C. (1961) 1 W.L.R. 1252
NOT FOLL. 1971 ch. 179

[HIGH COURT OF AUSTRALIA.]

ALLEN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

CRANE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1953.

SYDNEY, *Aug.* 28;

MELBOURNE, *Oct.* 15.

Dixon C.J., Kitto and Taylor JJ.

Will—Construction—"Male issue"—Prima-facie legal import—Intention of testator—"Issue male"—"Issue".

A testator directed his trustees to hold the residue of his estate upon trust for his son during his life, and after his death to hold "the same . . . upon trust for his" (the son's) "male issue living to attain the age of twenty-one years and if more than one in equal shares". The testator provided for a gift over on default.

Held, that the words "male issue" meant males tracing their descent through males.

Decision of the Supreme Court of New South Wales (*McLelland* J.): *Crane* v. *Allen* (1952) 69 W.N. (N.S.W.) 381, reversed.

APPEAL from the Supreme Court of New South Wales.

Daniel Allen (hereinafter called "the testator") died on 25th January 1925, having made his last will on 10th April 1923, and a codicil thereto dated 16th February 1924. He had been married twice, there being six children of the first marriage and nine of the second. Eleven of the children were daughters, five of whom survived the testator's son, Patrick James Allen. Patrick James Allen died on 19th March 1952, having married once, and leaving surviving him his widow and one daughter, Valerie Patricia Allen. Valerie Patricia Allen married Hugh John Carrigan, and, at the time of the hearing, had one child, John Hugh Carrigan, born on 10th February 1950.

By his will, the testator, after making provisions not relevant to this report, directed his trustees "to hold all the rest and residue

of my estate upon trust for my son Patrick James Allen to permit him to have all the rents and profits therefrom during his life and after his death the same shall be held upon trust for his male issue living to attain the age of twenty-one years and if more than one in equal shares. In the event of his death without leaving male issue or male issue surviving him and living to attain the age of twenty-one years then the same shall be held upon trust to divide the same in equal shares between such of my daughters and the widow of my said son as may then be living in equal shares ".

The codicil to the will did not affect this disposition.

On 28th May 1952, after the death of Patrick James Allen, the trustees instituted a suit by originating summons in the equitable jurisdiction of the Supreme Court of New South Wales for the determination of the following questions :—Whether upon the true construction of the will and codicil of the (testator) and in the events which have happened—(1) The residuary estate of the (testator) is held upon trust for the defendant John Hugh Carrigan upon his attaining the age of twenty-one years. (2) The said residuary estate is held upon trust to divide the same equally between the abovenamed defendants other than the said John Hugh Carrigan. (3) In the event of neither of the above questions being answered in the affirmative upon what trust or trusts is the said residuary estate held.

The defendants in the suit were the five daughters of the testator who survived Patrick James Allen, the widow of Patrick James Allen and John Hugh Carrigan. The suit was heard by *McLelland* J., who was of opinion that the words " male issue " were not to be construed as being equivalent to the technical expression " issue male " or as having the meaning of " male descendants tracing descent entirely through males ", and that they meant merely " issue who are male ". His Honour, accordingly, declared that " upon the true construction of the will . . . and in the events which have happened the residuary estate of the said testator is held upon trust for the defendant John Hugh Carrigan upon his attaining the age of twenty one years " (1).

From this decision the first five named defendants appealed to the High Court. The trustees and the remaining two defendants were respondents to the appeal. The widow of Patrick James Allen was not represented.

W. J. V. Windeyer Q.C. (with him *J. D. Evans*), for the appellants. It was conceded at the hearing that in this will " issue " does not

(1) (1952) 69 W.N. (N.S.W.) 381.

