaning unless by express words or necessary implication the Court were judicially satisfied (*a*) that some other meaning was intended and (*b*) what that other meaning was; and (2) that on the wording of the will he was not so satisfied: but, the respondents not having been heard, he was unable to finally determine against them.

Comments on the unsatisfactory character of the formal order made by the Supreme Court, and on the absence from the proceedings of any administrator or other person to represent the estate of the son.

Decision of the Supreme Court of Victoria (*Cussen* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Johannis August Emil Gutheil died on 17th April 1917 having made his will on 23rd March 1917, the material portions of which were as follows:—

"2. I appoint my wife Margaret Edith Lyell Gutheil Thomas Ryan Jones of Lydiard Street Ballarat aforesaid estate agent and my son Arthur Emil Gutheil when he shall attain the age of twenty-one years to be the executors and trustees of this my will and I declare that the expression 'my trustees' used throughout this my will shall (where the context permits) include the trustees or trustee for the time being of this my will whether original or substituted.

"3. I give and bequeath to my son Arthur Emil Gutheil my jewellery and my literary and musical library and all my scientific instruments.

"4. I give and bequeath to my son Arthur Emil Gutheil the sum of one thousand pounds to be paid to him on his attaining the age of twenty-one years and in the intervening period until he attains the age of twenty-one years I direct that the income thereof shall be paid to my wife during her life so long as she remains my widow and on my wife dying or remarrying whichever event shall first happen I direct that the said income shall be held on the trusts declared hereinafter as to my residuary estate Provided always that if my son Arthur Emil Gutheil shall die before attaining the age of twenty-one years I direct that the income shall be paid as aforesaid and that upon the death or remarriage of my wife the

said sum of one thousand pounds shall be held upon the trusts hereinafter declared as to my residuary estate.

"5. I bequeath all my household furniture plate plated articles linen china pictures to my trustees upon trust that they shall permit my wife to have the use and enjoyment thereof during her life or so long as she shall continue my widow and upon her death or remarriage whichever event shall first happen to transfer and hand the same to my said son absolutely I direct that my trustees shall cause an inventory to be made of the said furniture and effects and that the same shall be signed by my wife and retained by my trustees and a copy thereof signed by my trustees shall be delivered to my wife Provided always that it shall be lawful for my trustees at any time or times to sell the said furniture and effects or any part thereof and to invest the net proceeds of such sale in any mode of investment hereby authorized and to stand possessed of the income and capital thereof upon the like trusts as far as applicable as are hereby declared concerning the said furniture and effects.

"6. I give devise and bequeath all the rest and residue of my estate both real and personal unto my trustees upon trust to sell call in and convert the same into money (with power in their discretion to postpone such sale calling in and conversion) and after payment thereout of my debts and funeral and testamentary expenses to invest the residue on any of the investments authorized by law and to stand possessed of such investments and of all parts of my estate for the time being unsold (hereinafter called my residuary estate) :—

"(*a*) Upon trust to pay from the income thereof to my wife as and from the date of my death during her life so long as she continues my widow an annuity of four hundred pounds to be paid free of all deductions whatsoever by equal calendar monthly payments the first whereof shall be made one calendar month after my death and to accumulate and invest as aforesaid the balance of income and after her death or remarriage whichever event shall first happen then

"(*b*) Upon trust to transfer and hand over my residuary estate both corpus and income invested as aforesaid to my son absolutely Provided always that if my wife shall die or remarry before my

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son attains the age of twenty-one years upon trust with the exception of the sum of two pounds per week to be applied to the maintenance and support of my said son to accumulate my residuary estate until he attains the age of twenty-one years then upon that event happening to transfer and hand over to him as aforesaid my residuary estate absolutely and

"(*c*) In the event of my son dying before attaining the age of twenty-one years upon trust for my next of kin save and except my two sisters Henrietta Dorothea Elizabeth Gutheil and Ida Dart Green.

"7. I empower my trustees at any time or times to raise any part not exceeding in the whole one half of the then presumptive or vested share of my son in my residuary estate under the trusts of this my will and to apply the same in their discretion for the advancement and benefit of my son."

The testator left him surviving his widow, Margaret Edith Lyell Gutheil, and his son, Arthur Emil Gutheil, referred to in the will, who was born on 20th October 1915 and died on 28th May 1920. Probate of the will was granted to the Ballarat Trustees, Executors and Agency Co. Ltd. (which was appointed by Mrs. Gutheil to apply in her place for probate) and Thomas Ryan Jones.

An originating summons was taken out by the Company and Jones for the determination of certain questions, of which the following only are material:—

Upon a proper construction of the said will and in the events which have occurred, (1) what person or persons become or will become entitled under the trust expressed in par. 6 (*c*) of the said will; and more particularly, (2) are the persons therein described as "next of kin" to be ascertained at (*a*) the death of the testator, or (*b*) the death of the said Arthur Emil Gutheil, or (*c*) the death or remarriage of the defendant Margaret Edith Lyell Gutheil? (3) Is survival at all or any of the said periods (*a*), (*b*) or (*c*) necessary to enable any person to become entitled under the said trust?

