Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gibbons v. *Gibbons the younger from the Supreme Court of New South Wales, delivered* 14*th May* 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal in a suit brought in the Supreme Court of New South Wales by Richard Hutchinson Roberts against the Appellant and five other persons, praying that it might be declared that the Plaintiff and the Defendants were respectively entitled to certain hereditaments and premises called "Golden Grove Farm" in the parts or shares in the pleadings mentioned, and that the same might be sold or partitioned, and for consequent relief. On the hearing on the 25th of June 1879, a decree was made directing a reference to the Master of the Supreme Court to inquire and report who were the parties interested in the said hereditaments and premises, and for what estates and interests, and in what shares and proportions, and whether they were parties to the suit, and that the Respondent, the eldest son of William Kenny Gibbons, should be served with notice of the decree.

On the 16th of October 1879, the Master reported that if under the will of William Hutchinson the testator in the pleadings mentioned, William Kenny Gibbons, took a freehold estate in

tail male in the said hereditaments and premises, the Respondent William Matthew Hutchinson Gibbons the younger, was not interested, and had no estate therein, and was not a necessary party to the suit, and the Plaintiff and the Defendants were the only necessary and proper parties thereto; but if, under the will, William Kenny Gibbons took only a life estate, then the freehold estate in remainder in one fourth of the hereditaments and premises claimed by the Appellant was vested in the Respondent, who would be a necessary party to the suit. On the hearing upon further consideration before the Primary Judge in Equity of the Supreme Court on the 5th of December 1879, a decree was made, declaring that under the will William Kenny Gibbons took only a life interest, and that the freehold estate in remainder in one fourth of the hereditaments and premises was vested in the Respondent, and that he was a necessary party to the suit, and the pleadings were directed to be amended by making him a party as Defendant. This was done, and, on the 22nd of June 1880, the cause came on to be heard on the appeal of William Matthew Hutchinson Gibbons, the present Appellant, before three Judges of the Supreme Court, when two of them, one being the Primary Judge, delivered judgment in favour of the Respondent, and affirmed the decree and dismissed the appeal. The judgment of the third Judge was in favour of the Appellant.

The present appeal is from that affirmance.

William Hutchinson, by his will, dated the 20th of December 1845, among other bequests and devises, devised his estate called "Golden Grove Farm," after certain estates which have since determined, as follows:—

"To the use of my grandsons, William Hutchinson Gibbons, Mackenzie Bowman, Thomas Ormonde Clarkson, Charles Roberts, junior, William Charles Nicholls, and Richard Roberts during their respective lives, in equal shares and pro-

portions as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male ; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life or respective lives as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly herein-before limited to him, to his first and every other son successively, according to seniority of birth in tail male ; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates, messuages, and tenements, hereditaments, houses, and premises to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their respective seniorities in tail male."

The testator also devised many other properties to other persons for life, with remainders to their sons successively in tail male. In many of these devises the words used are "to the use "of her (or his) first and every other son suc- "cessively according to seniority of birth, and "the heirs male of the body of such son" (or "in tail male"). In two (to the children of his daughter Martha Roberts) the words are "to the "use of all the children, if more than one, now "born or hereafter to be born of the said "Martha Roberts by her present husband, in "equal shares and proportions as tenants in "common in tail, with cross remainders between "them in tail." In another part of the will there is a devise of certain property, after the decease of his daughter Elizabeth Bowman, to his grandsons, "Mackenzie Bowman and Frederick "Bowman, sons of William and Elizabeth Bow- "man, for life as tenants in common, and as to "the shares of each of them after his decease, to "the use of his first and every other son succes- "sively in tail male; and on failure of the issue

" male of one of them the share to go to the other " for life, and after his decease to his first and " other sons successively in tail male." And this is immediately followed by a devise of other property after the decease of his daughter Elizabeth Bowman " to the use of all the children now " born or hereafter to be born of the said Eliza- " beth Bowman by her present husband William " Bowman (excepting her eldest son, the said " Mackenzie Bowman, whom I consider I have " herein-before sufficiently provided for) equally " to be divided between them as tenants in " common in tail male, with cross remainders " between them in tail male." Thus Frederick Bowman, whom the testator had by name made a devisee for life in the previous devise, was to take by this devise, under the words " the children now born." Then, after a devise of certain property to his daughter Mary Holden for life, and after her decease to her husband John Rose Holden, if he should survive her, for his life, there is a devise of the property " to the use of Thomas Ormonde " Clarkson and George Holden, both now re- " siding with the said John Rose Holden and " Mary Holden, in York Street aforesaid, and all " and every other children or child of the said " John Rose Holden and Mary Holden his wife " (except an eldest son), to be divided in equal " shares and proportions as tenants in common " in tail male, with cross remainders between " them in tail."

And at the end of the will there is this proviso :—

" Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment, to the use of the same person respectively, for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively, according to their respective seniorities, in tail male."

The testator died on or about the 26th of July 1846, and the will was duly proved in the Supreme Court of New South Wales. Thomas Ormonde Clarkson and William Charles Nichols both died without issue. Mackenzie Bowman has never married, and has been duly found to be a lunatic, and Thomas M'Culloch, the Committee of his estate, is one of the Defendants.

