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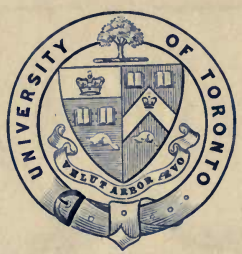

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# TREATISE

ON

# WILLS,

BY

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The Third Edition,

BY

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AND

S. VINCENT, B.A.,

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# THE LAW

WITH RESPECT TO

# WILLS.

## CHAPTER XXVII.

### CONDITIONS.

I. *Conditions, whether precedent or subsequent.—Consequences of this Distinction.*
II. *Conditions void for Repugnancy, and herein as to Provisions restrictive of Alienation, to defeat an Estate on Bankruptcy, &c.*
III. *Conditions in restraint of Marriage; and as to such Conditions being* in terrorem *only.—What amounts to a Performance of Conditions requiring Consent, &c. —Observations on miscellaneous Cases.*
IV. *Condition as to changing or assuming a Name, &c.*

Conditions, how created,

I. No precise form of words is necessary, in order to create conditions in wills; any expressions disclosing the intention will have that effect. Thus, a devise to "A., he paying," or "he to pay, 500*l.* within one month after my decease," would be a condition (*a*), for breach of which the heir might enter (*b*): unless the property were given over in default, by way of executory devise (*c*).

Conditions precedent and subsequent.

Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the

(*a*) 1 Co. Lit. 236 b.

(*b*) But as to the equitable relief afforded in such cases, see *Hayes* v. *Hayes*, Finch, 231, and cases cited and commented on, Hayes & Jarm. Conc. Wills, 3rd Ed. 398, [4 Ed. 336; and to the cases there cited, add *Paine* v. *Hyde*, 4 Beav. 468; *Hawkes* v. *Baldwin*, 9 Sim. 355; *Steuart* v. *Frankland*, 16 Jur. 738. In *Re Wellstead*, 25 Beav. 612, a bequest towards the endowment of a church in consideration of which testator's nephew and his heirs were to nominate every third incumbent, was held not a condition, but a purchase of the right; and the bishop declining to concede the right, the legacy failed.]

(*c*) See last Chapter.

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vesting of an estate, or the non-performance to *determine* an estate antecedently vested. But though the distinction between these two classes of cases is sufficiently obvious in its consequences; yet it is often difficult, from the ambiguity and vagueness of the language of the will, to ascertain whether the one or the other is in the testator's contemplation; *i.e.*, whether he intend that a compliance with the requisition which he has chosen to annex to the enjoyment of his bounty shall be a condition of its *acquisition*, or merely of its *retention*.

As on questions of this nature general propositions afford but little assistance in dealing with particular cases of difficulty (*d*), we shall proceed to the immediate consideration of the cases; adducing some instances, first, of conditions precedent; and, secondly, of conditions subsequent.

Instances of conditions precedent.

In an early case (*e*), where a man devised a term to A. if he lived to the age of twenty-five, and paid to his eldest brother a certain sum of money; it was agreed that no estate passed until that age, and payment of the money.

Legacy charge on land given upon marriage with consent.

So where (*f*) A. charged his real estate with 500*l.* to be paid to his sister H. within one month after her marriage, but so as she married with the approbation of his brother J., if living; and, in case she married without his consent, the 500*l.* was not to be raised. H. married in the lifetime of J., and without his consent; and it was held that, this being a condition precedent, nothing vested.

Rent-charge upon condition that the devisee releases.

Again, where (*g*) V. devised to his sister A. a rent-charge, to be paid half-yearly out of the rents of his real estate, during her life; and, by a codicil, declared that what he had given to her should be accepted in satisfaction of all she might claim out of his real or personal estate, and upon condition that she released all her right or claim thereto, to his executors. The Court held, it was a condition precedent, and that an action, which the husband as administrator had brought for the arrears, could not be sustained. *Willes*, C. J., observed, that no words necessarily made a condition precedent; but the same words would make a condition either precedent or subsequent, accord-

What makes a condition precedent.

(*d*) But see some general rules laid down by *Willes*, C. J., in *Acherley* v. *Vernon*, Willes, 153.

(*e*) *Johnson* v. *Castle*, cit. Winch, 116, 8 Vin. Ab. 104, pl. 2.

(*f*) *Reves* v. *Herne*, 5 Vin. Ab. 343, pl. 41.

(*g*) *Acherley* v. *Vernon*, Willes, 153. See also *Gillett* v. *Wray*, 1 P. W. 284; *Harvey* v. *Aston*, 1 Atk. 361, Com. Rep. 726.

ing to the nature of the thing, and the intent of the parties. If, therefore, a man devised one thing in lieu or consideration of another, or agreed to do anything, or pay a sum of money in consideration of a thing to be done, in these cases that which was the consideration was looked upon as a condition precedent. There was (he said) no pretence for saying, in the present case, that the devisee could not perform the condition before the time of payment of the annuity; for the first payment was not to be until six months after the testator's decease, and she might as well release her right in six months, as at any future time. Besides, the penning of the clause afforded another very strong argument that this was intended to be a condition precedent; for all the words were in the present tense. The testator willed that this annuity be accepted in satisfaction and upon condition that "she release," which is just the same as if he had said, "I give her the annuity, she releasing," which expression had been always holden to make a condition precedent, as appeared from *Large* v. *Cheshire* (*h*), where a man agreed to pay J. S. 50*l.*, he making plain a good estate in certain lands.

Other cases of conditions precedent.

Again, in the case of *Randall* v. *Payne* (*i*), where a testator, after giving certain legacies to J. and M., added, "If either of these girls should marry into the families of G. or R., and have a son, I give all my estate to him for life (with remainder over); *and if they shall not marry,*" then he gave the same to other persons. Lord *Thurlow* held this to be a condition precedent; and that nothing vested in the devisees over while the performance of the condition by J. or M. was possible, which was during their whole lives (*k*); and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands.

So in the case of *Lester* v. *Garland* (*l*), where L. by his will bequeathed the residue of his personal estate to trustees, upon trust that, in case his sister S. P. should not intermarry with A. before all or any of the shares thereafter given to her children should become payable; and in case his sister should, within six calendar months after his decease, give such security as his trustees should approve of, that she would not intermarry with

(*h*) 1 Vent. 147.
(*i*) 1 B. C. C. 55.
(*k*) As to this, see *Page* v. *Hayward*, 2 Salk. 571, stated infra, p. 5; *Lowe* v. *Manners*, 5 B. & Ald. 917.
(*l*) 15 Ves. 248.

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A.; or in case she should so marry, after all or any of the shares bequeathed to her children should be paid to him, her or them, that she would, within six calendar months after such marriage, pay the amount, or cause such child or children who should have received his, her, or their share or shares, to refund; *then and not otherwise,* the trustees were directed to pay such residuary estate to the eight children of S. P. at the age of twenty-one or marriage, with benefit of survivorship; and the testator provided, that in case his said sister should intermarry with A. before all or any of the shares should be payable, or should refuse to give such security as aforesaid, then he directed 1,000*l.* a-piece only to be paid to the children; and, subject thereto, gave his residuary estate to the children of another sister. It was agreed that this was a condition precedent; and the only question was, whether the computation of the six months was *inclusive* or *exclusive* of the day of the testator's decease, he having died on the 12th of January, and the security having been given on the 12th of July. Sir *W. Grant,* M. R., considered that the reason of the thing required the exclusion of the day, as the legatee could not reasonably be supposed to have any opportunity of beginning, on the day of L.'s death, the deliberation which was to govern the election ultimately to be made (*m*).

Computation of time.

Period allowed for performing condition held to be exclusive of the day of testator's death.

So, in *Ellis* v. *Ellis* (*n*), where a testator bequeathed to his grand-daughter, "if she be unmarried, and does not marry without the consent of my trustees," the sum of 400*l.*; one moiety to be paid upon her marriage, if her marriage should be made with consent, and the other in one year afterwards; but if she were then married, or should marry without such consent, then the 400*l.* to "sink in the personal fortune." Lord *Redesdale* was of opinion that marriage was a condition precedent, and that the legacy was wholly contingent until that event.

Cases of conditions subsequent.

One of the earliest examples of a condition subsequent in wills is afforded by the case of *Woodcock* v. *Woodcock* (*o*), where W. devised a leasehold house to J. for her life; and if she died

[(*m*) See also *Gorst* v. *Lowndes,* 11 Sim. 434.]

(*n*) 1 Sch. & Lef. 1. Compare this case with *Wheeler* v. *Bingham,* 3 Atk. 364. See further, as to conditions precedent, *Fry* v. *Porter,* 1 Ch. Cas. 138; *Semphill* v. *Bayly,* Pre. Ch. 562; *Pulling* v. *Reddy,* 1 Wils. 21; *Elton* v. *Elton,* Ib. 159; *Garbut* v. *Hilton,* 1 Atk. 381; *Reynish* v. *Martin,* 3 Atk. 330; *Long* v. *Dennis,* 4 Burr. 2052; *Stackpole* v. *Beaumont,* 3 Ves. 89; [*Latimer's case,* Dyer, 596; *Atkins* v. *Hiccocks,* 1 Atk. 500; *Morgan* v. *Morgan,* 15 Jur. 319, 20 L. J. Ch. 109.]

(*o*) Cro. El. 795.

before S., then that S. should have it upon such reasonable composition as should be thought fit by his overseers (i. e. his executors), allowing to his other executors such reasonable rates as should be thought meet by his overseers. It was agreed by the Court that this condition was subsequent, as the overseers might make agreement with him at any time.

So, in *Popham* v. *Bampfield* (*p*), where one R. devised real estate to trustees for payment of debts, and, after his debts paid, then in trust for A. and his heirs male; but declared that A. should have no benefit of this devise, unless his father should settle upon him a certain estate; and in default thereof, or if A. died without issue, then over. It was held, that this was a condition subsequent, and was performed by the father *devising* his estate to the son.

Condition subsequent.

So, in the case of *Peyton* v. *Bury* (*q*), where one bequeathed the residue of his personal estate to S., provided she married with the consent of A. and B., his executors in trust, and if S. should marry otherwise, he bequeathed the said residuum to W. A. died; after which S. married without the consent of B. The M. R. observed, it was very clear that, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death, since both of the executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be beneficially in the executors, they being expressly mentioned to be but executors in trust (*r*). In this case, he observed, the bequest over shewed what the testator meant, by making marriage with consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture (*s*). The case seems somewhat analogous, in principle, to those (*t*) in which a devise or bequest, if the object shall attain a certain age, with a gift over in case he shall die under that age, has been held to be immediately vested.

Again, in *Page* v. *Hayward* (*u*), where a testator devised lands

(*p*) 1 Vern. 79, 1 Eq. Ca. Ab. 108, pl. 2.

(*q*) 2 P. W. 626. See also *Gulliver* v. *Ashby*, 4 Burr. 1929, stated post, 8.

(*r*) Nor would the intermediate beneficial interest have belonged to them if they had not. It would have gone in augmentation of the contingently disposed-of residue.

[(*s*) See *Knight* v. *Cameron*, 14 Ves. 392.]

(*t*) Ante, ch. xxv., s. 2.

(*u*) 2 Salk. 570.

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to M. and the heirs male of her body, upon condition that she married and had issue male by a Searle; and, in default of both conditions, he devised the lands to E. in the same manner, with remainders over: it was held, that M. and E. took estates tail, which did not determine by marrying another person, inasmuch as they might survive their first husband, and marry a Searle. In this case the limitation was, in effect, and seems to have been regarded by the Court, as a devise in special tail to M. and E. successively, *i. e.* to them, and the heirs male of their bodies, begotten by a Searle.

So, in the more recent case of *Aislabie* v. *Rice* (*x*), where a testator devised certain lands and furniture to H. and her assigns for her life, in case she continued unmarried; and, after her decease, he devised the lands and furniture to such persons as she should by deed or will appoint, and, for want of appointment, then over; but in case H. should marry in the lifetime of the testator's wife, and with her consent, or, after her death, with the consent of A. and B. or the survivor, then H. should enjoy the lands and furniture in the same manner as she would have done if she had continued unmarried. The testator's wife and A. and B. all died; after which H. married. She and her husband sold the property in question; and the purchaser objecting to the title, Sir *W. Grant*, M. R., sent a case to the Common Pleas, on the question as to what estate H. took under the will. The Court certified that H. took an estate for life, with a power of appointment over the fee, subject, as to her life estate only, to the condition of her remaining sole and unmarried, which condition was qualified by the proviso, that a marriage with the consent of the persons mentioned should not determine her life estate; that the condition was a condition subsequent, and as the compliance with it was, by the deaths of those persons, become impossible by the act of God, her estate for life became absolute (*y*), and she might execute the power. Sir *John Leach*, V. C., in conformity to this certificate, decreed a specific performance of the contract. The Court must, in this case, have considered the limitation as being, in effect, a devise of an entire estate for life, subject to the condition of marrying (if at all) with consent, which being rendered impracticable by the death of the persons whose consent was required, the estate became absolute; not (as the language would seem

Remark on *Aislabie* v. *Rice*.

(*x*) 3 Mad. 256.

(*y*) As to this, see infra, 10.

to imply) a devise of two distinct estates, the one to cease on marriage, under *any* circumstances, and the other to commence on marriage with consent.

Of course, where an interest is given to certain persons, with a direction that, on a prescribed event, as their marriage without consent, it shall be forfeited, such a direction operates merely to divest, and not to prevent the vesting of the interest so given (*z*). [In like manner, where an annuity is given until a certain event takes place, or so long as the annuitant's conduct is discreet, the condition is subsequent (*a*). And it is not the less so merely because the estate or interest for the determination of which it provides is contingent, and can in no case vest before the condition takes effect; for a contingent gift or interest has an existence capable, as well as a vested interest or estate, of being made to cease and become void (*b*).]

Conclusions from the preceding cases.

It would seem, from the preceding cases, that the argument in favour of the condition being precedent is stronger where a gross sum of money is to be raised out of land (*c*) than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue (*d*); where the nature of the interest is such as to allow time for the performance of the act before its usufructuary enjoyment commences, than where not (*e*); where the condition is capable of being performed instanter, than where time is requisite for the performance (*f*); while, on the other hand, the circumstance of a definite time being appointed for the performance of the condition, but none for the vesting of the estate, favours the supposition of its being a condition subsequent (*g*).

(*z*) *Lloyd* v. *Branton*, 3 Mer. 108.

[(*a*) *Wynne* v. *Wynne*, 2 M. & Gr. 8. See *Webb* v. *Grace*, 2 Phill. 701.

(*b*) *Egerton* v. *Earl Brownlow*, 4 H. of L. Ca. 1. This case (which involved also a question of public policy) was decided by D. P., upon the advice of Lords *Lyndhurst*, *Brougham*, *Truro* and *St. Leonards*, against the opinion of the majority of the Judges, and overruling the decision of Lord *Cranworth*, V. C. (1 Sim. N. S. 464), who as L. C. retained his original opinion.]

(*c*) Indeed, such cases seem to fall à fortiori under the principle of the cases (referred to ante, v. i., ch. xxv., s. v.) in which such charges were held to fail, from the death of the devisee before the time of payment. [But here it will be useful to refer to a remark contained in 1 Sug. Pow. 122, 7th Ed., viz., that what by the old law was deemed a devise upon condition, would now, perhaps, in almost every case, be construed a devise in fee upon trust; and by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust could compel an observance of the trust by a suit in equity, *Wright* v. *Wilkins*, 9 W. R. 161, Q. B. accordingly.]

(*d*) *Peyton* v. *Bury*, 2 P. W. 626, ante, 5.

(*e*) *Acherley* v. *Vernon*, Willes, 153.

(*f*) *Gulliver* d. *Corrie* v. *Ashby*, 4 Burr. 1940.

(*g*) *Thomas* v. *Howell*, 1 Salk. 170, as to which, see infra, 10: [and see per

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Period allowed for performing conditions.

It is often difficult, from the absence of declared intention on the point (*h*), to determine what is the period allowed for the performance of a condition; *i. e.*, whether the devisee is bound to perform the act within a convenient time after the vesting of the interest, or has his whole life for its performance. One of these conclusions seems to be inevitable, for the nature of the case hardly admits of any other alternative. [The cases of *Randall* v. *Payne* (*i*) and *Page* v. *Hayward* (*k*) are instances of the devisee having his whole life for the performance of the condition; and] in *Gulliver* v. *Ashby* (*l*), where a devise in tail was declared to be upon condition that the devisee assumed a certain name, *Aston*, J., thought the devisee had his whole life for taking the name, and Lord *Mansfield* said that the Court would perhaps incline against the rigour of the forfeiture, though the condition remained unperformed three years after the estate devolved upon the devisee, when he suffered a common recovery, and though some of the expressions in the will certainly favoured a more rigid construction; the testator's requisition being, that whenever it should happen that the estate should come to any of the persons thereinbefore named (there being several successive limitations), the person or persons to whom the same should from time to time descend or come, did and should "then" change, &c. [The point was not, however, decided; the Court holding that the plaintiff, who was the next remainderman, was not entitled to take advantage of the breach, if there was one. If] the estate was not divested at the time

[Lord *Hardwicke*, *Avelyn* v. *Ward*, 1 Ves. 422; *Walker* v. *Walker*, 29 L. J. Ch. 856. See, however, *Roundell* v. *Currer*, 2 B. C. C. 67; *Robinson* v. *Wheelwright*, 6 D. M. & G. 535.

(*h*) Great care in denoting the intention is requisite, so as to exclude all doubt, see *Langdale* v. *Briggs*, 3 Sm. & Gif. 255; *Blagrove* v. *Bradshaw*, 4 Drew. 230.

(*i*) 1 B. C. C. 55.

(*k*) Salk. 570.]

(*l*) 1 W. Bl. 607, 4 Burr. 1929. In *Davies* v. *Lowndes*, 2 Scott, 67, 1 Bing. N. C. 597, in the event of the testator's lawful heir not being found within a year after his decease, he devised certain lands to A., "upon condition he changes his name to S." A. did not change his name to S. within the year, but he did so after the date of a final decree in a suit in Chancery, which gave him the possession of the property; and this was adjudged sufficient.

As to what amounts to a compliance with particular requisitions, see *Montague* v. *Beauclerk*, 3 B. P. C. Toml. 277; *Roe* d. *Sampson* v. *Down*, 2 Chitty's Cas. t. Mansfield, 529; *Doe* d. *Duke of Norfolk* v. *Hawke*, 2 East, 481; [*Tanner* v. *Tebbutt*, 2 Y. & C. C. C. 225; *Ledward* v. *Hassells*, 2 Kay & J. 370; *Priestly* v. *Holgate*, 3 ib. 286; *Woods* v. *Townley*, 11 Hare, 314.] Whether neglect amounts to refusal, see 2 East, 487, and Lord *Ellenborough's* judgment in *Doe* d. *Kenrick* v. *Lord Beauclerk*, 11 East, 667; [*Re Conington's will*, 6 Jur. N. S. 992. Condition that A. shall convey on the request of B.: if B. do not make the request in A.'s lifetime, the condition becomes impossible, *Doe* d. *Davies* v. *Davies*, 16 Q. B. 951.]

of the recovery, of course such recovery destroyed the condition; which leads us to observe, that to render effectual such conditions imposed upon tenants in tail, they should (so far as is practicable, consistently with the rule against perpetuities) be made to precede the vesting; for, if subsequent, whether accompanied by a devise over or not, they are, as we have seen, liable to be defeated by the act of the person to whose estate they are annexed (*m*). [For this reason, Lord *Mansfield* thought that such a condition annexed to an estate tail could never be meant to be compulsory; and *Yates*, J., in the last case, said the condition could only operate as a recommendation or desire. But in a case where there was annexed to an estate *for life* a condition not to mow a park, without any gift over on non-compliance, the condition was rendered effectual by injunction (*n*).

Conditions becoming incapable of performance.

In the case of real estate,] conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable.

If condition be precedent, estate never arises.

It is clear, that where a condition *precedent* becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails (*o*).

Thus, where a testator (*p*), being seised in fee of certain lands, and of other lands for life, under the will of C., devised both estates to trustees, to be conveyed to other trustees, to the use of R. (who was tenant in tail next in remainder under the will) for life; remainder to his first and other sons in tail male, remainders over. The devise was upon express condition that R. should within six months suffer a recovery, and bar the remainders in C.'s will, and convey all her estates to such uses, &c., as were declared by his (testator's) will, as to his own estates *and no conveyance of his estates was to be made before R. had suffered the recovery;* and, in default of his suffering such recovery, to convey his (testator's) estates to other uses. He also directed R. to take the name of C., and declared this to be a condition precedent to the vesting of his estate. R., on the testator's death, entered, and was preparing to suffer the

(*m*) *Page* v. *Hayward*, 2 Salk. 570; *Watson* v. *Earl of Lincoln*, Amb. 328; *Driver* d. *Edgar* v. *Edgar*, Cowp. 379.

[(*n*) *Blagrave* v. *Blagrave*, 1 De G. & S. 252.

(*o*) Co. Lit. 206 b.]

(*p*) *Roundel* v. *Currer*, 2 B. C. C. 67; 1 Swanst. 383, n. See also *Bertie* v. *Falkland*, 3. Ch. Cas. 129, 2 Vern. 340, 1 Eq. Ca. Ab. 110, pl. 10; [*Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Earl of Shrewsbury* v. *Scott*, 29 L. J. (C. P.) 34, 6 Jur. N. S. 452, 472.]

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recovery, when he died. Sir *Lloyd Kenyon*, M. R., appeared to consider this to be in the nature of a condition precedent, and decreed that, the act directed by the testator not being done, the estates created by him never arose. In answer to the argument that there was scarcely an opportunity, and that there was no neglect, and that if it was prevented by the act of God, it should be held as done, his Honor said that there were many cases where the act is rendered impossible to be done, and yet the estate should not vest; as an estate given to A. on condition that he shall enfeoff B. of Whiteacre, and B. refuses to accept, the estate would not vest in A.

[And, accordingly, in the case of *Boyce* v. *Boyce* (*q*), where a testator devised his houses to trustees, in trust to convey to his daughter M. such one of the houses as she should choose, and to convey and assure all the others which M. should not choose to his daughter C.; M. died in the testator's lifetime, and Sir *L. Shadwell*, V. C., considering the gift to C. to be of those houses that should remain *provided* M. should choose one of them (*r*), held that the condition having become impossible by M.'s death, the gift to C. failed.]

If condition subsequent is incapable of performance, estate becomes absolute.

On the other hand, it is clear, that if performance of a condition *subsequent* be rendered impossible, the estate to which it is annexed becomes by that event absolute.

Thus in the case of *Thomas* v. *Howell* (*s*), where one devised to his eldest daughter, on condition that she should marry his nephew on or before she attained the age of twenty-one years. The nephew died young; and after his death, the devisee, being then under twenty-one, married another. It was held, that the condition was not broken, its performance having become impossible by the act of God. It is not, indeed, expressly stated in this case that the Court held the condition to be subsequent; but, as it seems fairly to bear that construction, and the decision would otherwise stand opposed to the doctrine under consideration, it may reasonably be inferred that such was the opinion of the Court.

Distinction suggested where there is a gift over.

It is far from clear, however, that this principle applies even to conditions subsequent, *if the property be given over on non-performance.* The rule, indeed, has been often laid down in

[(*q*) 16 Sim. 476. See also *Philpott* v. *St. George's Hospital*, 21 Beav. 134.

(*r*) As to this part of the decision, see ante, ch. xii., s. 2.]

(*s*) 1 Salk. 170. See also *Aislabie* v. *Rice*, 3 Madd. 256, 2 J. B. Moo. 358; [*Burchett* v. *Woolward*, T. & R. 442; *Walker* v. *Walker*, 29 L. J. Ch. 856.]

very general terms; and the case of *Graydon* v. *Hicks* (*t*) might seem to countenance its application even to such a case. A testator there gave 1,000*l.* to his only daughter M. to be paid at her age of twenty-one, or day of marriage, provided she married with the consent of his executors; but, in case she died before the money became payable upon the conditions aforesaid, then he gave the same over. The executors died. M. afterwards married; and Lord *Hardwicke* held, that the death of the persons whose consent was necessary, relieved her from the restriction.

Remarks on *Graydon* v. *Hicks.*

It does not appear whether the claimant had reached the age of twenty-one (*u*): but it will be observed that marriage with consent was not the only condition on which the legacy was to be payable (*x*); it only accelerated the payment; so that it was impossible for the Court to declare, as was asked, that the legacy was forfeited by marriage without consent. This case, therefore, leaves the question untouched. Unless a direct authority can be shewn for extending, to the cases suggested, the doctrine, that estates subject to conditions subsequent become absolute by the effect of events rendering the performance impracticable, it is conceived the Courts would be reluctant to apply it to such cases. Where property is devised to a person, with a proviso divesting his estate in favour of another, if he (the first devisee) do not marry A., or do not enfeoff A. of Whiteacre, within a given period, and A. in the meantime dies, or refuses to marry the devisee, or be enfeoffed of Whiteacre, these are contingencies inseparably incident to such a condition, and may therefore be supposed to have been in the testator's contemplation when he imposed it; and having said that the estate shall be divested in case the act be not performed (not merely on its not being *attempted* to be performed) he is presumed to mean that it shall be divested if the act, under whatever circumstances, is not performed, though it may have been rendered impracticable by events over which the devisee has no control. But it may be said that this reasoning applies to *all* cases of conditions subsequent, as well those which are *not*, as those which *are*, accompanied by a gift over; and that, in regard to the former, the doctrine in question is fully esta-

Condition subsequent, how affected by devise over.

(*t*) 2 Atk. 16. Also *Peyton* v. *Bury*, 2 P. W. 626; but see infra.

[(*u*) It appears that the husband denied the marriage upon oath, and the wife brought the bill as a femme sole; it seems, therefore, that she was of age.]

(*x*) See *King* v. *Withers*, 1 Eq. Ca. Ab. 112, pl. 10.

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blished. The stronger argument, therefore, in favour of the distinction suggested, because it is applicable exclusively to the latter class of cases, is, that where there is a devise over on non-performance, the Court, by making the estate of the first devisee absolute, would *take the property from the substituted devisee in an event in which the testator has given it to him.* If the gift had been simply to B., in case A. do not marry C., or enfeoff C. of Whiteacre, it could not have been maintained for an instant that B.'s estate did not arise, in the event of the death or refusal of C.; and why should the result be different because A. happens to be the prior devisee? There seems to be no solid ground for treating with such unequal regard these respective objects of the testator's bounty: and the cases on marriage conditions afford (as we shall presently see) abundance of authority for the principle which ascribes this kind of efficiency to a bequest over.

Illegal involve same consequences as impossible conditions.

[The illegality of the condition to be performed generally involves the same consequences in the respective cases of precedent and subsequent conditions as its impossibility (*y*).

——except that devise over has no effect.

But it would seem that here no such effect can be attributed to a devise over, as in the case of the condition being impossible; for that which is illegal as a condition subsequent to defeat the prior estate, cannot change its nature, so as to be legal when viewed as a condition precedent (as in fact it is) to the vesting of the devise over. Thus it is clear that a condition subsequent defeating a gift to a married woman in case she live apart from her husband, is void: and it follows that a devise over, dependant on the same condition, is also illegal and void. If the substituted devisee be the husband, the case is free from all doubt, since the devise over in that case offers a direct inducement to one of the parties to the marriage contract breaking it (*z*). And if the substituted devisee be an entire stranger, the gift to him still fails, for the illegality of the condition exists independently of the person of the substituted devisee (*a*); and, as we have already seen, an illegal condition precedent avoids the devise to which it is annexed. A fortiori where the condition is to defeat the devise in case husband and wife

[(*y*) Co. Lit. 206; *Poor* v *Miall*, 6 Mad. 32; *Ridgway* v. *Woodhouse*, 7 Beav. 437.

(*z*) *Cartwright* v. *Cartwright*, 3 D. M. & G. 982; *H.* v. *W.* 3 Kay & J. 382.

(*a*) See *Westmeath* v. *Westmeath*, 1 Dow & Cl. 519.

[live together, both condition and gift over are illegal and void (*b*).

Rule as to personal estate, where condition is impossible.

But, with regard to personal estate, the civil law, which has thus far been adopted by Courts of Equity, recognises no distinction between conditions precedent and subsequent; and, therefore, when a condition precedent to the vesting of a legacy is impossible, the bequest is absolute and unconditional (*c*), except in cases where the performance of the condition is the sole motive of the bequest (*d*), or its impossibility was unknown to the testator (*e*), or the condition which was possible in its creation has subsequently become impossible by the act of God (*f*). The same variation between the rules applicable to real and personal property is observable, with respect to a condition precedent involving a malum prohibitum; since here, also, the condition is by the civil law void, and the bequest absolute (*g*). But when it involves a malum in se, the civil agrees with the common law in holding the gift as well as the condition void (*h*).

Distinction between malum prohibitum and malum in se.

Where a legacy is charged on both the real and personal estate, it will, so far as it is payable out of each species of property, be governed by the rules applicable to that species (*i*).

Rule where legacy comes out of both realty and personalty.

Conditions subsequent, which are intended to defeat a vested estate or interest, are always construed strictly, and must therefore be so expressed as not to leave any doubt of the precise contingency intended to be provided for. This is a clearly established rule which we have already seen illustrated in a former chapter (*k*); it will suffice here to refer to some of the later cases, in which it has been asserted and followed (*l*).]

Conditions subsequent are construed strictly.

Here it may be observed, that where the devisee, on whom a condition affecting real estate is imposed, is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof; for as he has, independently of the will, a title by descent, it is not neces-

Devisee, if heir of the testator, must have notice of the condition.

[(*b*) *Bean* v. *Griffiths*, 1 Jur. N. S. 1045; *Wren* v. *Bradley*, 2 De G. & S. 49.

(*c*) 1 Ed. 115, sq.; 1 Wils. 160; 3 Atk. 332, 366; 3 B. P. C. Toml. 359; 1 Beav. 478.

(*d*) Wms. Exec. 1086; *Rishton* v. *Cobb*, 5 My. & C. 145.

(*e*) 1 Swinb. pt. iv., s. vi., pl. 8, 9.

(*f*) 1 Swinb. pt. iv., s. vi., pl. 14; *Lowther* v. *Cavendish*, 1 Ed. 99; 1 Rop. Leg. 755, 4th ed. *Priestley* v. *Holgate*, 3 Kay & J. 286.

