

ators. There is hardly a case in which it is applied in which it does not obviously defeat the testator's real intention. The late Lord Esher, M.R., as quoted by Magee, J.A., affirmed that he had heard some judges say that in their opinion it was the most unjust decision that ever was come to; and it was one, he said, which he himself could never understand how anybody could come to. At the same time there it is, a rule of law governing the rights in real property, and not now to be set aside by judicial decision but rather by the action of the Legislature, as was done when the equally absurd doctrine of *Cumber v. Wane*, 1 S.W. 426, had to be got rid of. It was the graphic and virile criticism of that case by Jessel, M.R., which led to its legislative reversal.

That, it seems to us, is the only legitimate way of getting rid of judicial absurdities, which have practically become a recognized part of the law—and it is for that reason, and that reason alone, that we consider the decision now in question objectionable. If the rule in Shelley's case is the law, a suitor is entitled to have the benefit of it, and to deprive him of its benefit in a case to which it reasonably applies is practically a denial of the "justice" which he is entitled to, though it may be a kind of justice, viewed from the abstract, which looks very like injustice to other persons.

To return to the case of *Re McAllister*, the judgment of the learned Chief Justice appears to be based on what we venture to think is the wholly untenable ground, that the rule in Shelley's case was not applicable to this case because it would defeat the intention of the testator. It is true he does not put the case explicitly on that ground, but the whole trend of his remarks seems to lead inevitably to that conclusion. But if that consideration were, as we have already remarked, to determine the applicability of the rule, it would never apply in any case, for it is absolutely certain that in every case it defeats the testator's real intention.

Mr. Justice Meredith places his decision on the ground that the rule was not applicable because the estate of the father was