The defendants to the summons were Mrs. Gutheil, who was sued as a beneficiary under the will, as the testator's widow and as the

person entitled to the estate of Arthur Emil Gutheil; and the Public Trustee, who was sued as representing the interests of such of the testator's relatives as were German nationals.

The summons was heard by *Cussen* J., who answered the above questions as follows:—(1) Subject to the rights of the Public Trustee the testator's nearest blood relations at his death other than his son Arthur Emil Gutheil and his sisters Henrietta Dorothea Elizabeth Gutheil and Ida Dart Green. (2) Such persons as are referred to in answer to question 1, to be ascertained as at the time of the testator's death. (3) Survival at the death of the testator.

From that decision Mrs. Gutheil appealed to the High Court.

Pigott, for the appellant. Where there is a gift to next of kin the death of the testator is *primâ facie* the time at which the next of kin should be ascertained. An intention to the contrary must be expressed or necessarily implied. Here no contrary intention can be found. The word "then" at the end of par. 6 (*a*) of the will does not necessarily indicate a contrary intention. (See *Bullock* v. *Downes* (1); *Mortimore* v. *Mortimore* (2); *Hood* v. *Murray* (3); *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (4).) The words "next of kin" are technical words meaning the nearest in blood of the testator, and must be given that meaning in the absence of a clear intention to exclude some person who would be the nearest in blood. The exclusion of the testator's two sisters does not show an intention to exclude his son also (*Lee* v. *Lee* (5)). The fact that the exclusion of the two sisters indicates that by "next of kin" the testator intended a plurality of persons is not sufficient to negative the next of kin being the son only if he survived the testator (*Urquhart* v. *Urquhart* (6); *In re Barber* (7); *Ware* v. *Rowland* (8); *Holloway* v. *Holloway* (9)). The exclusion of the two sisters would be quite appropriate in the event of the son dying before the testator, which event the testator must be taken to have contemplated.

(1) (1860) 9 H.L.C., 1.
(2) (1879) 4 App. Cas., 448.
(3) (1889) 14 App. Cas., 124, at pp. 137-138.
(4) (1920) A.C., 794.
(5) (1860) 1 Dr. & Sm., 85, at p. 88.
(6) (1844) 13 Sim., 613.
(7) (1852) 1 Sm. & G., 118.
(8) (1848) 2 Ph., 635.
(9) (1800) 5 Ves., 399.

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[KNOX C.J. referred to *Lucas-Tooth* v. *Lucas-Tooth* (1).

[ISAACS J. referred to *Sidle* v. *Queensland Trustees Ltd.* (2).]

[Counsel also referred to *Jenkins* v. *Gower* (3); *Seifferth* v. *Badham* (4); *Rayner* v. *Mowbray* (5); *Wharton* v. *Barker* (6); *In re Wilson*; *Wilson* v. *Batchelor* (7); *Starr* v. *Newberry* (8); *Harrison* v. *Harrison* (9); *In re Ford*; *Patten* v. *Sparks* (10); *Hunter* v. *Attorney-General* (11); *Coltsmann* v. *Coltsmann* (12); *Martin* v. *Holgate* (13); *Hawkins on Wills*, 2nd ed., p. 2; *Halsbury's Laws of England*, vol. XXVIII., p. 654.]

Reginald Hayes, for the respondent the Public Trustee, was not called upon.

Weigall K.C. (with him *Pearce*), for the respondent trustees, referred to *Gleeson* v. *Fitzpatrick* (14).

Cur. adv. vult.

May 15.

The following written judgments were delivered :—

KNOX C.J. The question for decision turns on the true construction of the will of one Johannis August Emil Gutheil. Testator died on 17th April 1917, leaving his widow (the appellant) and one child, Arthur Emil Gutheil, who was born in the year 1915, him surviving. Arthur Emil Gutheil died on 28th May 1920.

The dispositions made by the will of the testator, which was executed on 23rd March 1917, so far as they are relevant to the question for decision may be summarized as follows :—By clause 3 the testator gave to his son his jewellery, his literary and musical library and all his scientific instruments. By clause 4 he gave to his son £1,000 to be paid to him on his attaining the age of twenty-one, and directed that in the meantime the income should be paid to the testator's widow during widowhood, and that on her death or remarriage the income should be held on the trusts declared as to his