(*g*) *Brown* v. *Peck*, 1 Ed. 140; *Harvey* v. *Aston*, Com. Rep. 738; *Wren* v. *Bradley*, 2 De G. & S. 49.

(*h*) 1 Swinb. pt. iv., s. vi., pl. 16.

(*i*) 3 Atk. 335.

(*k*) Ch. xxv., s. 3, ad fin.

(*l*) *Clavering* v. *Ellison*, 3 Drew. 451, in D. P. 29 L. J. Ch. 761; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1; *Bean* v. *Griffiths*, 1 Jur. N. S. 1045.]

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sarily to be presumed, from his entry on the land, that he is cognisant of the condition (*m*); and the fact of notice must be proved; it will not be inferred (*n*).

Repugnant conditions.

II. Conditions that are repugnant to the estate to which they are annexed, are absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition, which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute. Such would, it is clear, be the fate of any clause providing that the land should for ever thereafter be let at a definite rent (*o*), or be cultivated in a certain manner; this being an attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership. But, of course, a direction that the rents of the *existing* tenants should not be raised, or that certain persons should be continued in the occupation (*p*), would be valid; as this merely creates a reservation or exception out of the devise in favour of those individuals. [So, if there be a devise in fee upon condition that the wife shall not be endowed, or the husband be tenant by the courtesy,

(*m*) *Doe* d. *Kenrick* v. *Lord Beauclerk*, 11 East, 667.

(*n*) *Doe* d. *Taylor* v. *Crisp*, 8 Ad. & Ell. 778.

Case of *Inskip* v. *Lade*, [or *Lade* v. *Holford*.]

(*o*) *Att.-Gen.* v. *Catherine Hall*, Jac. 395. To this principle, it is conceived, may be referred the case of *Inskip* v. *Lade*, in Chancery, 16th June, 1741, [1 W. Bl. 428, Amb. 479, Butler's n. to Fearne C. R. 530,] where a testator, Sir John Lade, by his will, dated the 17th August, 1739, devised all his real estate to certain trustees, their heirs and assigns, to the use of his cousin John Inskip for life, with remainder to the use of the trustees for the life of John Inskip, to preserve contingent remainders, with remainder to the use of the first and other sons of John Inskip in tail male, with remainder to the use of several other persons and their issue, in strict settlement, in like manner; and the testator directed, that while John Inskip should be under the age of twenty-six, *and so often and during such time as the person for the time being, in case he had not otherwise directed, would, by virtue of his will, have been entitled to the said devised premises, or the trust thereof, as tenant for life in his own right, or tenant in tail male, should be severally under the age of twenty-six years*, his said trustees should enter upon the same premises, and receive the rents and profits thereof, and should [thereout maintain the person under age, and accumulate the residue, and invest the accumulations in purchasing other land to be settled to the same uses.] On the 14th of November, 1760, the Lord Chancellor (*Northington*) sent a case to the Court of King's Bench, with the question, whether upon the death of John Inskip the cousin, leaving his eldest son under the age of twenty-six, the trustees took any and what estate under the proviso. The answer of the Judges was in the negative; and their certificate was confirmed by the Lord Chancellor.

It does not appear what was the precise ground of the decision—whether the proviso was adjudged to be invalid, as being repugnant to the several estates conferred by the devise, or as being obnoxious to the rule against perpetuities: on either ground, it seems open to exception: [but the latter appears to be the true objection, see Butler's n. cited above.]

(*p*) *Tibbetts* v. *Tibbetts*, 19 Ves. 656.

[the condition is void, because repugnant to the estate devised (*q*).]

General restraint on alienation is void.

A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A. and his heirs, upon condition that he shall not alien (*r*), [or charge them with any annuity (*s*),] the condition is void. [And in like manner a condition or conditional limitation annexed to a devise in fee purporting to give the property over in case the devisee shall die intestate, or shall not part with the property in his lifetime, is repugnant and void; since, in the first case, it would not only defeat the rule of law which says, that upon the death intestate of an owner in fee simple his property shall go to his heir-at-law, but also deprive him of the power of alienation by act inter vivos; and, in the second case, it would take away the testamentary power from an owner in fee (*t*). And the circumstance that the devise gives only a contingent transmissible interest will not vary the case, so as to make the condition effectual upon an alienation during the contingency (*u*).]

And a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where (*x*) a testator devised lands to A. and his heirs for ever, and in case he offered to mortgage or suffer a fine or recovery of the whole or any part, then to B. and his heirs: it was held, that A. took an absolute estate in fee, without being liable to be affected by his mortgaging, levying a fine, or suffering a recovery.

[So a condition inconsistent with any other of the ordinary legal incidents of the estate to which it is attempted to be annexed is void. And therefore there can be no doubt that a condition purporting to exempt real estate from the operation of the bankrupt or insolvent laws, or from payment of the owner's debts after his death, would be repugnant and void, as we shall presently see has been decided with reference to personal estate. And it was said by Lord *Hardwicke* (*y*) that a gift over in case devisee in fee commits treason within a given number of years, would be void as abrogating the law.]

[(*q*) *Portington's case*, 10 Rep. 36; *Mildmay's case*, 6 Ib. 40 a.]

(*r*) Co. Lit. 206 b, 223 a.

[(*s*) *Willis* v. *Hiscox*, 4 My. & C. 201.

(*t*) *Holmes* v. *Godson*, 25 L. J. Ch. 317, 2 Jur. N. S. 383; *Greated* v. *Greated*, 26 Beav. 621. *Gulliver* v. *Vaux*, Serj. *Hill's* MSS. in Linc. Inn Library, lib. x., fo. 282, to the same effect, cited in *Holmes* v. *Godson*; *Barton* v. *Barton*, 3 Kay & J. 512. It is presumed, therefore, that *Doe* d. *Stevenson* v. *Glover*, 1 C. B. 448, which decided the contrary, must be treated as overruled.

(*u*) *Barton* v. *Barton*, 3 Kay & J. 516.]

(*x*) *Ware* v. *Cann*, 10 B. & Cr. 433.

[(*y*) *Carte* v. *Carte*, 3 Atk. 180.]

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Restraints on alienation by devisees in fee, how far valid.

But such a partial restraint on the disposing power of a tenant in fee may be imposed, as that he shall not alien to such a one, or to the heirs of such a one, or that he shall not alien in mortmain (*z*). It was even held in one case, that a condition imposed on a devisee in fee, not to alien, except to a particular person or persons, was good. The case was this (*a*): a testator devised to his two daughters A. and H. his lands in the county of Y. (subject to some legacies), to hold to them, their heirs and assigns, as tenants in common, "upon this special proviso and condition," that in case his said daughters, or either of them, should have no lawful issue, that then, and in such case, they or she, having no lawful issue as aforesaid, should have no power to dispose of her share in the said estates so above given to them, *except to her sister or sisters, or to their children;* and the testator devised the residue of his real estate to his said two daughters in fee. A. married W., and levied a fine of her moiety, declaring the uses in trust for W. in fee, and died without having had any issue. It was held, that this occasioned a forfeiture entitling the heir to enter. Lord *Ellenborough* —"We think that the condition is good; for, according to the case of *Daniel* v. *Ubley* (*b*), though the Judges did not agree as to the effect of a devise 'to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased;' *Jones*, J., thinking it gave an estate for life, with a *power* to dispose of the reversion among the sons; the other Judges, according to his report, thinking it gave her a fee-simple in trust to convey to any of her sons; yet, in that case, it was not doubted but that she might have had given her a fee-simple conditional to convey it to any of the sons of the devisor; and, if she did not, that the heir might enter for the condition broken; which estate *Jones* thought the devise gave, if it did not give a life estate, with a power of disposing of the reversion among the sons. And *Dodderidge* said (*c*), 'he conceived she had the fee, with condition, that if she did alien, that then she should alien to one of her children;' and concluded his argument on this point, by saying, that 'her estate was a fee, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons.' And

Condition not to alien *but* to particular persons held good.

(*z*) Co. Lit. 223 a.
(*a*) *Doe* d. *Gill* v. *Pearson*, 6 East, 173.
(*b*) Sir W. Jones, 137, Latch, 9, 39, 134.
(*c*) Latch, 37.

there is a case (*d*) to this effect: 'A devise to a wife to dispose and employ the land on herself and her sons at her will and pleasure:' and *Dier* and *Walsh* held she had a fee-simple, but that it was conditional, and that she could not give it to a stranger; but that she might hold it herself, or give it to one of her sons."

*Muschamp* v. *Bluet*, and *Attwater* v. *Attwater*, contra.

[In the previous case, however, of *Muschamp* v. *Bluet* (*e*), it was held, that a condition not to alienate to any but J. S., imposed on a devisee in fee-simple, was void. And, in the recent case of *Attwater* v. *Attwater* (*f*), Sir *J. Romilly*, M. R., made a similar decision upon a condition, that a devisee in fee-simple should not alien except to one of his brothers; since it would be easy to select the name of a person who would be almost certain not to purchase. It seems, therefore, that the case of *Doe* v. *Pearson* is not to be treated as an authority in favour of the general validity of such a condition.

Gift over, if estate sold within limited time, good.

It appears however that there is no objection to a condition, in restraint of alienation within a particular period (*g*), with a clause giving the estate over in case of non-compliance.]

Restraints on alienation by tenant in tail invalid.

Conditions restraining alienation by a tenant in tail are also void, as repugnant to his estate (*h*), to which a right to bar the entail by means of a fine with proclamations, and the entail and the remainders, by suffering a common recovery, was, before the abolition of these assurances, inseparably incident (*i*); but it was held, that a tenant in tail might be restrained from making a feoffment or levying a fine at common law, i. e. without proclamations, or any other tortious alienation; and also, it seems, from granting leases under the stat. 32 Hen. 8. c. 28 [or a lease for his own life (*k*)]. The invalidity of any restraint on the power of a tenant in tail to enlarge his estate into a fee-simple, however, being once established, it is of little avail to fetter him even with such conditions as are consistent with his estate, since he may at any time, by barring the entail, emancipate himself from all restrictions annexed to it. At one period, the attempts to restrain the aliening power of a tenant in tail

(*d*) Dalison, 58.

[(*e*) Bridgm. Rep. 137.

(*f*) 18 Beav. 330.

(*g*) *Large's case*, 2 Leon. 82, where the point seems to have been assumed. It is said, 1 Coll. 445, that an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime the estate shall shift to B., is valid.]

(*h*) *Pierce* v. *Win*, 1 Vent. 321, Pollex. 435.

(*i*) 10 Rep. 36, Fea. C. R. 260.

(*k*) Co. Lit. 223 b.

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were numerous; and as it was apparent that it was too late to defeat the estate tail on the suffering of the recovery, since by that act the condition itself was defeated, the next contrivance was to declare the estate to be determined, on the tenant in tail taking any preparatory steps for the purpose, as agreeing or assenting to, or going about, any act, &c. (*l*), but which, of course, was equally void on the principle already stated.

Trust to charge lands on alienation by tenant in tail, void.

One of the latest attempts to interfere indirectly with the power of alienation incidental to an estate tail, occurs in *Mainwaring* v. *Baxter* (*m*), where lands were limited by deed to A. for life, remainder to trustees for 1000 years, remainder to B. for 99 years, if he should so long live, remainder to trustees during his life, to preserve, &c., remainder to his first and other sons in tail male, with remainders over; and the trusts of the term of 1000 years were declared to be, to the intent that it should not be in the power of any person to destroy or prevent the estate or benefit of him or them appointed to succeed; and that the trustees, after any contract touching the alienation of the premises, should raise 5000*l.* for the benefit of the person whose estate was so defeated. It was held, by Sir *R. P. Arden*, M. R., that the trusts of the term were void, as being inconsistent with the rights of the tenants in tail.

Limitation over as if tenant in tail were *dead* (not dead *without issue*).

Here it may be noticed, that an objection is advanced in some of the early cases, and has been adopted by text writers of high reputation (*n*), to conditions or provisoes which are intended to defeat an estate tail, on the ground that the estate is declared to cease, as if the tenant in tail were dead, not as if he were dead *without issue;* or, as we are told, would be most correct (*o*), as if the tenant in tail were dead, and there was a general failure of issue inheritable under the entail. A limitation over in the terms first mentioned is, it is said, contrariant, and on that account void, inasmuch as it amounts to saying, that the estate shall be determined as it would be in an event, which *might* not determine it. But it seems questionable, whether much reliance can at the present day be placed on the objection. The Courts would, it is conceived, supply the words " without

(*l*) *Mary Portington's case*, 10 Rep. 36; *Corbet's case*, 1 Rep. 83 b; *Jermyn* v. *Arscot*, cit. 1 Rep. 85 a; *Mildmay's case*, 6 Rep. 40; *Foy* v. *Hynde*, Cro. Jac. 696; all stated Fea. C. R. 253, et seq.

(*m*) 5 Ves. 458. The same principle applies to wills.

(*n*) Fea. C. R. 253, Harg. & Butl. Co. Lit. 223 b, n. 132, [Sand. Uses, ch. 2, s. iv., 4.]

(*o*) Mr. *Butler's* n. Fea. C. R. 254.

issue," as in an early case (*p*), the principle of which seems not very dissimilar), where a devise to a person in tail, with a limitation over "if he die," was read, if he die *without issue*. It is to be observed, too, that in the cases in which the doctrine in question was advanced (*q*), the proviso was void on the ground of repugnancy; and it is remarkable, that even Mr. *Fearne*, its strenuous advocate, completely disregarded the point in the opinion given by him on Mr. *Heneage's* will (*r*); the proviso in which, so far as it respected the sons of the tenant for life, was obnoxious to this objection.

[However in the case of *Bird* v. *Johnson* (*s*), where a testator gave personal property in trust for his daughter for life, and after her death for her children, payable at the age of twenty-one, or at the decease of the daughter, which should last happen, with a proviso, that if any of the legatees should become bankrupt before his share was payable, his interest should "cease and determine as if he were then dead;" it was held by Sir *W. P. Wood*, V. C., that a child who became bankrupt in the lifetime of his mother did not thereby forfeit his interest, the terms of the condition not fitting to the previous gift. "If," said his Honor, "the interest given had been an annuity, which would naturally be at an end on the death of the annuitant, such a clause would be operative; but here it is an absolute interest which is given, and if the donee were dead, the only effect would be to give the fund to his executors or administrators."

As to restraining alienation by legatee of personalty.

The statement of the last case has somewhat anticipated the remark that] the principle which precludes the imposition of restrictions on the aliening powers of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty (*t*). It is clear, therefore, that if a legacy were given to a person, his executors, administrators, or assigns, with an injunction not to dispose of it, [though followed by a limitation over in case of non-compliance,] the restriction would be void; and a gift over, in case of the legatee dying without making any disposition, would be also rejected as a qualification repugnant to the preceding absolute gift (*u*). [But, as in the

(*p*) *Anon.*, 1 And. 33 pl. 84.
(*q*) *Corbet's case*, 1 Rep. 83 b; *Jermyn* v. *Arscot*, cit. ib. 85 a; *Mildmay's case*, 6 Rep. 40; *Foy* v. *Hynde*, Cro. Jac. 696.
(*r*) Butl. Fea. 616, App.
[(*s*) 18 Jur. 976.
(*t*) Co. Lit. 223. a.]
(*u*) *Bradley* v. *Peixoto*, 3 Ves. 324; [*Rishton* v. *Cobb*, 5 My. & C. 153;] *Ross* v. *Ross*, 1 Jac. & W. 154; [*Green* v. *Harvey*, 1 Hare, 428; *Watkins* v. *Williams*, 3 Mac. & G. 622; *In re Yalden*, 1 D. M. & G. 53; *Hughes* v. *Ellis*,

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[case of real estate, so in the case of personalty, a prohibition against alienation within a limited period is valid (*x*).]

Property cannot be given to a man exempt from the operation of bankruptcy.

Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift from its liability to the debts of the donee: and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer, by operation of law, of the whole estate; and it is immaterial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest than to an absolute or transmissible property (*y*). Whatever remains in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency becomes vested in the person or persons on whom the law, in such event, has cast the property.

But his interest may be made to cease on that event.

Thus, in *Brandon* v. *Robinson* (*z*), where a testator, after devising his real and personal property to trustees, upon trust to sell and divide the produce among his children, directed that the share of his son should be invested at interest, in the names of the trustees, during his life, and that the dividends and interest thereof, as the same became payable, should be paid by them from time to time into his own proper hands, or on his order and receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and, upon his decease, the principal, together with the interest thereof, to be paid and applied to such persons as would be entitled to any personal estate of A.'s said son, if he had died intestate. The legatee became bankrupt.

Effect of bankruptcy on inalienable trust.

On a bill filed by the assignees against the trustees of the will, to have the benefit of the bequest, the latter demurred. It was argued for the defendants, that it could not be disputed that a testator might limit a personal benefit strictly, excluding

[20 Beav. 193; *In re Mortlock's trust*, 3 Kay & J. 456; *Rogers* v. *Birkhead*, 3 Jur. N. S. 405; *Bowes* v. *Goslett*, 27 L. J. Ch. 249. The cases show that repugnancy is the true ground of the decision, and not, as suggested by Lord *Truro*, in *Watkins* v. *Williams*, ubi sup., the difficulty or impossibility of ascertaining whether any, or what part, of the fund remained undisposed of.

(*x*) *Churchill* v. *Marks*, 1 Coll. 441. The restriction was imposed in respect of a contingent reversionary interest, upon which fact some stress seems to have been laid; and see *Graham* v. *Lee*, 23 Beav. 388. *Re Payne*, 25 ib. 556. But see *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1.

(*y*) *Brandon* v. *Robinson*, 18 Ves. 429, 1 Rose, 197; *Graves* v. *Dolphin*, 1 Sim. 66; *Rochford* v. *Hackman*, 9 Hare, 475; all referred to, post.]

(*z*) 18 Ves. 429, 1 Rose, 197.

any assignee either by actual assignment or operation of law. He might limit the enjoyment up to a particular period or event, and then to be forfeited or transferred to some other person. If the testator has a right so to limit, he may direct the trustees, who are to take the absolute legal interest, to dispose of it from time to time in a particular manner, to pay into the hands of the legatee personally from time to time, and to no other. Such a disposition, it was contended, is not opposed by any principle of law or public policy. The son acquires nothing until each payment becomes due. When he actually receives, and then only, the trust is executed; and the effect of a decision, that the payment is to be made not to him personally, but to others, who by representation are become at law entitled to his rights, would be making another will for the testator. It was contended for the assignees, that this case was not to be distinguished from the case of a lease with a proviso not to assign without license, which would pass by the assignment under a commission of bankruptcy, or might be sold under an execution. The voluntary act is restrained, but not the act of law *in invitum*. Lord *Eldon*, C., "There is no doubt that property may be given to a man until he shall become bankrupt: it is equally clear, generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not *sell* or *alien* it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. In the case of *Foley* v. *Burnell* (*a*), this question afforded much argument. A great variety of clauses and means was adopted by Lord *Foley*, with a view of depriving the creditors of his sons of any resort to their property. But it was argued here, and, as I thought, admitted, that if the property were given by Lord *Foley* to his sons, *it must remain subject to the incidents of property*, and it could not be preserved from the creditors, unless given to some one else. So the old way of expressing a trust for a married woman was, that the trustee should pay into her own proper hands, and

Lord Eldon's judgment in *Brandon* v. *Robinson*.

(*a*) 1 B. C. C. 274.

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upon her own receipt only (*b*), yet this Court always said she might dispose of that interest, and her assignee would take it;

What words create a trust for separate use.

(*b*) What words create a trust for separate use, has often been a subject of dispute. [The principle of construction is stated to be, that the marital right is not to be excluded, except by expressions which leave no doubt of the intention; 5 Ves. 521; 9 ib. 377; 1 Mad. 207; 2 R. & My. 188; 2 My. & K. 181, 188.]

"To be at her own disposal."

In *Kirk* v. *Paulin*, at the Rolls (1737), 7 Vin. Abr. 95, pl. 43, A., by his will, bequeathed household goods, &c., to his daughter B., then the wife of C., *to be at her own disposal*, and to do therewith as she should think fit: the bequest was held to be for her separate use. See also *Prichard* v. *Ames*, T. & R. 222.

"For the livelihood" of the wife.

In *Darley* v. *Darley*, 3 Atk. 399 [there is attributed to Lord *Hardwicke* a dictum, that a gift in trust *for the livelihood* of the wife created a trust for her separate use. It appears, however, from Mr. *Sanders'* note to that case, that A., by indenture between himself and his daughter, the wife of B., in consideration of natural love and affection, and her livelihood and future support, assigned a moiety of a term to her, which she afterwards, in her husband's lifetime, bequeathed by her will to the plaintiff: but the plaintiff's bill against the husband was dismissed. See also 3 B. C. C. 383. This was in effect deciding that the term was not given to the separate use of the wife; for a power of disposition by will is a regular incident to such an interest, *Fettiplace* v. *Gorges*, 3 B. C. C. 8; *Rich* v. *Cockell*, 9 Ves. 369: and therefore, the plaintiff in this case would have been entitled in equity under the wife's will to the one half of the term. This view is strengthened by an opinion expressed by Sir *J. Leach*, V. C., in *Packwood* v. *Maddison*, 1 S. & St. 232, that by a gift "for the support" of a feme coverte a trust for her separate use was not created. And see *Gilchrist* v. *Cator*, 1 De G. & S. 188. In *Cape* v. *Cape*, 2 Y. & C. 543, a gift by codicil for the support and maintenance of the wife of A. was held to be for her separate use, probably because the will had contained a bequest of the same fund to A. himself, which was expressly revoked by the codicil.]

Receipt to be a discharge.

In *Lee* v. *Priaux*, 3 B. C. C. 381, the trust, in a will, was to pay certain dividends to A., but the trustee was not to "be troubled to see to the application of any sum or sums paid to the said A., *but her receipt in writing should be a sufficient discharge*" to the trustee for the sums so paid. Lord *Alvanley*, then M. R., was of opinion, that the words were sufficient to give an absolute power to the wife independently of her husband.

Direction to deliver legacy on the demand of the feme legatee.

In *Dixon* v. *Olmius*, 2 Cox, 414, a bequest to the testator's niece, Lady W., of certain securities owing from Lord W., with a direction that they should be delivered up to her whenever she should demand or require the same, was held, by Lord *Loughborough*, to be a gift to her separate use; because Lord W. could not have obtained them from the executors without a demand made by Lady W. The same principle evidently applies to a direction that a feme legatee shall not sell without her husband's consent; *Johnes* v. *Lockhart*, 3 B. C. C. 383, n., Belt's Ed.

"To pay into the proper hands."

In *Hartley* v. *Hurle*, 5 Ves. 540, Sir *R. P. Arden*, M. R., held, that a trust to pay *into the proper hands* of A. was a trust for separate use.

But in the more recent case of *Tyler* v. *Lake*, 4 Sim. 144, Sir *L. Shadwell*, V. C., made a contrary decision on the same words. There was a similar gift to a male legatee in the same will; but his Honor seems not to have wholly relied on this circumstance: and the decision was affirmed, on appeal, by Lord *Brougham*, 2 R. & My. 183. [The authority of this case was reluctantly followed by Sir *J. Wigram*, V. C., in *Blacklow* v. *Laws*, 2 Hare, 49, where he decided that a trust "to pay into the proper hands of A. for her own proper use and benefit," was not a trust for separate use.

"For her own proper and absolute use."

And in *Taylor* v. *Stainton*, 2 Jur. N. S., Sir *W. P. Wood*, V. C., so decided upon a bequest to a married woman "for her own proper and absolute use and benefit." See also *Rycroft* v. *Christy*, 3 Beav. 238. But a gift in trust for a woman, she "to receive the rents while she lives *whether married or single*," with a clause forbidding a sale or mortgage during her life was in *Goulden* v. *Camm*, 29 L. J. Ch. 135, 6 Jur. N. S. 113, held to create a trust for her separate use.]

In *Adamson* v. *Armitage*, Coop. 283, 19 Ves. 416, Sir *W. Grant* decided

as if there was a contract entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before Miss *Watson's case* that these words, 'not to be paid by anticipation,' &c., were

that a bequest to A. of a sum of money to be vested by the executors in the hands of trustees, the income arising therefrom to be *for her own sole use and benefit*, was an absolute bequest of the property exclusive of the marital right.

"For her own sole use."

So, in *Ex parte Ray*, 1 Mad. 199, where certain sums of stock were, by a marriage settlement, vested in the hands of trustees, in trust to pay the dividends to A., the intended wife, for life, for her separate use; and, after her decease, to permit B., the intended husband, to receive the dividends during his life; and, after his decease, in trust for the children of the marriage; and, in default of children, in trust *for the sole use and benefit of A.*, her executors, administrators, and assigns: Sir *T. Plumer*, V.C., held, that the words "sole use" meant separate use, and consequently, that A. had the power of disposing of the trust property by will; and that the circumstance of other words being elsewhere superadded to "sole" in creating a similar trust, was not material. [See also *Lindsell* v. *Thacker*, 12 Sim. 178; *Inglefield* v. *Coghlan*, 2 Coll. 247; *Ex parte Killick*, 3 M. D. & D. 483.]

"Sole use and benefit."

But, of course, a trust or direction to pay the rents or income of property, real or personal, simply to a married woman for life, creates no trust for her separate use; *Brown* v. *Clark*, 3 Ves. 166; *Lumb* v. *Milnes*, 5 Ves. 517; [*Jacobs* v. *Amyatt*, 1 Mad. 376, n.;] and the addition of the words "for her *own* use and benefit" has been repeatedly held not to vary the construction; *Wills* v. *Sayer*, 4 Mad. 409; *Roberts* v. *Spicer*, 5 Mad. 491; [*Beales* v. *Spencer*, 2 Y. & C. C. C. 651;] which, it should be observed, is also wholly uninfluenced by any extrinsic circumstances in the situation of the cestui que trust, which might seem to render a trust of this nature reasonable or convenient, as that of her being indigent, or living separately from her husband, or both; *Palmer* v. *Trevor*, 1 Vern. 261, Raithby's Ed.; nor does the fact of the husband being *one* of the trustees, nor even that of the prior trust being for him determinable on bankruptcy, &c., afford a ground for departing from the construction; *Kensington* v. *Dollond*, 2 My. & K. 184; *Stanton* v. *Hall*, 2 R. & My. 175. [But see *Shewell* v. *Dwarris*, 1 Johns. 172. And perhaps the fact that the husband is sole trustee does afford such ground; *Darley* v. *Darley*, 3 Atk. 399; *Ex parte Beilby*, 1 Gl. & J. 167.]

Mere trust for married woman not sufficient to create separate property.

"Own use and benefit."

Extrinsic circumstances not to be regarded.

So, if a testator after directing that a fund bequeathed to females shall be "under their *sole* control" (words which, standing alone, would clearly exclude the marital right), shews, by the context of the will, that the expression has reference to the possible control of some person other than the husband, the words in question will be inoperative to modify the interest; *Massey* v. *Parker*, 2 My. & K. 174; but where the gift was to A. and B. (one a married woman, and the other her infant daughter), to be equally divided between them, "for their own use and benefit, *independent of any other person*;" it was held, that these words meant "*independent of*" *all mankind*, and, therefore, included the husband; *Margetts* v. *Barringer*, 7 Sim. 482.

"Under their sole control."

"Independent of any other person."

A direction to trustees to pay the interest to the testator's wife, to be by her applied for the maintenance of herself *and her children*, has been held not to create a trust for separate use. *Wardle* v. *Claxton*, 9 Sim. 524. [Sir *L. Shadwell*, V. C., remarked, that the words "to be applied, &c." had reference not only to the testator's widow, but to all the children he might have by her. But this circumstance will not control the force of a clear trust for separate use; *Bain* v. *Lescher*, 11 Sim. 397; for, as Sir *K. Bruce*, V. C., said, 2 Coll. 421, "a case might arise in which the words 'sole use' applied to a class of men and women, might not be held indiscriminately applicable to each." See also *Froggatt* v. *Wardell*, 3 De G. & S. 685.]

Where a trust for separate use is created, but no trustee is appointed, the husband becomes a trustee for his wife. *Bennett* v. *Davis*, 2 P. W. 316; [see

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introduced. I believe they were Lord *Thurlow's* own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord *Thurlow* endeavoured to prevent that, by imposing upon the trustees the necessity of paying her from time to time, and not by anticipation, reasoning thus; that equity making her the owner of it, and enabling her as a *married* woman to alien, might limit her power over it; *but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.* This is a singular trust. If upon these words it can be established that he had no interest until he tenders himself personally to the trustees to give a receipt, then it was not his property till then; but if personal receipt is in the construction of this Court a necessary act, it is very difficult to maintain, that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would

[also 9 Ves. 375, 583. The point had been doubted by Lord *Cowper* in *Harvey* v. *Harvey*, 1 P. W. 125.]

What amounts to a restraint on anticipation by a feme coverte.

To the complete efficiency of a trust for the separate use, a restraint on the anticipation of future income is essential as a protection against marital influence. Hence, to ascertain by what terms a restrictive provision of this nature may be created is a point of much importance. [The intention must be clear; and therefore a direction to pay the income *from time to time*, or as it shall become due, or into the *proper hands* of the feme coverte; *Pybus* v. *Smith*, 3 B. C. C. 340, 1 Ves. jun. 189; *Parkes* v. *White*, 11 Ves. 222; *Acton* v. *White*, 1 S. & St. 429; *Glyn* v. *Baster*, 1 Y. & Jerv. 329, or even upon her personal appearance and receipt, *Ross's trust*, 1 Sim. N. S. 196; cf. *Arden* v. *Goodacre*, 11 C. B. 883, will not take away the power of anticipation. In *Alexander* v. *Young*, 6 Hare, 393, the principle was carried to its full extent, Sir *J. Wigram*, V. C., holding that a trust for the separate use of a married woman for her life; and after her death, as she should appoint, *but no appointment by deed to come into operation until after her death* did not forbid anticipation.