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mean " children " ; we do not concede that here. " Male issue " means either children or males descended through males. The word " issue " connotes the idea of descent ; the compound expression " male issue " the idea of male descent. It is not merely a word of denotation qualified by an adjective. We submit that there is no distinction between the meaning of the two expressions, " male issue " and " issue male ". There is a distinction between " male issue " and " issue male " on the one hand, and " issue being male " or " issue who are males " on the other. We submit that the technical meaning was the one intended by the testator, and that that construction is reinforced by the context. The original inherent meaning of " issue " was different from that of " heir ". " Heir male " created an estate tail. A gift to A. and his issue created an estate tail, and to A. and his issue male created an estate tail male. " Male issue " and " issue male " are interchangeable, and, apart from the peculiar position in *Lightfoot* v. *Maybery* (1), there is no distinction between them. As to what was known of the meaning of the expressions in 1923, see *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 317. The words " issue male " are the most apt words to keep the property in the Allen family, through Partick James Allen. They are the same as " male issue ". As to " issue male ", see *Lywood* v. *Kimber* (2) ; *Bernal* v. *Bernal* (3) (" male descendants "). It would be strange if sons of daughters were to benefit, but not daughters themselves. The testator probably wanted the property to remain in the name of Allen. The context seems to reinforce the meaning we contend for. [He referred to *Lambert* v. *Peyton* (4) (" issue male ") ; and *Hampson* v. *Brandwood* (5) (" male issue ").] If " male issue", in *Hampson* v. *Brandwood* (5), had not been construed as sons, it would have been construed in the sense for which we contend. *Oddie* v. *Woodford* (6) (" eldest male lineal descendant ") has a very complicated setting. The introduction of the word " lineal " was not necessary to give the words the meaning which Lord *Cottenham* said they had (7). *Jarman* on *Wills*, 8th ed. (1951), vol. 3, p. 1551, makes a distinction between a gift to male descendants taking by purchase, and the case where they take by descent. In *Lord Rendlesham* v. *Robarts* (8), another *Thellusson* case, the court refused to deal with the matter. *Thellusson* v. *Lord Rendlesham* (9) concluded the litigation in

(1) (1914) A.C. 782.
(2) (1860) 29 Beav. 38, at p. 41 [54 E.R. 539, at p. 540].
(3) (1838) 3 My. & Cr. 559, at pp. 581, 582 [40 E.R. 1042, at p. 1049].
(4) (1860) 8 H.L.C. 1, at pp. 11, 12, 13 [11 E.R. 325, at pp. 329, 330].
(5) (1816) 1 Madd. 381 [56 E.R. 140].
(6) (1825) 3 My. & Cr. 584, at p. 598 [40 E.R. 1052, at p. 1057].
(7) (1825) 3 My. & Cr. at p. 628 [40 E.R., at p. 1068].
(8) (1856) 23 Beav. 321 [53 E.R. 126].
(9) (1859) 7 H.L.C. 429 [11 E.R. 172].

the matter. The last two cases are not helpful here. Some light may be thrown on the question by the effect of the words when used as words of limitation. A devise to issue created an estate tail. *Clinton* v. *Duke of Newcastle* (1) and in the House of Lords (2), is not decisive, but is of some significance. There was never any care exercised about the use in those circumstances of " issue male " or " male issue ". They were completely interchangeable, as, e.g., in *Sheridan* v. *O'Reilly* (3) (" eldest male issue "); *Lovelace* v. *Lovelace* (4). *Re Finlay's Estate* (5) (" eldest male issue "), where the words were regarded as having the same meaning as " issue male ". [He also referred to *Whitelock* v. *Heddon* (6) (" male issue ").] *McLelland* J. founded his view on *Lightfoot* v. *Maybery* (7) . There, the House of Lords was dealing with the doctrine known as " the very heir ". We refer to an article, " Shelley's Case and the Very Heir " (8) by R. E. Megarry, in which *In re Routledge*; *Marshall* v. *Elliott* (9) is discussed. It has no relevance to this case; neither has *Lightfoot* v. *Maybery* (7). Some distinction is drawn between " male heir " and " heir male ". That is not the question here, and in any case is only dicta. This question is remote from the doctrine of " very heir " : see *Lightfoot* v. *Maybery* (10). There is no finding that the positions of the adjective and the noun have any significance. The remarks on the order of words are dicta only, and they are out of harmony with other cases. " My nearest male heir " has no strict technical meaning, and the decision of the Court did not proceed on that distinction. The House of Lords was looking for an individual—" heir " is a single person. Courts were astute to displace *Coke's* technical rule; the effect of displacing it was to import the idea we wish to import; the effect of applying the rule was the opposite. *Lightfoot* v. *Maybery* (7) does not stand with other decisions of the House of Lords. They have never regarded *Coke's* rule as depending on the order of words: see *Doe d. Winter* v. *Perratt* (11) referred to in *Jarman* on *Wills*, 8th ed., (1951), vol. 3, p. 1553. The variety of judicial opinion in the case makes it of little significance, but the passage (12) is important. *Coke's* rule is stated by *Bosanquet* J. (13). The words " male issue " are words expressing an idea of descent; they are not merely an