(1) (1921) 1 A.C., 594, at pp. 613-614.
(2) (1915) 20 C.L.R., 557, at p. 560.
(3) (1846) 2 Coll. C.R., 537, at p. 541.
(4) (1846) 9 Beav., 370.
(5) (1791) 3 Bro. Ch., 234, at p. 236.
(6) (1858) 4 Kay & J., 483.
(7) (1907) 2 Ch., 572.
(8) (1857) 23 Beav., 436.
(9) (1860) 28 Beav., 21.
(10) (1895) 72 L.T., 5.
(11) (1899) A.C., 309, at pp. 315-317.
(12) (1868) L.R. 3 H.L., 121.
(13) (1866) L.R. 1 H.L., 175, at p. 186.
(14) (1920) 29 C.L.R., 29, at pp. 34-35, 38.

residuary estate, subject to a proviso that if his son should die before attaining twenty-one the income should be paid as thereinbefore directed and that on the death or remarriage of the widow the said sum of £1,000 should be held upon the trusts declared as to his residuary estate. By clause 5 he bequeathed household furniture and effects upon trust to permit his widow to have the use and enjoyment thereof during her life or widowhood and on her death or remarriage upon trust for his son absolutely. Clause 6 of the will is in the following words:—[Clause 6 was here set out]. The question is whether the gift contained in clause 6 (*c*) the residuary estate passed on the death of the son under twenty-one to his personal representative or to the person nearest in blood to the testator at the date of his death excluding his son and his two sisters Henrietta and Ida. The answer to this question depends on the meaning to be attributed to the expression "my next of kin" in this will.

In the Supreme Court *Cussen* J. held that "my next of kin" was to be construed as "my nearest blood relations at my death other than my son Arthur Emil Gutheil and my sisters Henrietta and Ida"; and it is against this decision that the appeal is brought.

It is not, and I think cannot be, disputed that the primary meaning of the expression "next of kin" used *simpliciter* in a will is "the nearest blood relations of the testator at the date of his death" (*Elmsley* v. *Young* (1)). I think it also true that the expression "my next of kin" so used is a technical expression, or at any rate an expression of known legal import. Therefore, one rule to be applied in construing this will is that technical words shall have their legal effect unless from other words it is very clear that the testator meant otherwise (per Lord *Redesdale* in *Jesson* v. *Wright* (2)). To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is (per Lord *Wensleydale* in *Roddy* v. *Fitzgerald* (3)). But another rule also is to be observed. In *Hawkins on Wills*, 2nd ed., at p. 6, it is stated in these terms:—"Notwithstanding the

(1) (1835) 2 Myl. & K., 780.
(2) (1820) 2 Bli., 1.
(3) (1858) 6 H.L.C., 823, at p. 877.

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last two propositions" (one of which is the rule as to technical expressions referred to above) "the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent . . . to control the sense even of clear words." This proposition is, I think, amply warranted by the decisions referred to as supporting it, especially the statements of Lord *St. Leonard* in *Grey* v. *Pearson* (1) and Lord *Kingsdown* in *Towns* v. *Wentworth* (2).

By clause 6 of the will the testator first, by par. (*a*), provides for payment out of the income of the residuary estate of an annuity to his wife during widowhood, and directs that during that period the balance of the income is to be accumulated. By par. (*b*) he directs that upon the death or remarriage of his wife the whole residuary estate, including accumulations of income, is to be transferred and handed over to his son, subject to a proviso that if his wife should die or remarry before his son should attain twenty-one the sum of £2 per week is to be applied to his son's maintenance and support and the balance of the income is to be accumulated until the son attains twenty-one, and that upon the happening of that event the whole residuary estate is to be transferred and handed over to the son absolutely. The effect of this provision is to give the son in the event of his surviving the testator an immediately vested interest in the residuary estate, which interest would vest in his personal representatives in the event of his death before payment or transfer of the property to him. In other words, under this bequest the whole residuary estate would, subject to the provision for the widow, have been payable to the son on his attaining twenty-one or to his legal personal representative if he died under that age. Having made this provision, the testator introduced par. (*c*), and the question to be determined is: In what sense did the testator use the expression "my next of kin" in that paragraph? In considering this question it must be assumed that the testator knew the effect of the antecedent provisions of the will including par. (*b*), and that he

(1) (1857) 6 H.L.C., 61. (2) (1858) 11 Moo. P.C.C., 526.