However, no technical form of words is necessary; and it was decided in *Brown* v. *Bamford*, 1 Phill. 260, by Lord *Lyndhurst*, reversing the decision of Sir *L. Shadwell*, 11 Sim. 127, that a bequest to trustees in trust to pay the income to such persons as a married woman should appoint, but not by way of anticipation, and in default of such appointment, into her proper hands for her separate use, created a valid restraint against anticipation, extending not only to the express power but to the trust in default of appointment. And similar decisions were pronounced in *Moore* v. *Moore*, 1 Coll. 54, and *Harnett* v. *M'Dougall*, 8 Beav. 187. In *Field* v. *Evans*, 15 Sim. 375, Sir *L. Shadwell*. V. C., decided, that under a trust for the separate use of a married woman, and a declaration that the receipts of herself or the persons to whom she should appoint the income, *after the same should become due*, should be effectual, she was restrained from anticipating. See also *Baker* v. *Bradley*, 7 D. M. & G. 597. And in *Steedman* v. *Poole*, 6 Hare, 193, a gift of property for the separate use of a feme coverte, "and not to be sold or mortgaged" was similarly construed. Of course a clause in restraint of anticipation does not apply to arrears of income, *Pemberton* v. *M'Gill*, 29 L. J. Ch. 499.]

be so. Next, is there in this will evidence to shew, that as the interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? *To prevent that it must be given to some one else* (*c*); and, unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest capable of being parted with. The principal at the death of the bankrupt will be under very different circumstances. The testator had a right to limit his interest to his life, giving the principal to such person as may be his next of kin at his death, to take it as the personal estate not of the son, but of him the testator, not as if it was the son's personal estate, but as the gift of the testator. The demurrer must, upon the whole, be overruled."

Assignees in bankruptcy entitled to benefit of trust for maintenance.

So in the case of *Graves* v. *Dolphin* (*d*), where a testator directed trustees to pay an annuity of 500*l.* to his son I. for his life, and declared that it was intended for his personal maintenance and support; and should not, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges, or incumbrances of his said son, but that the same should, as it became payable, be paid over into the proper hands of him, the testator's said son, and not to any other person or persons whomsoever; and the receipts of the son only were to be sufficient discharges. The son became bankrupt, and it was held by Sir *J. Leach*, V. C., that the annuity belonged to his assignees.

Notwithstanding trustees have a discretion as to mode of application.

And the vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a cestui que trust, does not take it out of the operation of bankruptcy or insolvency; to effect which the discretion of the trustees must extend, not merely to the manner of applying the income for the benefit of the cestui que trust, but also to the enabling of them to apply it either for his benefit, or for some other purpose.

Thus in the case of *Green* v. *Spicer* (*e*), where a testator devised certain estates to trustees, upon trust to pay and apply the rents and profits to or for the board, lodging, maintenance, and support, and benefit of his son R., at such times and in such manner as they should think proper, for his life: it being

[(*c*) As to this, vid. post, 33.] (*d*) 1 Sim. 66.
(*e*) 1 R. & My. 395, Taml. 396.

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the testator's wish, that the application of the rents and profits, for the benefit of his said son, might be at the entire discretion of the said trustees; and that his son should not have any power to sell or mortgage, or anticipate in any way the same rents and profits. R. took the benefit of an insolvent act, whereupon his interest was claimed by the assignee. Sir *J. Leach*, M. R., held the assignee to be entitled, on the ground that the insolvent was the sole and exclusive object of the trust. The trustees were bound, he said, to apply the rents for the benefit of R., and their discretion applied only to the manner of their application.

Title of assignees in bankruptcy not excluded by discretion seemingly given to trustees.

So in the case of *Snowden* v. *Dales* (*f*), where A vested a money fund in trustees, in trust during the life of B., or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, or at such other time or times, and in such sum or sums as they should judge proper, to allow and pay the interest into the proper hands of B., or otherwise, if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessaries; but so that he should not have any right, title, claim, or demand, in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper or expedient; and so as no creditor of his should or might have any lien or claim thereon, or the same be in any way subject or liable to his debts, dispositions, or engagements; with a direction that a proportionate part of the interest should be paid up to the decease of B.; and after his decease the fund, and all savings and accumulations, should be in trust for his children, &c. B. became bankrupt. Sir *L. Shadwell*, V. C., held, that his assignees were entitled to the life interest; his Honor being of opinion, that there was no discretion to withhold and accumulate any portion of the interest during the life.

Exception upon special terms of the trust.

[On the other hand, in the case of *Twopeny* v. *Peyton* (*g*), where the trustees had a discretion to apply *the whole or such part* of the income as they should think fit, for the maintenance and support of the cestui que trust, who, the testatrix recited, *had become a bankrupt and insane, and for no other purpose whatsoever;* Sir *L. Shadwell*, V. C., held, that the assignees

(*f*) 6 Sim. 524. [See also *Piercy* v. *Roberts*, 1 My. & K. 4; *Younghusband* v. *Gisborne*, 1 Coll. 400.

(*g*) 10 Sim. 487. The bankrupt was uncertificated, so that this property was liable. See also *Yarnold* v. *Moorhouse*, 1 R. & My. 364, stated post.

[took no interest. Yet, notwithstanding the peculiar terms of the trust, it may be doubted how far the case will be a safe guide on future occasions; for the trustees could scarcely, under the words of the trust, have withheld the *whole* income from the bankrupt.

Assignees entitled to bankrupt's undivided share.

If the trusts of the property be declared in favour of several, as a man, his wife and children, to be applied for their benefit, at the discretion of the trustees, the man's assignees, in case of his bankruptcy, are entitled to as much of the fund as he would himself have been separately entitled to, after providing for the maintenance of the wife and children (*h*). But if he was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children, then his assignees have no claim (*i*).

—— except in special cases.

Assignees may be excluded where the trustees have a discretion to exclude the bankrupt.

Although where the bankrupt is the only person interested, and the trustees have a discretion as to the manner of applying the funds for his benefit, that discretion is, as we have seen, determined by his bankruptcy. Yet, where the trustees of a settlement had a discretionary power of excluding any of the beneficiary objects of the trust, their power was held to continue after the insolvency of one of such objects (*k*). But it was said, that any benefit which the insolvent might take would belong to his assignees (*l*). And if the trustees decline (as by paying the fund into Court) to exercise their power of exclusion, the power is gone, and the assignees are entitled to the whole or an aliquot portion of the fund, according as the bankrupt was the only cestui que trust or not (*m*).]

Life interest may be made to cease on bankruptcy.

But though a testator is not allowed to vest in the object of his bounty, an inalienable interest exempt from the operation of bankruptcy; yet there is no principle of law which forbids his giving a life interest in real or personal property, with a proviso, making it to cease on such event: for whatever objection there may be to allowing a person to modify his own property, in such manner as to be divested on bankruptcy or insolvency, it seems impossible, on any sound principle, to deny to a third person

[(*h*) *Page* v. *Way*, 3 Beav. 20; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Rippon* v. *Norton*, 2 Beav. 63; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Wallace* v. *Anderson*, 16 Beav. 533. Some of these cases arose on deeds, but the same principles seem to apply to wills.

(*i*) *Godden* v. *Crowhurst*, 10 Sim. 642. The principle for which this case is cited is recognised in *Kearsley* v. *Woodcock*, 3 Hare, 185; but the decision itself has been questioned; see *Younghusband* v. *Gisborne*, 1 Coll. 400.

(*k*) *Lord* v. *Bunn*, 2 Y. & C. C. C. 98.

(*l*) Per Sir *K. Bruce*, V.C., ib.

(*m*) *In re Coe's trust*, 4 Kay & J. 199.]

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the power of shifting the subject of his bounty to another, when it can no longer be enjoyed by its intended object. The validity of such provisions was established in the early case of *Lockyer* v. *Savage* (*n*), where 4,000*l.* was settled by the father of a *feme coverte*, for the use of the husband for life, with a direction that *if he failed in the world*, the trustees should pay the produce to the separate maintenance of his wife and children; and the latter trust was held to be good. [And alienation will work a forfeiture, though the legatee was ignorant of the condition; as where (*o*) a will, taken to be the last will, gave an unconditional annuity, and it was afterwards discovered that a subsequent will had revoked the first, and repeated the annuity subject to a condition forbidding alienation, but the annuitant had in the meantime mortgaged his interest, it was held that the annuity ceased.]

Indeed, this principle is now so well settled, that the only point on which any doubt can arise, is, whether the clause is so framed as to apply to bankruptcy, which we shall see has often been a subject of controversy.

It appears that bankruptcy is a forfeiture, under a proviso prohibiting alienation, if the terms of such proviso extend to alienations by operation of law, as well as those produced by the act of the devisee; bankruptcy being regarded as an alienation of the former kind.

Where bankruptcy is a forfeiture under a clause restraining alienation.

Thus, in *Dommett* v. *Bedford* (*p*), where a testator after giving an annuity, charged on real estate, to A. for life, directed that it should from time to time be paid *to himself only*, and that a receipt under his own hand, and no other, should be a sufficient discharge for the payment thereof; the testator's intent being that the said annuity, or any part thereof, should *not on any account be alienated* for the whole term of his life, or for any part of the said term; and, *if so alienated, the said annuity should cease*. A. having become bankrupt, it was held that the annuity had determined.

So in *Cooper* v. *Wyatt* (*q*), where the overplus of the rents of a moiety of the testator's real estate was directed to be paid into

(*n*) 2 Stra. 947. This case (among many others) shews that there is not (as sometimes contended) any real distinction between a trust for A. until bankruptcy and a trust for A. for life, with a proviso determining the life interest on bankruptcy; each is equally valid. [Of course clauses of this nature do not affect arrears of income, *In re Stulz's Trusts*, 4 D. M. & G. 404.

(*o*) *Carter* v. *Carter*, 3 Kay & J. 618.]

(*p*) 3 Ves. 149, 6 T. R. 684.

(*q*) 5 Mad. 482.

the hands of S., *but not to his assigns*, for the term of his natural life, for his *own sole* use and benefit, with a limitation over if the devisee should, by any ways or means whatsoever, *sell, dispose of, or incumber*, the right, benefit, or advantage, he might have for life, or any part thereof: Sir *J. Leach*, V. C., held that bankruptcy was a forfeiture; his Honor considering that the expressions of the testator denoted that the devisee's interest was to cease when the property could be no longer personally enjoyed by him.

Bankruptcy held *not* to be a forfeiture.

On the other hand, in the case of *Wilkinson* v. *Wilkinson* (*r*), where a testator, after giving certain annuities and other life interests to several persons, provided that in case they should "respectively *assign or dispose of or otherwise charge or incumber* the life estates, the annuities, and provisions so made to and for them during their respective lives as aforesaid, *so as not to be entitled to the personal receipt, use, and enjoyment thereof:* then the annuity, life estate, or interest, of him, her, or their heirs respectively (*s*), so doing, or attempting (*t*) so to do," should cease, and should immediately thereupon devolve upon the persons who should be next entitled thereto. Sir *W. Grant*, M. R., was of opinion, that the testator had not with sufficient clearness expressed an intention that the life estate, which he had given to his son, should cease upon bankruptcy.

So in the case of *Lear* v. *Leggett* (*u*), where a testator, after bequeathing to his son and daughters the dividends of certain stock for their respective lives, declared, that their provisions should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt. And in case they, or any or either of them, should charge or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then such mortgage, sale, or other disposition, or incumbrance so to be made by them, or any or either of them, on his, her, or their interest, should operate as a complete forfeiture thereof, and the same should devolve as if he, she, or they were then dead. The son became bankrupt, and Sir *L. Shadwell*, V. C., decided that the bankruptcy was not a forfeiture. His Honor observed,

(*r*) Coop. 259, 3 Swanst. 515, see 528.

(*s*) Sic orig. as reported.

[(*t*) In *Graham* v. *Lee*, 23 Beav. 391, was said by the M. R. that the "attempt" must be such as, but for the clause of forfeiture, would operate as an alienation.]

(*u*) 2 Sim. 479, 1 R. & My. 690. See also *Whitfield* v. *Prickett*, 2 Kee. 608; [*Graham* v. *Lee*, ubi sup.]

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that the words declaring that the gift should not be subject to any alienation or disposition, did not create any forfeiture. And the subsequent words referred to a voluntary alienation only, and bankruptcy was not such. The learned Judge commented on the difference of the language of the clause here, and in *Cooper* v. *Wyatt* (*x*), the authority of which had been much pressed on the Court.

The case was afterwards brought before Lord *Lyndhurst*, C., on appeal, when his Lordship affirmed the decree of the V. C., observing, that the prohibition in *Dommett* v. *Bedford* (*x*), was expressed in much more general and comprehensive terms than in the case before him, and might well be construed to extend to alienations by act of law.

Where the language of a clause restrictive of alienation does not extend to an alienation *in invitum*, it seems that the seizure of the property under a judicial process sued out against the devisee or legatee, does not occasion a forfeiture.

Sale under process of outlawry held no forfeiture, clause requiring positive act.

Thus in the case of *Rex* v. *Robinson* (*z*), where an annuity of 400*l.* was bequeathed to W. as an unalienable provision for his personal use and benefit, for his life, and not otherwise; and so that the same annuity, or any part thereof, should not be subject or liable to be alienated, or be or become in any manner liable to his debts, control, or engagements; and the annuity was made to cease in case W. should "at any time sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate," the annuity or any part thereof, or should "make, do, execute, or cause or procure to be made, done, and executed, any act, deed, matter, or thing whatsoever, to charge, alienate, or affect, the said annuity," or any part thereof. A creditor of the legatee sued him to outlawry. *Macdonald*, C. B., held, on the authority of *Dommett* v. *Bedford* (*a*) and *Doe* d. *Mitchinson* v. *Carter* (*b*), that the seizure of the annuity under the outlawry, at the suit of the Crown, arising merely from the negative, and not the positive acts of the party, was *not* a forfeiture on the words of the bequest, which required a positive act. He considered the words, in the present case, were not so

(*x*) Ante, 28.
(*z*) Wightw. 386.
(*a*) 6 T. R. 684, ante, 28.
(*b*) 8 T. R. 57. A lessee having covenanted not to let, set, assign, transfer or make over, &c., the indenture of lease, a warrant of attorney to confess judgment, given without any special intent to evade the restriction on alienation, [was held not to create a forfeiture under a proviso for re-entry on breach of any covenant.]

large as in *Dommett* v. *Bedford*, but were more conformable to those in *Doe* v. *Carter*.

Clause restraining should extend to involuntary alienation.

These cases shew that when it is intended to take away a benefit as soon as it cannot be personally enjoyed by the devisee, it should be made to cease on alienation, not only by his own acts, but by operation of law.

Taking benefit of Insolvent Debtors' Act a voluntary alienation.

It seems that taking the benefit of an insolvent act is construed to be an alienation, when bankruptcy would not, as it requires certain acts on the part of the insolvent, (viz., the filing of a petition, schedule, &c.,) constituting it a voluntary alienation, as distinguished from a bankruptcy, which partakes more of the nature of a compulsory measure (*c*).

As in the case of *Shee* v. *Hale* (*d*), where a testator gave real and personal estate to trustees, upon trust to pay to his son J. M. the yearly sum of 200*l.* during his natural life, or until he should sign any instrument whereby he should contract to sell, assign, or otherwise part with the same, or any part thereof, or in any way charge the same as a security, or in any other manner dispose of such annuity by anticipation, *or whereby he should authorize, or intend to authorize, any person or persons to receive the same,* except only as to the then next quarterly payment. And the testator declared that, in case his said son should at any time sign or execute any instrument or writing for any of the purposes aforesaid, then the annuity should cease. The testator's son took the benefit of an insolvent act; and this Sir *W. Grant* held to be a forfeiture, *being an act authorizing others to receive the annuity.* It differed, he said, from the case of a bankrupt. The insolvent debtor was not in a situation to be compelled to part with the annuity; he might have enjoyed it for his life: the signing of the petition and schedule were clear acts (*e*).

[So in *Branton* v. *Aston* (*f*), where a testator bequeathed to

(*c*) But by the Bankrupt Act, 6 Geo. 4, c. 16, [and since, by stat. 12 & 13 Vict. c. 106, s. 70,] the legislature, in admitting declarations of insolvency by the trader himself to be acts of bankruptcy, has given to bankruptcy, in these cases at least, the character of a voluntary act. [But *Graham* v. *Lee*, 23 Beav. 388, is contra. On the other hand, a creditor being enabled, under the act 1 & 2 Vict. c. 110, s. 36, to obtain an order vesting an insolvent's property in the provisional assignee (which is as much a proceeding in invitum as bankruptcy usually is), insolvency under such circumstances is not within the reason of the distinction noticed in the case next stated in the text. See *Pym* v. *Lockyer*, 12 Sim. 394.]

Bankruptcy, how far to be regarded as a voluntary alienation of the interest.

(*d*) 13 Ves. 404.

(*e*) This distinction was also recognised by Lord *Lyndhurst*, in the case of *Lear* v. *Leggett*, already stated (ante, 29), [and by Sir *G. J. Turner*, V. C., in *Rochford* v. *Hackman*, 9 Hare, 484.

(*f*) 2 Y & C. C. C. 24.

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[trustees an annuity of 50*l.* upon trust, during the life of his nephew J. N., to pay the same to him when and as the same should become due for his own use and benefit. And the testator declared that J. N. should have no power to sell, mortgage, incumber, or anticipate the payment of the said annuity; and in case he should attempt so to do, the same should cease, and be no longer payable to him; with a gift over upon the death of J. N., or any such attempt by him to sell, &c. The nephew took the benefit of the Insolvent Act, and Sir *J. Knight Bruce*, V. C., held that there had been a clear attempt to incumber or anticipate payment of the annuity.

And in the case of *Churchill* v. *Marks* (*g*), the same Judge held that taking the benefit of an Insolvent Act was a forfeiture of property bequeathed to the insolvent, subject to a proviso that he should not be "allowed, or sell, or part with," his share in the money till it should be divided; with a gift over in case of non-compliance (*h*).]

Effect of bankruptcy in lifetime of testator.

Sometimes the question arises, whether a proviso of this nature extends to bankruptcy or insolvency occurring in the lifetime of the testator. If such event has left the after-acquired property of the bankrupt or insolvent exposed to the claims of his creditors, then a forfeiture would take place under words sufficiently strong to determine the interest of the devisee or legatee, when the property becomes applicable to any other purpose, than the benefit of the cestui que trust.

As in the case of *Yarnold* v. *Moorhouse* (*i*), where a testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements; and that he should have no power to charge, assign, anticipate, or incumber them; but that if he should attempt so to do, or if the dividends by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, *or be, or become, applicable to or for any other purpose than for the maintenance of the nephew and his family*, his interest therein should cease, and the stock be held upon trust for his children. Subsequently to the execution of the

[(*g*) 1 Coll. 441; see also *Martin* v. *Maugham*, 14 Sim. 230; *Rochford* v. *Hackman*, 9 Hare, 475.

(*h*) In each of the two last cases, the insolvent stated in his schedule that he had no power to assign the property in question. But the V. C. considered the fact to be immaterial to the point at issue.]

(*i*) 1 R. & My. 364.

will, and prior to a codicil confirming it, the nephew took the benefit of the Insolvent Act (1 Geo. 4, c. 119,), in the usual way: afterwards the testator died. As it appeared that the act of 1st Geo. 4, gave to the Insolvent Debtors' Court a control over stock in the public funds, and the future property generally of a discharged prisoner (*k*), the V. C. held that the insolvency operated as a forfeiture of the legatee's life interest in the stock; and his decree was affirmed on appeal, by Lord *Lyndhurst*, who thought that, as the dividends were subject, at the discretion of the creditors, to be charged with the payment of their debts, the interest was forfeited under the words carrying over the bequest in the event of its being or becoming in any manner applicable to or for any other purpose than for the maintenance of the legatee.

[On the same principle if the income of property be given to a person until he become bankrupt, and on that event to another, and the prior legatee is already a bankrupt at the date of the instrument, or becomes so before he is entitled to possession, the gift over takes effect immediately (*l*).

As to validity of condition determining legatee's interest where there is no gift over.

Some observations which fell from Lord *Eldon* in the case of *Brandon* v. *Robinson* (*m*), have sometimes been cited to prove that a limitation over to some third person is in all cases essential to the validity of these conditions. Those remarks do not, however, appear to warrant such a conclusion (*n*), and the cases of *Dommett* v. *Bedford* (*o*), and *Joel* v. *Mills* (*p*), in which the life interest was held to cease upon the proviso for cesser without any gift over, are direct authorities to the contrary.]

Unalienable trust for maintenance not permitted by the law of England.

An attempt to vest in a person an interest which shall adhere to him, in spite of his own voluntary acts of alienation, is no less nugatory and unavailing than is, we have seen, the endeavour to create an interest which shall be unaffected by bankruptcy or insolvency (*q*), as the law of England does not (like that of

(*k*) The insolvent had also executed to the provisional assignee a warrant of attorney, as required by the act; but this fact, though very prominently set forth in the Master's report, seems not to have been material, since property of this nature could not, in the then state of the law, be seized under any execution which could have been obtained by virtue of such warrant of attorney.

(*l*) [*Manning* v. *Chambers*, 1 De G. & S. 282. *Sharp* v. *Cosserat*, 20 Beav. 470; *Re Muggeridge's Trusts*, 1 Johns. 625; *Seymour* v. *Lucas*, 29 L. J. Ch. 841. See an analogous case, *In re Williams*, 12 Beav. 317.

(*m*) 18 Ves., see p. 435; and see per Sir *W. P. Wood*, V. C., *Stroud* v. *Norman*, 1 Kay, 330.

(*n*) See per Sir *G. J. Turner*, V. C., *Rochford* v. *Hackman*, 9 Hare, 481, 482.

(*o*) 6 T. R. 684.

(*p*) 3 Kay & J. 458.]

(*q*) But, of course, as a life interest may be made to cease on bankruptcy or

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Scotland) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who it is well known may be restrained from anticipation; [and that, whether the subject of the gift be real or personal property, for an estate in fee or for life only (*r*). And where an annual sum is given upon trust for any person for life, a gift over of so much as has not been applied for his benefit is void on the same principle as a gift over, after an absolute bequest, in case the legatee has not disposed of the legacy (*s*).]

Except in the case of a married woman.

But this doctrine is not applicable to unmarried women, a restriction on the aliening power of a woman not under coverture being no less inoperative than a similar restraint on the *jus disponendi* of a person of the male sex. This was distinctly admitted in the case of *Barton* v. *Briscoe* (*t*), where a sum of money was vested in trustees, upon trust to pay the dividends, interest, and annual produce, to such persons as A. (a feme coverte) should, notwithstanding her coverture, appoint, but not so as to deprive herself of the intended use or benefit thereof, by sale, mortgage, charge, or otherwise, in the way of anticipation; and in default of such direction, into her own proper hands, for her separate use, exclusively of B. her husband; and after her decease, upon trust to transfer the fund as A. by will should appoint, and in default of such appointment to M., the only child of A. A survived her husband, and now with M. filed a bill to obtain a transfer of the fund, which Sir *T. Plumer*, M. R., decreed, on the ground that the restriction was confined to coverture, and that when a married woman becomes discoverte, she has the same power of disposition over her property as other persons.

Remark on *Barton* v. *Briscoe*.

As the restriction was evidently confined to the existing coverture, the case cannot be considered as an authority on the general question, concerning which, however, there is no doubt either upon authority or principle.

insolvency, so it may be determined on voluntary alienation, [*Lewes* v. *Lewes*, 6 Sim. 304.]

Questions frequently arise as to the effect of particular acts in occasioning forfeiture under clauses of this description. Where an annuity was to cease if the annuitant should do any act "with a view to assign, charge, incumber, or anticipate," it was held to be forfeited by his giving an unstamped memorandum, charging the annuity with an annuity which he had contracted to grant: *Stephens* v. *James*, 4 Sim. 499.

[(*r*) *Baggett* v. *Meux*, 1 Coll. 138, 1 Phil. 627.

(*s*) *In re Sanderson*, 3 Jur. N. S. 809.]

(*t*) Jac. 603.

Inalienable trust for unmarried woman not admissible.

Thus, in the case of *Jones* v. *Salter* (*u*), where the income of a money fund was bequeathed, in trust for A., the wife of B., for her life, for her separate use, so that the same should not be subject to the debts, dues, or demands, and should be free from the control or interference of B., or of any other husband or husbands, with whom she might at any time thereafter intermarry, *and without any power to charge, incumber, anticipate or assign the growing payments thereof;* and after her decease, in trust for other persons. B., the husband, died, and A., the widow, and the ulterior cestuis que trust, petitioned for a transfer of the fund. Sir *W. Grant,* M. R., after some consideration, made the order.

So in *Woodmeston* v. *Walker* (*x*), part of a residue was to be laid out in the purchase of a life annuity for A., for her separate use, and independent of any husband she might happen to marry, with a direction that her receipts, notwithstanding her coverture, should be good and sufficient discharges for the same, and to be for her personal benefit and maintenance, *and without power for her to assign or sell the same by way of anticipation, or otherwise.* A. was a widow at the date of the will, and not having married again, applied for payment of the fund. Sir *John Leach,* M. R., held that A. was not entitled to the absolute interest, inasmuch as the gift was subject to the contingency of a future marriage, when the restriction would be operative. He observed, that at law a wife could have no separate estate, and it was only by the principles of a Court of Equity that such an estate was permitted for protection against the legal rights of the husband; that to give full effect to such protection, equity permitted a restraint upon the power of disposition, which would be invalid in any other case; and he could not satisfy himself that there was any substantive distinction between a present coverture and a future coverture. It was a familiar case (he added), that where the interest of a legacy was given to an unmarried female for life, to her separate use in case of coverture, and the power of sale or anticipation was restrained, then in case of a future marriage, and a sale or anticipation of the interest during the coverture, the Court held that sale or anticipation void, although by the terms of the will, the life interest of the legatee was not limited

(*u*) 2 R. & My. 208. (*x*) 2 R. & My. 197.

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over upon that event (*y*). The decree was reversed by Lord *Brougham*, C., on the authority of *Barton* v. *Briscoe*. After laying down the doctrine, that equity allows a restriction to be imposed on the dominion over separate estate, as a thing of its own creation, the better to secure it for the benefit of the object, his Lordship observed, that the operation of the clause against anticipation, where there was no limitation over, rested entirely on its connection with the coverture, and on its being applied to a species of interest which was itself the creature of equity; that the present was not a case where there was a coverture, but a possibility only of coverture; and it would be going farther than the authorities warranted, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest, conveyed to the separate use of a feme sole (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply because, at some after period, she might possibly contract a marriage. It was said (his Lordship continued), that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, which would fall off upon her husband's death, and be again imposed should she contract a second marriage. That, he observed, would be a strange and anomalous species of estate; nor was it very easy to conceive by what process or contrivance it could be effectually created, unless, perhaps, by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures.

Remarks on *Woodmeston* v. *Walker*.

It will be perceived that both the M. R. and the Lord Chancellor touched upon a point, which though not raised by the case before the Court, is of great and general importance, and has since been the subject of much discussion, namely, whether a restriction on alienation, extending generally to future coverture, is valid. Formerly this point was not supposed to admit of doubt. It was considered that a trust restricting anticipation during future coverture might, like a trust for future separate use, be created, without violating the principle which denies effect to inconsistent and repugnant qualifications, as no

(*y*) These passages in the judgment of the M. R. contain a clear statement of the doctrine, as understood in the profession before the recent decisions; but as, in the case before the Court, the cestui que trust was *discoverte*, the observations are inapplicable.

attempt is made to restrain the aliening power of the object of the trust, until she enters into that state to which the restriction is adapted. It was supposed, therefore, that if no act was done by the cestui que trust, while sole, to emancipate herself from the restriction, the coverture, when it supervened, had the effect of fastening such restriction on her, in the same manner as if it had existed at the time of its original imposition. To the surprise of the profession, however, a restriction on alienation applied to future coverture, was pronounced by Sir *L. Shadwell* to be invalid in the cases of *Newton* v. *Reid* (*z*), and *Brown* v. *Pocock* (*a*), though without much consideration. Lord *Brougham*, too, in *Woodmeston* v. *Walker*, expressed (as we have seen) his strong doubt of the capacity of a testator or settlor to create a fetter on alienation which should attach during future coverture, and from time to time fall off, when such coverture determines. But it may be asked, is not a trust for separate use during future coverture (the validity of which neither the V. C. nor his lordship attempted to impeach (*b*)), obnoxious to the same line of reasoning? It comes into operation on each successive coverture, and expires at its determination, and what principle of law forbids the creation of a prospective restriction on alienation in the same manner? Both the trust for separate use, and the fetter on alienation, are certainly not applicable to the actual condition of the cestui que trust, while sole; but no attempt is made to apply them to such condition; they are only to arise on a change of circumstances, to which they are adapted, and in which, therefore, the supposed incongruity does not exist. Separate property is the creature of equity, and according to Lord *Eldon's* reasoning in *Brandon* v. *Robinson* (*c*), as equity conferred the power of alienation, as an incident to the trust for separate use, why should it not modify the power as convenience, or the exigency of the case require?

Controversy as to trust for separate inalienable use during future coverture.

Happily, we are now relieved from all uncertainty on this subject, by subsequent cases which have established beyond

(*z*) 4 Sim. 160.

(*a*) 5 Sim. 663.

(*b*) Even trusts for separate use during future coverture seemed exposed at one time to some peril by the often cited doctrine in *Massey* v. *Parker*, 2 My. & K. 274; but the apprehensions on this subject had considerably abated, even before the cases of *Tullett* v. *Armstrong*, and *Scarborough* v. *Borman*, post, had established beyond controversy the validity of restrictions on alienation extending to future coverture: *Davies* v. *Thornycroft*, 6 Sim. 420; *Johnson* v. *Johnson*, 1 Kee. 648.

(*c*) Ante, 25.

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dispute the validity of a trust for the separate unalienable use of a woman during *future* coverture.

The cases here alluded to are, *Tullett* v. *Armstrong* (*d*), and *Scarborough* v. *Borman* (*e*), in both of which Lord *Langdale*, M. R., and afterwards Lord *Cottenham* on appeal, held a trust of this nature to be valid. "After the most anxious consideration," said the Lord Chancellor, in concluding an elaborate judgment in the former case, "I have come to the conclusion that the jurisdiction which this Court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it throughout a *subsequent* coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this Court first established the separate estate it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation" (*f*).

Validity of trust for separate and unalienable use during future coverture finally established.

Conditions in restraint of marriage.

III. It is now proposed to treat of conditions in restraint of marriage. The numerous and refined distinctions on this subject, however, do not apply to devises of, or pecuniary charges upon, real estate (*g*), but are confined exclusively to personal legacies; and, with regard to the latter, they owe their introduction to the ecclesiastical courts, who, in the exercise of their jurisdiction over personal legacies, it is well known, borrowed many of their rules from the civil law.

Distinction in regard to real and personal estate.

Rule of the civil law.

