Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Edyvean and others v. *Archer and others* (*In re Harriet Brooke, deceased*), *from the Supreme Court of the State of Tasmania; delivered the* 18*th June* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

The question in this case depends upon the true meaning and effect of one clause—a clause in the shape of a gift over—occurring in a testamentary appointment contained in a codicil to the will of the late Harriett Brooke, wife of the Rev. Warren Auber Brooke.

Mrs. Brooke died on the 31st of May 1886. There was no issue of her marriage with Mr. Brooke. By a former marriage with a Mr. Landale she had seven children, who survived her. There were three sons, Clarence, Richard, and William Dry, who all attained 21 and died without having been married. There were besides four daughters, each of whom was married in Mrs. Brooke's lifetime and had issue. One of the four, Maria Rebecca Adams, now a widow, had two children, Jessie Harriett, the wife of William Henry Edyvean, and John Garibaldi Marriott Adams.

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The Appellants are Mrs. Edyvean, her brother, Mr. J. G. M. Adams, the trustees of Mrs. Edyvean's marriage settlement, of whom Mr. J. G. M. Adams is one, and an incumbrancer on his share. The Respondents are the trustees of Mrs. Brooke's will, and the children of the other three daughters of the testatrix all now deceased. The controversy between the parties is as to the right of the two children of Mrs. Adams to participate in the distribution of certain moneys appointed by the testatrix to or in favour of her three sons, in which in the events that happened they took only a life interest.

Two settlements were executed on Mrs. Brooke's second marriage, both dated the 13th of February 1857. One is referred to as the "Boiton Hill settlement," the other as the "general settlement." Under the former Mrs. Brooke had a general power of appointment; under the latter she had a power of appointment in favour of her children and remoter issue.

By a codicil dated the 7th of September 1882 Mrs. Brooke revoked certain directions contained in her will as to the disposal of the moneys to arise from the sale of Boiton Hill except as to the life estate thereby given to her husband, Mr. Brooke. In lieu thereof Mrs. Brooke appointed that the trustees of her will should after Mr. Brooke's death stand possessed of the moneys to arise from the sale of Boiton Hill and the investments thereof upon trusts declared as follows:—"Upon trust for such "of my children living at my decease (other than "and except my daughter Maria Rebecca Adams) "and for my grandchildren Jessie Harriett Adams "and John Garibaldi Marriott Adams in place of "and in substitution for their mother the said "Maria Rebecca Adams and such of the issue "then living of any child or children of mine "dying in my lifetime as either before or after my

" decease being males attain the age of 21 years
" or being females attain that age or be married
" as tenants in common in a course of distribution
" according to the stocks the said J. H. Adams
" and J. G. M. Adams taking one share only
" between them and the issue of deceased children
" of mine taking by substitution the shares only
" which their respective parents would if living at
" my decease have taken." The testatrix then directed that the net moneys to arise from the sale of the lands comprised in the " general settlement" and then remaining undisposed of should be held upon trusts declared as follows :—" Upon trust for
" such of my children grandchildren and issue
" living at my decease in whose favour I have
" hereinbefore directed and appointed the moneys
" to arise from the sale of my estate of Bolton Hill
" and in the same parts shares and proportions but
" subject as to the share of each child of mine
" to the directions and declarations hereinafter
" contained concerning the same and I direct
" and declare that the share to which each child
" of mine shall become entitled in the moneys
" to arise as aforesaid shall be retained and held
" by the said trustees or trustee upon trust to
" invest the same . . . . and upon further
" trust to pay the annual income of the same
" share or the securities whereon the same shall
" be invested (which share and securities are
" hereinafter referred to under the denomination
" of 'the said settled fund') . . . . into the
" proper hands of my child entitled thereto
" during his or her life . . . . as a strictly
" personal provision . . . . and immediately
" after the decease of my same child as to as
" well the capital of the said settled fund as
" the annual income thenceforth to accrue due for
" the same" upon certain trusts for the benefit of the child and children of the same child. The testatrix then proceeded to declare her will

as follows " but if there shall not be any child of " my same child who being a son shall attain the " age of 21 years or being a daughter shall attain " that age or be married then in trust for the other " of my children and their issue to whom or in " whose favour I have hereinbefore appointed the " moneys to arise as aforesaid and as to the " shares of such my children respectively upon " the same or the like trusts as are hereinbefore " declared concerning the original shares of such " children respectively."

The whole question turns upon this last clause. The Appellants point out that the moneys set free by the death of a child under circumstances that bring into operation the gift over are (in the words of the testatrix) " to be " held in trust for the other of " her " children " and their issue "—that is for her other children and the issue of her other children—but subject to this condition or qualification that those only share in the ultimate distribution who take by appointment under the original gift. The testatrix collects her other children and the issue of her other children into one gathering, and out of the number she chooses those who are beneficiaries under the original gift. Inheritance or succession under the original gift was obviously the leading idea in her mind and the one qualification for participation in the substituted gift.

The case of the Appellants is simplicity itself. They say that the two children of Mrs. Adams are issue of one of the testatrix's children other than the child whose line has failed. That is a proposition that cannot be disputed if the word "issue" is to have its ordinary grammatical signification, or indeed any recognised meaning of which the word is capable. They also say that they are among the number of those who take by appointment under the original gift. That

again is a proposition which cannot be disputed. So the two children of Mrs. Adams come within the very words of the gift over if those words are to be understood in their plain ordinary meaning. Why then are they to be excluded?

