many of which he could probably have disposed of had he been other than scrupulously honest. He handed over a list of these properties to the Official Administrator on the latter date. His relationship to the deceased may not be as close as that of some of the other petitioners, but as I have already indicated relationship is by no means the only index by which the court assesses claims in cases of this kind. I am satisfied that Mr. Williams has a perfectly good claim to a share in the estate, and I hope that the money he will receive will enable him to fulfil the very laudable purpose of completing his education in England.

In the result I order that, after deduction of the taxed costs of Mr. Betts, Mr. Edmondson and Mr. Harding, the Accountant-General pay out the balance now lying to the credit of the estate of the late Clarissa Weeks Thomas in three equal shares to Leah Howard, Georgiana Jones and Ernest Claudius John Bowlay-Williams.

Order accordingly.

HARRIS *v.* NICOL and HARDING

SUPREME COURT (Beoku-Betts, J.): February 18th, 1952
(Civil Case No. 216/51)

[1] **Land Law—estate tail—creation—devise "to A and his children"—devisee takes joint estate with children or estate tail according as children living or not at date of devise:** A devise "to *A* and his children" *prima facie* gives an estate tail to *A* if *A* has no children at the time of the devise or, if there are children, a joint estate to *A* and his children as purchasers; and this effect will also be given to the devise where it is one "to *A* and his issues" but not where it is "to *A* and his issue" (page 196, lines 7–20; page 197, lines 7–11).

[2] **Land Law—estate tail—descent traced from last purchaser—purchaser is person taking property other than by act of law:** In order to determine who is entitled to inherit an entailed interest, descent must be traced from the last purchaser, he being the person who last took the property other than by descent, escheat, partition or other act of law (page 195, lines 32–35).

[3] **Land Law—joint tenancy—creation—devise "to A and his children"—devisee takes joint estate with children or estate tail according as children living or not at date of devise:** See [1] above.

[4] **Succession—wills—construction—devise "to A and his children"—devisee takes joint estate with children or estate tail according as children living or not at date of devise:** See [1] above.

[5] **Succession—wills—construction—"issue" collective noun for, prima facie, descendants of every degree alive at distribution—testator's intention paramount:** Although the word "issue" may be included in the word "children" in a will and its meaning is anyway ascertained according to the intention of the testator, it is a collective noun with a wider meaning synonymous with the words "heirs of the body" and, unless otherwise shown, will include descendants of every degree in existence at the time of distribution (page 196, line 20—page 197, line 6).

The plaintiff applied by originating summons for the construction of a will.

The plaintiff's grandfather devised certain property to his "daughter . . . and her lawful issues." The second defendant, who was the eldest grandson of the testator, claimed that these words conferred an estate tail on the testator's daughter, and that on her death he took as sole owner by the rule of primogeniture. The plaintiff claimed that the devise was either an estate tail in joint tenancy to the devisee and all her children borne at the time the will was made, or an estate tail to the devisee alone which devolved on all her children after her death. She applied in the present proceedings for the construction of the will.

Cases referred to:

(1) *King* v. *Melling* (1684), 1 Vent. 225; 86 E.R. 151, applied.

(2) *In re Noad (Dcd.), Noad* v. *Noad*, [1951] Ch. 553; [1951] 1 All E.R. 467, applied.

(3) *Pelham-Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34; (1900), 83 L.T. 627.

(4) *Roddy* v. *Fitzgerald* (1858), 6 H.L. Cas. 823; 10 E.R. 1518, applied.

(5) *Wild's case* (1599), 6 Co. Rep. 16b; 77 E.R. 277, distinguished.

Wilson for the plaintiff;
J.B. Marcus-Jones and *Miss Wright* for the defendants.

BEOKU-BETTS, J.:

This is an originating summons for the construction of certain words in the will of the late Moses Walter Nicol. The relevant portion of the will is: "I give devise and bequeath to my daughter Virtue Jane Harding and her lawful issues" certain real properties. The parties agree that at the time of the will, the person named Virtue Jane Harding had the following children, namely, Rowland

Harding (the second defendant), Sweet Gabbidon, Florella Ogunti and Virtue Jane Harris (the plaintiff). A daughter, Muriel Harding, was born to Virtue Jane Harding after the date of the making of the will but before the death of the testator. Three constructions have been contended for by the parties. On behalf of Rowland Harding, it is contended that the words confer an estate tail on Virtue Jane Harding and on her death Rowland, her eldest son, becomes entitled to the property as sole owner. On behalf of the plaintiff, it is contended that the rule in *Wild's case* (5) applies and the devise is an estate tail in joint tenancy to Virtue Jane Harding and all her children born at the time the will was made. The third contention is that the devise is an estate tail to Virtue Jane Harding, and after her death all her children take. I shall deal first with the contention on behalf of Rowland Harding that he is the sole owner as the eldest son of the late Virtue Jane Harding.