By this law, all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift

(*d*) 1 Beav. 1, 4 My. & Cr. 390, and Sweet's Cases on Separate Estate, 28.

(*e*) 1 Beav. 34, 4 My. & Cr. 378.

[(*f*) As to the question whether the terms of a trust for separate use are applicable to all future covertures, or only to the coverture existing or contemplated at the date of the gift, see *Beable* v. *Dodd*, 1 T. R. 193; and *In re Gaffee*, 1 Mac. & G. 541, and the cases there cited.]

(*g*) *Reves* v. *Herne*, 5 Vin. Ab. 343, pl. 41; *Hervey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 Atk. 330.

over or not, and however qualified, were absolutely void (*h*); and marriage simply was a sufficient compliance with a condition requiring marriage with consent, or with a particular individual, or under any other restrictive circumstances (*i*); but this doctrine did not apply to widows.

What are valid restraints on marriage by the law of England.

Our Courts, however, [while they equally deny validity to conditions in general restraint of marriage, though accompanied by a gift over (*k*), yet] have not adopted the rule of the civil law in its unqualified extent, but have subjected it to various modifications. "By the law of England," says an eminent Judge, "an injunction to ask consent is lawful, as not restraining marriage generally (*l*). A condition that a widow shall not marry, is *not* unlawful (*m*). An annuity during widowhood (*n*), a condition to marry or not to marry T., is good (*o*). A condition prescribing due ceremonies and place of marriage is good (*p*); still more is the condition good which only limits the time to twenty-one (*q*), or any other reasonable age, provided it be not used as a cover to restrain marriage generally" (*r*). [So a devise or bequest during celibacy (*s*), or a condition not to marry a Papist (*t*) is valid.

But a condition not to marry a man of a particular profession (*u*), or a man who is not seised of an estate in fee, or of perpetual freehold of the annual value of 500*l.* (*x*), is said to be too general to be legal.

Gift over is necessary, to make effectual

And to make a condition restraining marriage with a particular person effectual, there must be a bequest over, in default,

(*h*) Godolph. Orph. Leg. p. 1, c. 15.

(*i*) Ib. p. 3, c. 17.

[(*k*) *Morley* v. *Rennoldson*, 2 Hare, 570; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Bird* v. *Hunsdon*, 2 Swanst. 342; *Rishton* v. *Cobb*, 9 Sim. 619.]

(*l*) *Sutton* v. *Jewks*, 2 Ch. Rep. 95; *Creagh* v. *Wilson*, 2 Vern. 573; *Ashton* v. *Ashton*, Pre. Ch. 226; *Chauncey* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munckley*, 1 B. C. C. 303; *Dashwood* v. *Bulkeley*, 10 Ves. 230.

(*m*) *Barton* v. *Barton*, 2 Vern. 308; [*Lloyd* v. *Lloyd*, 2 Sim. N. S. 255.]

(*n*) *Jordan* v. *Holkham*, Amb. 209.

(*o*) *Jervoise* v. *Duke*, 1 Vern. 19. See also *Randall* v. *Payne*, 1 B. C. C. 55, ante, 3.

[(*p*) In *Haughton* v. *Haughton*, 1 Moll. 611, a condition in restraint of marriage otherwise than according to the rules of the Quakers was held valid. This was a case of real estate; but here, as in personal estate, the common law determines the question of legality or illegality. In a case of real estate, however, the question can arise for any practical purpose only on a condition subsequent.]

(*q*) *Stackpole* v. *Beaumont*, 3 Ves. 89.

(*r*) Per Lord *Thurlow*, in *Scott* v. *Tyler*, 2 B. C. C. 488; [*Yonge* v. *Furse*, 26 L. J. Ch. 352.

(*s*) *Right* v. *Compton*, 9 East, 267; *Webb* v. *Grace*, 2 Phill. 701; *Scott* v. *Tyler*, Dick. 722; *Heath* v. *Lewis*, 3 D. M. & G. 954; *Potter* v. *Richards*, 24 L. J. Ch. 488, 1 Jur. N. S. 462.

(*t*) *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295. But compare next case.

(*u*) 1 Eq. Ca. Ab. 110, pl. 1, n. in marg.

(*x*) *Keily* v. *Monck*, 3 Ridg. P. C. 205.

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conditions in partial restraint of marriage;

[otherwise the condition will be regarded as *in terrorem* only. And, therefore, where (*y*) a testator gave his personal estate in trust for T. for life if he did not marry H., and after any such forfeiture should take place, he directed his trustees to lay out the same, *and* after the decease of T., upon trust for his widow, except as aforesaid, and his children by any other woman than H.; Lord *Langdale*, M. R., held, that T. was still entitled, although he had married H.

It seems to have been argued that "and" ought to be construed "or" (*z*), so as to understand a gift over either upon breach or death. But the argument failed, perhaps on the ground that one of the legatees over was the *widow* of T., who could have no existence during his life. Moreover, the change is usually made in favour of vesting, not of divesting.

So a condition imposed by a testator on his widow not to marry again (*a*), and a condition generally not to marry without consent (*b*), must be accompanied by a gift over in default, or it will be deemed to be *in terrorem* only. But the necessity for a gift over does not exist in cases where the clause imposing the restraint is in the form of a limitation, as in the case of a bequest during celibacy (*c*).]

——but not in cases of *limitation* as distinguished from *condition*.

Bequest over, its effect in rendering such conditions effectual.

"Different reasons have been assigned for allowing this "operation to a bequest over. Some have said that it afforded "a clear manifestation of the intention of the testator not to

[(*y*) *W*—— v. *B*——, 11 Beav. 621. See also *Poole* v. *Bott*, 17 Jur. 688, 22 L. J. Ch. 1042.

(*z*) Ante, I. ch. xvi. s. 3; *Day* v. *Day*, Kay, 703.

(*a*) *Marples* v. *Bainbridge*, 1 Mad. 590.]

Death of persons whose consent is required.

(*b*) 2 Ch. Rep. 95; 2 Freem. 41; 2 Eq. Ca. Ab. 212; 1 Ch. Cas. 22; 2 Freem. 171; 2 Vern. 357; 2 Vern. 452; Pre. Ch. 562; 2 Eq. Ca. Ab. 213; Sel. Cas. in Ch. 26; 1 Atk. 361, Willes, 83; 2 Atk. 616; 3 ib. 330; 1 Wils. 130; 3 Atk. 364; 19 Ves. 14. Two cases, indeed, may be cited which may seem to militate against the rule ascribing this effect to a bequest over—*Underwood* v. *Morris*, 2 Atk. 184; and *Jones* v. *Suffolk*, 1 B. C. C. 528; but the authority of the former was doubted by Lord *Loughborough*, in *Hemmings* v. *Munckley*, 1 B. C. C. 303, 1 Cox, 39; and denied by Lord *Thurlow*, in *Scott* v. *Tyler*, 2 B. C. C. 488; and in the other (*Jones* v. *Suffolk*), it is to be inferred from the judgment, though the fact is not distinctly stated, that one of the persons whose consent was required was dead, and consequently the gift over on marriage without consent failed; and although it cannot be advanced, it is conceived as a general principle, that where the act or event which is to give effect to the gift over and defeat the prior defeasible gift becomes impossible, the former is defeated, and the latter is rendered absolute (ante, 10), yet where the effect of a contrary construction would be, as in the present case, to impose a general restraint on the marriage of the first devisee or legatee, after the death of the person whose consent is required, the case seems to fall within the principle on which conditions restraining marriage generally have been considered as void; the necessary consequence of which would be, that the first legacy is absolute, and the substituted gift fails. The same observations apply to the case of *Peyton* v. *Bury*, 2 P. W. 626.

[(*c*) *Heath* v. *Lewis*, 2 D. M. & G. 954; *West* v. *Kerr*, 6 Ir. Jur. 141.]

" make the declaration of forfeiture merely *in terrorem*, which " might otherwise have been presumed. Others have said that " it was the interest of the legatee over which made the difference, " and that the clause ceased to be merely a condition of forfeiture, " and became a conditional limitation, to which the Court was " bound to give effect. Whatever might be the real ground of " the doctrine, it was held that where the testator only declared, " that in case of marriage without consent, the legatee should " forfeit what was before given, but did not say what should " become of the legacy, in such case the declaration was wholly " inoperative" (*d*).

*In terrorem* doctrine as to conditions subsequent;

This observation, it will be seen, refers to conditions subsequent, and certainly it is in regard to them only that it can be made with confidence; for though in many of the cases already cited the condition was precedent, yet there are, on the other hand, not a few such cases in which a compliance with a condition to marry with consent, though unaccompanied by a bequest over, has been enforced.

and precedent.

On examining these cases, however, it seems that in each of them there was some circumstance which afforded a distinction; and though some of these distinctions may appear to savour of excessive refinement, and were not recognised by the Judges who decided the cases, yet in no other manner than by their adoption can many of the modern cases be reconciled with the stream of general authorities. But it is impossible that the reader should receive without some degree of jealousy a plan for reconciling these cases, when an eminent Judge (*e*) expressed an opinion that they were so contradictory as to justify the Court in coming to any decision it might think proper. With diffidence, therefore, the writer submits that, according to the authorities, conditions *precedent* to marry with consent, unaccompanied by a bequest over in default, will be held to be *in terrorem*, unless in the following cases.

Conditions precedent when not *in terrorem*.

First, Where the legatee takes a provision or legacy in the alternative of marrying without the consent, *Creagh* v. *Wilson* (*f*), *Gillet* v. *Wray* (*g*). In *Creagh* v. *Wilson* this principle is not expressly stated to have governed the decision, but it can be accounted for only on this ground. The smallness of the alter-

Where the legatee takes an alternative provision.

(*d*) Per Sir *W. Grant*, in *Lloyd* v. *Branton*, 3 Mer. 108.

(*e*) See Lord *Loughborough's* judgment in *Stackpole* v. *Beaumont*, 3 Ves. 98.

(*f*) 2 Vern. 573, 1 Eq. Ca. Ab. 111, pl. 5, stated ante.

(*g*) 1 P. W. 284.

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native legacy could make no difference, if the principal be, as apparently it is, that the testator, by providing for the event of the condition being broken, shews that he did not intend it to be *in terrorem* only. In *Gillett* v. *Wray*, the alternative provision was an annuity of 10*l.*; and Lord *Cowper* held, that as the legatee was provided for, equity could not relieve (*h*).

Where legacy is given upon an alternative event.

Secondly, Where marriage with consent is only one of two events, on either of which the legatee will be entitled to the legacy; as where it is given on marriage with consent, or attaining a particular age, *Hemmings* v. *Munckley* (*i*), *Scott* v. *Tyler* (*k*). In these cases *neither* of the events happened. In *Hemmings* v. *Munckley*, the legatee married without consent, and died before attaining the required age. In *Scott* v. *Tyler* the alternative event was reaching a particular age unmarried, and the legatee defeated the gift *quâcunque viâ*, by marrying without consent before that age.

Where marriage with consent is restricted to minority.

Thirdly, Where marriage with consent is confined to minority, *Stackpole* v. *Beaumont* (*l*). Lord *Loughborough*, in his judgment in this case, observed, that it was perfectly impossible to hold that restraints on marriage under twenty-one could be dispensed with, now (i. e. since the Marriage Act of 26 Geo. II. c. 33) that marriage was contrary to the political law of the country, unless (if by licence) with the consent of parents; and the testator merely places trustees in the room of parents (*m*).

Observations.

In all such cases, therefore, the legatee must comply with the condition imposed on him by the will, although there is no bequest over. They certainly shew the anxiety of the Judges of later times to limit as much as possible the rule adopted from

(*h*) The case of *Hicks* v. *Pendarvis*, 2 Freem. 41, 2 Eq. Ca. Ab. 212, pl. 1, in which this principle is denied, is of no authority. In *Holmes* v. *Lysaght*, 2 B. P. C. Toml. 261, the circumstance of another legacy being given free from any such condition of marrying with consent was not regarded as an alternative provision so as to bring it within this exception. Against this decision, however (which was made in the Irish Court of Exchequer), there was an appeal to the House of Lords, which was compromised. But the case of *Reynish* v. *Martin*, 3 Atk. 330, seems to go to the same point.

(*i*) 1 B. C. C. 303, 1 Cox, 39.

(*k*) 2 B. C. C. 431.

(*l*) 3 Ves. 89. See also *Hemmings* v. *Munckley*, 1 B. C. C. 303, referred to supra, where the age on which the legatee was to become entitled, independently of the condition of marrying with consent, was eighteen; and *Scott* v. *Tyler*, 2 B. C. C. 431, where it was, as to one moiety twenty-one, and the other twenty-five.

(*m*) The Courts seem to have inclined greatly to confine marriage conditions to marriage during minority or within the period fixed for the payment of the legacy: *Knapp* v. *Noyes*, Amb. 662; *Osborn* v. *Brown*, 5 Ves. 527; *King* v. *Withers*, Cas. t. Talb. 117, 1 Eq. Ca. Ab. 112, pl. 10; [*Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 473.]

the civil law, which regards such restraining conditions as being *in terrorem* only; and suggest the necessity of great caution in its application to all other cases of conditions precedent, since it is not easy to calculate whether future Judges will adopt the distinctions which modern cases present, or treat them as getting rid altogether of the *in terrorem* doctrine, as applicable to conditions precedent (*n*) Such, indeed, we may collect was the intention of Lord *Loughborough*, who in *Stackpole* v. *Beaumont* made a general and indiscriminate attack on the qualified adoption of the rule of the civil law, as applicable either to personal legacies or legacies charged on real estates, conditions precedent or subsequent. His decision may, and it is conceived does, rest on solid grounds; but his lordship's observations do not evince that respect for authority and established principles which has characterised his successors.

Marriage necessary, when.

But it should be remembered that no question exists as to the applicability of the *in terrorem* doctrine to conditions *subsequent* (*o*); and here it may be observed, that, admitting it to the fullest extent in regard to conditions precedent; yet, in such a case a legacy given on marriage with consent cannot be claimed by the legatee while *unmarried*, as the doctrine dispenses only with the consent, not with the marriage itself (*p*).

Residuary bequest does not amount to a gift over.

It has been decided that where a condition of this nature is annexed to a specific or pecuniary bequest, a residuary clause in the same will is not equivalent to a positive bequest over, in rendering the condition effectual (*q*), unless there is an express direction that the forfeited legacy shall fall into the residue (*r*). [And it was held in *Keily* v. *Monck* (*s*), that a direction that a

Neither does a

(*n*) Such a conclusion would overturn *Reynish* v. *Martin*, 3 Atk. 330, stated infra, and many other cases decided upon great deliberation.

(*o*) See *Marples* v. *Bainbridge*, 1 Mad. 590; [*Bellasis* v. *Ermine*, 1 Eq. Ca. Ab. 110; pl. 1; *Wheeler* v. *Bingham*, 3 Atk. 368.]

(*p*) *Garbut* v. *Hilton*, 1 Atk. 381.

(*q*) *Semphill* v. *Bayly*, Pre. Ch. 562; *Paget* v. *Haywood*, cit. 1 Atk. 378; *Scott* v. *Tyler*, as reported Dick. 723; which overrule *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112, pl. 9.

(*r*) *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108, overruling the dictum in *Reves* v. *Herne*, 5 Vin. Ab. 343, pl. 41, and Mr. *Roper's* suggestion, 1 Rop. Leg. 327. See also *Ellis* v. *Ellis*, 1 Sch. & Lef. 1.

[(*s*) 3 Ridg. P. C. 205. Legacies, charged on real in aid of the personal estate, were there given to the testator's daughters, payable on their respective days of marriage, subject to a proviso, that if either married without consent, or a man not seised of an estate in fee or of perpetual freehold of the annual value of 500*l.*, she should forfeit her legacy, which was then to sink as in the text; one daughter married with consent, but her husband had not the requisite estate. Lord *Clare* was of opinion that she was nevertheless entitled to her legacy on either of two grounds: first, that the legacy was pecuniary and there was no gift over; or secondly, that even if it were held that the legacy was a charge

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direction that legacy shall fall into fund for paying debts, if there are no debts.

[forfeited legacy should fall into a fund created for payment of debts and legacies, there being no deficiency in the general personalty to occasion a resort to that fund, was not equivalent to a gift over: and a dictum to the same effect of Lord Keeper *Harcourt* (*t*) was cited in support of that opinion. The ground of this opinion was, that in order to constitute such a gift over, there must appear a clear distinct right vested in a third person; but as there was no necessity to resort to the fund, there was no person who had such a right; there was therefore no gift over. It is conceived, however, that this reasoning could not be extended so as to include a case where a clear undoubted gift over lapses.]

Effect where legacy is chargeable on real and personal estate.

As the rule which denies effect to a condition restraining marriage, unless accompanied by a bequest over, is (we have seen), confined to bequests of personal estate, it follows that where a condition of this nature is annexed to a legacy which is charged on real estate, in aid of the personalty, the condition will, so far as the latter (which is the primary fund) is capable of satisfying the legacy, be invalid; while, to the extent that it becomes an actual charge on the real estate, it will be binding and effectual (*u*).

Whether condition requiring marriage with consent is broken by a *first* marriage without consent.

It is remarkable, that in the early cases of conditions to marry with consent annexed to devises of land, no attempt was made to argue that the condition was not broken or rendered impossible by marriage without consent, as the devisee might survive his wife or her husband, and then be in a situation to comply with the condition. Upon this principle Lord *Thurlow*, in *Randall* v. *Payne* (*x*) held that a gift in case J. and M. did not marry into certain families did not arise on their marrying into other families, as they had their whole life to perform the condition; but in a modern case (*y*), a devise subject to a condition of this nature was held to be forfeited by marriage into another family. There were circumstances distinguishing it from *Randall* v. *Payne*, particularly a legacy payable at twenty-one or marriage, by way of alternative provision, which shewed that the testator had a *first* marriage in contemplation.

[And this leads to the observation that the argument here

[on the realty, the condition was illegal at common law, being too generally in restraint of marriage.

(*t*) Pre. Ch. 350.]

(*u*) *Reynish* v. *Martin*, 3 Atk. 330.

(*x*) 1 B. C. C. 55, ante, 3. See also *Page* v. *Hayward*, 2 Salk. 570.

(*y*) *Lowe* v. *Manners*, 5 B. & Ald. 917.

[referred to might equally arise with regard to personal estate in those cases where a condition precedent may be enforced without a gift over on breach (*z*). Thus in *Clifford* v. *Beaumont* (*a*), where a legacy was given by the testator to his daughter L., payable upon her marriage "with such consent and approbation as aforesaid," (the reference being to a clause requiring marriage "if before twenty-one with the consent of trustees"): the legatee married under twenty-one and without consent, and Lord *Loughborough* decided that the legacy was not then payable (*b*). Afterwards, having attained twenty-one, she married a second husband, and claimed the legacy; but Sir *J. Leach*, M. R., thought himself precluded from allowing the claim by the previous decision; that decision, however, appears in fact to have left the point untouched; and in a recent case Sir *J. Leach's* judgment was called in question by the Court of Q. B. (*c*).]

General restrictions on marriage, as to real estate.

But, even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision), that unqualified restrictions on marriage are void, on grounds of public policy. Though (*d*), where lands were devised to A. in fee, with an executory limitation over if she married with any person born in Scotland, or of Scottish parents, the devise over was held to be valid, as not falling within this principle. It is evident, from Lord *Ellenborough's* few remarks, that he would have considered a devise over, defeating the estate of the prior devisee on marriage generally, to be void.

Legatee marrying in testator's lifetime.

It has been decided, that a requisition to marry with consent, imposed by a testator on his daughters, then spinsters, did not apply to a daughter, who afterwards married in the testator's lifetime, and was a widow at his death (*e*). The contrary construction would have produced the absurdity of obliging the legatee to marry again, in order to provide for her children, if any, by her first husband. And in such a case, it seems, if the legatee marry with her father's consent, or even his subsequent approbation (*f*), she will be entitled to all the benefit attached by him to marrying with the consent required; as it is impossible to suppose that a testator could intend to place a

[(*z*) Vid. ante, 41.
(*a*) 4 Russ. 325.
(*b*) *Stackpole* v. *Beaumont*, 3 Ves. 89.
(*c*) See *Beaumont* v. *Squire*, 16 Jur. 591, 21 L. J. Q. B. 123.]
(*d*) *Perrin* v. *Lyon*, 9 East, 170.
(*e*) *Crommelin* v. *Crommelin*, 3 Ves. 227.
(*f*) *Wheeler* v. *Warner*, 1 S. & St. 304.

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daughter, marrying with his own consent, in a worse situation than if she had married with that of his trustees (*g*). [On the same principle, a condition attached by a testator to his daughter's legacy, that she shall not marry a particular person, is dispensed with by her marriage with such person during the lifetime and with the consent of the testator (*h*). But if an annuity be given to a person "so long as she continues single and unmarried, and not otherwise," and the legatee afterwards marries in the testator's lifetime, though with his knowledge, this being a limitation and not a condition, the gift fails (*i*). And a condition forbidding a daughter's marriage under the age of twenty-eight years has been held a reasonable restraint on marriage, and not waived by marriage under that age with the testator's consent (*k*).]

Assent to marriage, when presumed.

It seems that the assent of trustees will sometimes be presumed from the non-expression of their dissent, according to the maxim, *qui tacet consentire videtur*, especially if the express assent were withheld with a fraudulent intent (*l*); [and, in the absence of direct evidence, assent will be presumed, where no objection to the legatee's title is taken for a long period of time after the alleged forfeiture has taken place (*m*).] But where the consent is required to be *in writing*, it is not clear that any misconduct on the part of the trustees would be a ground for dispensing with it. Thus in *Mesgrett* v. *Mesgrett* (*n*), though the trustee was actuated by the motive of inveigling the legatee into a match without his consent, in order to transfer the portion to one of his own children, yet the Lord Keeper laid some stress on the circumstance that a consent in writing was not required; and Lord *Eldon*, in *Clarke* v. *Parker* (*o*), observed that it would be difficult to support the decision if it had been. On the other hand, Lord *Hardwicke*, in *Strange* v. *Smith* (*p*), held that the mother, whose consent *in writing* was required, had, by making the offer to, and permitting the addresses of, the intended hus-

Consent *in writing*.

(*g*) *Clarke* v. *Berkeley*, 2 Vern. 720; *Parnell* v. *Lyon*, 1 V. & B. 479; [*Coventry* v. *Higgins*, 14 Sim. 30.

(*h*) *Smith* v. *Cowdery*, 2 S. & St. 361.

(*i*) *West* v. *Kerr*, 6 Ir. Jur. 141; *Bullock* v. *Bennett*, 7 D. M. & G. 283. The distinction between this case and *Rishton* v. *Cobb*, 5 My. & C. 145, post, 47, n, (*x*), is, that in the former, as the legatee is unmarried at the date of the will, and the terms of the will thus correspond with the actual fact, we are forbidden by the circumstances to reject the restrictive part of the limitation on the ground of mistake, as was done in the latter case.

(*k*) *Yonge* v. *Furse*, 26 L. J. Ch. 352.]

(*l*) *Mesgrett* v. *Mesgrett*, 2 Vern. 580; [*Berkley* v. *Ryder*, 2 Ves. 533.

(*m*) *Re Birch*, 17 Beav. 358.]

(*n*) 2 Vern. 580.

(*o*) 19 Ves. 12.

(*p*) Amb. 263.

band, given consent to her daughter's marriage, which she could not retract, though there appears to have been no written consent; a circumstance to which his lordship does not once advert, nor, which is still more singular, does Lord *Eldon*, in his comments on this and the other cases, in *Clarke* v. *Parker*, notice it.

Sir *John Leach* (*q*), thought that the accidental omission of a trustee, who approved the marriage, to give a consent *in writing*, would not have invalidated it; but in the case before his Honor, the requisite consent was held to have been contained in a letter written by the trustee before the marriage, though a more formal writing was in his contemplation (*r*).

Expressions of consent, how construed.

The Courts are disposed to construe liberally the expressions of persons whose consent is required (*s*), especially if they have sanctioned, by their acquiescence, the growth of an attachment between the parties (*t*). In *Pollock* v. *Croft* (*u*), [where, under the circumstances, consent was not required to be in writing,] a general permission to the legatee to marry according to her discretion, appears to have been deemed sufficient, without any further consent.

As to marriage in wrong name.

A consent to a marriage with A., of course, is no consent to a marriage with B., though B. should, for the purpose of the marriage, and with the fraudulent design of deceiving the trustees as to his identity, assume the name of A. (*x*),

(*q*) *Worthington* v. *Evans*, 1 S. & St. 165.

[(*r*) See also *Le Jeune* v. *Budd*, 6 Sim. 441.]

(*s*) *Daley* v. *Desbouverie*, 2 Atk. 261; but as to which, see *Clarke* v. *Parker*, 19 Ves. 12; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

(*t*) *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

(*u*) 1 Mer. 181; [see also *Mercer* v. *Hall*, 4 B. C. C. 326.]

(*x*) Where (as sometimes occurs) a person drops his real name and assumes another, without any authority, a marriage by the adopted name (being the name by which he is generally known) is clearly valid. And even the adoption of a false name, pro hâc vice, will not, under the statute of 3 Geo. 4, c. 75, invalidate a marriage, *unless the misnomer is known to both parties.*

And here it may be observed that a gift by will to a person described as the husband or wife [or widow] of another is not in general affected by the fact of the devisee or legatee not actually answering the description, by reason of the invalidity of the supposed marriage, [or by reason of the second marriage of the supposed widow,] or otherwise: *Giles* v. *Giles*, 1 Kee. 685; [*Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Rishton* v. *Cobb*, 5 My. & C. 145; *Re Petts*, 27 Beav. 576. And, on the same principle, a legacy to a person described as the testator's intended wife has been held to be payable, although the testator did not eventually marry her: *Schloss* v. *Stiebel*, 6 Sim. 1.* A different rule prevailed, however, where a fraud had been practised on a testatrix, the discovery of which, there was reason to suppose, would have destroyed the motive for the gift. As, in

* This was before the recent act, under which the marriage would, if it had taken place, have been a revocation of the bequest, ante, ch. vii. s. 1.

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(supposing the marriage, under such circumstances, to be lawful) (*y*).

Trustees withholding consent.

It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the Court of Chancery will interfere (*z*); but in such a case the *onus* of proof would lie on the complaining party, and it would not be incumbent on the trustee to assign any reason for his dissent, even although the person whose consent is required be the devisee over (*a*), notwithstanding the doubt thrown out by Lord *Hardwicke*, in *Hervey* v. *Aston* (*b*), and by Lord *Mansfield*, in *Long* v. *Dennis* (*c*): but of course the refusal of such a person would be viewed with particular jealousy. And where a trustee refuses either to assent or dissent, the Court will itself exercise his authority, and refer it to the Master to ascertain the propriety of the proposed marriage (*d*).

Retracting consent.

It seems that consent once given, with a knowledge of the circumstances, and where there is no fraud, cannot be retracted (*e*) without an adequate reason, unless it be given upon a condition, (as that of the intended husband making a settlement (*f*),) which is not performed; but actual withdrawal in such a case must be unnecessary, since a conditional consent is no consent until the performance of the condition.

Consent of all.

Where the consent of several persons is required all must concur; and the consent of two out of three, the third not expressly dissenting, is insufficient (*g*). [But the weight of authority inclines, after some fluctuation, towards dispensing with the concurrence of a renouncing executor or trustee.]

Renouncing executor and trustee; his consent not necessary.

Lord *Hardwicke*, in *Graydon* v. *Hicks* (*h*), held that a consent,

*Kennell* v. *Abbott*, 4 Ves. 804, where the testatrix, under a power, bequeathed a legacy to a man whom she described and with whom she lived as her husband; the marriage was invalid, on account of his having a wife at the time, but the fact was never known to the testatrix. Under these circumstances, the legacy was held to be void.

Gifts to supposed husband or wife, not being actually such.

(*y*) *Dillon* v. *Harris*, 4 Bligh, N. S. 329. In this case, the marriage was had with a person whom the testator had prohibited the legatee from associating with or having any further knowledge of: expressions which Lord *Brougham* appeared to think did not necessarily extend to marriage; but Lord *Tenterden* (whom Lord *Brougham* consulted) seems to have inclined to a contrary opinion. However, this point did not arise, according to the adjudged construction.

(*z*) See judgments in *Clarke* v. *Parker*, 19 Ves. 18; [*Dashwood* v. *Lord Bulkeley*, 10 Ib. 245; *Peyton* v. *Bury*, 2 P. W. 628.]

(*a*) 19 Ves. 22.

(*b*) 1 Atk. 381.

(*c*) 4 Burr. 2052.

(*d*) *Goldsmid* v. *Goldsmid*, Coop. 225, 19 Ves. 368.

(*e*) *Lord Strange* v. *Smith*, Amb. 263; *Merry* v. *Ryves*, 1 Ed. 1; *Le Jeune* v. *Budd*, 6 Sim. 441.

(*f*) *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230. [It seems that a settlement after marriage is sufficient to satisfy such a conditional consent. Ib. 244; *Daley* v. *Desbouverie*, 2 Atk. 261.]

(*g*) See *Clarke* v. *Parker*, 19 Ves. 1.

(*h*) 2 Atk. 16.

which was to be obtained of the testator's "executor," was not rendered unnecessary by his renunciation. On the other hand, Sir *John Leach*, V. C., (before whom Lord *Hardwicke's* decision was not cited,) held (*i*), [according to an intimation of Lord *Eldon's* opinion in *Clarke* v. *Parker*,] that where the marriage was to be with the consent of "trustees," the concurrence of one who had not acted, and had renounced the executorship, (he being also executor,) was not necessary. [And this case was followed by Lord *Plunket*, L. C. of Ireland, in *Boyce* v. *Corbally* (*k*), in which *Graydon* v. *Hicks* was cited, where he held that a legacy given by will with a gift over in case of marriage without the consent of the executors "after named," was not forfeited by marriage without the consent of one of the persons named as executors, but who had declined to act. But although to this extent the power of giving consent is considered as attached to the office of executor, yet it seems to be so far personal as to render it unnecessary to procure the consent of the representatives of a surviving executor (*l*): by which we are reminded that where the persons whose consent is required are all dead, (but, in the case of real estate, only where the condition is subsequent,) the general rule (*m*) prevails, and performance having become impossible, the gift remains absolute (*n*).]

Nor the consent of surviving executor's representative.