(1) (1902) 1 Ch. 34.
(2) (1903) A.C. 111.
(3) (1900) 1 I.R. (Ch.) 386.
(4) (1584) Cro. Eliz. 40 [78 E.R. 304].
(5) (1913) 1 I.R. (Ch.) 143, at p. 152.
(6) (1798) 1 Bos. & Pull. 243 [126 E.R. 883].
(7) (1914) A.C. 782.
(8) (1914) 59 L.Q.R. 272.
(9) (1942) Ch. 457, at p. 465.
(10) (1914) A.C., at pp. 788, 790, 795, 800, 801.
(11) (1833) 10 Bing. 198 [131 E.R. 879].
(12) (1833) 10 Bing., at p. 204 [131 E.R., at p. 881].
(13) (1833) 10 Bing., at p. 215 [131 E.R., at p. 886].

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adjective qualifying a noun descriptive of a class of persons. "Issue" contains the idea of descent. "Male issue" means male persons of male descent. "Issue", in its primary meaning, may have a meaning not originally given to it: see *In re Cust*; *Glasgow* v. *Campbell* (1) referred to in *Matthews* v. *Williams* (2). There is a distinction between "issue" and "heirs of the body"; the basic idea in "issue" is descent. *McLelland* J. approached the case on the basis that he was dealing with a technical form of words which, if construed technically, would frustrate the testator's intention. The phrases "issue" and "male issue" are known to lawyers—they do not constitute a non-natural use of words. They are not technical as distinct from normal; the "technical" meaning is the normal meaning. *McLelland* J. was striving to get away from this meaning for some reason. He said that the phrase was not known in New South Wales in 1923. We submit that, if so, that makes no difference. No case has been found in which the phrase has been construed in the manner in which *McLelland* J. construed it. As to the context displacing the technical meaning, see *Matthews* v. *Williams* (2). See also *Campbell* v. *Glasgow* (3). The primary meaning of "issue" is descendants: *Roddy* v. *Fitzgerald* (4). See generally *Norton* on *Deeds*, 2nd ed., (1928), p. 683; *Theobald* on *Wills*, 10th ed. (1947), p. 252; *Hawkins* on *Wills*, 3rd ed. (1925), p. 207; *Jarman* on *Wills*, 8th ed. (1951), vol. 3, pp. 1548-1552. There is nothing in the will to displace the meaning for which we contend. If "male issue" does not bear this meaning, then "issue" in this will should be construed as "children". The only additional matter is the difficulty of applying the substitutional provisions, but he has used "children" elsewhere in the will. We do not put this strongly, but do not concede that "issue" in this will must mean descendants. The testator had in mind that if a daughter married, she was no longer an Allen. The women mentioned are either his daughters or his son's wife. He was not providing for persons born in other families.