There are three grounds upon which it has been contended that their claim must be rejected. In the first place it is said that although they may be issue of one of the testatrix's other children in the ordinary sense of the word, yet they are not included in the term "issue" in the gift over, because they were not comprehended in the term "issue" in the original gift. That was the view of the Full Court citing and relying upon what was said by Lord St. Leonards in *Ridgeway* v. *Munkittrick*, 1 Dr. and War. 84: "It is a well settled rule of "construction," said his Lordship, "never to "put a different construction on the same word "where it occurs twice or oftener in the same "instrument, unless there appear a clear "intention to the contrary." That dictum, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention? That which is clear to one man is not always clear to another. 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 Y. and C. 231, at p. 235, "from its legal and proper import, I must "be satisfied that the contents of the will demon-"strate 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*, 15 Ves. jun. 396, at p. 406, 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 it seems to their Lordships that when this codicil is carefully considered, there is nothing to show that the testatrix intended to use the word "issue" in the clause now under consideration in any other but its proper sense. The language of the gift over is not a mere repetition of the language used in the original gift, or an abridged reference to it. There is a marked difference in expression. On the other hand, the language of the original gift of the proceeds of the property comprised in the "general settlement" is obviously a compendious repetition of the language used in the original gift of the proceeds of Boiton Hill. It is just as if the testatrix had put in the word "aforesaid" before the words "children, grandchildren, and issue" in the original gift of the proceeds of the property comprised in the "general settlement." If you insert that word, which is clearly implied, it becomes quite plain that the word "issue" is not used in any restricted sense. It is applied, and by force of the context confined, to the issue of children of the testatrix dying in her lifetime. That is the reason, and the only reason, why neither children of the testatrix nor the two children of Mrs. Adams are comprehended in the word "issue" in the original gift of the proceeds of the property comprised in the "general settlement."

There is another ground upon which the Full Court relied in rejecting the claims of Mrs. Adams' children. It is stated in the following passage of the judgment under review:—"There " is another point, however, to be considered, " which appears to dispose of the whole question. " If the words 'the other of my children' do " not include Mrs. Adams, it is clear that her

" two children are not comprised in the term " 'issue,' whatever meaning it may carry; that " the words referred to cannot include Mrs. " Adams seems clear, for the simple reason that " the original gift is to her two children to her " exclusion. In the appointment of original " shares under the general settlement the words " are: 'for such of my children, grandchildren, " 'and issue living at my decease in whose " 'favour I have hereinbefore directed and " 'appointed the moneys to arise from the sale of " 'my estate of Boiton Hill.' Under the terms " of this appointment Mrs. Adams could not " successfully claim a share in the original " moneys appointed as aforesaid. The same " construction must follow as to the gift over." Their Lordships are unable to follow the reasoning in this passage. In the gift over the children of Mrs. Adams take under the word "issue" and wholly independently of their mother. The view of the Full Court, if it were correct, would not only exclude Mrs. Adams' children, but also the children of any other of the testatrix's children who might happen to die in her lifetime leaving children. It cannot be supposed that the testatrix intended such a result as that.

The third ground for excluding Mrs. Adams' children was suggested by Mr. Warmington in his able argument for the Respondents. He said that the children of Mrs. Adams were in some respects placed in a better position than the other beneficiaries. Their share would not go over to an uncle, aunt, or cousin in any case. It was therefore only reasonable that they should not participate in the gift over of the shares of the other beneficiaries. There was, in fact, a sort of settlement within a settlement, and there were, so to speak, cross-limitations between those interested in the settlement fund provided for the

beneficiaries other than the children of Mrs. Adams. Possibly that might have been a reasonable disposition if the testatrix had so willed it. But the testatrix has done nothing of the kind. When she speaks of the "said settlement fund," she is not referring to a settlement fund in which all the beneficiaries other than Mrs. Adams' children are interested. By the "said settlement fund" the testatrix describes the individual share of each of her children other than Mrs. Adams who might happen to survive her.

It only remains to add that there is no reason to be discovered why Mrs. Adams' two children should be placed in a worse position than the children of any child of the testatrix who might happen to die in her lifetime. The testatrix seems to have had singular confidence in Mr. J. G. M. Adams. Young as he was, she puts him in the position of guardian to his own mother. She had evidently a great affection for Mrs. Edyvean, as is shown by the gift of jewellery to her.

For these reasons their Lordships think that the Judgment of the Full Court ought to be reversed except as to costs, and that, in answer to the question submitted to the Court a declaration should be made to the effect that the Appellants, Mrs. Edyvean and Mr. J. G. M. Adams, became entitled in equal shares under the gift over to one-fourth of the three undivided seventh shares of the moneys to which the said Clarence Landale, Richard Landale and William Dry Landale were respectively entitled for life.

Their Lordships will therefore humbly advise His Majesty accordingly.

In regard to costs their Lordships cannot but express their regret that costs appear to have been unduly increased. There was nothing to justify severance in the case of the Respondents beneficially interested. These Respon-

dents will be allowed only one set of costs, in which any Respondent who unnecessarily appeared separately will not participate. This matter is left to the Registrar to decide subject to a reference to their Lordships without appearance by the parties. The parties having consented, the trustees will be allowed their costs. The Registrar will consider whether it was necessary that the agreed statement of facts should be repeated at length four times over, in the Case of the Appellants and the Case of the trustees as well as in the Cases of both the other sets of Respondents. Subject to these observations the costs will be taxed as between solicitor and client and be paid out of the general estate.