A consent, required to be given by several persons *nominatim*, of course, cannot be exercised by survivors; and in *Peyton* v. *Bury* (*o*), it was so decided, though the persons were also appointed executors, whose office survives; in which, however, Lord *Thurlow* seems not to have fully concurred (*p*); his Lordship's opinion being, that the required consent of "guardians," might be given by a survivor, though he admitted that it was collateral to the office (*q*).

Whether survivors can give consent.

It seems to be clear, that approbation subsequent to a marriage is not in general a sufficient (*r*) compliance with a condition requiring consent; but Lord *Hardwicke*, in *Burleton* v. *Humfrey* (*s*), took a distinction between the words "consent"

Subsequent approbation.

(*i*) *Worthington* v. *Evans*, 1 S. & St. 165.

[(*k*) 2 Ll. & Go. 102. See also *Ewens* v. *Addison*, 4 Jur. N. S. 1034.

(*l*) *Grant* v. *Dyer*, 2 Dow, 73.

(*m*) Ante, pp. 9, 10.

(*n*) *Graydon* v. *Hicks*, 2 Atk. 18; *Grant* v. *Dyer*, 2 Dow, 73; *Aislabie* v. *Rice*, 3 Mad. 256.]

(*o*) 2 P. W. 626.

(*p*) See *Jones* v. *Earl of Suffolk*, 1 B. C. C. 528.

(*q*) See this point, in regard to powers generally, 1 Powell, Dev., Jarm. 239.

(*r*) *Fry* v. *Porter*, 1 Ch. Cas. 138; *Reynish* v. *Martin*, 3 Atk. 33.

(*s*) Amb. 256.

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and "approbation," holding the latter to admit subsequent approval, where coupled with the former disjunctively; but he decided the case principally on another ground, and in regard to the admission of subsequent consent the authority of the case has been questioned (*t*).

Instance of equitable relief.

Where a term was limited to trustees, upon trust to raise portions for daughters upon marriage with consent, and upon condition that the husband should settle property of a certain value; and the marriage was had with the requisite consent, but the settlement was omitted by the neglect of the trustee; the Court relieved against a forfeiture, upon a settlement being ultimately made (*u*).

"Against" consent, construed *without*.

It remains only to be observed, that in a case (*x*) in which the devise was on marrying *with* consent, and the limitation over on marrying *against* consent, the word "against" was construed *without*, to make it alternative to the other gift.

Condition to assume a name.

IV. An obligation is frequently imposed on a devisee or legatee to assume the testator's name; and in such case the question arises, whether the condition is satisfied by the voluntary assumption of the name, or requires that the devisee or legatee should obtain a licence or authority from the Crown, or the still more solemn sanction of the legislature, unless (as commonly happens) the instrument imposing the condition prescribes one of those modes of procedure.

Whether satisfied by voluntary assumption.

In the case of *Lowndes* v. *Davies* (*y*), where a testator constituted A. his lawful heir, on condition he changed his name to G., it was held that A.'s unauthorised assumption of the name was sufficient.

So, in the case of *Doe* d. *Luscombe* v. *Yates* (*z*), where a condition was imposed upon devisees *not bearing the name of Luscombe*, that they, within three years after being in possession, should procure their names to be altered to Luscombe by act of Parliament; it was held that this requisition did not apply to an individual who, before he came into possession (*a*),

(*t*) See *Clarke* v. *Parker*, 19 Ves. 21.
(*u*) *O'Callaghan* v. *Cooper*, 5 Ves. 117.
(*x*) *Long* v. *Ricketts*, 2 S. & St. 179. See also *Creagh* v. *Wilson*, 2 Vern. 573, 1 Eq. Ca. Ab. 111, pl. 5.
(*y*) 2 Scott, 71, 1 Bing. N. C. 597.
(*z*) 1 D. & Ry. 187, 5 B. & Ald. 543. See also *Hawkins* v. *Luscombe*, 2 Swanst. 375.

(*a*) He was under age at the time, and this perhaps is not an immaterial circumstance, as Lord C. J. *Abbott* observed, "that a name assumed by the voluntary act of a young man *at his outset into life*, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if

had voluntarily and without any special authority assumed the name of Luscombe; he being, it was considered, a person "bearing the name" within the meaning of the will (*b*).

[On the other hand,] in the case of *Barlow* v. *Bateman* (*c*), a testator gave a legacy of 1,000*l.* to his daughter, upon condition that she married a man *who bore the name and arms of Barlow;* and in case she married one who should not bear the name and arms of Barlow, he gave the legacy to another. The daughter married a person whose name was Bateman, but who, three weeks before the marriage called himself Barlow, and this was held to be a compliance with the condition by Sir *J. Jekyll*, M. R., who said, that the usage of passing acts of Parliament for the taking upon one a surname was but modern, and that any one might take upon him what surname, and as many surnames as he pleased, without an act of Parliament. It was suggested that the husband might, after receiving the legacy, resume his old name, and the Court was requested to make an order that he should retain it, but this was refused. [The decision of the M. R. was, however, reversed by the House of Lords, who decided that the gift over had taken effect (*d*).

Condition requiring "residence," when effectual.

Another condition frequently imposed on a devisee is that he shall "reside" in a particular house. The terms of the will are generally such as to leave no doubt that personal residence to some extent is required (*e*); but where no period is fixed for the duration of the residence, it is almost impossible to enforce the condition; for on the one hand it may be contended that the devisee must live in the house all his life; or it may be argued, on the other, that if he constantly keeps up an establishment there it will be sufficient if he goes there only once in his lifetime (*f*). In *Fillingham* v. *Bromley* (*g*), this difficulty was held insurmountable, and a purchaser was compelled by Lord

he had obtained an act of Parliament to confer it upon him."

(*b*) As to gifts to persons of a prescribed name, vide *Jobson's case*, Cro. El. 576, and other cases cited post. And as to the period at which the conditions for the assumption of a name are to be performed, see *Gulliver* v. *Ashby*, 4 Bur. 1940, ante, 8; *Lowndes* v. *Davies*, 2 Scott, 74; *Pyot* v. *Pyot*, 1 Ves. 335, post, Cro. El. 532, 576.

(*c*) 3 P. W. 65.

[(*d*) 2 B. P. C. Toml. 272.

(*e*) See cases ante, ch. xxiv. ad fin. As to the construction of a bequest to a class of persons "residing in this country," see *Dale* v. *Atkinson*, 3 Jur. N. S. 41; *Woods* v. *Townley*, 11 Hare, 314.

(*f*) Per *Wood, V. C.*, Kay, 545. See, however, *Stones* v. *Parker*, 29 L. J. Ch. 874, where this difficulty was not alluded to.

(*g*) T. & R. 530. See also 7 Beav. 443; 24 L. J. Ch. 488.

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[*Eldon* to take a title depending on the invalidity of the condition. "Suppose," said the L. C., "the devisee had been a member of Parliament, and had had a house in London, would you say he did not live and reside at J.?" To make the condition effectual, therefore, a definite period for residing should be specified in the will (*h*), or the devisee should be required to make the house his principal or usual abode (*i*): whereby Lord *Eldon's* difficulty will be got rid of. It will depend on the particular terms of the will whether a forced absence or departure from the house, as where the devisee becomes bankrupt and the assignees sell to a purchaser who turns the devisee out (*k*), or the devisee is a married woman whose husband does not reside in the house (*l*), is a breach of the condition. Personal presence in the specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there (*m*).]

Condition that a legatee shall not dispute the will, as to personal estate, ineffectual without a gift over.

Sometimes a testator imposes on a devisee or legatee a condition that he shall not dispute the will. Such a condition is regarded as *in terrorem* only, at least, where the subject of disposition is personal estate; and, therefore, a legatee will not, by having contested the validity or effect of the will, forfeit his legacy, where there was *probabilis causa litigandi* (*n*), unless, it seems, the legacy be given over upon breach of the condition (*o*).

Secus, as to real estate.

[But this doctrine has never been applied to devises of real estate: on the contrary, in *Cooke* v. *Turner* (*p*), it was expressly decided that such a condition annexed to a devise of land was valid and effectual without a gift over upon breach of the condition. It was argued that the condition was void as being contrary to the liberty of the law (*q*); but it was answered by the Court, that it was no more so than a condition not to dispute a person's legitimacy, which was good (*r*): that, in truth,

[(*h*) *Walcot* v. *Botfield*, Kay, 534.

(*i*) *Wynne* v. *Fletcher*, 24 Beav. 430; *Dunne* v. *Dunne*, 3 Sm. & Gif. 22.

(*k*) *Doe* v. *Hawke*, 2 East, 481; *Doe* d. *Shaw* v. *Steward*, 1 Ad. & Ell. 300.

(*l*) See per *Stuart*, V. C., *Dunne* v. *Dunne*, 3 Sm. & Gif. 27.

(*m*) Per *Wood*, V. C., *Walcot* v. *Botfield*, Kay, 550. See also *Attenborough* v. *Thompson*, 2 H. & N. 559; *Dunston* v. *Paterson*, 4 Jur. N. S. 1024.]

(*n*) *Powell* v. *Morgan*, 2 Vern. 90; *Lloyd* v. *Spillett*, 3 P. W. 344; *Morris* v. *Burroughs*, 1 Atk. 404.

(*o*) *Cleaver* v. *Spurling*, 2 P. W. 528; 1 Rep. 304. [A gift to the executors of the first legatee will not suffice, *Cage* v. *Russell*, 2 Vent. 352.

(*p*) 15 M. & Wel. 727, 14 Sim. 493.

(*q*) Citing Shep. Touchst. 132; which, however, says only that conditions which are against the liberty of the law are invalid, not that a condition not to dispute a will is against the liberty of the law. And see *Anon.*, 2 Mod. 7.

(*r*) *Stapilton* v. *Stapilton*, 1 Atk. 2.

[there was not any policy of the law on the one side or the other: that conditions said to be void as trenching on the liberty of the law were such as restrained acts which it was the interest of the state should be performed, as marriage, trade, agriculture, and the like; but it was immaterial to the state whether land was enjoyed by the heir or the devisee, and, therefore, the condition was good, and the devisee had, by disputing the will, forfeited the devise in her favour.

Remark on *Cooke* v. *Turner*.

The argument and judgment both turned on the legality of the condition, and no doubt seems to have been entertained that if it was legal it must also be effectual. That this ought to be the sole criterion in all cases where the effect of a condition is brought in question, can scarcely be doubted; and that as no gift over will give effect to a condition in itself illegal (as a condition in total restraint of marriage (*s*)), so a legal condition should never be rendered ineffectual by the absence of such a gift. The validity of a condition that the devisee shall not dispute the will was assumed in *Violett* v. *Brookman* (*t*) although there was no gift over on breach: the only question was whether the testator had by concurring in the acts alleged as a breach and by subsequent codicils confirming his will waived the condition; and it was held that he had.

How far, apart from the civil law, legal conditions are effectual without a gift over, as to personal estate.

It is too late, however, to question the authorities establishing that conditions in partial restraint of marriage, although legal, are used merely *in terrorem*, unless aided by a gift over. Those authorities owe their existence to the course followed by early Judges, with the view of avoiding a conflict between the decisions of the Court of Chancery and the Ecclesiastical Courts (*u*). But in the case of conditions against disputing a will, there is no such explanation to be given, for it does not appear that they were void by the civil law: and the matter is therefore reduced to this absurdity, that a condition, valid when applied to real estate, is invalid when annexed to a bequest of personalty. If such be, indeed, the law, and if the current of authority be too strong for opposition in cases strictly falling within it, it may yet be safely asserted that they will not be permitted to govern analogous cases arising on other conditions. Accordingly, in the case of *Dickson's Trust* (*x*), where a testator bequeathed

Case of *Dickson's Trust*.

[(*s*) *Morley* v. *Rennoldson*, 2 Hare, 570; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255.
(*t*) 26 L. J. Ch. 308.
(*u*) See Com. Rep. 730; 3 Ves. 98.
(*x*) 1 Sim. N. S. 37.

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[to his daughter a life interest in 10,000*l.*, and by a codicil, provided that if she should become a nun she should forfeit the legacy; Lord *Cranworth*, V. C., held, that the condition being legal was effectual, and that the daughter having become a nun had forfeited the legacy.

Acceptance of legacy makes the annexed condition binding.

Where the legatee has taken his legacy with a legal condition of any kind annexed, he is, of course, estopped by his own act from afterwards insisting on rights, which by the terms of the condition he is bound to release (*y*), or from declining a duty which he is thereby required to perform. This principle was applied in the case of *Attorney-General* v. *Christ's Hospital* (*z*), where a testator bequeathed to the governors of the hospital (who had power to accept such gifts) an annuity of 400*l.* for ever, upon condition that his trustees should be at liberty to send a certain number of children to be educated at the school; and in case, and as often as the governors should refuse to admit the children, the trustees were empowered to apply the annuity towards the education of the children elsewhere. For some years the governors of the hospital received the annuity and admitted the children, but afterwards resolved to do so no longer. Sir *J. Leach*, M. R., said, the question was whether this was a gift of the annual sum so long as they should receive the children, or a gift upon condition that they should receive them? His Honor thought it was clear the latter was the true construction, and that having accepted it they were bound by the condition. The proviso gave an authority to the trustees, without releasing the governors from their engagement.]

(*y*) *Egg* v. *Devey*, 10 Beav. 444.
(*z*) Taml. 393. And see *Gregg* v. *Coates*, 23 Beav. 33.]

# CHAPTER XXVIII.

## GIFTS TO THE HEIR AS PURCHASER (WITHOUT ANY ESTATE IN THE ANCESTOR).

Gifts to "heir," how construed.

Gifts to the heir, whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term *heir* is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question, in case of intestacy. It is clear, therefore, that where a testator devises real estate simply to his heir, or to his heir at law, or his right heirs, the devise will apply to the person or persons answering this description at his death, and who, under the recent enactment regulating the law of inheritance (*a*), will take the property in the character of devisee, and not, as formerly, by descent. And if the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, the circumstance that the expression is *heir* (in the singular) creates no difficulty in the application of this rule of construction; the word "heir" being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description; and which persons, if there are no words to sever the tenancy, will be entitled as joint tenants (*b*).

Devise to heirs

And it is to be observed, that a devise [to *heirs*, in the plural,]

(*a*) 3 & 4 Will. 4, c. 106, s. 3. (*b*) *Mounsey* v. *Blamire*, 4 Russ. 384.

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passes fee-simple.

(though contained in a will made before the year 1838) vests in the heir an estate in fee-simple, *without further words of limitation,* or any equivalent expression, on the ground (to use the quaint though significant language of an early Judge (*c*)), that "the word heirs is nomen collectivum: and it is all one to say heirs of J. S., as to say heir of J. S., and heirs of that heir; for every particular heir is in the loins of the ancestor, and parcel of him."

Whether devise to heir (in the singular) passes fee-simple.

[Whether the same holds with regard to a devise to the *heir,* in the singular, is a question which seems never to have been decided. There is a dictum of *Holt,* C. J., in favour of such a conclusion (*d*); but on the other hand Lord *Cottenham* thought it clear that the devisee would take no more than a life estate (*e*), and it is impossible to read the judgment of *Taunton,* J., in the case of *Doe* v. *Perratt* (*f*) without seeing that the learned Judge entertained a similar opinion. In the case of *Doe* d. *Sams* v. *Garlick* (*g*), the devise was "to the person who is heir of J. S.," clearly shewing that the testator referred to an individual, who was therefore held entitled for his life only.]

Heirs of the body as purchasers.

So again it is well settled, that a devise to *the heirs of the body* of the testator or of another confers an estate tail; which estate, it is to be observed, will (unless stopped in its course by the disentailing act of the tenant in tail), devolve to all persons who successively answer the description of heir of the body.

The leading authority for this doctrine is *Mandeville's case* (*h*), the circumstances of which aptly illustrate the peculiar mode of devolution in such cases. John de Mandeville died, leaving issue by his wife, Roberge, two children, Robert and Maude. A. gave certain lands to Roberge, and to the heirs of John de Mandeville, her late husband, on her body begotten; and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heir of the body of his father, being a good name of purchase), and that then, when he died without issue, Maude, the daughter, was tenant in tail of the body of her father, per formam doni. "In which case it is to be

(*c*) Per *Pollexfen,* [arguendo] in *Burchett* v. *Durdant,* Skinn. 206.

[(*d*) *Beviston* v. *Hussey,* Skinn. 385, 563.

(*e*) *Chambers* v. *Taylor,* 2 My. & Cr. 387, 388. And see *Wood* v. *Ingersole,* 1 Bulst. 62, 63.

(*f*) 9 Cl. & Fin. 614, 616; see also per *Bosanquet,* J., ib. 624.

(*g*) 14 M. & Wel. 698.]

(*h*) Co. Lit. 26 b. See also *Southcote* v. *Stowell,* 1 Mod. 226, 237, 2 Mod. 207—211, Freem. 216, 225; *Wills* v. *Palmer,* 5 Burr. 2615, 2 W. Bl. 687; [*Wright* v. *Vernon,* 2 Drew. 439, 7 H. of L. Ca. 35, 4 Jur. N. S. 1113.

observed," says Lord *Coke*, "that albeit Robert, being heir, took an estate tail by purchase, and the daughter was no heir of his (John's) body at the time of the gift, yet she recovered the land per formam doni, by the name of heir of the body of her father, which, notwithstanding her brother was, and he was capable at the time of the gift; and, therefore, when the gift was made, she took nothing but in expectancy, when she became heir per formam doni."

"Heir of the body" (in the singular).

As a devise to the heir general, in the singular, confers (as it seems) [only an estate for life,] so, on the same principle, a devise to the heir of the body in the singular would doubtless be held to confer a like estate by purchase on the person or persons first answering the description of heir of the body: [accordingly in *Chambers* v. *Taylor* (*i*), Lord *Cottenham* said, "the cases proved that the word heir in the singular number has sometimes the same effect as the word heirs in the plural, but that if words of limitation are superadded to the word heir, it is considered as conclusively shewing that the word is used as a word of purchase: when that is not the case, it is considered in construing wills as *nomen collectivum* for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir. If the word heir would per se give an estate of inheritance to the party answering the description, there would be no reason for any distinction whether words of limitation or inheritance were or were not superadded." So also] Mr. Justice *Taunton*, in the case of *Doe* d. *Winter* v. *Perratt* (*k*), after citing *Mandeville's case* (*l*), and *Southcote* v. *Stowell* (*m*), said, "In these instances, the estate tail arises out of proper words of limitation *in the plural number*, denoting a certain continuous line of posterity 'heirs of the body.' But no such effect can be given to the word 'heir,' 'heir of the body,' 'right heir,' or 'next,' or 'first heir,' where they constitute only a mere designatio personæ" (*n*).

Devise to

[And here it may be noticed that on the ground that the

[(*i*) 2 My. & Cr. 388.]

(*k*) 3 M. & Sc. 597, 10 Bing. 198, 9 Cl. & Fin. 616, post, 63.

(*l*) Ante, 56.

(*m*) 1 Mod, 226, 237, 2 Mod. 207, 211.

(*n*) The case, however, did not raise this precise point, as the words "male *heir*," occurring in the will then before the Court, were held to mean male *descendants*, in which sense they could not operate to confer an estate tail by force of the doctrine under consideration, any more than those words themselves would if employed by the testator.

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"issue," held to give an estate tail by purchase.

[word "issue" like "heirs of the body," in the plural, includes all descendants, it was held in the case of *Whitelock* v. *Heddon* (*o*), that under a devise to issue the property devolved successively to every individual who answered the description, so as to create an estate tail as in *Mandeville's case.*] The case was, a testator devised to his grandson C. all his estates, to him, his heirs, and assigns, except as thereinafter mentioned; that is to say, provided that in case his (testator's) son B. should have any son or sons begotten or born in lawful matrimony, then he devised the said estates *to such* (*p*) *male issue as his son B. should or might have at the time of C.'s attaining the age of twenty-one years;* but in case his said son B. should have any male issue, then he directed that C. should receive the rents, until twenty-one, as above-mentioned: it was held, that a son of B., in ventre matris, on C.'s attaining his majority, (and who was the eldest son in esse at that period, the first being dead,) *took an estate tail* by force of the word "issue," and not a fee-simple by the effect of the word "estates." Lord C. J. *Eyre* said, as the objects were the sons of the testator's son, who, it appeared, were to have his bounty in preference to the son of his daughter (for such C. was), and *as "issue" was a collective term,* capable of being descriptive of either person or interest, or both, he thought it reasonable to understand the word "issue" in its largest sense, so as to deem it descriptive of an estate tail male to the sons of B., as many as there should be, in order of succession.

Devise to male issue.

Remarks upon *Whitelock* v. *Heddon.*

It must be observed, however, that the Court did not construe the words "male issue" as altogether synonymous with heirs male of the body, inasmuch as the devise was held to take effect in favour of the son of B. in the lifetime of his father, so that the words were read as importing heirs *apparent* of the body, [a construction not inconsistent with the effect, attributed to the words, of creating an estate of inheritance (*q*).]

"Heir" with superadded qualification.

Where a testator has thrown into the description of heir an additional ingredient or qualification, the devisee must answer the description in both particulars. Thus, a devise to the right heirs *male* of the testator, or to the right heirs *of his name,* is,

(*o*) 1 B. & P. 243. [But see *Cook* v. *Cook*, 2 Vern. 545.]

(*p*) *Eyre*, C. J., reasoned upon the word "such," as if it meant such sons before mentioned; but the expression was, "such male issue as my said son shall or may have." The word, therefore, evidently had reference to the succeeding words of the context.

[(*q*) See *Burchett* v. *Durdant*, Carth 154.]

according to the early cases, to be read as a devise to the heir, provided he be a male, or provided he be of the testator's name (as the case may be); and, consequently, on the principle just stated, if the character of heir should happen to devolve to a person not answering to the prescribed sex or name, the devise would fail.

"Right heirs male," how construed.

Thus, in *Ashenhurst's case* (*r*), where the devise was to the *right heirs male* of the testator for ever; it was held both in B. R. and in the Exchequer Chamber, that, as the testator died leaving no other issue than three daughters, (who were, of course, his heirs general,) the devise failed, and did not apply to his next collateral heir male.

"Right heirs of my name and posterity."

So, in *Counden* v. *Clerke* (*s*), where a testator, having issue a son and daughter, and two grand-daughters the issue of his daughter, devised an annuity out of certain lands to his grand-children, and a legacy to his brother; and then declared that the lands should descend unto his son, and, if he died without issue of his body, then to go unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his grand-daughters he devised another annuity out of the land. The question was, whether the devise to the right heirs of his name and posterity was a good devise to the testator's brother, who was of his name, but was not his heir. It was held, that the brother was not entitled, and that the devise was void (*t*). [And the principle of these decisions

(*r*) Cited Hob. 34.

(*s*) Moore, 860, pl. 1181, Hob. 29. See also *Starling* v. *Ettrick*, Pre. Ch. 54; *Lord Ossulston's case*, 3 Salk. 336, 11 Mod. 189, Co. Lit. 25 a; [*Dawes* v. *Fervers*, 2 P. W. 1, 8 Vin. Ab. 317, pl. 13, Pre. Ch. 589.]

(*t*) But is there not ground to contend that a devise to the heirs male of the testator operates as a devise to the heirs male *of his body*, seeing that it has been long settled that a devise to A. and his heirs male, or to A. and his heirs female, confers an estate tail special (*Baker* v. *Wall*, 1 Ld. Raym. 185); and such is likewise the effect of a devise to A. for life, and after his death to his right heirs male for ever (*Doe* d. *Lindsey* v. *Colyear*, 11 East, 548); the word "heirs" being in these several cases construed to mean heirs *of the body*. Indeed, the opinion of the Court seems to have been in favour of such a construction in *Lord Ossulston's case*, 3 Salk. 336, Co. Lit. 25 a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever; and the three sons being dead without issue, the whole Court held that the brother could not take as male heir—first, *because a devise to heirs male operates as a limitation to heirs male of the body*, and the brother could not be heir male of the devisor's body; secondly, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law. As the case on the latter ground accords with the antecedent authorities above stated, it would not be safe or correct to treat it as an adjudication on the first point; though, if the Court had been called upon to decide the case, it is pretty evident what the decision would have been. The doctrine of these cases was

Whether devise to heirs male means heirs male of the body.

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[was adopted in the recent case of *Wrightson* v. *Macaulay* (*u*), where it was held, that under a devise to the testator's "right heirs being of the name of H.," the person who was his nearest relation of that name, but not his heir, had no claim.]

It remains to be considered how far the doctrine of the preceding cases is applicable to limitations to heirs *of the body*. Sir *Edward Coke* (*x*), lays down the following distinction:—

Whether devise to heirs of the body, male or female, applies to a person not heir general.

"That where lands are given to a man and his heirs females of his body, if he dieth leaving issue a son and a daughter, the daughter shall inherit; for the will of the donor, the statute working with it, shall be observed. But in the case of a purchase, it is otherwise; for if A. have issue a son and a daughter, and a lease for life be made, the remainder to the heirs female of the body of A., and A. dieth, the heir female can take nothing, because she is not heir; for she must be heir and heir female, which she is not, because her brother is heir."

The latter branch of this proposition has been the subject of much controversy. Lord *Cowper*, in the well-known case of *Brown* v. *Barkham* (*y*), denied it to be law, and so decided; and though the propriety of his determination was questioned by Lord *Hardwicke*, before whom the case was brought by a bill of review (*z*), and though Mr. *Hargrave* has defended the position of his author with his usual acuteness and learning (*a*), yet subsequent cases appear to have established, in opposition to *Coke's* doctrine, that a limitation, either in a will or deed, to the heirs special of the body by purchase, will take effect in favour of the designated heir of the body (if any) *though he or she be not the heir general of the body*. Thus in the case of *Wills* v. *Palmer* (*b*) it was held, that, under a devise in remainder to the heirs male of the body of A., (a person who had no estate of freehold under the will,) the second son of A. was entitled as heir *male* of the body, though he was not heir general of the body, which character belonged to a grand-daughter, the child of a deceased elder son.

Heir male of body as purchaser held entitled, though not heir general.

This case was followed by *Evans* d. *Weston* v. *Burtenshaw* (*c*), in which the same construction was applied to the limitations

recognised in the recent case of *Doe* d. *Winter* v. *Perratt*, 5 B. & Cr. 65, 3 M. & Sc. 605, and 9 Cl. & Fin. 606, where, however, the question before the Court was (as we shall presently see) different. [See also *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.

(*u*) 14 M. & Wel. 214.]

(*x*) Co. Lit. 24 b.

(*y*) Pre. Ch. 442, 461. [1 Stra. 35, 2 Vern. 729; and see per *Hale*, C. J., *Pybus* v. *Mitford*, 1 Freem. 369.]

(*z*) Amb. 8.

(*a*) Co. Lit. 24 b, n. (3).

(*b*) 5 Burr. 2617.

(*c*) Co. Lit. 164 a, n. (2).

of a marriage settlement. In this state of the authorities, it seems unnecessary to incumber the present work with a statement of the numerous early cases on the subject (*d*), which (conflicting as they are) cannot exert much influence on a question which has been the subject of three distinct adjudications of a comparatively recent date, all concurring to support the more convenient and liberal construction. It is probable, indeed, that a Judge less abhorrent of technical and rigid rules of construction than Lord *Mansfield*, would have hesitated to decide as his Lordship did in *Wills* v. *Palmer*, and *Evans* v. *Burtenshaw*, in the teeth of the high authority of Lord *Coke*; but it is still more probable that the Courts, at the present day, would refuse to set the question again afloat, by attempting to overrule those cases, even if they disapproved of the principle on which they were decided (*e*).

Heir male of the body claiming by descent, must claim through heirs male.

And here it may be proper to notice, that, in order to entitle a person to *inherit* by the description of heir male or heir female of the body, it is essential not only that the claimant be of the prescribed sex, but that such person trace his or her descent entirely through the male or female line, as the case may be. Thus, it is laid down by *Littleton*, that "if lands be given to a man and the heirs male of his body, and he hath issue a daughter, who has issue a son, and dieth, and after the donee die, in this case the son of the daughter shall not inherit by force of the entail; for whoever shall inherit by force of a gift made to the heirs male, ought to convey *his descent wholly by heirs male.*" (*f*)

Aliter as to heirs taking by purchase.

It is otherwise, however, in the case of gifts to the heir male or female by *purchase*; for, if lands be devised to A. for life, and, after his decease, to the heirs male of the body of B., and B. have a daughter who dies in his lifetime, leaving a son, who survives B., (all this happening in the lifetime of A., the tenant for life,) such grandson is entitled, under the devise, as a person

(*d*) The reader who wishes to examine these cases will find the authorities on one side fully stated in Mr. Hargrave's note above referred to, and those on the other in Mr. Powell's Treatise on Devises, vol. i. p. 319, 3rd ed.; these authors having both displayed much industry in the search for cases to support their respective views. It should be observed that Mr. Hargrave's strictures were written before the cases of *Wills* v. *Palmer* and *Evans* v. *Burtenshaw*, and that in many of the cases cited by him the devise was to the heirs general; as to which it is not attempted to impugn the doctrine for which he contends.

[(*e*) In *Wrightson* v. *Macaulay*, 14 M. & Wel. 231, the Court of Exchequer admitted that Sir *E. Coke's* rule on this point was permanently infringed.]

(*f*) Co. Lit. 25 a.

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answering the description of heir male of the body of B., he being not only the immediate heir of B., (though the heirship is derived through his deceased mother (*g*),) but being also of the prescribed sex (*h*).

It should be observed, however, that, in the case of *Oddie* v. *Woodford* (*i*), which arose on the celebrated will of Mr. Thellusson, and also in *Bernal* v. *Bernal* (*k*), a devise to male descendants was held to be confined to males claiming through males, and not to comprise descendants of the male sex claiming through females; but in neither of these cases does the rule in question seem to have been impugned, the decision having, in each instance, been founded on the context. In *Oddie* v. *Woodford*, Lord *Eldon* dwelt much on the association of the word "*lineal*" with male descendant; the expression being "eldest male lineal descendant." The word "lineal," indeed, may seem, in strictness, not to materially add to the force of the word "descendant;" but his Lordship considered that, having regard to all parts of the will, and to the rule which imputes to a testator an additional meaning for each additional expression, the anxious repetition of the word "lineal," in every instance, indicated an intention to confine the devise to persons of male lineage. But though neither Lord *Eldon* nor Lord *Cottenham* questioned the rule of construction, which reads a devise simply to the male descendant of A. as applying to the male issue of a female line; yet their respective decisions teach the necessity of caution in the application of the rule, and of a diligent examination of the context, before such an hypothesis is adopted (*l*). [In *Thellusson* v. *Rendlesham* (*m*), which arose on the same will, it was further decided, that the word eldest, in the connection above mentioned, had reference not to seniority

(*g*) Hob. 31; Co. Lit. 25 b.