M. F. Loxton Q.C. (with him *R. J. Ellicott*), for the respondent trustees. The appellants relied largely upon the interpretation of "male issue" in its technical sense. Our submissions rest solely on the will. "Male issue" is introduced as a description of a class. It is a compound expression, and cannot be taken separately. "Issue" should be given its prima-facie meaning, viz., issue of all

(1) (1919) V.L.R. 221, at p. 255.
(2) (1941) 65 C.L.R. 639, at p. 651.
(3) (1919) 27 C.L.R. 31, at pp. 48-50.
(4) (1858) 6 H.L.C. 823 [10 E.R. 1518].

generations. "Male" must be given an interpretation proper as a qualification of a collective. A mob of wild cattle is not necessarily a wild mob of cattle. *McLelland* J. destroyed the collectiveness of the word "issue". He then applied the descriptive word "male", and applied it not to the compound, but to the components of "issue". "Descendant" describes the individual. "Issue" does not: it describes a class possessing a common characteristic. "Issue" conveys descent. We adopt the appellants' submission that "issue" is a word the main import of which is to connote descent. *McLelland* J., in applying "male" to "descendant", failed to give effect to the word "issue" as a collective, referring to descent. He applied "male" to each descendant, instead of applying it to the collective. Issue as a class comprises issue in the female and in the male lines. There can be two classes—one in the male line, and the other in the female line. The testator's "male issue" refers to the issue in the male line, and is the appropriate expression. "Issue male" may be words of art, but have no special meaning, having retained their ordinary meaning.

E. S. Miller Q.C. (with him *H. A. Henry*), for the respondent, J. H. Carrigan. Where the testator has desired to restrict the class of persons to children rather than issue, he has had no difficulty in doing so. He finds the appropriate words. In contrast, in speaking of Patrick James Allen, he says "his male issue". No case has been cited to show that "male issue" is a phrase of any technical meaning, or that it is a "compound phrase". "Issue" is well understood, "male" well known as a descriptive word. There is no case which says that "male issue" is the same as "issue male". There is no context in the will to show that the words are used in any other than their ordinary meaning. [He referred to *Davenport* v. *Hanbury* (1).] The word "issue" embraces all descendants, unless there is some other context. If the word "male" is omitted from the phrase in question, it could not be argued that the proper construction was not the descendants of Patrick James Allen. Does the insertion of the word "male" operate to deprive my client of the interest? There are various references in the will to "children", "grandchildren", "daughter", &c. "Son" is used frequently. It is straining language to say that he referred to Patrick James Allen's sons as "male issue". It is a simple case of the use of language which, on its ordinary meaning, permits of no doubts in interpretation. There is no authority laying it down that the expression has a technical meaning.

(1) (1796) 3 Ves. Jun. 257 [30 E.R. 999].

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There is no context in the will indicating an intention of the testator, in using "male issue", to refer to a different class from that ordinarily understood to be within that description. If the testator had wanted to refer to descendants in the male line, he would have found the appropriate words. [He referred to *Bernal* v. *Bernal* (1).] In *Oddie* v. *Woodford* (2) the use of the word "lineal" caused the Court to come to the particular conclusion. There is nothing on the face of the will to show that the testator intended to benefit persons carrying his name. That is pure speculation. The result of the interpretation sought by the appellants would be that the property would pass to unmarried women. There is no ground for severance in the persons entitled as soon as there is a break in the male lineage. My client answers the description fully.

W. J. V. Windeyer Q.C., in reply.

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered :—

DIXON C.J. The question for determination upon this appeal concerns the meaning and application of the expression "male issue" used by a testator in the description of the objects of a trust of his residuary real and personal property. Is it simply a periphrasis for sons ? If not and the expression includes remoter male issue, may the descent be traced through females or must it be traced through males ?

The testator is the late Daniel Allen, a grazier who died in 1925, being possessed of 4,000 acres of land in the neighbourhood of Moree. He had married twice and by his first wife he had six children and by his second nine children. Of these fifteen children eleven were daughters. One only of his four sons is affected by the disposition to be construed, namely Patrick James Allen, who died on 19th March 1952. He was survived by his widow and by an only child, a daughter who had married and has one child. Her child is a son born on 10th February 1950, two years before the death of his grandfather Patrick James Allen. He is the respondent John Hugh Carrigan. The question is whether this child is the "male issue" of his grandfather, Patrick James, within the meaning of that expression in the trust contained in the will. The trust is one taking effect upon the death of the testator's widow, an event which in fact occurred in 1936. Until the widow's death the will and codicil empowered the trustees to carry on the testator's

(1) (1838) 3 My. & Cr. 559 [40 E.R. 1042].