knew also that if his son survived him he would be nearer in blood to the testator than the testator's sisters. The testator cannot be supposed to have intended to make provision for his son in the event of his predeceasing him. In these circumstances he directs that, in the event of his son dying under twenty-one—in which event the residuary estate would but for this provision have become vested in the personal representative of the son—the residuary estate is to be held upon trust for the testator's next of kin save and except his two sisters Henrietta and Ida. I find it impossible to come to the conclusion that the testator used the expression "my next of kin" in this clause in any sense which would include his son, and I think it is clear that the sense in which he used the expression was "my next of kin excluding my son." On the other construction suggested by the appellant the effect of the clause, having regard to the previous provisions of the will, may be stated thus: "Having so disposed of my residuary estate that on my son attaining twenty-one he will receive the whole of it (subject to a provision for my widow), and that if he dies under twenty-one his personal representative will receive it, I now declare that if my son survive me and do not attain twenty-one my residuary estate is to go to his personal representative." The result of adopting the construction put forward by the appellant would be to deprive this clause of any effect whatever, provided the son survived the testator. The exclusion of the two named sisters of the testator from the class of next of kin supports, though it may not of itself be sufficient to justify, the conclusion at which I have arrived, and other considerations tend in the same direction. I think the words of par. (*c*) show that it was intended to operate as a defeasance of the interest given to the son by par. (*b*), but the construction put upon it by the appellant would prevent it from operating as a defeasance in the only event in which the gift to the son contained in par. (*b*) could take effect—that is, the event of his surviving the testator. And if the other provisions of the will be examined those contained in par. 4 also support the opinion I have expressed. I do not think it necessary to comment in detail on the cases cited by Mr. *Pigott* for the appellant. A careful consideration of these decisions has satisfied me that they lay down no rule that prevents me from construing the words of this will according

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to what I find to be the intention of the testator as expressed in it. I have had the opportunity of reading the reasons about to be given by my brother *Higgins*, and desire to express my concurrence in his observations with reference to the form of the order appealed from and the parties to the proceedings in the Supreme Court.

In my opinion the appeal fails and should be dismissed, but in the special circumstances of the case I think the costs of all parties of this appeal should be paid out of the estate, the costs of the plaintiff Company to be as between solicitor and client.

ISAACS J. When the appellant's argument had finished, the Court reserved judgment without calling upon the respondents. I then shared the opinion that it was unnecessary to hear the respondents' counsel. On further consideration my impressions have greatly altered. My learned brethren, however, retaining their opinions, my change of view is immaterial. I cannot, of course, pronounce definitely against the respondent the Public Trustee. He represents the parties whose interests are antagonistic to the appellant. But, in view of the pecuniary importance of the matter to the immediate parties, and the still greater importance of the principles regulating the construction of wills, especially where technical terms are involved, I feel bound to state some of the reasons which lead me seriously to doubt the correctness of the decision appealed from.

The question is the construction of the will; and, as Lord *Campbell* in *Livesey* v. *Livesey* (1) said, it is the duty of a Court "*to construe a will, and not to make it.*" In *Bowen* v. *Lewis* (2) Lord *Blackburn* said: "I think that in construing a will we are to inquire what is the intention of the testator shown by the *words of the will.*" That is the well-known general rule. Then there is a very special rule—an established canon of construction; and even so staunch an advocate as Lord *Halsbury* was of reading the words of a will for himself, felt compelled to recognize canons of construction (see *Kingsbury* v. *Walter* (3)). The special rule I refer to was thus stated by Lord *Macnaghten* in the celebrated case of *Van Grutten* v. *Foxwell* (4). The learned Lord, speaking of "the

(1) (1849) 2 H.L.C., 419, at p. 438.
(2) (1884) 9 App. Cas., 890, at p. 913.
(3) (1901) A.C., 187, at p. 189.
(4) (1897) A.C., 658, at p. 672.

established rules of construction," says:—"The most important of those rules for the purpose in hand was stated by Lord *Redesdale* in the following words: 'The rule is,' said his Lordship, 'that technical words *shall* have their legal effect unless, from *subsequent inconsistent words*, it is very clear that the testator meant otherwise.' What is to be understood by 'otherwise' is shown, I think" (says Lord *Macnaghten*), "by the last words of the passage, in which the rule was repeated in *Roddy* v. *Fitzgerald* (1)." Then he quotes Lord *Wensleydale* as follows:—"It is another and most important rule, in the construction of the words used in a will, that *technical terms or words of known legal import* should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judical mind that they were meant by the testator to be used in some other sense, and *to show what that sense is*." Lord *Macnaghten* then refers to *Jesson* v. *Wright* (2), and says it covers the whole field of controversy. Now Lord *Redesdale* in *Jesson* v. *Wright* (3) makes another observation besides the one quoted from the following page by Lord *Macnaghten*. He says: "It is dangerous where words have a fixed legal effect, to suffer them to be controlled without some *clear expression, or necessary implication*." And in *Roddy* v. *Fitzgerald* (4) Lord *Wensleydale* also adds an observation which I feel it my duty to bear in mind. He says: "It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have *intended* to write, whereas the only and proper inquiry is, *what is the meaning of that which he has actually written*." Then, in the Privy Council, in *Lalit Mohum Singh Roy* v. *Chukkun Lal Roy* (5), Lord *Davey*, for the Judicial Committee, said that one of the *cardinal principles* in the construction of wills, "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

(1) (1858) 6 H.L.C., at p. 877.
(2) (1820) 2 Bli., 1.
(3) (1820) 2 Bli., at p. 56.
(4) (1858) 6 H.L.C., at p. 876.
(5) (1897) L.R. 24 I.A., 76, at p. 85.