(*h*) This distinction, however, seems to have been lost sight of by Mr. Justice *Taunton*, in *Doe* d. *Winter* v. *Perratt*, 3 M. & Sc. 594, [and by Sir J. *Romilly*, M.R., in *Lywood* v. *Warwick*, 9 W. R. 88]. On the authority of the above-cited passage in *Littleton*, *Taunton* J. seems to have considered, that even under a devise to the heir male of the body *by purchase*, the heir must derive his title entirely through males, and that the male issue of a deceased daughter could not under any circumstances support a claim. The case, however, did not raise the point; and others of the learned Judges in the same case expressly recognised the distinction stated in the text.

(*i*) 3 My. & Cr. 584.

(*k*) 3 My. & Cr. 559. [This is rather a decision on the question who shall *inherit*, than on that of who can claim as *purchaser* a legacy given to male children (construed descendants); in which view it agrees with the general rule, that the descent is to be traced wholly through males.

(*l*) See also *Doe* d. *Angell* v. *Angell*, 3 Q. B. 328.

(*m*) 7 H. of L. Ca. 429, 28 L. J. Ch. 948, 5 Jur. N.S. 1031.]

[of birth, but to priority of line, so as to entitle an infant grandson (son of an eldest son) in preference to the uncle, who was son of a second son.]

Devise to heir male may apply to several grandsons.

Since, therefore, the son of a deceased female may take by purchase under the description of heir male, it follows that several individuals, as grandsons, may become entitled under a devise to heirs male, or even (as several co-heirs make but one heir) to heir male in the singular. As where a testator devises real estate to the heir male of his body, and dies without leaving any son or daughter surviving him, but leaving grandsons the issue of several deceased daughters, the sons of the several daughters respectively, or, if more than one, the eldest sons of the several daughters, are concurrently entitled, under such devise, as the heir or heirs male of the testator. Under such circumstances, however, considerable difficulty is occasioned, if the testator has prefixed to the word "heir" any expression shewing that he had in his view a single individual; as in the case suggested by Lord *Coke* (*n*), who says, "If lands be devised to one for life, the remainder to the next heir male of B., in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and the daughters die; some say the remainder is void for uncertainty; some say the eldest shall take, because he is the worthiest; and others say that both of them shall take, for that both make but one heir."

"Next heir male," how construed as between sons of several daughters.

A question of this nature was elaborately discussed in the case of *Doe* d. *Winter* v. *Perratt* (*o*), where a devise in remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family;" the facts being that, at the date of the will in 1786, and the death of the testator in 1787, the uncle was dead, leaving five daughters, of whom the eldest died before the remainder fell into possession (which happened in July, 1820), leaving several daughters, one of whom (who was living) had a son born in 1795; [the uncle's second daughter (who was also living) had a son born in 1763, and the fourth (who was dead) a son born in 1768; and it was agreed, both in the King's Bench and on appeal in the House of Lords, that the devisee must be a single individual; but as to the meaning of the word "first," the only point decided was that the second daughter's son, though first in priority of birth, was not the

"First male heir" in similar case.

(*n*) Co. Lit. 25 b.

[(*o*) 5 B. & Cr. 48; in D. P. 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

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[first male heir within the meaning of the will (*p*). That construction was upheld indeed by two of the Judges, but opposed by nine others; of whom two favoured the claim of the eldest daughter's grandson as being first in priority of line; five, with Lord *Brougham*, were of opinion that the son of the fourth daughter was entitled, because, by the decease of his mother he had first acquired the character of male *heir*, in the strict sense of the word (*q*), while the remaining two held the will void for uncertainty (*r*).]

Nemo est hæres viventis.

It is clear, that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, nemo est hæres viventis. Therefore, where (*s*) a man having two sons, devised lands to the younger son and the heirs of his body, and, for want of such issue, to the heirs of the body of his elder son, and the younger died without issue in the lifetime of the elder; it was held, that the son of the elder could not take under the devise (*t*).

The great struggle, however, in cases of this nature, has generally been to determine whether the testator uses the word "heir" according to its strict and proper acceptation, or in the sense of heir apparent, or in some inaccurate sense.

Heir when construed to

Sometimes the context of the will shews that he intends the person described as heir to become entitled under the gift in

[(*p*) This was the only question before the House of Lords on an appeal in an action of ejectment, on the demise of the second daughter's son.] In favour of the claim of the stock of the eldest daughter, some reliance appears to have been placed on *Harper's case*, which is thus stated in Hale's MSS., Co. Lit. 10 b, n. (2):— "Harper, having a son and four daughters, namely, A., B., C. and D., devises to the son in tail, remainder to B. and C. for life, remainder proximo consanguinitatis et sanguinis of the devisor; and in Easter, 17 James, by two justices against one, the remainder vests in all the daughters when the son dies without issue; but afterwards, Michaelmas, 20 James, per totam curiam, it vests in the eldest daughter only, and not in all the daughters: first, because proximo; secondly, because an express estate is limited to two of the daughters." *Perriman* v. *Pierce*, Palm. 11, 303, 2 Roll. Rep. 256; nom. *Perin* v. *Pearce*, Bridg. 14, O. Bendloe, 102, 106. It was also observed, that though the course of descent among females is to all equally, yet that for some purposes the elder is preferred, as in the case of an advowson held in co-parcenary, in which the first right to present is conceded to the elder; and so under a partition made by a third person among parceners, in which the elder has the choice of several lots.

[(*q*) As to this, see next paragraph.

(*r*) "Heir of a family" was said to be an expression not known to the law; but, in *Horsefield* v. *Ashton*, 1 Weekly Rep. 259, Lord *Cranworth* was of opinion that a devise in remainder to the "heir of the testator's family" was not void for uncertainty.]

(*s*) *Challoner* v. *Bowyer*, 2 Leon. 70. See also *Archer's case*, 1 Co. 66; [*Anon.*, Dyer, 99 b, pl. 64; *Frogmorton* d. *Robinson* v. *Wharrey*, 2 W. Bl. 728, 3 Wils. 125, 144.]

(*t*) It will be observed that the failure of the devise in this case was a consequence of the rule which required that a contingent remainder should vest at the instant of the determination of the preceding estate.

his ancestor's lifetime; the term being used to designate the heir apparent, or heir presumptive (*u*). As, in the case of *James* v. *Richardson* (*x*), where a man devised lands to A. and his heirs during the life of B., in trust for B., and, after the decease of B., to the heirs male of the body of B. *now living*, and to such other heirs male or female as B. should have of his body, the words "heirs male of the body now living" were held to be a good description of the son and heir apparent, living at the time of the making of the will, to which period the word "now" was considered to point (*y*).

mean heir apparent.

Heirs male "now living."

So, in the case of *Lord Beaulieu* v. *Lord Cardigan* (*z*), a bequest of personal estate to the heir male of the body of A., to take lands in course of descent, being followed by a gift in default of such heir male to A. himself for life, the testator was considered to have explained himself to use the words "heir male" as descriptive of the son or heir apparent.

Again, in the more recent case of *Carne* v. *Roch* (*a*), where a testator gave his real and personal estate to the *heir at law* of A., and in case such heir at law should die without issue, then he devised the same to the *next heir at law of A.*, and his or her issue, and in case all the *children* of A. should die without issue, then over. A. was living at the date of the will, and at the death of the testator; and it was held, that her eldest son had an estate tail under the will.

"Heir at law," held to mean eldest son by force of context.

In this case, it was probably considered, that the testator had, by the word "children," explained himself to use the words "heir at law" as synonymous with *eldest son*. And this construction has prevailed in some other cases where the indication of intention was less decisive and unequivocal.

Remark on *Carne* v. *Roch*.

(*u*) The reader scarcely need be reminded of the difference between an heir apparent and an heir presumptive. An heir apparent is the person who will *inevitably* become heir in case he survives the ancestor. The heir presumptive is a person who will become heir in the same event, provided his or her claim is not superseded by the birth of a more favoured object. Thus, if a man has an eldest or only son, such son is his heir apparent. If he has no child, but has a brother or sister, or any other collateral relation, such relation is his heir presumptive, because liable to be postponed by the birth of a child; so, if his only issue be a daughter, such daughter, being liable to be superseded by an after-born son, is heir presumptive.

Difference between an heir apparent and heir presumptive.

(*x*) T. Jon. 99, 1 Vent. 334, 2 Lev. 232, 3 Keb. 832, Pollex. 457, Raym. 330; [*Burchett* v. *Durdant*, on same will, Skin. 205, 2 Vent. 311, Carth. 154. See also *Rittson* v. *Stordy*, 3 Sm. & Gif. 230. If the person is otherwise clearly designated, his being an alien an consequently incapable of holding land, will not alter the construction, *S. C.*]

(*y*) Ante, ch. x.

(*z*) Amb. 533.

(*a*) 4 M. & Pay. 862, 7 Bing. 226.

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"Heir" held to mean heir *apparent.*

As, in *Darbison* d. *Long* v. *Beaumont* (*b*), where the testator, after creating various limitations for life and in tail, devised his estates to the *heirs male of the body of his aunt E. L. lawfully begotten,* remainder to the testator's own right heirs; *he also gave* 100*l. to his said aunt E. L.,* and 500*l.* to her children; he likewise gave to A. (who was his heir at law) an annuity out of the said hereditaments, and a legacy to her children. The prior limitations determined in the lifetime of E. L., upon which the question arose, whether A., the eldest son of E. L., could take; to whose claim it was objected, that, his mother being living, he was not heir. But it was adjudged, in the Exchequer, which judgment (after being reversed in the Exchequer Chamber) was ultimately affirmed in the House of Lords, that A. was entitled under this devise; it being evident from the whole will, that the eldest son was the person designed to take by the appellation of the heir male of the body of the testator's aunt E. L.; and that although the word "heir," in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living: that the testator took notice that the sons of E. L. were living at that time, by giving them legacies, and also that E. L. was likewise living, by giving her a legacy (*c*); and, therefore, he could not intend that the first son should take strictly as heir, that being impossible in the lifetime of the ancestor; but, as heir apparent, he might and was clearly intended to take.

So, in *Goodright* d. *Brooking* v. *White* (*d*), where the testator, after devising certain life annuities to three daughters, and an annuity to M., another daughter, during the joint lives of herself and the testator's only son R., gave the estate (subject to the annuities) to his daughter M. for two years, with remainder to R., his son, for ninety-nine years, if he should so long live; and subject thereto, he devised the same to R.'s heirs male, *and to the heirs of his daughter M.,* jointly and equally, to hold to the heirs male of R. lawfully begotten, and to the heirs of M. jointly and equally, and their heirs and assigns for ever; and for want of heirs male lawfully begotten of the body of R., at the time of his decease, the testator devised the same, charged as aforesaid,

"Heirs" held to mean *heir apparent* by force of context.

(*b*) 1 P. W. 229, 3 B. P. C. Toml. 60, et vid. *James* v. *Richardson,* ante, 65.

(*c*) But might not the testator have calculated on E. L. surviving him, and afterwards dying before the remainder to her heir took effect in possession?

(*d*) 2 W. Bl. 1010.

to the heirs and assigns of M. lawfully begotten of her body, to hold to the heirs and assigns of M. for ever. R., the son, had, at the date of the will, a son and two daughters; and M., the testator's daughter, then had one son. R. died in the life-time of M. It was contended, that the devise to the heir of M. was void, his mother being alive at the expiration of the preceding estates; but the Court held, that her son was entitled. *De Grey*, C. J., said, that the testator took notice that M. was living, *by leaving her a term and a subsequent annuity*, and meant a present interest should vest in her heir, that was, her heir apparent, during her life. *Blackstone* thought that, as the testator had varied the tenure of M.'s annuity from that of the other sisters, *theirs* depending on their own single lives, and *hers* on the joint lives of herself and her brother R., it was plain the testator had in his contemplation that *she might survive R.*, as, in fact, she did; and, therefore, the word *heir* must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeably to the intent of the testator.

In the case of *Doe* d. *Winter* v. *Perratt* (*e*), a testator devised lands to his kinsman, John Chilcott, or his male heir, and, in default of male heir by him, directed the lands to fall *to the first male heir* of the branch of his (the testator's) uncle, Richard Chilcott's family, paying unto such of the daughters of the said R. Chilcott, as should be then living, the sum of 100*l.* each, at the time of taking possession of the said estates. John Chilcott died without issue. R. Chilcott was dead when the testator made his will, having left five daughters, several of whom (including the eldest) died before the remainder fell into possession. The eldest daughter left several daughters, one of whom had a son, who was the only male descendant of the eldest daughter. Each of the other deceased daughters left sons, and each of the living daughters had also sons, some of whom were born before the grandson of the eldest daughter. The question between these several stocks was, which of them was entitled under the denomination of "first male heir." Mr. Justice *Holroyd* and Mr. Justice *Littledale* held, that the son of the daughter *who first died*, leaving male issue, was entitled: dissentiente Mr. Justice *Bayley*, who was of opinion that the son of the *eldest of the daughters*, who had a son, was entitled, whether such daughter

"To first male heir of the branch of R. C.'s family."

(*e*) 5 B. & Cr. 48; in D. P. 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314.

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"First male heir" held to mean *male descendant.*

were living or dead, and without regard to the relative ages of the sons of the several daughters; the learned Judge thinking that "heir" here meant heir apparent of the eldest daughter. The case was brought by writ of error into the House of Lords; and the House submitted to the Judges the question (among others), whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living. [Four out of ten Judges (namely, Justices *Littledale, Maule,* and *Coltman,* and Baron *Parke*) answered this question in the negative, thereby supporting the judgment of the Court of K. B.: and with them agreed Lord *Brougham.* The opinion of the other six Judges (namely, Justices *Taunton, Bosanquet, Bayley, Patteson, Williams,* and C. J. *Tindal*), with whom Lord *Cottenham* concurred,] was in the affirmative; and this opinion was founded on the circumstances of the testator's knowledge of the state of his uncle Richard's family; that his uncle was then dead; that he had left no heir male, but only daughters; that legacies were given to such of the daughters as should be living when the remainder vested, to be paid by the person who was to take under the description of "first male heir," not "of my daughters," or "of daughters," or of any one daughter specifically, but "of the of branch my uncle Richard Chilcott's family;" all of which it was considered amounted to a demonstration that the testator used the word "heir" to denote a person of whom the ancestor might be living. [It ultimately appeared that the precise point was not before the House, and was therefore not decided.

"Heir" held not to mean heir apparent.

On the other hand, in *Collingwood* v. *Pace* (*f*), where lands were devised to the heir of A. and to the heirs of the said heir, and an annuity bequeathed to A., for the bringing up A.'s eldest son, it was held, that A. being alive at the testator's death, the devise to his heir failed; for, though it was strongly argued for the eldest son of A., that by giving A. an annuity the testator shewed that he expected him to survive, and therefore, the devise being immediate, could not have used the word heir in its technical sense; yet it was answered there was nothing to shew, in case A.'s eldest son died in the testator's lifetime, whether a second son was to take; and that, if the eldest was intended, it might have been so expressed, as it was in another part of the will. It

[(*f*) Bridg. by Ban. 410.

may be added, that a contrary construction would have involved the attribution of different senses to the words "heir" and "heirs," although standing in close juxtaposition (*g*).

And, in the case of *Doe* d. *Knight* v. *Chaffey* (*h*), a devise to husband and wife for their lives, remainder to their son A. in fee; but in case he should die without issue in their lifetime, then to "their next heir" in fee, was held to give the estate to the true heir of the husband and wife, and not to the child born next after A.]

"Heir" explained by context to denote a person not heir-general.

Where a testator shews by the context of his will, that he intends by the term *heir* to denote an individual who is not heir general, such intention, of course, must prevail, and the devise will take effect in favour of the person described. Thus, if a testator says, "I make A. B. my sole heir," or "I give Blackacre to my heir male, *which is my brother A. B.*;" this is, it seems, a good devise to A. B., although he is not heir-general (*i*).

Again (*k*), it is laid down, that "if a man, having a house or land in borough English, buy lands lying within it, and then, by his will, give his new-purchased lands to his heir of his house and land in borough English, for the more commodious use of it, such heir in borough English will take the land by the devise as hæres factus, not natus or legitimus; for the intent is certain, and not conjectural: [and it is said (*l*), that if a man having lands at common law and other lands in borough English or gavelkind devise his common-law lands to his heir in borough English, or heirs in gavelkind, such customary heir or heirs shall take them by the devise, though not heir at common law.]

So, in the case cited by Lord *Hale*, in *Pybus* v. *Mitford* (*m*), where a man having three daughters and a nephew, gave his daughters 2000*l.*, and gave the land to his nephew by the name of his *heir* male, provided that, if his daughters "troubled *the heir*," the devise of the 2000*l.* should be void; it was adjudged

Term "heir" applied by a

[(*g*) The devise in the above case would be construed at the present day as an executory devise to the person who should be the heir of A. at his death, and the testator's heir would be entitled during A.'s life, the old distinction between gifts *per verba de præsenti* and *per verba de futuro* being now exploded. Fearne, C. R. 535; *Harris* v. *Barnes*, 4 Burr. 2157.

(*h*) 16 M. & Wel. 656.]

(*i*) Hob. 33. [See also *Dormer* v. *Phillips*, 3 Drew. 39.]

(*k*) Hob. 34. [But a devise of customary lands to the *heir* simpliciter gives them to the common-law heir, Co. Lit. 10 a; post, 71, 72.

(*l*) Pre. Ch. 464, per Lord *Cowper*.]

(*m*) 1 Vent. 381.

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testator to a devisee.

that the devise to the nephew was good, although he was not heir-general; (because the devisor expressly took notice, that his three daughters were his heirs;) and that the limitation to the brother's son by the name of heir male was a good name of purchase.

"Next heir" held to denote a person not heir-general.

Again, in the case of *Baker* v. *Wall* (*n*), where the testator, having issue two sons, devised to A., his eldest son, his farm, called Dumsey, to him and his heirs male for ever; adding, "if a female, my next heir shall allow and pay to her 200*l.* in money, or 12*l.* a-year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male for ever." A. died leaving issue a daughter only; and the question now was, whether in event, C., the younger son of the testator, was entitled. And the Court held, that he was: first, because it was manifest that the devise to A. was an estate tail male; secondly, that it was apparent that the devisor had a design, that if A. had a daughter, she should not have the lands; for the words, "if a female, then my next heir," &c., must be intended, as if he had said, "But if my son A. shall have only issue a female, *then* that person, who would be my next heir, if such issue female of A. was out of the way, shall have the land:" and, to make his intent more manifest, the testator gave a rent to such female out of the lands; for she could not have both the land and a rent issuing out of it. By the words "to *him*," it was apparent that he intended the *male* heir; so that it was the same thing as if he had said, "I mean my next heir male." And as to the objection, that C. was male, but not heir (for J. D., a female, was right heir to the devisor), the Court said, that if the party take notice that he has a right heir, and specially exclude him, and then devise to another by the name of heir, this shall be a special heir to take.

"To the right

But in the case of *Goodtitle* d. *Bailey* v. *Pugh* (*o*), where the devise was to the eldest son of the testator's only son, begotten or to be begotten, for his life; and the testator added, "and so on, in the same manner, to all the sons my son may have; if but one son, then all the real estate to him for his life, and for want of heirs in him, *to the right heirs of me* (*the testator*) *for ever, my*

(*n*) 1 Ld. Raym. 185, Pre. Ch. 468, 1 Eq. Ca. Abr. 214, pl. 12. See also *Rose* v. *Rose*, 17 Ves. 347, where the phrase "my heir under this will" was held, in reference to certain pecuniary legacies, to point to the testator's residuary legatee. [See *Thomason* v. *Moses*, 5 Beav. 77.]

(*o*) 3 B. P. C. Toml. 454. See also Butl. Fea. 573, 575; *S. C.* cit. 2 Mer. 348.

*son excepted, it being my will he shall have no part of my estates, either real or personal.*" The testator left his son and three daughters. The son died without issue, having enjoyed the lands for his life. The daughters contended, that they were the personæ designatæ under the devise *to the testator's own right heirs, his son excepted;* for that the son, who was the proper heir, was plainly and manifestly excluded by the express words. And of this opinion were Lord *Mansfield* and the rest of the Court of King's Bench, who held, that the words were to be interpreted as if the testator had said, "Those who would be my right heirs, if my son were dead." This judgment, however, was reversed in the House of Lords, with the concurrence of the Judges present, who were unanimously of opinion that no person took any estate under the will by way of devise or purchase.

heirs of me, my son excepted."

This is an extraordinary decision; and high as is the authority of the Court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son (which, it is admitted, would not alone amount to a devise), but a positive and express disposition in favour of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very faintly the anxiety, generally imputed to judicial expositors of wills, ut res magis valeat quam pereat.

Remarks upon *Goodtitle* v. *Pugh*.

[But if a person truly answers the special description contained in the will, the fact that he is also heir-general affords no pretext for his exclusion; and therefore where a testator devised the ultimate interest in his property to his right heirs on the part of his mother, his co-heirs at law, who were also his heirs ex parte maternâ, were held entitled under the devise (*p*). It scarcely requires notice that wherever the heir-general is a descendant, or the brother or sister, or descendant of a brother or sister of the testator, he will be heir ex parte maternâ as well as ex parte paternâ.]

Capacity of special heir not affected by his being general heir also.

It is next to be considered how far the construction of the word "heir" is dependent upon, or liable to be varied by, the nature of the property to which it is applied.

If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a

"Heir" in reference to gavelkind or

[(*p*) *Forster* v. *Sierra*, 4 Ves. 766; *Rawlinson* v. *Wass*, 9 Hare, 673. See *Gundry* v. *Pinniger*, 14 Beav. 94, 1 D. M. & G. 502.]

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borough English lands;

manor in which a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir-general at common law, or his heir quoad the particular property which is the subject of the devise; and the authorities, at a very early period, established the claim of the common-law heir (*q*); supposing, of course, that there is nothing in the context to oppose the construction.

——as between pars paterna and pars materna;

[If a testator seised of lands by descent from his mother devises them to his heir, and die leaving different persons his heir ex parte maternâ and his heir ex parte paternâ (who both claim at common law), the question, which is entitled, will depend on whether the devise is sufficient according to the principles of the old law to break the descent and to make the testator himself the stock or ancestor from whom the character of heir is to be derived. Thus in the case of *Davis* v. *Kirk* (*r*) a testator devised all his real estate (part of which had descended to him ex parte maternâ) to a trustee, his heirs and assigns, upon trust to sell part, and to pay the income of the residue to the testator's widow for life, and after her death "upon trust to convey the said residue unto such person as should answer the description of the testator's heir-at-law." It was held by Sir *W. P. Wood*, V. C., that the descent was broken by the devise, and that the heir ex parte paternâ was therefore entitled.]

——in reference to personal estate, how construed.

With respect to the personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description (*s*). Where the gift to the heirs is by way of substitution, the latter construction [generally] prevails. Thus, in the case of *Vaux* v. *Henderson* (*t*), where a testator bequeathed to A. 200*l*., "and, failing him by decease before me, *to his heirs;*" the legacy was held to belong to the next of kin of A.

(*q*) Co. Lit. 10 a; Rob. Gavelk. 117, 118; [*Thorp* v. *Owen*, 2 Sm. & Gif. 90.

(*r*) 2 Kay & J. 391. The will was dated in 1845, and it would seem that the statute regulating the law of inheritance (s. 2) does not affect this question. It is to be determined first who is the person to take, and then, if the heir ex parte maternâ is found to be the person intended, the statute directs how he takes it.

(*s*) *I.e.* under the statute of distribution, not as nearest by blood, *Doody* v. *Higgins*, 2 Kay & J. 729, and cases there cited. But the husband is excluded as being entitled paramount the statute. *In re Walton's Trusts*, cor. V. C. *Kindersley*, 25 L. J. Ch. 569, and cited in *Doody* v. *Higgins*.]

(*t*) 1 J. & W. 388, n.

living at the death of the testator; [and a similar decision was made in the case of *Gittings* v. *M'Dermott* (*u*). With respect to this case Lord *St. Leonards* has remarked (*x*), that the gift over was to prevent a lapse. The argument was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so when the testator spoke there, by way of substitution, of the heir of the body, it was understood that he meant the same person who could have taken after him in case there had (qu. not) been a lapse. And this principle has since been followed in other cases (*y*).

"Heirs" applied to both real and personal estate.

But if real estate be combined with personalty in a gift to *heirs*, the difficulty noticed by Lord *Eldon* (*z*), of giving different meanings to the same words in the same place, affords a strong ground for construing the word *heirs* in its natural sense, as to both species of property. And accordingly, notwithstanding that some doubt has been thrown (*a*) on the authenticity of the opinion to this effect attributed to Lord *Eldon* (*b*), such appears now to be the settled rule of construction.

Thus, in the case of *De Beauvoir* v. *De Beauvoir* (*c*), where a testator devised his estates in the funds of England, and his freehold, copyhold, and leasehold property to several persons, and their sons in strict settlement, remainder to his own right heirs; and empowered his trustees to invest the residue of his personal estate in the purchase of freehold land, to be settled to the same uses. Sir *L. Shadwell*, V. C., held, that if there was any doubt on the first part of the will, it was entirely removed by the power, which was decisive to shew that there should be but one set of takers, and that, as well the estates in the funds of England, as the real property, should ultimately go to the heir at law. And this decision was affirmed by the House of Lords on appeal (*d*). Lord *St. Leonards*, after laying down the general rule in the words above quoted, proceeded, "Then we come to the mixed cases. I quite agree, that as to them the argument is still stronger against the appellant (the next of kin), for if the law is settled when you can collect the

[(*u*) 2 My. & K. 69.
(*x*) *De Beauvoir* v. *De Beauvoir*, 3 H. of L. Ca. 557.
(*y*) *Doody* v. *Higgins*, 9 Hare, App. 32; *Jacobs* v. *Jacobs*, 16 Beav. 557; *In re Porter's Trusts*, 4 Kay & J. 188.
(*z*) *Wright* v. *Atkyns*, Coop. 111, 123.
(*a*) By Lord *Cottenham*, *White* v. *Briggs*, 2 Phill. 590.
(*b*) *Wright* v. *Atkyns*, ubi sup.
(*c*) 15 Sim. 163. See also *Boydell* v. *Golightly*, 14 Sim. 327. Cf. *Macpherson* v. *Stewart*, 28 L. J. Ch. 177.
(*d*) 3 H. of L. Ca. 524; see p. 557.]

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[intention, as regards personal estate, the argument that it is so must, à fortiori, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate, there can be no doubt, but the person who is described as "heir" is intended to take in that character. You, therefore, at once in speaking of heir impress upon the gift, or upon him who is to take it, his own proper character—that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labour under in the more naked case of personal property, and having found that the testator meant what he has expressed, as regards that portion which is real property, you may more readily infer the same intention as regards the other portion of the same gift depending upon the same words, and you, therefore, allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone."

"Heir" in the singular.

Still less is there any reason for holding the next of kin to be entitled to the personalty, where real and personal property is devised to the *heir* (in the singular): and accordingly,] in the case of *Gwynne* v. *Muddock* (*e*), where a testator gave all his real and personal estate to A. for life; adding, after her death, his "*nearest heir at law* to enjoy the same;" Sir *W. Grant*, M. R., held, that the heir at law took both the real and personal estate, not the realty only, the testator having blended them in the gift.

"Nearest heir at law," how construed.

[And the same distinction between heir and heirs was taken by Sir *J. Knight Bruce* in *Tetlow* v. *Ashton* (*f*), where a testator devised and bequeathed his real and personal estate, upon failure of certain previous limitations, to the heir at law of his family, whosoever the same might be. "The testator," said his Honor, "has used words which no person, professional or unprofessional, can misunderstand. I think that he meant what he said."]

"Heirs," unexplained, strictly construed in bequests of personal estate.

And even where the entire subject of gift is personal, the word "heir," [and also, as it seems, "heirs," in the plural,] if unexplained by the context, must be taken to be used in their proper sense. Sir *R. P. Arden*, M. R., in *Holloway* v. *Hol-*

(*e*) 14 Ves. 488. [(*f*) 20 L. J. Ch. 53, 15 Jur. 213.]

*loway* (*g*), it is true, was strongly disposed to give to the word "heirs" the sense of next of kin whenever it was applied to personalty; though his opinion on another question rendered the point immaterial. [But in the case of *De Beauvoir* v. *De Beauvoir* (*h*), before the House of Lords, Lord *St. Leonards* did not approve of this construction; and, after an elaborate view of the cases, said, "As far as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform—to give to the words the sense which the testator himself has impressed upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as persona designata. It is impossible to lay down any other rule of construction."

The early authorities agree with the rule as thus stated. For example, it was laid down that if one possessed of a term of years devise it to J. S., and that after his death the heir of J. S. shall have it; in this case, J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the executor of that heir, shall have the remainder of the term (*i*). And the position is further confirmed by the cases of *Danvers* v. *Lord Clarendon* (*k*), and *Pleydell* v. *Pleydell* (*l*), in the first of which goods were bequeathed to one for life, and after her decease to the heir of Sir J. D.; and in the other the testator, after making several contingeut dispositions of a sum of money, gave the ultimate interest to his own right heirs (in the plural): in both cases it seems to have been assumed that the words were to receive a strict interpretation.]

Nor will the construction be varied by the circumstance, that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir (*m*). Thus, under the words "to my heir 4,000*l.*," three co-heiresses of the testator were held to be entitled; Sir *J. Leach*, M. R., observing, "Where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it

(*g*) 5 Ves. 403.

[(*h*) 3 H. of L. Ca. 524, 557. See also *Re Rootes*, 29 L. J. Ch. 868.

(*i*) Shep. Touch. 446.

(*k*) 1 Vern. 35.

(*l*) 1 P. W. 748; see *Ware* v. *Rowland*, 15 Sim. 587; *Southgate* v. *Clinch*, 27 L. J. Ch. 651, 4 Jur. N. S. 428. The case of *Evans* v. *Salt*, 6 Beav. 266, is contra, but was disapproved of by Lord *St. Leonards*, 3 H. of L. Cas. 556. See and consider *Low* v. *Smith*, 2 Jur. N. S. 344, 25 L. J. Ch. 503.]