(2) (1825) 3 My. & Cr. 584 [40 E.R. 1052].

business of grazier and, out of the income, made provisions for five named daughters, his son Patrick James and two granddaughters, all of whom the will names. On the death of the testator's widow the will directs the trustees to raise legacies for each of the five named daughters and for a sixth daughter and for the two granddaughters. After the bequests comes the provision containing the trust in favour of " male issue ". It is expressed as follows :—" I further direct my said Trustees to hold all the rest and residue of my estate upon trust for my son Patrick James Allen to permit him to have all the rents and profits therefrom during his life and after his death the same shall be held upon trust for his male issue living to attain the age of twenty-one years and if more than one in equal shares. In the event of his death without leaving male issue or male issue surviving him and living to attain the age of twenty-one years then the same shall be held upon trust to divide the same in equal shares between such of my said daughters and the widow of my said son as may then be living in equal shares."

It will be seen that the crucial words, " male issue ", do not stand alone. They are qualified, not only by the requirement that the issue must live to attain twenty-one years, but by the direction that, if more than one, they are to take in equal shares. " The Word *Issue, ex vi termini*, is *nomen collectivum*, and takes in all Issues to the utmost Extent of the Family, as the Word *Heirs of the Body* would do " : *Rainsford* J., *Warman* v. *Seaman* (1). The prima-facie consequence is that in devises of realty " issue " forms a word of limitation having the same operation as heirs of the body. But as Lord *Abinger* C.B. remarked in *Lees* v. *Mosley* (2) a reason why the words " heirs " and " heirs of the body " are words of limitation is because heirs are not coexistent and that does not necessarily apply to the word " issue " which may mean existing issue or all the descendants. Obviously the prima-facie meaning and effect is not compatible with the words of distribution or with the condition that full age must be attained.

But it is further to be remarked that the conditions qualifying the limitation do not stop with the words " living to attain the age of twenty-one years and if more than one in equal shares ". If the limitation stopped there it might be read in a sense infringing upon the rule against perpetuities. For the words are capable of a meaning which would include " male issue " coming into existence at any time. But the limitation over that follows shows that the words are not to be so understood. There is a redundancy of

(1) (1677) Finch 279, at p. 282 [23 E.R. 153, at p. 155].

(2) (1836) 1 Y. & C. Ex. 589, at p. 599 [160 E.R. 241, at p. 245].

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expression in the limitation over but it clearly means that there is a gift over to such of the "said daughters" and Patrick James' widow who shall be then living if at the death of Patrick James there is not male issue him surviving who has attained or thereafter attains twenty-one years. The gift over expresses an intention that reflects back upon the primary limitation which must be read as a trust in favour of the male issue of Patrick James in being at his death who have attained or shall attain twenty-one years. The issue takes or take by purchase as a person or persons filling a description. The question is what does the description connote. First does it mean any more than male child of Patrick James? If the context supplied any additional consideration pointing to such a restrictive meaning of "male issue" it might perhaps be adopted. For it is not unlikely that the testator's mind did not in fact go beyond his own male grandchildren by Patrick James. But there is no such context and the natural meaning of issue includes remoter descendants.

Doubtless the testator was primarily concerned with the existence at a point of time, namely at the death of Patrick James, of a person falling within the designation he adopted and he must be understood as including remoter male descendants of his son Patrick James then existing provided they attained twenty-one, notwithstanding that it might mean that descendants of very different degrees take together and in equal shares. Once the limitation is understood as including remoter male issue, it necessarily opens the question whether male descendants of Patrick James fill the description if they trace their descent from him through females.