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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." Lord *Kingsdown*, in *Towns* v. *Wentworth* (1), when dealing with the principle of construing a will so as generally to read the language in the sense which the testator himself has attached to the expressions which he has used, adds "this qualification": that, "when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, *beyond all doubt*, such construction." The words "beyond all doubt" are, I need scarcely say, of great importance, and entirely differentiate the problem from that which attends the interpretation of ordinary words. A signal instance of adhering firmly to the very words of a will, even though not technical, is found in the recent case of *Tarbutt* v. *Nicholson* (2). Viscount *Haldane* said: "Words in a will ought to be read, unless the context or the document read as a whole renders it unnatural to do so, in their literal sense." His Lordship was there speaking of ordinary non-technical words, and emphasizing the duty even in that case, of adhering to them literally unless "unnatural" in that sense.

But when we add to that the special rule—the rule of construction so stringently expressed by the highest authorities in the Empire—a very formidable task is set in this case to give to the expression "my next of kin" any but its recognized meaning. And before examining the meaning of that term, I find it necessary to keep steadily before me the two conditions of departure from its technical meaning which Lord *Wensleydale* laid down, and which Lord *Macnaghten* confirmed. I must be convinced *judicially* (1) that "my next of kin" was intended to be used in some sense other than its technical sense, and (2) that that other sense is shown. I understand that to mean, that the technical class is departed from only if *some distinct artificial class* is shown to be substituted. In this, to my mind as at present advised, consists the problem we have to solve so far as the appellant is concerned.

The expression "my next of kin" *simpliciter*—that is, without

(1) (1858) 11 Moo. P.C.C., at p. 543. (2) (1920) 89 L.J. P.C., 127, at p. 129.

reference to the *Statute of Distributions*, or to intestacy, or to some special period which would indicate a special class—denotes "next of kin at common law and not according to the statute" (per Viscount *Finlay* in *Hutchinson's Case* (1)). The learned Lord cites *Withy* v. *Mangles* (2), where Lord *Cottenham* says (3) that these words must be construed "in their natural and obvious meaning, *of nearest in proximity of blood.*" In *Hutchinson's Case* (4) it is made very clear that apart from any qualifying word such as "then," or its equivalent, you must here ascertain who were the testator's "next of kin" *at the time of his death.* There are three possible solutions of the meaning of the phrase "my next of kin save and except my two sisters." It may possibly mean: (1) The testator's next of kin as at the date of his death, except his son and his two sisters—that is "next of kin" in some non-technical sense; (2) his next of kin as at the date of his death, in the ordinary technical sense, except his two sisters; or (3) his next of kin as at the date of his widow's death or remarriage except his two sisters. It is the first of these meanings that *Cussen* J. and my learned brothers have adopted. The difficulty I have in accepting that meaning arises in this way. I ask myself, in obedience to the authorities I have quoted: What is there in the will, which shows, not as a balance of probabilities, not as "a reasonable implication" which different minds might well accept or reject in competition with some other reasonable implication, not such an implication as might justify a conclusion as to the special signification in the circumstances to be attached to an ordinary word, but what is there in the will which makes it "very clear" or "perfectly clear," —which carries "judicial *certainty*" that is "beyond all doubt"— (1) that the known legal import of the expression does not apply, and (2) that some other distinct meaning is substituted? I must confess that, now I have more thoroughly applied the rule of construction as to technical words, I have not been able to attain that *judicial certainty* which the authorities tell me I am bound to have before I can decide in favour of the respondent.

I have carefully examined the reasons so explicitly stated by

(1) (1920) A.C., at p. 803.
(2) (1843) 10 Cl. & Fin., 215.
(3) (1843) 10 Cl. & Fin., at p. 254.
(4) (1920) A.C., 794.

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Cussen J.; but, with deep respect, they appear to me, even in cumulative effect, to fall short of the necessary standard. The will is very carefully drawn by a lawyer, and technical terms abound. Clause 6 is the residue clause, and provides for an annuity to the widow of £400 until her death or remarriage, whichever event first shall happen. On her death or remarriage, says (*b*), the son is to receive the residuary estate absolutely, if twenty-one, and, if not, is to be maintained out of £2 a week until twenty-one, and then to receive the residuary estate absolutely. But suppose he does not attain the age of twenty-one? The view that prevails to exclude the son from "my next of kin" ascertained as at the testator's death rests, if I understand it aright, on the fact that (*c*) is a gift over, and on two inferences. First, it is assumed to be highly improbable that a testator, after saying that the residuary estate should not be handed over to his son until he reached twenty-one, would, in the event of the son dying before twenty-one, include him in his next of kin to take the property, though he might have conceivably married and had issue before that age. I do not think a more appropriate reference to this inference could be made than is contained in the judgment of Lord *Buckmaster* in a very recent case before the Privy Council; and *in limine* it is a passage dealing with non-technical words. In *Auger* v. *Beaudry* (1) his Lordship, for the Judicial Committee, says:—"The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would be *reasonably* certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give *the fair and literal meaning to the actual language of the will.* Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean."