(*m*) See 2 Ld. Raym. 829.

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otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir'" (*n*).

[But where (*o*) a testator bequeathed a legacy "to the heirs of his late partner for losses sustained during the time that the business of the house was under my sole control." Sir *W. P. Wood*, V. C., held that the next of kin according to the statute were entitled, founding his decision on the expressed reason of the bequest, which would be unmeaning if the testator intended to benefit the heir strictly so called. "Had it been 'to the heirs of my late partner' simply," added the learned Judge, "I should not have felt so clear upon the point."]

The words "heirs" and "heirs of the body," applied to personal estate, have been sometimes held to be used synonymously with "children"—a construction which, of course, requires an explanatory context.

"Heirs" held to mean *children*.

As, in the case of *Loveday* v. *Hopkins* (*p*), where the words:—"Item, I give to my sister Loveday's *heirs* 6,000*l*."—"I give to my sister Brady's children equally 1,000*l*." At the date of the will, Mrs. Loveday had two children, one of whom was a married daughter, who afterwards died in the lifetime of the testatrix, leaving three children. Mrs. Loveday was still alive, and her surviving child claimed the legacy. Sir *Thomas Clarke*, M. R., was clearly of opinion, that the testatrix intended to give the 6,000*l*. to the children of Mrs. Loveday, the same as in the subsequent clause to Brady's children, and had not their descendants in view; or if she had, yet as she had not expressed herself sufficiently, the Court could not construe the will so as to let them in to take. His Honor, therefore, held the surviving child to be entitled to the legacy.

"Heirs of the body" held to mean *children*.

[So, in the case of *Pattenden* v. *Hobson* (*q*), where a testator directed his property to be sold, and the produce equally divided after the death of his wife between his "children, viz., his daughters, A., B. and C., or to the heirs of their bodies lawfully begotten, should they be taken away before the time of our demise; and gave an equal share to the two children of his deceased daughter D.; Sir *R. T. Kindersley*, V. C., held that

(*n*) *Mounsey* v. *Blamire*, 4 Russ. 384.

[(*o*) *In re Gamboa's Trusts*, 4 Kay & J. 756.]

(*p*) Amb. 273.

[(*q*) 22 L. J. Ch. 697; 17 Jur. 406. See also *Price* v. *Lockley*, 6 Beav. 180, where children were held entitled; but whether as such or as sole next of kin does not appear; and see *Symers* v. *Jobson*, 16 Sim. 267; *Fowler* v. *Cohn*, 21 Beav. 360; *Gummoe* v. *Howes*, 23 ib. 184.

the words "heirs of the body" meant next of kin, issue of the body, *i.e.* children.

And in the case of *Bull* v. *Comberbach* (*r*), where a testator devised lands to trustees in trust for six persons equally for their lives, and after the death of all, in trust to sell the land and divide the money equally "amongst their several heirs." Sir *J. Romilly*, M. R., held that heirs meant children. "I am at a loss to conceive," said his Honor, "why he should direct the property to be sold, except for the purpose of division amongst a larger class than the tenants for life; he does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct that after their deaths it shall be sold for the purpose of division." "Where," added his Honor, "there is a gift of personalty to one for life, and after his death *amongst* his 'heirs,' I should have no doubt that the expression 'heirs' would apply to children."

Same construction applied in the case of real estate.

But such a construction is not to be confined to personal estate, if it is clear that lands devised in terms to "heirs" are intended to go to children. And, therefore, in *Milroy* v. *Milroy* (*s*), where a testator, after giving a life interest to his daughter, and directing that after her death the proceeds of his real and personal estate should be applied for the benefit of her children during their minority, and that afterwards the personalty should be assigned to them, ordered his trustees to convey his freehold and leasehold estates to "the heir or heirs who should be legally entitled to the same;" but, in case his daughter left no children, he gave all the property over; Sir *L. Shadwell*, V. C., thought the words "heir or heirs" evidently meant the children of the daughter.

At what period the heir is to be ascertained.

What is the period at which the object of a devise to the heir is to be ascertained, is a question of frequent occurrence, in the determination of which, the rule that estates shall be construed to vest at the earliest possible period consistent with the will, bears a principal part. An immediate devise to the testator's own heir vests, of course, at his death, and the interposition of a previous limited estate to a third person does not alter the case. Thus, in the case of *Doe* d. *Pilkington* v. *Spratt* (*t*), where a testator devised to his son A. and M. his

At the ancestor's death, both in the case of a gift to testator's heir,

[(*r*) 25 Beav. 540.
(*s*) 14 Sim. 48. See also *Micklethwait* v. *Micklethwait*, 4 C. B. N. S. 790.
And compare *Spence* v. *Handford*, 27 L. J. Ch. 767, 4 Jur. N. S. 987.
(*t*) 5 B. & Ad. 731.

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[wife, and B. and N. his wife, or the survivor of them, for their lives with remainder to the male heir of him the said testator, his heirs and assigns for ever, the remainder was held to vest at the testator's death in his eldest son C., who was his male heir at law at that time.

——and of a gift to the heir of a stranger.

On the same principle an executory gift to the heir of another person vests as soon as there is a person who answers that description, namely, at the death of the person named; and if the gift is postponed till the determination of an immediate limited interest given to a third person, still the death of the propositus is the time for ascertaining the person of the devisee. Thus, in *Danvers* v. *Earl of Clarendon* (*u*), where goods were bequeathed to A. for life, remainder to the heir of B., B. having died in A.'s lifetime, the question was, whether the person to take the remainder was he who was B.'s heir at his death or at the death of A., and judgment was given in favour of the former.

Same rule as to real and personal estate.

This case also shews, that though the rule which requires the earliest possible vesting of an interest so given in remainder is, in a great measure, founded on a reason applicable only to legal estates in real property; namely, that it is (or was (*x*)) in the power of the owner of the prior particular estate to defeat a contingent remainder (*y*); yet that the rule also holds good generally with regard to personal property for the purposes of the present question.

Previous devise to the heir out of same property no cause for an exception.

And since a departure from the rule leads to frequent inconveniences, slight circumstances, or conjectural probability will not prevent an adherence to it. Thus it is not sufficient to create an exception to the rule, that the heir has an express estate in the same property limited to him in a prior part of the will; and, therefore, in *Rawlinson* v. *Wass* (*z*), under a devise in trust for the testator's daughter (who was his heir at law) for life, remainder as she should appoint, and, in default of appointment, for the testator's heirs and assigns, as if he had died intestate, the daughter was held entitled to an immediate conveyance of the estate from the trustees.

The words "as if he had died intestate" do, no doubt, themselves point expressly to the period of the testator's death, and in a balance of probabilities would weigh in favour of the

[(*u*) 1 Vern. 35.
(*x*) Before the stat. 8 & 9 Vict. c. 106, s. 8.
(*y*) Vid. ante, ch. xxvi.
(*z*) 9 Hare, 673.

[general rule (*a*). But that the case stood in need of no such aid appears clear from the authorities stated below, in which other circumstances added to the express provision for the heir were held insufficient to exclude the operation of the rule. Thus, in the case of *Boydell* v. *Golightly* (*b*), where a testator devised real estates in trust for the maintenance of his son J. (who was his heir apparent) during his life, remainder to his sons successively in tail, with remainders over in strict settlement to other persons and their issue, with an ultimate remainder to the testator's right heirs; and power was given to the trustees to limit a jointure to any wife of J., and to raise portions for his children; the intermediate remainders having failed, it was argued, that the testator had clearly shewn an intention that his son J. should not take the fee, not only by the express provision for him, but by the subsequent clauses in the will; but Sir *L. Shadwell*, V. C., held, that there was no such indication of intention as he could act upon, to prevent the estate vesting in the testator's heir at his death.

Again, in *Wrightson* v. *Macaulay* (*c*), where a testator devised an estate to his son R. (who was his heir apparent) for life, and after several intermediate limitations, remainder in default of issue of the last devisee "to the male heir who should be in possession of and lawfully entitled for the time being to the estate at M. for his life, remainder to his issue, and for default of a male heir being in possession and entitled to the M. estate, at the time thereinbefore for that purpose mentioned, or in default of issue male of such heir male, then to his own right heirs, and *his, her, and their* heirs and assigns for ever." It was contended, upon the determination of all the estates preceding the ultimate remainder, that the express provision for R., the words of contingency introducing the ultimate devise, and the use of the words "his, her, or their" applied to the testator's heir, terms which he could not mean to apply to his own son and heir, shewed that the testator referred to some future period for the ascertainment of the heir entitled under the will; but the Court of Exchequer were of opinion that the evidence of such an intention was not clear enough to control

[(*a*) *Doe* v. *Lawson*, 3 East, 278; *Jenkins* v. *Gower*, 2 Coll. 537; *Smith* v. *Smith*, 12 Sim. 317; *Southgate* v. *Clinch*, 27 L. J. Ch. 651, 4 Jur. N. S. 428.
(*b*) 14 Sim. 327.
(*c*) 14 M. & Wel. 214.

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[the rule of law, and decided that the remainder vested in R. immediately on the testator's decease.

It is to be observed, that in all these cases the estate given in the first place to the person who was the heir apparent, was a limited one (*d*), and that between it and the ultimate remainder to the "heir," were interposed either other estates, or, at least, a power to the heir apparent to appoint the estate. This remark is made with reference to the case of *Doe* d. *King* v. *Frost* (*e*), where the ultimate limitation to the "heir" was an executory devise following immediately upon the devise of a fee simple to the person who was the testator's heir apparent. In that case a testator devised his lands to his son W. (who was his heir apparent) in fee, and if he should have no issue, "the said estate was, on his decease, to become the property of the heir at law, subject to such legacies as W. might leave to the younger branches of the family;" and it appeared that at the date of the will, the testator had a daughter who had five children; it was held that the person who at the time of the decease of W., without issue, should then be the heir at law of the testator, was the person entitled under the executory devise. And this decision was grounded on the state of the family to which the testator was thought to be specifically referring, and on the consideration that if the heir were to be ascertained at the testator's death, the executory devise and the power to give legacies would have been wholly unnecessary.

What is sufficient to cause a departure from the rule.

Of course, if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time (*f*).]

Devise to the person who shall be heir at a future time.

[(*d*) That is, the whole fee had not been exhausted; for in wills made before the statute 3 & 4 Will. IV. c. 106, s. 3, the heir would take by his better title, namely, by descent.

(*e*) 3 B. & Ald. 546. (The gift over was held to be an executory devise in the event of the son dying without leaving issue *at his death*, post, chap. xli.) See also *Locke* v. *Southwood*, 1 My. & C. 411; *Cain* v. *Teare*, 7 Jur. 567; and the analogous cases on devises and bequests to next of kin in the next chapter.

(*f*) *Wrightson* v. *Macaulay*, 14 M. & Wel. 214, answer to second question.]

# CHAPTER XXIX.

## GIFTS TO FAMILY, DESCENDANTS, ISSUE, NEXT OF KIN, RELATIONS, PERSONAL REPRESENTATIVES, EXECUTORS, OR ADMINISTRATORS, AND PERSONS OF TESTATOR'S BLOOD OR NAME.

Construction of the word "family."

THE word *family* has been variously construed, according to the subject-matter of the gift and the context of the will. Sometimes the gift has been held to be void for uncertainty.

Devises to "family," when void for uncertainty.

As, in *Harland* v. *Trigg* (*a*), where a testator gave leasehold estates to his brother "J. H. for ever, hoping he will continue them in the family," Lord *Thurlow* thought it too indefinite to create a trust, as the words did not clearly demonstrate an object. The testator's brother was tenant for life in remainder, with remainder to his issue in strict settlement, of some freehold lands, and the testator had given some other leaseholds to the same uses; and it was contended, that the leaseholds in question were intended to be subject to the same limitations, so far as the nature of the property would admit; but his Lordship considered that this was not authorised. He said, the testator understood how to make his estates liable to those uses, and intended something different here.

So, in *Doe* d. *Hayter* v. *Joinville* (*b*), where a testator devised and bequeathed residuary real and personal estate to his wife for life, and, after her decease, one half to his wife's "family," and the other half to his "brother and sister's family," share and share alike; and it appeared that, at the date of the will, the testator's wife had one brother who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, it was held, that both the devises were void, from the uncertainty in each case as to who was

(*a*) 1 B. C. C. 142.

(*b*) 3 East, 172.

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meant by the word "family;" and in the latter case, also, from the uncertainty whether it applied to the family as well of the deceased, as of the surviving sister; and also whether it referred to the brother's family; which, however, the Court thought it did not.

Gifts to family held void for uncertainty.

Again, in the more recent case of *Robinson* v. *Waddelow* (*c*), where a testatrix, after bequeathing certain legacies, in trust for her daughters, who were married, free from the control of any husband, for life, and after their decease, for their respective children, gave the residue of her effects to be equally divided between her said daughters *and their husbands and families;* Sir *L. Shadwell,* V. C., after remarking that, as, in the gift of the legacy, "any" husband extended to future husbands, in the bequest of the residue, the word "husbands" must receive the same construction, declared his opinion to be, that such bequest as to the husbands and families was void for uncertainty. "The word 'family,'" said his Honor, "is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words 'husbands and families.'" It was accordingly decreed that the daughters took the residue absolutely as tenants in common (*d*).

It will be observed, that, in *Harland* v. *Trigg,* and *Robinson* v. *Waddelow,* the subject of gift was personal estate; and in *Doe* v. *Joinville,* it consisted of both real and personal property, and not of real estate exclusively—a circumstance which we shall see has been deemed material.

"Family" synonymous with *heir.*

Sometimes the word *family* or "house" (which is considered as synonymous) has been held to mean "heir." A leading authority for this construction is the often-cited proposition of Lord *Hobart,* in the case of *Counden* v. *Clerke* (*e*), that if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house.

So, in *Chapman's case* (*f*), where C., seised in fee of three houses, devised that which N. dwelt in to his three brothers amongst them, and N. to dwell still in it, and they to raise no ferme; and willed his house that T., his brother, dwelt in, to

(*c*) 8 Sim. 134. ["I cannot say that that case is quite satisfactory to my mind," per Lord *Cranworth,* V. C., 1 Sim. N. S. 246.] See also *Stubbs* v. *Sargon,* 2 Kee. 253.

(*d*) No doubt the testator's real intention was to assimilate the residuary bequest to the legacies, [so far as the children were concerned;] but the V. C. seems to have considered that this hypothesis savoured too much of mere conjecture.

(*e*) Hob. 29.

(*f*) Dyer, 333 b.

him, and he to pay C. 3*l.* 6*s.* to find him to school with, and else to remain to the house: the words "and else to remain to the house" were construed to mean the chief, most worthy, and eldest person of the family (*g*).

Where "family" means *heir*.

These authorities were recognised and much discussed in the more recent case of *Wright* v. *Atkyns* (*h*), which was as follows:—A testator devised all his manors, &c., as well leasehold as freehold and copyhold, in certain places, and all other his real estate, unto his mother, C., and her heirs for ever, in the fullest confidence that, after her decease, she would devise *the property to his family*. The question was, what estate the mother took. It was contended for her, on the authority of *Harland* v. *Trigg*, that the word "family" was too indefinite to create a trust in favour of any particular objects, and, therefore, that she took the fee. But Sir *W. Grant*, M. R., relying on the early authorities before referred to, held, there was no uncertainty in the object. It was a trust for the testator's heir. He said: "Cases relative to personal property, or to real and personal comprised in the same devise, or where the meaning is rendered ambiguous by other expressions or dispositions, will not bear upon this question. In the case of *Harland* v. *Trigg*, Lord *Thurlow* doubted whether 'family' had a definite meaning. The authorities above alluded to were not cited. *The case related to leasehold estate*, and it was, by other dispositions in the will, rendered uncertain in what way the testator willed the family to take the benefit of the leasehold estates, it being contended, he meant to give them to the same uses to which the real estate was settled."

Lord *Eldon's* judgment in *Wright* v. *Atkyns*.

The case was brought before Lord *Eldon* by appeal. His Lordship admitted the general rule, that, if a man devises lands to A. B., with remainder to his *family*, inasmuch as the Court will never hold a devise to be too uncertain, unless no fair construction can be put upon it, the heir at law, as the worthiest of the family, is the person taken to be described by that word. But several circumstances embarrassed the question in this case; one was, that leaseholds were included, *which was not noticed at the Rolls;* and the others were, that it was not a trust simply,

(*g*) But was not the word "house" used in the same sense as in the former part of the will, the effect of the clause being merely to declare that the charge should merge or sink in the property which was the subject of the devise? [17 Ves. 257, n.; 19 Ves. 300.]

(*h*) 17 Ves. 255.

but a power which might be exercised at any time during the life of the donee, before which period the object might be dead; and the remaining circumstance was founded on the objection, why should the testator have given this lady a power of devising, if by the words "his family," he only meant his heir at law? As to the first of these circumstances, his Lordship was of opinion that the word *family*, as had been decided with regard to relations (*i*), used in a devise of both real and personal estate, must receive the same construction as to both; and he denied the authority of the case, cited 1 Taunt. 266, in which, under a limitation to the family of J. S., the real estate was held to go to the heir at law, and the personalty to the next of kin. In regard to the two other circumstances, his Lordship thought they could not vary the construction; for it was merely what might happen in the case of a similar power to appoint among relations, where all the relations might die before the exercise of the power, or there might originally be but one relation; and it could not be contended, that these circumstances would make any difference in the construction; and, therefore, not in the present case (*k*). Lord *Eldon*, accordingly, affirmed the decree at the Rolls.

"Family" in gift of real and personal estate similarly construed as to both.

In the next case (*l*), the word *family*, applied to real estate, was construed to mean heir *apparent*. A very illiterate testator devised lands into his "sister C.'s family, to go in heirship for ever;" and it was held, that the eldest son and heir apparent of C. was entitled, though it was admitted that the word "family," in *another* part of the will, and applied to personal property, meant children; the Court thinking it no objection, that the same word, when elsewhere applied to a different subject, would receive a different construction.

"Family" held to mean heir apparent.

[Lastly, in the case of *Griffiths* v. *Evan* (*m*), where a testator devised to his daughter in tail, with power to her, in default of issue, to appoint to the testator's "nearest family;" it was held, that this was a power to appoint to the heir.]

"Nearest family" held to mean heir.

It is evident that the construction, which reads the word "family" as synonymous with *heir*, only obtains where real estate is included in the disposition; it certainly never would be

Influence which the nature of the property has upon the construction.

(*i*) Coop. 111, 19 Ves. 299. See also T. & R. 143.

(*k*) This is a very brief summary of his lordship's elaborate judgment, which deserves the reader's perusal.

(*l*) *Doe* d. *Chattaway* v. *Smith*, 5 M. & Sel. 126.

[(*m*) 5 Beav. 241.]

applied to a bequest of personalty only: and with regard to a gift comprehending both real and personal estate, the point is far from being clear; for though Lord *Eldon* appears, by Sir *Geo. Cooper's* report of *Wright* v. *Atkyns*, to have argued (and most convincingly) that the gift was to be construed as if it had actually embraced, in its operation, both species of property; yet as this is at variance with Mr. *Vesey's* report of the same case, and as the learned Judge, who originally decided it, treated the gift as comprising real estate exclusively, and it was cited as a case of that kind by Lord *Ellenborough*, in *Doe* d. *Chattaway* v. *Smith* (*n*), it cannot confidently be regarded as an authority for applying the construction in question to a gift comprising both real and personal estate. [Indeed, the doctrine imputed to Lord *Eldon*, that both species of property must flow in the same channel, was denied by Lord *Cottenham*, in the recent case of *White* v. *Briggs* (*o*), in which a testator gave his real and personal property to his wife for life, and after her death, his nephew to be heir to all his property; but, apprehending his nephew might require control, he directed it to be secured for the benefit of the nephew's family: the L. C. was of opinion, that the testator's object was simply to secure against the supposed improvidence of his nephew, the succession to each species of property in the course prescribed by law; and, therefore, decreed the real estates to be conveyed to uses in strict settlement, on the sons and daughters of the nephew in succession, and the personalty to all the children as joint tenants.]

Where word "family" used to designate *children*.

In some cases the word *family* has been held to mean *children*. Thus, where (*p*) a testator devised the remainder of his estate to be equally divided between "brother L.'s and sister E.'s family," it was held, by Sir *W. Grant*, M. R., that the children of L. and E. took as well the real as the personal estate, per capita. In this case, the only questions in regard to the objects of the gift were, whether the children took per stirpes, and whether L. and E. were included; both which were decided in the negative. [So, in *Woods* v. *Woods* (*q*)

(*n*) 5 M. & Sel. 129. [There were, in fact, no leaseholds, T. & R. 146; so that, in any view, the case can only be an authority, that where the principal subject is realty, the construction as to that will not be varied by the presence of personalty: it leaves undecided what will become of the latter.

(*o*) 15 Sim. 17, 2 Phill. 583.]

(*p*) *Barnes* v. *Patch*, 8 Ves. 604. See also *M'Leroth* v. *Bacon*, 5 Ves. 159; and *Doe* d. *Chattaway* v. *Smith*, 5 M. & Sel. 126.

[(*q*) 1 My. & Cr. 401.

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[where a testator gave the proceeds of his real estate, if sold under a power contained in his will, to his wife, towards her support and her family; Lord *Cottenham* thought it clear that the word "family" could not be confined to the heir, but that the other children were also entitled. And on the other hand, in *Wood* v. *Wood* (*r*), Sir *J. Wigram*, V. C., held, that collateral relations had no claim as against children under a bequest to the family of A., following a bequest to A. himself.]

Husband and wife not included in "family."

In *M'Leroth* v. *Bacon* (*s*), the husband was held to be included in the term *family* by force of the context; Sir *R. P. Arden*, at the same time, admitting that, in general, under a power to appoint to A. and her family, the husband is excluded. [And in *Blackwell* v. *Bull* (*t*), Lord *Langdale*, M. R., considering the variety of constructions of which the term was capable, held, that, under the circumstances of that case, the testator's wife was entitled to participate.

Gift to A. and his family; A. and his children entitled jointly.

But notwithstanding the flexibility of the word "family," the rule in favour of children is not necessarily altered merely because the gift to the family is coupled with a gift to the parent; as if there be a bequest to A. and his family; here the word "family" will not be rejected as surplusage, but the children will take as joint tenants with their parent (*u*).]

Where "family" construed *relations*.

The word *family* has also been construed as synonymous with *relations* (*x*). Thus, in the case of *Cruwys* v. *Colman* (*y*), where a testatrix, after bequeathing her property to her sister for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeath "at her own death, to those of her own family, what she has in her own power to dispose of that was mine." Sir *W. Grant*, M. R., held, that the expression "of her own family," was equivalent to *of her own kindred*, or *her own relations*; and she, not having exercised the power, it was, therefore, a trust for her next of kin. [So, in *Grant* v. *Lynam* (*z*), where a trust was created in favour of some one of the testator's

[(*r*) 3 Hare, 65. See also *Beales* v. *Crisford*, 13 Sim. 592; *Morton* v. *Tewart*, 2 Y. & C. C. C. 67; *Owen* v. *Penny*, 14 Jur. 359; *Gregory* v. *Smith*, 9 Hare, 708; *In re Terry's will*, 19 Beav. 580.]

(*s*) 5 Ves. 159.

[(*t*) 1 Kee. 176. In *James* v. *Lord Wynford*, 2 Sm. & Gif. 350, there was a devise of lands, "except such as the testator might derive from A. or from any of her *family*," and it was held that the father of A. was here within the meaning of the word "family."

(*u*) *Woods* v. *Woods*, 1 My. & Cr. 401; *Beales* v. *Crisford*, 13 Sim. 592; *Re Parkinson*, 1 Sim. N. S. 242.]

(*x*) As to which, see post.

(*y*) 9 Ves. 319.

[(*z*) 4 Russ. 292.

[*family*, Sir *J. Leach*, M. R., held "family" and "relations" to be convertible terms.]

General remark on preceding cases.

It should seem, then, that a gift to the *family* either of the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special, creating that uncertainty. The subject-matter and the context of the will are to be taken into consideration. It is observable, that wherever the word "family" has been construed to mean children, no one was interested in insisting on its receiving the more enlarged signification of relations; for there being no other objects than children, either construction carried it to the same persons; if there had been issue of deceased children, who would have been excluded as children, but might have taken as relations, the question would have arisen. It seems very probable, that, in such a case, the Courts would adopt the more extensive construction, authorised as it is by the case of *Cruwys* v. *Colman* (*a*), and according to the view suggested of the other decisions, not contradicted by those decisions. [And accordingly, in the case of *In Re Maxton* (*b*), where a testator gave a sum of money in trust for his wife for her life, and "at her demise, let the principal return to the good of my family, whoever survives longest;" the testator left no children, and Sir *W. P. Wood*, V. C., held that this was a remainder vesting in the next of kin of the testator, at the time of his decease as joint tenants.] Every case, however, must depend upon its particular circumstances.

"Family" held to mean descendants.

[Indeed, a meaning even more extensive than that of relations was given to the word in the case of *Williams* v. *Williams* (*c*), where a testator by his will bequeathed personal property to his wife, and by a codicil expressed a wish in favour of her *children;* but said he should be unhappy if he thought any one not of her *family* should be the better for it; Lord *Cranworth*, V. C., held, that the words "of her family" were equivalent to "of her blood," that is "her posterity, her descendants," so as to include grandchildren the issue of living parents. This opinion was probably owing in some degree to the fact that her children were her relations (i. e. next of kin), and when the testator meant to speak of "children" he used that word.

Gift to the

Whether effect can be given to a devise to the "younger

[(*a*) See also per Lord *Hardwicke*, *Gower* v. *Mainwaring*, 2 Ves. 110.

(*b*) 4 Jur. N. S. 407.

(*c*) 1 Sim. N. S. 358.

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"younger branches" of a "family."

[branches of a family" must of course chiefly depend on the state of the family at the time when the will is made. In *Doe* d. *Smith* v. *Fleming* (*d*), where a testator disposed of the ultimate remainder of his estates to the *younger branches of the family of* A. and their heirs as tenants in common, and in default of such issue to the elder branches of the same family and their heirs as tenants in common. There were living at the date of the will, and of the testator's death, two daughters of A., four children of one of those daughters and children of two deceased sons of A., and the meaning of the testator being, under these circumstances, open to different interpretations, the Court of Exchequer held the devise void.

On the other hand, in the case of *Doe* d. *King* v. *Frost* (*e*), where a testator devised his real estates to his son W. in fee; but if he should die without issue living at his decease (which happened) to I. S. "subject to such legacies as W. might leave to any of the younger branches of the family:" and it appeared that besides his only son W. the testator had issue one daughter, who at the time the will was made had five children; *Abbott*, C. J., and *Bayley*, J., agreed that by the term "the younger branches of the family," the testator meant his daughter's younger children: the daughter herself and her eldest son being in the event contemplated successive heirs apparent to W., and therefore excluded from any claim to the legacies.]

Word "descendants," how construed.

A gift to *descendants* receives a construction answering to the obvious sense of the term; namely, as comprising issue of every degree.

In the case of *Crossley* v. *Clare* (*f*), a devise of real estate "to the descendants of A. now living in or about B., or hereafter living anywhere else," and a bequest of personalty in the same words were held to apply to all who proceeded from A.'s body, so that grandchildren [and great grandchildren] were entitled, and a great great grandchild was not included, only because born after the date of the will, the words "*now* living" excluding him. In *Legard* v. *Haworth* (*g*), the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

"Relations by lineal descent."

[In the case of *Craik* v. *Lamb* (*h*), where a testator gave the

[(*d*) 2 C. M. & R. 638.
(*e*) 3 B. & Ald. 546.]
(*f*) Amb. 397; [*S. C.* 3 Sw. 320, n.]
(*g*) 1 East, 120.
[(*h*) 1 Coll. 489. "To speak of a man's collateral kindred as related to

[residue of his real and personal property "unto and equally amongst all his relations who might prove their relationship to him by lineal descent;" it appeared that the testator was a widower, and had no issue, but several first cousins, his next of kin, and it was held by Sir *J. Knight Bruce*, V. C., that, as the testator had not required his devisees to prove their descent from him, he might be understood to mean lineal descent from a common progenitor, and therefore that his cousins were entitled to the residue.]

Gift to descendants *equally*.

Under a gift to descendants *equally*, it is clear that the issue of every degree are entitled per capita, i. e. each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent (*i*). And even where the gift is to descendants simply, it seems that the same mode of distribution prevails; unless the context indicates that the testator had a distribution per stirpes in his view, as in *Rowland* v. *Gorsuch* (*k*), where the testator, as to the residue of his fortune, willed that the descendants *or representatives* of each of his first cousins deceased should partake in equal shares with his first cousins then alive; Sir *Lloyd Kenyon*, M. R., considered that the gift applied to first cousins, and all persons who were descendants of first cousins, and who, in quality of descendants, would be entitled, under the Statute of Distributions, to represent them. He had some doubt whether they were to take per capita, or per stirpes; but upon the whole, he thought that no person taking as representative could take otherwise than as the statute gives it to representatives, i. e. per stirpes.

Bequest to "issue," how construed.

The word *issue*, when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree (*l*). And here the distribution is per capita, not per stirpes. The case of *Davenport* v. *Hanbury* (*m*) presents a simple example: The bequest was to M., or her issue. M. died in the lifetime of the testator, leaving one son living,

[him in any 'line' is not an improper use of language, but equally allowable with the genealogical 'transversa linea' of the civil lawyers;" per Sir *J. K. Bruce*, L. J., *Boys* v. *Bradley*, 4 D. M. & G. 68.]

(*i*) *Butler* v. *Stratton*, 3 B. C. C. 367.

(*k*) 2 Cox, 187.

(*l*) *Haydon* v. *Wilshere*, 3 T. R. 372; *Hockley* v. *Mawbey*, 1 Ves. jun. 150; *Wythe* v. *Thurlston*, Amb. 555, 1 Ves. 195, stated more correctly 3 Ves. 258; *Horsepool* v. *Watson*, ib. 383; *Bernard* v. *Mountague*, 1 Mer. 434; [*Hall* v. *Nalder*, 22 L. J. Ch. 242, 17 Jur. 224; *South* v. *Searle*, 2 Jur. N. S. 390; *In re Jones' Trusts*, 23 Beav. 242; *Maddock* v. *Legg*, 25 Beav. 531. "Offspring" is synonymous with "issue," see *Thompson* v. *Beasley*, 3 Drew. 7.]

(*m*) 3 Ves. 257.