This question cannot be treated as one depending simply on the result of an attempt to discover the intention of the testator independently of any presumption as to the meaning of the words "male issue". If it were so treated, the result would, I think, largely depend on conjecture. But the more probable conjecture seems to me to be that the testator desired someone standing in the male line of succession to inherit his property. Why should he prefer a grand-daughter's unborn son to his own daughters or their sons? On the other hand, a desire that if there were grandsons or greatgrandsons bearing his own name they should have his property is intelligible enough even if there be few now who would regard such a preference on the part of a testator as having much justice or justification. Moreover, although it is not easy to say how the expression "male issue" would be interpreted outside the law, I think that most men would take it to refer to a male line of descent and would not disintegrate the expression and say

simply that one word required no more than that the person denoted should be a descendant and the other word no more than that he should be a male, so that it did not matter whether he traced his descent by the female line or the male line so long as he himself was a male. However this may be, the interpretation of the provision must be approached by inquiring first whether, when used as words of purchase the phrase " male issue " has a prima-facie legal import so that you begin with a presumption as to its meaning and application, be it weak or be it strong. I think that in common with analogous expressions like " male descendants ", " issue male ", " heirs male ", and " male heirs ", the words " male issue " are to be understood, unless the contrary appears from the context or circumstances, as referring to descendants in the male line.

This prima-facie meaning has not been fixed by any decided case upon the exact expression " male issue " with the adjective preceding the noun, though the same two words in the reverse order, with the noun preceding the adjective, " issue male ", have been so construed judicially. The law of inheritance was that only those claiming exclusively by male descent could take under a limitation to their ancestor and the heirs male of his body. *Thomas Jarman*, however, lent the support of his great authority to a distinction between descent by inheritance under a limitation to the heirs male of the body and the case of the heirs male of a named person taking by purchase. According to this distinction a devise to them as purchasers operated in favour of an heir general of the body of the ancestor who was a male but who traced his descent through a female. Thus a devise to the heirs male of the body of B. might vest in B.'s daughter's son. But it appeared to follow that if B. died survived by issue consisting of his deceased first son's daughter and his deceased second son's son, neither would take because in neither was to be found the double qualification of being at once the heir general of the body and of being male. It is needless to examine the origin of this construction of a limitation to the heirs special of the body as purchasers. It is enough to say that it gradually came to be regarded as a heresy and not to represent the law.

But it is obvious that if it were true of such words as heirs male of the body, it must be even more true of untechnical or at least less technical expressions like " descendants " and " issue " when qualified by the word " male ". Indeed, the mere fact that such an opinion was current at all even though it were treated as an error was calculated to weaken the view that male descendants

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and issue male connoted descent through males. Nevertheless it came to be the accepted view that prima facie such expressions did require that the claimant should trace his descent by a male line. " In speaking of a man and his male descendants, as a class, no one would conceive the son of a female descendant as included; and such is the construction which our law has put upon the words; as 'issue male', which is, in fact, the same thing as male descendants "—per Lord *Cottenham* in *Bernal* v. *Bernal* (1).

" Issue male " possessed the same meaning. " I am satisfied . . . that these words must be construed in their strict technical sense, which means issue male claiming through males. I should be unsettling the settled rules of the Court, if I gave any other meaning to these words, unless I found on the face of the will something to shew that he intended to use them in another sense "—per Sir *John Romilly* in *Lywood* v. *Kimber* (2). In *Thellusson* v. *Lord Rendlesham* (3), Lord *St. Leonards* examined the separate words making up the phrase " eldest male lineal descendant ". When he came to the second word he said: " Then as to the word 'male', the meaning of that was thought for a long while to be very doubtful, but it has been held to mean males claiming through males " (4).

The reason why the expressions " issue male ", " male descendants ", " male heirs " or what is the same thing " male heirs of the body ", bear a prima-facie meaning which connotes persons claiming through the male line does not appear to be artificial. No doubt the technical rules of inheritance applicable to an estate in tail male may well be responsible for common conceptions and opinions and be reflected in the use of terms. But that is something different from the direct incorporation by the courts of a rule of descent into the meaning of such terms as " issue male " and " male descendants ". The fact is that the legal use of such terms was not the result of combining two independent qualifications or conditions having no connection in thought, namely, that of membership of the male sex with that of being a descendant of the named ancestor. It is rather the use of a compound expression to describe a compound idea, namely " male descent ". There is no reason to regard male issue as involving any different conception from male descendant or issue male. To treat that expression as possessing any other prima-facie meaning would be to introduce an unreal distinction and disregard the reasoning by which the meaning of kindred expressions has been governed.