(1) (1920) A.C., 1010, at pp. 1013-1014.

The second inference is that the son must have been intended to be excluded because otherwise the express exclusion of the testator's sisters would be meaningless. Undoubtedly the exclusion of the sisters shows that the testator understood they would otherwise have been included in the possible takers under (*c*); but that, on the literal force of the words themselves, simply effects the exclusion of the sisters and no one else. In order to exclude the son, another step must be taken. That step consists in saying that the class the testator meant by next of kin must in his mind have included the sisters, otherwise he would not have thought it necessary to specifically exclude them. That is the first inferential step. Then a second step is "if the sisters would, but for express exclusion, have been in his mind included, that necessarily excludes the son, because, in the *strict sense* of the term 'next of kin,' sisters cannot enter while a son exists." Well, the first comment I make is that all that goes far beyond the words of the will and far into the realm of conjecture. It is also open to the charge of inconsistency, by assuming, first, an artificial class in the first step, and the technical class in the second. If it is said that the testator meant the strict class of next of kin less the sisters, the son must be left in the class, for the assumption includes him. If the mere specific exclusion of the sisters is, as a matter of necessary implication, to be held to exclude the son, then it must be on the principle that *the specific exclusion of a more remote relative impliedly excludes all higher degrees.* If, for instance, the testator had for some personal reason excluded a cousin, could it be said that he thereby excluded his own children? And yet, if the inference applied as the second step is correct, that would have to follow. Speaking for myself, I am unable to go so far afield from the testator's own words, particularly in face of such a passage as I have read from Lord *Buckmaster's* judgment, and the authorities I have quoted, on words of legal import. To these I add the observations of *Page-Wood* V.C., in *Wharton* v. *Barker* (1), quoting Lord *Cottenham* in *Ware* v. *Rowland* (2), and also the observations of Sir *R. P. Arden* in *Holloway* v. *Holloway* (3).

It is said that (*c*) should read thus: In the event of my son

(1) (1858) 4 Kay & J., at pp. 500-501.

(2) (1848) 2 Ph., 635.

(3) (1800) 5 Ves., 399.

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(surviving me and) dying (thereafter and) before attaining the age of twenty-one years, upon trust for my next of kin (as at the time of my death) save and except (my son and) my two sisters Henrietta Dorothea Elizabeth Gutheil and Ida Dart Green. That is a very drastic alteration of the testator's words. I cannot think it is supported by the so-called correlative event at the end of (*b*). If that event and the event in (*c*) are to be taken as strictly correlative, then the event in (*c*) must, like that in (*b*), be an event which takes place entirely after the death or remarriage of the wife. *Cussen* J. did not adopt that view; and I agree with him. He referred it back to the end of (*a*), and that makes (*c*) stand as an alternative to the first part of (*b*), namely, "upon trust to transfer and hand over my residuary estate, both corpus and income as aforesaid to my son absolutely." For this purpose I omit the proviso in (*b*). How does the matter stand on this basis? Par. (*b*) of course involves that the son survives the testator and, if he is to receive the legacy (except the maintenance in the proviso), that he also attains twenty-one years. *Par.* (*c*) *does not involve his surviving the testator.* It assumes he may or may not. But it involves his death before he attains twenty-one. That failure to attain twenty-one is the condition of the gift to the next of kin, and the failure of the condition, though existing at the necessary point of time after the testator's death, may have arisen long before. The son may have died at any time after the making of the will, and either before or after the testator. It could not reasonably be said that, if the son had died a day before the testator, the gift over in (*c*) would have failed. But, if that be so, it follows that when (*c*) was penned it was unknown whether or not the son would be necessary to be considered the next of kin at the testator's death. And therefore the whole foundation of the supposition that the mention of the sisters necessarily excludes the son disappears. If the son did survive, *he* would be the next of kin; if he did not, then the next of kin would come in proper degree, but the sisters would be excluded. I can at present see nothing more in the words. But, as I have already said, in any case the mention of the sisters would work no more effect than the law itself would do without

them. The mention of them would be superfluous. Even inconsistent words—as the authorities quoted determine—are not always sufficient to break down the technical sense of legal expressions, and these words are certainly not inconsistent. It is the supposed logical inference that becomes inconsistent.

But then comes another difficulty. If an artificial class is to be substituted for the natural class, what does it include? Does the mention of the sisters not merely exclude the son but also include others? And, if so, what others? Consequently, if it is conceded here that the appropriate time for ascertaining the next of kin in sub-clause (*c*) is as at the death of the testator, the first question is: Who during his lifetime appeared to be those who might answer that description? The answer, in my opinion so far, is his son, and next his sisters and then his more remote relatives. The next question is: Who in fact answered that description at the time of the testator's death? The answer I give at present is: The son, and the son only.