William Kenny Gibbons is the eldest son of the Appellant, the grandson of the testator, whom, in his will, he calls William Hutchinson Gibbons, and was born on the 24th of October 1844, before the date of the will; and, by a disentailing deed dated the 31st of July 1866, conveyed to the Appellant his share and interest in the Golden Grove Farm in fee.

The Respondent is the eldest son of William Kenny Gibbons, and claims that under the proviso he is entitled to an estate in tail male in remainder in one fourth part, and in one third part of another fourth part, of Golden Grove Farm, and that William Kenny Gibbons is entitled to only a life estate therein.

Of the two learned Judges who delivered judgment in favour of the Respondent, one held that the proviso applied to all tenants in tail born during the testator's lifetime, whether before or after the date of his will. The other held that the expression in the proviso, "if any person "whom I have made tenant in tail male of my "said estate shall be born in my lifetime," might "be appropriately applied to classes of unnamed "devisees, of whom it would necessarily be un- "certain whether those who would be alive at the "testator's death might prove to have been born "earlier or later, but not so to individuals whom "the testator knew to be already in life, and "whom he had specially singled out for re- "mainders in tail." Both appear to have thought that the will must be construed as speaking at

the testator's death, in which they were clearly mistaken.

The decision in this appeal depends upon the construction of this proviso. The learned Counsel for the Respondent contended that the words "shall be born in my lifetime" had a technical meaning, and must be construed so as to include all persons born before or after the date of the will, and they further contended that the general intention of the will was to extend the rule of perpetuities to its utmost extent; and that all persons born in the testator's lifetime were to have life estates only. But their Lordships do not accede to this view. Where indeed the word issue is a word of limitation it may be said that expressions coupled with it and pointing to future births receive a technical construction. In that case there is no gift to the issue; the mention of issue only operates to designate the quality of the interest given to their parent, and the distinction between future and existing issue altogether disappears. It is quite different when there is a direct gift to the issue. In that case the only rule of construction applicable is the common one, that words are to have their natural signification, and that legal and technical words are to have their legal and technical signification, unless there be something in the context of a particular instrument to show the contrary.

As Vice-Chancellor Kindersley says in Loring *v.* Thomas, 1 Drewry and S., 523, where the words were "shall die," "The question is really "one of intention, whether the testator intended "to make a gift by way of substitution of the "issue only of those who were living at the date "of the will, or to include the issue of any pre-"deceased child, and, of course, this intention "can be taken from the language of the will." In cases of substitution an intention is implied

on the face of the will that "if the precedent "limitation by what means soever is out of the "case the subsequent limitation takes place." *In re* Sheppard's Trust, 1 Kay and J., 269. But in this case the object of the proviso is to cut down certain definite gifts, and this is not to be done unless the intention is clearly expressed. Sturgess *v.* Pearson, 4 Mad., 411. In the case of a proviso to take effect on the legatee becoming bankrupt, words of futurity are not allowed to operate to defeat the manifest intention of the testator, that the gift shall be a personal benefit to the legatee. Trappes *v.* Meredith, 7 Law Rep., Chan. App., 248.

Numerous cases, to which it is unnecessary to refer, have undoubtedly decided that the words "shall be born," in the absence of any context to explain them, are to be taken as words of futurity. But they have not a technical meaning, except in the case before mentioned, and their construction in other than the ordinary meaning depends upon the intention. It cannot be presumed in this case that the testator's intention was that all persons born in his lifetime were to have life estates, since he has given an estate tail to two persons by their names in the will, and to another who, though not named in that devise, had been named in a previous one. Indeed, it was allowed in the argument that the testator did not intend to include named persons, or any one of whose existence he knew. Thus, if the Respondent's construction be adopted, an exception would have to be introduced into the proviso after the words "any person." Again, the proviso is confined to tenants in tail male, and thus could not affect the devise to the children of Martha Roberts, which is contrary to the supposed intention. It results therefore from a consideration of the several devises that no such general

intention as has been contended for can be collected from the will, and the words of the proviso must therefore be construed according to their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will. Arguments founded upon the supposed general intention of a testator require to be carefully watched. This was pointed out by the Lord Chancellor in Giles *v.* Melsom, 1 Law R., E. & I., App. 31. He says :—

"I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases where it is used. I do not say that there are not cases in which it may be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principles, and endeavours to get into a region of speculation as to the probable intent of the testator."

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the Supreme Court, dated the 5th of December 1879, so far as it declares, that under the said will of William Hutchinson the said William Kenny Gibbons took only a life estate in the hereditaments and premises the subject matter of the suit, and that the freehold estate in remainder in one-fourth part of the said hereditaments and premises claimed by the Defendant William Matthew Hutchinson Gibbons was vested in the said infant William Matthew Hutchinson Gibbons the younger, and that he was a necessary party to the suit, and the order of the said Court on appeal dated the 22nd of June 1880, affirming the same and dismissing the petition of appeal therein mentioned; and to declare that the said William Kenny Gibbons took an estate in tail male in the said one fourth part of the said hereditaments and premises, and that the said William Matthew Hutchinson Gibbons is now entitled to the same in fee simple. The costs of the Appellant and Respondent of this appeal, being taxed as

between solicitor and client, will be paid out of the *corpus* of the share to which the Appellant, the said William Matthew Hutchinson Gibbons, is declared to be entitled.