(1) (1838) 3 My. & Cr. 559, at p. 582 [40 E.R. 1042, at p. 1049].
(2) (1860) 29 Beav. 38, at p. 41 [54 E.R. 539, at p. 540].
(3) (1859) 7 H.L.C. 429, at p. 512 [11 E.R. 172, at pp. 204-205].
(4) (1859) 7 H.L.C., at p. 512 [11 E.R., at p. 205].

There can be no doubt that the prima-facie meaning restricting such expressions to descent by the male line may readily yield to a context. If there had been any indication in the will of an intention to extend the application of the words used to male descendants claiming through females the case might present a different aspect. But there is no such indication. Circumstances may be supposed to which a testator meant his will to apply that might suffice to control the meaning placed on expressions like " male issue ". But here there is nothing proved as to the state of his family or as to other circumstances which would affect the question.

McLelland J. decided that John Hugh Carrigan filled the description " male issue " and took under the gift. His Honour said: " I do not see any reason why a testator making his will in New South Wales in 1923 should be supposed, when using the words ' male issue ', to have meant ' issue male ' and therefore a term of art having a strict technical meaning. In my opinion, the words ' male issue ' in this will were meant to describe a class which comprised issue who were male " (1).

For the reasons I have given I think that a prima-facie legal meaning attaches to such expressions as issue male, male issue, and male descendants because they are compound expressions apt to describe descendants by a male line. This meaning appears to me to be consistent with common understanding and, moreover, somewhat more probably, to represent the intention of the testator.

Notwithstanding Lord *Romilly's* use of the words " technical sense " with reference to " issue male ", I would not describe the meaning of " male descendants " and similar expressions as a strict technical meaning nor the expressions as terms of art. But I think it is a meaning established as presumptively that which such expressions bear where context or subject matter do not indicate the contrary.

I do not think that anything that was said in *Lightfoot* v. *Maybery* (2) is inconsistent with the view that I have adopted. Certainly there are to be found in the opinions of their Lordships warnings against a misuse of the doctrine that technical terms should receive a technical meaning, against a use of the doctrine at the expense of the true intention of the testator. But otherwise it does not appear to me that the decision is in point. The testamentary provision there to be construed described the objects of the relevant trust in varying terms, as " my nearest male heir ", " the eldest of my male kindred ", " my said eldest relative ", and " my nearest and eldest male relative ". Moreover, the words " my nearest male

(1) (1952) 69 W.N. (N.S.W.) 381, at p. 384. (2) (1914) A.C. 782.

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heir " were accompanied by a reference to the possibility of there being two or more in equal degrees of consanguinity with the testator. The decision of the House of Lords was that the expression " nearest male heir " meant the testator's nearest male relative ascertained at the death of the tenant for life and that at that date the nearest male relative of the testator was the grandson of his female first cousin. In the courts below it had been held that, on the true construction of the provision it denoted the testator's heir being a male and that, as no person answered that description, the gift failed. In rejecting this view the House discussed the rule or supposed rule attributed to Lord *Coke* that the words " heir male " and " male heir " or " heir female " and " female heir ", mean the very heir if a male or if a female, as the case may be. But that is hardly relevant to the present question. Indeed it may be said that in denying that " male heir " was to be construed by taking the two separate words and treating them as stating two separate qualities, heirship and membership of the masculine sex, the decision pursued a course of reasoning not unlike that I have adopted in refusing to disintegrate the expression " male issue ".

In my opinion the appeal should be allowed and the decretal order varied by discharging so much thereof as declares that upon the true construction of the will of the testator Daniel Allen deceased and in the events which have happened the residuary estate of the testator is held upon trust for the defendant John Hugh Carrigan upon his attaining twenty-one years and in lieu thereof declaring that upon the true construction of the will and in the events that have happened the residuary estate of the testator is held upon trust to divide the same between the defendants other than John Hugh Carrigan.