My present impression is, then, that the true answer to the problem raised by this appeal lies in a choice between the second and the third possible meanings I have stated in the earlier part of this judgment.

I refer now to the third of those possible meanings, namely, next of kin as at the date of the widow's death or remarriage (excepting the sister). This depends very largely on the force to be given to the word "then" at the end of par. (*a*). It is undoubtedly there an adverb of time. The law is so fully set out in *Hutchinson's Case* (1) that no further investigation as to principles need be made. It may be that the proper view is to regard the time of the death or remarriage of the widow as the moment for ascertaining the next of kin to benefit by the residuary estate. I do not dwell upon this aspect of the case at any length. It does not affect the appellant, so far as I can see, beyond this: that it heightens the practical possibility of the son dying under twenty-one and leaving issue who, on the interpretation to which I cannot agree, would have been excluded. As a matter of legal interpretation that possibility exists in either case. But this alternative view does materially

(1) 1920) A.C., 794.

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affect the affirmative declaration as to the next of kin actually entitled, if the son be excluded. There has been no separate representation to guard interests in this aspect.

Being unable to concur in the opinion of my learned brothers and at the same time not having heard the arguments of the respondents' counsel, I have simply to say I do not assent to the judgment of the Court.

HIGGINS J. The position is, if one may state it in broad outline, that a testator dies, leaving a wife and a son about eighteen months old. The will, after certain gifts to the wife and others, directs the trustees after the death or remarriage of the wife to hand over the residuary estate to the son absolutely; and it proceeds: "and in the event of my son dying before attaining the age of twenty-one years upon trust for my next of kin save and except my two sisters Henrietta Dorothea Elizabeth Gutheil and Ida Dart Green." The son died under twenty-one, and these words have to be applied. *Primâ facie* the gift to the son has failed, and the next of kin of the testator are substituted, with the exception of the two sisters named. In its ordinary sense, the expression "next of kin," apart from the context, refers to the son, and the son only—not to the sisters; but the learned Judge below (*Cussen* J.) has decided that the nearest blood relations of the testator at the death *other than the son and the two sisters named* are entitled to the residue. Mr. *Pigott*, whose examination of the relevant cases has been of much assistance to me, urges on behalf of the widow that the son answered the description of "my next of kin" at the death, and that therefore the residue passes to the son's representative, and, after the necessary outgoings from the son's estate, to the widow, as the nearest of kin to the son. I accept Mr. *Pigott's* contention (we have not heard the other side on the subject) that the words "my next of kin" refer to the next of kin at the death of the testator, and that they refer to the next of kin by blood, as determined by nature and the common law, not to the persons entitled under the Statutes of Distribution to share in the estate on intestacy. But, in the view of the learned Judge, the expression "my next of kin" on the context of this will is used as meaning "those who would be his next of kin if the son

had died before the testator "—as in contradistinction to the son; and I think that this view is right. Otherwise, we face the absurdity of the testator saying, in effect, "I give my estate to my son if he reach twenty-one; but, even if he do not reach twenty-one, I still give it to him (if he survive me) under the name of my next of kin." The testator must be presumed to know the meaning of the words "next of kin," and to know that his son would be the next of kin—the only next of kin—if he survive the testator at all. On the other hand, the absurdity vanishes if we treat "my next of kin" as meaning either "those of my kin who are nearest to me in blood after my son," or "those who would be my next of kin if my son were dead." On this latter reading, the exception of two named sisters, Henrietta and Ida, from the class of next of kin who are to take, becomes perfectly intelligible and consistent; for the testator had no nearer of kin than his sisters (barring his son) living at his death. I am prepared to concede that if one had to consider only the exception of these two sisters, by itself, there might not be sufficient reason for giving any qualification to the ordinary meaning of "my next of kin"; for the testator could consistently intend that these two sisters should be excluded only *if* the son died before him, and *if* there were no one then nearer of kin than sisters. What I am impressed by is the inconsistency of a gift to the son *if* he attained twenty-one, and then a gift to the son of the same thing even if he do not attain twenty-one. The line of reasoning which I adopt seems to be in entire accordance with that adopted in *Bird* v. *Wood* (1), explained in *Elmsley* v. *Young* (2); *White* v. *Springett* (3); *In re Taylor*; *Taylor* v. *Ley* (4).

The *dicta*—for they are only *dicta*—of *Kindersley* V.C. in *Lee* v. *Lee* (5) apply to a very different position. There the testator gave a life interest to A, who was his daughter and next of kin; and he gave the corpus (in the event which happened) to his next of kin. There was nothing either absurd or repugnant in the same person taking a life interest and also (in certain events) the corpus or a share of the corpus. The principle as stated by Lord *Wensleydale* in *Bullock* v. *Downes* (6) and in *Grey* v. *Pearson* (7), I am prepared

(1) (1825) 2 Sim. & St., 400.
(2) (1833) 2 Myl. & K., 82, at p. 89.
(3) (1869) L.R. 4 Ch., 300.
(4) (1885) 52 L.T., 839.
(5) (1860) 1 Dr. & Sm., 85.
(6) (1860) 9 H.L.C., at p. 23.
(7) (1857) 6 H.L.C., at p. 106.