To support this proposition, learned counsel for Rowland Harding states that the rule of primogeniture applies and as Rowland Harding is the eldest male he would take first. Learned counsel however recognised that, whether the rule of primogeniture applies or not, the will itself has to be looked at as to the meaning. If that is so, then the words giving the devise to Virtue Jane Harding and her issues would by themselves be opposed to a suggestion that the eldest male child only shall take or shall take in priority to other persons to fall within the category of "issues." There are no words in the devise to restrict the devise to tail male.

On the ordinary construction of the words "to my daughter Virtue Jane Harding and her lawful issues," it should be taken that the testator intended that Virtue Jane Harding and her issues should take or benefit. I do not think the rule about primogeniture as referred to in *Cheshire's Modern Real Property*, 6th ed., at 332 (1949), is appropriate.

To determine who is entitled on a descent of property, descent must be traced from the last purchaser, that is, the person who last took the property otherwise than by descent, escheat, partition or otherwise. Virtue Jane Harding was not a purchaser at law, and primogeniture cannot apply as regards the rights of her children. Where it is intended to restrict a devise to males in tail, appropriate words are used (*Pelham-Clinton* v. *Duke of Newcastle* (3)). But as it is admitted the devise itself has to be considered, and not a blind or meaningless application of the rule as to primogeniture, it seems to me that the words the testator used contemplate not Virtue

Jane Harding and her eldest child but all who can be regarded as her issues. This disposes of the contention on behalf of Rowland Harding.

As regards the next contention, that the rule in *Wild's* case (5) applies, the rule, as stated in 34 *Halsbury's Laws of England*, 2nd ed., at 349, is:

> "Where there was an immediate devise of real estate to a *person* and *his children*, and he had at the date of the will no child, then *prima facie* the word 'children' was taken to be a word of limitation and the named person had an estate tail; the context might show, however, that the unborn children were to take as purchasers. On the other hand, if he had a child or children at the time of the devise, then the will was *prima facie* construed as giving a joint estate to him and his children as purchasers." [Emphasis supplied.]

It is however important to remember that that construction is only *prima facie*, and most important of all it takes effect only where the word used is "children" not "issue," *i.e.*, the rule may only apply where the devise is to a named person and his "children," not a named person and his "issue." The word "children" may include "issue," but the word "issue" is a term of wider import, synonymous with the words "heirs of the body." By the use of the word "issue" the ancestor takes an estate tail capable of comprising in its devolution all the objects embraced by the word in its largest sense (2 *Jarman on Wills*, 4th ed., at 411–412 (1881)). It extends to persons who come within the class of "issues" at the time the will was made and afterwards up to the time of distribution. In the case of *King* v. *Melling* (1), Hale, C.J. said (1 Vent. at 231; 86 E.R. at 155): ". . . [F]or 'tho the word children may be nomen collectivum, the word issue is nomen collectivum itself." In *Roddy* v. *Fitzgerald* (4), it is stated (6 H.L. Cas. at 847; 10 E.R. at 1528): ". . . [T]he word 'issue' is '*ex vi termini nomen collectivum*' and takes in all issues, to the utmost of the family, as far as heirs of the body would do." To determine the persons who would be regarded as issues, the following is stated in 34 *Halsbury's Laws of England*, 2nd ed., at 316:

> "The class of issue is ascertained according to the declared intention of the testator, and where this is not otherwise shown, then, according to the ordinary rules, at the testator's death, letting in issue coming into existence before the period of

distribution, every degree of issue taking concurrently with their descendants."

In the recent case of *In re Noad (Dcd.)*, *Noad* v. *Noad* (2), Roxburgh, J. said ([1951] Ch. at 556; [1951] 1 All E.R. at 469): "'Issue' means 'issue to all degrees' unless that meaning be restrained by the context."

On a careful construction of the context, I have come to the conclusion that the word "issue" in this will extends to all the children of Virtue Jane Harding alive at the time of the distribution, and that the persons now who take are Rowland Harding, Sweet Gabbidon, Florella Ogunti, Virtue Jane Harris, and Muriel Harding. The costs of, and incidental to, this application are to be paid out of the estate and taxed as between solicitor and client.

Order accordingly.

JABER v. RADAR (No. 2)

SUPREME COURT (Luke, Ag.J.): February 18th, 1952
(Civil Case No. 101/51)

[1] **Tort—damages—trespass—trespass to land—damages recoverable even though no actual loss suffered:** A successful plaintiff in an action of trespass to land is entitled to recover damages even though he has not suffered any actual loss (page 200, lines 14–16).

[2] **Tort—trespass—trespass to land—damages recoverable even though no actual loss suffered:** See [1] above.

[3] **Tort—trespass—trespass to land—definition:** Trespass to land is a wrongful act of commission done in disturbance of the possession of property of another; and continuing to remain in possession of such property when lawful authority has been withdrawn is an act of commission not an act of omission (page 199, lines 35–39).

The plaintiff brought an action against the defendant to recover damages for trespass to his land.

The defendant was put in possession of premises owned by the plaintiff by a judgment of the Sheriff. That judgment was subsequently set aside by a court order in which the judge felt it was unnecessary to specifically direct the defendant to give up possession. The plaintiff demanded possession but his demand was not complied with, and the defendant remained in possession until a further