KITTO J. This appeal turns upon the true interpretation to be placed upon the expression " male issue " as used in a will as the designation of a class of persons taking as purchasers, and in a context which shows that " issue " is intended not to be confined to children but to include descendants of every degree who are found *in esse* at the death of their common ancestor.

It is, I think, an error to commence by assuming that there is no ambiguity in the expression when considered apart from context. " Issue ", like its synonym " descendants ", is the collective title of a class of persons whose common attribute is descent from a *praepositus*; and the use of the adjective " male " may produce either of two limitations of the class. It may confine it either to male persons descended from the *praepositus*, or to persons whose

descent from him is male descent. A choice between these alternatives cannot legitimately be made by asserting that the former adheres to the literal meaning of the component words, and therefore must be accepted in the absence of a controlling context. The truth is that each interpretation allows some measure of literal force to the two words separately considered. The second interpretation, however, gives effect to a very definite shade of meaning in the word " issue " or " descendants ", which its rival ignores. The import of these words is not a collection of persons each of whom is conceived of as separately included by reason of his or her individual relationship to the *praepositus*. The words suggest the idea of a genealogical tree, the essential notion being that of relatives arranged in lines of descent, the qualification of each for membership of the class depending upon his inclusion in a branch which is pictured as stemming from the common ancestor. It is his place in a line proceeding from the ancestor that entitles any individual to be accounted one of the issue ; it is his inclusion in a descending line that attracts the title of a descendant.

Due weight is given to this conception if the word " male ", when used to qualify " issue " or " descendants ", is understood as intended to exclude, not only all individuals who are females, but all female lines of descent. This, I think, accords with usage. In Spenser's lines : " Next him, King Leyr, in happie peace long raynd, But had no issue male him to succeed, But three faire daughters . . . " (*Faerie Queene*, bk. ii. c. 10), no one would understand the poet to be referring to the fact that the daughters had no sons. Accordingly a prima-facie presumption must, I think, be acknowledged, when construing the expression " male issue " in a particular context, that the intention shown by the adjective is to refer to males descended through males. The judgments of the courts to which we have been referred by counsel show that judges have found the expression more apt, and therefore more likely to be intended, to convey the meaning of descendants in the male line than all descendants who are themselves male. I do not understand these judgments to mean that the expression is one to which the law has attached a special presumptive meaning of its own. They appear to me rather to accept a uniform view upon a question of English usage, and to insist upon finding a justification in the particular context before abandoning the meaning suggested by experience as generally the more probable. These judgments, it is true, were delivered a century and more ago, and they reflect the understanding of their time ; but there is no reason to suppose that in the interval there has been any change in the significance of the expression.

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The particular context of the will now before us provides no dictionary of its own. There is nothing in it that I can see which tends in the least against acceptance of the meaning which I think is the more natural. On the contrary, the probability that that meaning accords with the actual intention appears to me to have special strength in relation to a lawyer-drawn instrument concerned with the regulation of succession to property.

In my opinion it should be held that the " male issue " to which the will now in question refers include such only of the descendants of the testator's son Patrick James in existence at his death as trace descent from him in the male line.

I therefore agree that the appeal should be allowed.

TAYLOR J. I agree entirely with the reasons which have been prepared in this matter by the Chief Justice and I have nothing to add.

Appeal allowed. Vary the decretal order of the Supreme Court by discharging so much thereof as declares that upon the true construction of the will of the testator Daniel Allen deceased and in the events which have happened the residuary estate of the said testator is held upon trust for the defendant John Hugh Carrigan upon his attaining the age of twenty-one years and by declaring in lieu thereof that upon the true construction of the said will and in the events which have happened the residuary estate of the said testator is held upon trust to divide the same between the defendants other than John Hugh Carrigan.

Costs of all parties to the appeal to be taxed as between solicitor and client and retained or paid out of the estate, the costs of the infant defendant being paid to his guardian ad litem or his solicitor.

Solicitors : *R. R. Bruce*, Narrabri, by *Sly & Russell.*

G. D. N.