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to apply unreservedly, and to say that the words " my next of kin " are to be taken here, as referring to the next of kin at the death, whether the next of kin be a son, or a grandfather, or sisters, unless on this construction there would be an " obvious absurdity or inconsistency." Here I find both absurdity and inconsistency. The will, in giving the residue to the son, says in effect that if the son die under twenty-one the son is not to get the residue, but that the testator's next of kin are to get it with the exception of two named sisters. Such a provision is absurd and inconsistent if the words " next of kin " are to be understood as referring to the son, and the son only. The words " next of kin " have an ordinary meaning, it is true, a meaning which, on the facts here, would include the son, and the son only; but, as Lord *Herschell* pointed out in *Seale-Hayne* v. *Jodrell* (1), the rule as to giving the primary meaning to a word is not a hard and fast rule—it is entirely subservient to the context.

This reasoning does not, to my mind, involve any use of the words " my next of kin " in some non-technical sense. Even if it did, the rule is not that " technical words, or words of known legal import " must, at all cost, get their technical meaning; the technical meaning must yield to a plain indication to the contrary in the context (per *Parke* B. in *Doe d. Winter* v. *Perratt* (2)). This is not such a case as that of *Van Grutten* v. *Foxwell* (3), in which there was a rule of law as to the effect of certain limitations (*Shelley's Case* (4)), where the rule of law operated whatever the intention. The question here is one of pure construction. Accepting, however, the words " my next of kin " in their full technical sense (if " technical " is the right word to use), as referring to the next or nearest of kin of the testator at his death, not the next of kin according to the *Statute of Distributions*, I think that the gift to " my next of kin " applies only to the contingency contemplated by the testator—the contingency of the son being dead, out of the way, out of the reckoning of rights, excluded by his death from taking the residue whether as legatee or as next of kin or otherwise, as if he had died before the testator. The application of the gift to this contingency

(1) (1891) A.C., 304, at p. 306.
(2) (1843) 6 Man. & G., 314, at p. 342.
(3) (1897) A.C., 658.
(4) (1581) 1 Rep., 93b.

or hypothesis depends on the context, not on any straining of the words "my next of kin" from their usual meaning.

This case is a good illustration of the importance of clearly apprehending the true relation of other decided cases to a particular will in its interpretation. In former times the Courts seem often to have treated the words of a will as if the will were a patchwork quilt of expressions having each a fixed colour under decided cases, and to have based their interpretation on the combination. But in modern times this practice has been greatly altered by the application of the plain principle that the meaning of the will has to be ascertained by careful consideration of the words as a whole, making the will its own interpreter. The words of Lord *Selborne* L.C. in *Waite* v. *Littlewood* (1) express the modern view: "There can be nothing more certain than that every will is to be construed by itself, not with reference to other wills; and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have by Judges of high authority been applied in cases more or less similar." Therefore the testator here was entitled to expect that his will would be construed on its own true meaning in the English language, however other wills may have been construed. The position of the Courts with regard to wills is now very similar to that established by the *Code Napoléon* (Civil Code, art. 1351) with regard to all kinds of decisions—"the authority of a decision applies only to the case which the Court is called on to decide." It is true that cases are cited in French practice; but the Court is asked to follow precedent, not because it is precedent, but because it is just.

The Chief Justice has already, during the argument, called attention to the very unsatisfactory form in which this order on originating summons—the formal order—has been drawn up, especially in that it leaves the declarations of right unintelligible without a study of the words of the summons. Such an order ought never to have been passed and entered. Moreover, an unusual course has been taken in declaring the interpretation of the will without the appointment of an administrator of the son's estate, or of some person to represent that estate, and without a service of the summons or

(1) (1872) L.R. 8 Ch., 70, at p. 73.

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order on the administrator or person. Probably, the provisions of Order XVI., r. 46, of the Victorian rules give power to the learned Judge to proceed in the absence of the son's representative; but the order does not show that this grave power was exercised; and if some one other than the widow were appointed administrator, it is not clear that he would be bound by this order. The public trustee is treated as representing the interests of collateral kindred, not yet ascertained, although his interest is, in a very possible contingency, adverse to theirs; and, personally, I should hesitate in making any declaration *in favour* of the son or widow, and *against* the collateral kindred, unless more precautions were taken to see that they had an opportunity to put their case.

Appeal dismissed. Costs of all parties to be paid out of the estate; those of the trustees as between solicitor and client.

Solicitors for the appellant, *Nevett & Nevett*, Ballarat, by *Madden, Butler, Elder & Graham.*

Solicitors for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *R. J. Gribble*, Ballarat, by *Anderson & Cornwall.*

B. L.