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and two children of a deceased daughter. Sir *R. P. Arden*, M. R., held, that these three objects were entitled per capita; and, there being no words of severance, they took as joint-tenants.

Words "lawful issue" held to comprise children and grandchildren.

In the case of *Leigh* v. *Norbury* (*n*), we have an instance of the same mode of construction applied to a deed. By indenture, in consideration of an intended marriage, A. assigned to trustees all his personal estate, upon trust to permit him to enjoy the same during his life, and, after his decease, in trust for such persons as he should appoint, and, in default of appointment, for the lawful *issue* of A. A. made no appointment, and died leaving several children, some of whom had children. Sir *W. Grant*, M. R., held that the property was divisible among all the children and grandchildren per capita. He said, it was clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention, he said, was required for the purpose of limiting the sense of that word to children.

Distribution per capita.

Gift to *issue* extended to children and grandchildren.

In *Freeman* v. *Parsley* (*o*), a testator devised and bequeathed a moiety of his personal estate, and of the proceeds of his real estate (which he directed to be sold), to T., his heirs, &c., to be divided among A., B., C., and D.; "but in case of their decease, or any of them, such deceased's share to be divided among the *lawful issue* of such deceased, and, in default of such issue, such share to be equally divided among the survivors." B., C., and D., died in the testator's lifetime, leaving children and grandchildren. Lord *Loughborough* held, that all were entitled, though he expected that it was contrary to the intention. His Lordship regretted, that there was no medium between the total exclusion of the grandchildren, and admitting them to share with their parents.

Devise of real estate to issue.

It will be perceived, that, in all the preceding cases, the subject of disposition was personal estate, or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word "issue" would not be varied when applied to real estate. It is true, indeed, that the word "issue," when preceded by an estate for life in the ancestor, is frequently construed (as we shall hereafter see) as synonymous with heirs of the body, and as such conferring an estate tail, on the ground

(*n*) 13 Ves. 340. (*o*) 3 Ves. 421.

that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants born and unborn; and it must be confessed, that the same reasoning applies, to a certain extent, in the case now under consideration; for to adopt any other interpretation narrows the range of objects, by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants, on whom an estate tail would, if not barred, devolve (as in *Mandeville's case*). But whatever may be the plausibility or force of such analogical reasoning, it has received but little countenance from the cases; there being, it is believed, no direct adjudication in favour of such a construction, while positive authority may be cited against it: as in the case of *Cook* v. *Cook* (*p*), where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

"To the issue of J. S."

Seeing that the construction, which obtained in this case, has the merit of letting in all the existing issue concurrently, instead of vesting the property in the eldest or only son (as would generally be the effect of the alternative construction above suggested), it seems probable that it will be hereafter followed in a similar case; and there appears to be an increased motive for its adoption, now that, under such a devise (if contained in a will made or republished since the year 1837), the issue would take the fee.

Remark on *Cook* v. *Cook*.

At all events, if the devise to the issue not only confers an estate in fee, but also contains words of distribution (which are obviously inconsistent with holding the word "issue" to be synonymous with heirs of the body), it is clear that issue of every degree are entitled as tenants in common.

Effect where the devise is to the issue as tenants in common in fee.

Thus, in the case of *Mogg* v. *Mogg* (*q*), where, under a devise to trustees, to pay the profits to the children begotten and to be begotten of M. for their lives (which vested the legal estate pro tanto in the trustees), and after the decease of such children, the testator devised the estate to the lawful issue of such children, *to hold unto such issue, his, her, and their heirs, as tenants in common*, without survivorship (and which was held to execute the use *in the issue*), the Court of King's Bench, on

(*p*) 2 Vern. 545. See ante, pp. 57, 58.

(*q*) 1 Mer. 654.

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a case from Chancery, certified (*r*) that the issue of such of M.'s children as were *living at the testator's decease took the remainder in fee, expectant on the estate* pur auter vie *of the trustees as tenants in common;* and this certificate was confirmed by Sir *W. Grant,* M. R.

"Issue" explained to mean *children.*

The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of *children.* A clause substituting issue for their *parents,* it seems, has such effect, the word "parent" so used being considered to import, according to its ordinary meaning, *father* or *mother,* as distinguished from, and in exclusion of, a more remote ancestor.

Thus, in the case of *Sibley* v. *Perry* (*s*), where a testator made certain bequests to several persons, if living at his decease, and, if not, he directed that their lawful *issue* should take the shares which their respective *parents,* if living, would have taken; and he made other bequests to the lawful issue living, at certain periods, of other persons; Lord *Eldon* thought it was clear, as to the former class, that children were intended, and that this was a ground for giving to the word "issue" the same construction in the other bequests (*t*).

[But if in such a case there follows a gift over in case the original legatees die without leaving any issue, there is strong ground for retaining the primary and more extended meaning of the word "issue" in the preceding gift; since by construing it as children in both clauses it is clear, that though the gift over would take effect, yet it would be at the expense of the remoter issue, who would take nothing: or by giving the word "issue" *in the gift over* only its natural acceptation, the gift over is prevented taking effect, and intestacy is the consequence. This point arose in *Ross* v. *Ross* (*u*), and the M. R., chiefly on the ground indicated, held that the word "issue" must retain its primary meaning; so that on the death of a parent of any

(*r*) See answer to the query, 1 Mer. 689.

(*s*) 7 Ves. 522; [*Pruen* v. *Osborne,* 11 Sim. 132; *Buckle* v. *Fawcett,* 4 Hare, 536, 544; *Crozier* v. *Crozier,* 3 D. & War. 386; *Bradshaw* v. *Melling,* 19 Beav. 417; *Smith* v. *Horsfall,* 25, ib. 628; *Maynard* v. *Wright,* 26 ib. 285.

(*t*) See also *Ridgway* v. *Munkittrick,* 1 D. & War. 84; *Edwards* v. *Edwards,* 12 Beav. 97; *Rhodes* v. *Rhodes,* 27 Beav. 413. It is not, however, a necessary result of the word "issue" being used in the sense of *children* in one clause, that it is to be similarly construed in another clause, where it is surrounded by a different context, *Carter* v. *Bentall,* 2 Beav. 551; *Head* v. *Randall,* 2 Y. & C. C. C. 231; *Hedges* v. *Harpur,* 9 Beav. 479; *Caulfield* v. *Maguire,* 2 Jo. & Lat. 176; *Williams* v. *Teale,* 6 Hare, 239. Still less can "issue" be restricted to "children" merely to make two different bequests correspond, *Waldron* v. *Boulter,* 22 Beav. 284.

(*u*) 20 Beav. 645.

[generation, his children (whether children, grandchildren, or remoter issue of the person whose issue was originally spoken of) took his share, but not letting in issue of a remoter generation to share with issue less remote. In other words, the substitution would take place according to circumstances through all the generations of issue (*x*).

Where a gift is made to issue, and the testator proceeds to speak of "issue" of such former mentioned "issue," it is clear he did not, in the first instance, use the word "issue" in its most comprehensive sense; and if he has further called the first "parents" of the second, the sense to which the word is limited must be that of "children" (*y*). Even without this latter circumstance it is difficult to see how, if restricted at all, the term can mean anything but children (*z*), except in cases where it may refer to issue living at a particular period.]

On the same principle, in the case of *Hampson* v. *Brandwood* (*a*), it was considered that a limitation in a deed to the first male issue, *lawfully begotten by A.*, was restricted to *sons*; but the construction seems to have been aided by the context, the next limitation being expressly to *daughters*, [and the father having a power, in case of there being any such male issue to inherit, to charge the property in favour of his *other children*. It has been frequently decided, that the words "lawfully begotten by A." are not per se enough to limit a bequest "to the issue of A." to his children (*b*).

It was held, by Sir *E. Sugden*, in a case upon articles for a settlement to the husband and wife successively for their lives, with remainder to the issue as they should appoint, and in default of appointment, then in equal shares, if there were more than one of such issue, born in the husband's lifetime or *in a reasonable time after his death*, that the word "issue" meant *children* (*c*).

Effect where words "issue" and "children" are used indifferently.

Difficulty, however, often arises from the testator having used the words *issue* and *children* synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these respective terms

[(*x*) See also *Robinson* v. *Sykes*, 23 Beav. 40; *Amson* v. *Harris*, 19 Beav. 210.

(*y*) *Pope* v. *Pope*, 14 Beav. 593; *Williams* v. *Teale*, 6 Hare, 239.

(*z*) See per *Maule*, J., 8 C. B. 880.]

(*a*) 1 Madd. 381; [*Gordon* v. *Hope*, 3 De G. & S. 351.

(*b*) *Caulfield* v. *Maguire*, 2 Jo. & Lat. 176; *Evans* v. *Jones*, 2 Coll. 516; *Haydon* v. *Wilshere*, 3 T. R. 372. And see *King* v. *Melling*, 1 Vent. 230.

(*c*) *Thompson* v. *Simpson*, 1 D. & War. 459, 480.]

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should be established. Lord *Hardwicke* thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution —viz. to each, or their respective *children* one-fourth, followed by a gift to survivors, in case any of them should be dead without issue, the word "children" was not restrictive of "issue" previously mentioned, the videlicet being merely explanatory of the shares to be taken, and not of the objects to take. The word "children," therefore, was to be construed as meaning *issue*, and not "issue" abridged to *children* (*d*).

Gift to next of kin, how construed.

A devise or bequest to *next of kin* [creates a joint tenancy (*e*) in the nearest blood-relations in equal degree of the propositus; such objects being determined without regard to the Statute of Distribution. This rule, however, more particularly as it affects the rights] of persons who claim by representation under the express clause of the statute (*f*), entitling the children of the brothers and sisters of an intestate to stand in the place of their deceased parents, [has not been established without a struggle.] In favour of the claim of these representatives were the dictum of Lord *Kenyon* (*g*), and the decisions of Mr. Justice *Buller* (*h*), and Sir *J. Leach* (*i*). On the other side were ranged the strongly expressed opinions of Lord *Thurlow* (*k*), Lord *Eldon* (*l*), and Sir *W. Grant* (*m*), and a decision of Sir *T. Plumer* (*n*).

Next of kin confined to persons strictly answering to this character.

Such was the perplexing state of the authorities antecedently to the case of *Elmesley* v. *Young*, which was as follows:—A fund was settled by indenture, upon trust, after failure of certain

(*d*) *Wyth* v. *Blackman*, 1 Ves. 196, Amb. 555. See also *Horsepool* v. *Watson*, 3 Ves. 383; *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welsh*, 2 Sim. 319, stated post; *Doe* d. *Simpson* v. *Simpson*, 5 Scott, 770, 4 Bing. N. C. 333, 3 M. & Gr. 929, stated post; *Harley* v. *Mitford*, 21 Beav. 280. The case of *Cursham* v. *Newland*, 2 Scott, 105, 2 Bing. N. C. 58, 4 M. & Wel. 104, presents the converse case; for in a will where both words were used indifferently, "issue" was restrained to *children*. See also *Jennings* v. *Newman*, 10 Sim. 219; [*Goldie* v. *Greaves*, 14 ib. 348; *Benn* v. *Dixon*, 16 ib. 21; *Earl of Oxford* v. *Churchill*, 3 V. & B. 67; *Bryan* v. *Mansion*, 5 De G. & S. 737; *Farrant* v. *Nichols*, 9 Beav. 327; *Edwards* v. *Edwards*, 12 ib. 97; *Heath's settlement*, 23 Beav. 193.

(*e*) *Withy* v. *Mangles*, 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69; *Baker* v. *Gibson*, 12 Beav. 101; *Lucas* v. *Brandreth*, 6 Jur. N. S. 945. Life estate only in lands passes without words of limitation, see last case. In *Dugdale* v. *Dugdale*, 11 ib. 402, a bequest, equally among next of kin, both maternal and paternal, was distributed per capita, not in moieties between the next of kin ex parte maternâ, and ex parte paternâ.]

(*f*) 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30.

(*g*) *Stamp* v. *Cooke*, 1 Cox, 234.

(*h*) *Phillips* v. *Garth*, 3 B. C. C. 64.

(*i*) *Hinckley* v. *Maclarens*, 1 My. & K. 27.

(*k*) *Phillips* v. *Garth*, 3 B. C. C. 64.

(*l*) *Garrick* v. *Lord Camden*, 14 Ves. 372.

(*m*) *Smith* v. *Campbell*, Coop. 275.

(*n*) *Brandon* v. *Brandon*, 3 Sw. 312.

previous trusts, for such persons as should, at the decease of A., be his *next of kin*. A. died, leaving a brother, and the children of a deceased brother. Sir *J. Leach*, M. R., held, that the children of the deceased brother were entitled to participate in (*i. e.* to take a moiety of) the fund; his Honor's opinion being, that the words "next of kin" imported next of kin according to the Statutes of Distribution (*o*). The case was then brought, by appeal, before Lords Commissioners *Shadwell* and *Bosanquet*, who, after a full examination of the conflicting authorities, held, that the trust applied to the next of kin in the strictest sense of the term, excluding persons entitled by representation under the statute, and consequently, that A.'s surviving brother was entitled to the whole fund (*p*).

[The application of the rule to this case had the effect of excluding some of those who are popularly called "next of kin according to the statute." But an adherence to the principle will obviously have the effect in some cases of including persons who do not belong to that class. Accordingly, in the case of] *Withy* v. *Mangles* (*q*), where the question was as to who was entitled under the ultimate limitation in a marriage settlement in favour of "such persons or person as shall be the next of kin of E. M. at the time of her decease;" E. M. having died, leaving a child, and also her father and mother, who claimed each an equal share of the property with the child; Lord *Langdale*, M. R., decided that the parents, though postponed to children by the Statutes of Distribution, were nevertheless entitled concurrently with the child, as being of equal degree. His Lordship observed, "All writers on the law of England appear to concur in stating, that, in an ascending and descending line, the parents and children are in an equal degree of kindred to the proposed person (*r*); and I think that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in an equal degree of consanguinity. The law of England gives a preference to the child

Parents and children, being of kin in equal degree, take together as "next of kin."

(*o*) 2 My. & K. 82.

(*p*) 2 My. & K. 780. [A gift to "next of kin *in equal degree*" had been twice decided not to include representatives, *Wimbles* v. *Pitcher*, 12 Ves. 433: *Anon.* 1 Mad. 36.]

(*q*) 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jur. 69.

[(*r*) 2 Bl. Com. 504. The degrees are to be reckoned according to the civil law, *Cooper* v. *Denison*, 13 Sim. 290; by which law, it is to be remembered, the half-blood stands on equal ground with the whole-blood, *Cotton* v. *Scarancke*, 1 Mad. 45.

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over the parent in distribution; but I think we cannot, therefore, conclude with respect to every distribution of property, made in words to give the same to persons equally next of kin, the parents are to be held more remote than the child." [And the House of Lords affirmed the decision.

So of a brother and grandfather.

On the same principle Sir *L. Shadwell*, V. C., decided in *Cooper* v. *Denison* (*s*), that the testator's brothers and sister, being related to him in equal degree with his grandchildren, were entitled to share with them a residue left to his next of kin. These and subsequent (*t*) decisions must] be considered to have finally settled this long-agitated question.

Secus, where statute of distribution or intestacy is expressly referred to.

[An express reference, however, to the statute, or to an intestacy, will entitle all kindred, who would come in under the statute in case of an intestacy, to a share in the bequest (*u*): but not a husband or wife; who are not of kin to each other, nor indeed considered as such by the statute (*x*). It follows that, where the same reason for exclusion does not exist, as in the case of a gift "to the person or persons who would, under the statute, have been entitled to the testator's personal estate, in case he had not disposed of the same by will," the wife will take a share (*y*). And if a testator directing payment and division under the statute does not expressly state how the objects are to take, they must take according to the mode and in the shares directed by the statute (*z*).

Construction of gift to next of kin, ex parte paternâ or maternâ.

We have seen that an heir ex parte maternâ does not the less answer the description, because he is also heir ex parte paternâ: and the same rule holds with regard to next of kin; so that, under a bequest to the next of kin ex parte maternâ, the person who combines in himself the character of next of kin on the father's as well as the mother's side will be entitled (*a*), unless the testator has expressly excluded the next of kin ex parte

(*s*) 13 Sim. 290.

(*t*) *Avison* v. *Simpson*, 1 Johns. 43.

(*u*) 14 Ves. 385, 386; 4 Beav. 368; 1 Kay & J. 504. In the case of *In re Webber*, 17 Sim. 221, the rule that the first words in a deed shall prevail was applied so as to make a reference to the statute inoperative upon a previous gift to next of kin.

(*x*) *Garrick* v. *Lord Camden*, 14 Ves. 372; *Cholmondeley* v. *Lord Ashburton*, 6 Beav. 86; *Kilner* v. *Leech*, 10 Beav. 362. But where a wife's fund (who was illegitimate) was settled in default of issue in trust for her next of kin, and she died without issue in her husband's lifetime, it was held against the Crown that the settlement was exhausted and that the husband administrator was entitled for his own benefit, *Hawkins* v. *Hawkins*, 7 Sim. 173.

(*y*) *Martin* v. *Glover*, 1 Coll. 269; *Jenkins* v. *Gower*, 2 Coll. 537; *Starr* v. *Newberry*, 23 Beav. 436.

(*z*) *Lewis* v. *Morris*, 19 Beav. 34, and see post, n. to *Tiffin* v. *Longman*.

(*a*) *Gundry* v. *Pinniger*, 14 Beav. 94, 1 D. M. & G. 502.

[paternâ, as if the bequest be to the testator's "next of kin on the part of his mother only, and not to any of his next of kin on the part of his father;" in which case they who, if the person filling the double character were out of the way, would be the next of kin ex parte maternâ will take the legacy (*b*).

Gift to next of kin of a particular name.

It seems never to have been decided whether in case an additional term of description be annexed to a gift to next of kin, as if property be given to next of kin of a particular name, and the true next of kin do not bear that name, the nearest relations who do bear it can take under the will (*c*). The question was discussed, but a decision expressly avoided, in *Doe* d. *Wright* v. *Plumptre* (*d*); yet Sir *L. Shadwell* collected from the case that the Court of King's Bench thought both parts of the description must concur in the same individual, and seemed himself to entertain the same opinion (*e*).

"Next of kin in the male line."

In the case of *Boys* v. *Bradley* (*f*) a testator, who died a bachelor, bequeathed his residue to his "nearest of kin in the male line, in preference to the female line;" Sir *W. P. Wood*, V. C., held that this meant next of kin ex parte paternâ, and that the legatee need not be a male, nor claim wholly through males. One of the parties who claimed wholly through males, but was not one of the next of kin, appealed, but the Lords Justices and the House of Lords affirmed the decision so far as was necessary to the rejection of the appellant's claim. It was doubted, however, by Sir *J. Knight Bruce*, whether the expression "male line" was equivalent to the phrase "ex parte paternâ;" for though all a man's maternal kindred might be designated as his relatives in the female line, whether related to his mother on her father's side or otherwise; yet he was not necessarily related in the male line to all his father's relations.

"Next of kin by way of heirship."

In *Williams* v. *Ashton* (*g*), a testator devised land to her "nearest of kin by way of heirship," and the heir not being one of the nearest of kin, it was argued that he was not entitled; but Sir *W. P. Wood*, V. C., decided that he was, that

[(*b*) *Say* v. *Creed*, 5 Hare, 580. Whether a bequest to one "in preference to" the other excludes the latter, quære? See *Boys* v. *Bradley*, 10 Hare, 389, 4 D. M. & G. 58.

(*c*) See the analogous case of gifts to the heir, p. 58.

(*d*) 3 B. & Ald. 474, case upon a deed.

(*e*) See *Carpenter* v. *Bott*, 15 Sim. 606; and *Boys* v. *Bradley*, 4 D. M. & G. 58.

(*f*) 10 Hare, 389, 4 D. M. & G. 58, and nom. *Sayers* v. *Bradley*, 5 H. of L. Ca. 873, 25 L. J. Ch. 593.

(*g*) 1 Johns. & H. 115.]

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[the word heirship must be referred to the subject of gift, which was realty, and that the testatrix meant the nearest in the line through which real estate would descend; in short (though it was a circuitous way of expressing it) the heir.]

"Legal representatives" or "personal representatives," how construed.

The construction of the words "legal representatives," or "personal representatives," has presented another perplexing and fruitful topic of controversy. Each of these terms, in its strict and literal acceptation, evidently means "executors," or "administrators," who are, properly speaking, the "personal representatives" of their deceased testator or intestate; but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, [in some cases,] that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee. Accordingly, in numerous cases, the term "legal representative," or "personal representative," has been construed as synonymous with *next of kin*, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to "represent" the deceased.

"Legal representatives" held to denote *next of kin.*

Thus, in the case of *Bridge* v. *Abbot* (*h*), (which is a leading authority for this construction), a testatrix made a bequest to certain persons, and, in case of the death of any of them before her (the testatrix), to his or her *legal representatives;* and Sir *R. P. Arden,* M. R., held the next of kin to be entitled. This construction has been also adopted in several recent cases. As in the case of *Cotton* v. *Cotton* (*i*), where a testator bequeathed the residue of his property to his executors, to be divided between the gentlemen thereafter named, *or the legal representatives* of the said gentlemen, in the proportion that the sums set against their names bore to each other. The testator wrote the names of twelve persons, opposite to which he placed different figures. One of these persons was dead at the date of the will, having left a will. Lord *Langdale,* M. R., held that the next of kin of the deceased person named by the testator, not the residuary legatee, were entitled.

[In the two preceding cases the gift to the persons named

(*h*) 3 B. C. C. 224. See also *Long* v. *Blackall,* 3 Ves. 486; [*Jennings* v. *Gallimore*, ib. 146. They take per stirpes, *Rowland* v. *Gorsuch,* 2 Cox, 187; *Booth* v. *Vicars,* 1 Coll. 6.]

(*i*) 2 Beav. 67.

[was immediate; a circumstance which will be observed upon in the sequel.

"Personal representative" held to mean *next of kin.*

Again,] in the case of *Baines* v. *Ottey* (*k*), where a testator gave certain real and personal estate to trustees, in trust for such persons as A. (a married woman) should appoint, and in default of appointment, for her separate use, and, at her decease, to convey the real estate to such person or persons as would be the heir at law of the said A., and to assign the personal estate *to or amongst* such person or persons as would be the personal representatives of the said A.; Sir *J. Leach,* M. R., held the next of kin to be entitled.

"Legal representative" held to mean *next of kin.*

[And in a very similar case, where a testator, after the death of his wife, gave his property to A. "if he should be then living, but if he should be then dead, to his legal representative or representatives, if more than one, *share and share alike;*" Sir *J. Wigram,* V. C., held these words to mean next of kin, according to the Statute of Distribution (*l*).

"Personal representatives held to mean *descendants.*

So, in the case of *Atherton* v. *Crowther* (*m*), where there was a residuary bequest to the testator's wife for life, remainder to the children of A. living at A.'s death, "but if any of the said children should die in A.'s lifetime, then for the personal representatives of such child or children *to take per stirpes and not per capita;*" and in another clause there was a gift "in case there should be no such children nor any representatives of such children living at A.'s death, then to the persons who should be the testator's next of kin;" it was held by Sir *J. Romilly,* M. R., that the words personal representatives were not to be construed in their strict sense of executors or administrators, but that they meant descendants (*n*).

In the three last cases the direction as to the mode in which the legatees were to share and enjoy the bequest, was

(*k*) 1 My. & K. 465, 2 Coll. 733 n.

[(*l*) *Smith* v. *Palmer,* 7 Hare, 225; see also *Wilson* v. *Pilkington,* 11 Jur. 537; *King* v. *Cleaveland,* 26 Beav. 26, 4 De G. & Jo. 477; *Holloway* v. *Radcliffe,* 23 Beav. 163.

(*m*) 19 Beav. 448.

(*n*) The sense of next of kin was held to be excluded by the context, because the provision that the legatees should take per stirpes was less applicable to next of kin than to descendants, and in the subsequent clause the words "personal representatives" and "next of kin" were contrasted, where the former could not be held to mean executors or administrators without leading to the absurdity that that gift was to depend on whether administration was taken out in the lifetime of A. It may be added that the children being legitimate, could scarcely die "without any representatives" in the sense of next of kin.]

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[in each case sufficient evidence that the testator did not use the words "personal representatives" in their strict sense.]

Effect of limitation to executors or administrators in same will.

And as a testator is supposed to have a different meaning whenever he uses a different expression, it is always a circumstance favourable to the construction which reads the words "legal" or "personal representatives" as denoting *next of kin*, that there is elsewhere in the same will, and in reference to another subject of disposition, a gift to the executors or administrators of the same individual.

Thus, in the case of *Walter* v. *Makin* (*o*), where a testator gave 450*l.* to trustees, in trust for his son for life, and, after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the *legal representatives* of his son; and he gave the residue of his personal estate to his son, his *executors, administrators, and assigns;* Sir *L. Shadwell*, V. C., held, that the words "legal representatives" meant next of kin.

"Personal representatives" construed *next of kin.*

So, in the case of *Robinson* v. *Smith* (*p*), where the bequest was to M., his executors, &c., in trust to pay the interest to the testator's daughter, S., wife of M., for her separate use for life, and, after her decease, to pay the trust monies to such persons as S. by will should appoint, and, in default, to her *personal representatives.* S. died in her husband's lifetime, without having made any appointment, and her husband claimed the fund as her administrator; but Sir *L. Shadwell*, V. C., decided that the next of kin of the wife were beneficially entitled.

Effect of the word "next" prefixed to "legal representatives."

[And an argument for the same construction is derived from the word "next" being prefixed to "legal representatives," that being a word which has no connexion with the character of executor or administrator (*q*).]

"Executors or administrators" held to

Indeed, so strong has been the leaning sometimes in favour of the construction which gives to words pointing at succession

(*o*) 6 Sim. 148. [The opposite inference is obviously deducible from the circumstance of "personal representatives" being elsewhere used in the sense of "executors," *Dixon* v. *Dixon*, 24 Beav. 129.]

(*p*) 6 Sim. 47. [See also *Nicholson* v. *Wilson*, 14 Sim. 549; *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Booth* v. *Vicars*, 1 Coll. 10, 11. But see *Saberton* v. *Skeels*, 1 R. & My. 587; *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216; and per Sir *R. T. Kindersley*, V. C., *In re Crawford*, 2 Drew. 240. In *Philps* v. *Evans*, 4 De G. & S. 188, "personal representatives" were interpreted by the words "or next of kin" subjoined. See also *Baker* v. *Gibson*, 12 Beav. 101.] In *Styth* v. *Monro*, 6 Sim. 49, the word "representatives" was construed, by force of the context, as synonymous with *descendants* and in *Horsepool* v. *Watson*, 3 Ves. 383, as "issue."

(*q*) *Booth* v. *Vicars*, 1 Coll. 6.]

mean *next of kin.*

or representation the sense of next of kin, that even a gift to *executors* or *administrators* has been thus construed. As in the case of *Palin* v. *Hills* (*r*), where a testator, after bequeathing certain pecuniary legacies, declared that, in case of the death of any or either of the legatees, his or her legacy should go *to his or her executors or administrators;* Sir *J. Leach,* M. R., held, that the residuary legatee of one of the legatees, who died in the testator's lifetime, was entitled to the legacy; but his decree was reversed by Lord *Brougham,* C., who decided in favour of the next of kin, on the authority of the case of *Bridge* v. *Abbot* (*s*); his Lordship thinking, that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives.

From cases of this description, however, we must carefully distinguish those in which the words "executors and administrators," or "legal representatives," are used as mere words of limitation.

"Executors or administrators" used as words of limitation.

As in the common case of a gift to A. and his executors or administrators, or to A. and his legal representatives, which will, beyond all question, vest the absolute interest in A. (*t*). The same construction, too, in some instances, has been applied in cases of a more doubtful complexion; as where the bequest was to A. for life, and, after his decease, to his executors or administrators (*u*). And it should seem that where the word "assigns" is subjoined to "executors and administrators," they are always read as words of limitation, and not as designating next of kin. Thus, in *Grafftey* v. *Humpage* (*x*), where a sum of 4000*l.* was bequeathed by A. to trustees, in trust for his wife and daughter and the survivor for life, for their separate use, and after the decease of the survivor, in trust for the daughter's children, if any, and if none, then the testator gave one moiety of the 4000*l.* to his brother I., and the other moiety to such persons as the daughter should by deed or will appoint, and in default, to the *executors, administrators, or assigns* of the

Limitation to executors, administrators, *and assigns.*

(*r*) 1 My. & K. 470; [and see *Bulmer* v. *Jay,* 4 Sim. 48, 3 My. & K. 197.] But see *Wallis* v. *Taylor,* 8 Sim. 241, stated post, 107.

(*s*) Ante, 98.

(*t*) *Lugar* v. *Harman,* 1 Cox, 250; [*Taylor* v. *Beverley,* 1 Coll. 108.]

(*u*) Co. Lit. 54 b; *Socket* v. *Wray,* 4 B. C. C. 483. [See other cases, post, Chap. xxxvi. *Nurse* v. *Oldmeadow,* 5 L. J. Ch. 300, cor. *Shadwell,* V. C., is contra, unless distinguishable on the ground that the limitation was to the executor, in the singular. Sed qu.]

(*x*) 1 Beav. 46. See also *Hames* v. *Hames,* 2 Kee. 646; [*Howell* v. *Gayler,* 5 Beav. 157: *Spence* v. *Handford,* 27 L. J. Ch. 767, 4 Jur. N. S. 987.

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daughter. The daughter died in the lifetime of her husband, childless, and without having made any appointment; and the husband was, on the ground above mentioned, held to be entitled as her administrator.

[Indeed, the conclusion to be drawn from the more modern, not unsupported by some of the earlier, cases is, that not only the words "executors or administrators," but also the words "representatives," "legal representatives" (*y*), and "personal representative" must primâ facie be taken to mean the persons constituted representatives by the Ecclesiastical Court. This is the ordinary and legal meaning of the terms, and it lies on those alleging the propriety of a different interpretation to shew that the testator's intention is clearly so,—to shew more than a doubt; since raising only a doubt, they leave his expression in possession of its proper force.

"Legal representatives" similarly construed.

Thus,] in the case of *Price* v. *Strange* (*z*), a testator devised real estate to his wife during widowhood, and, at her death or marriage, to trustees, upon trust for sale, and directed that, in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or, being a daughter, should have attained that age, or be married with consent, his trustees should, immediately after the receipt of the money arising from the said real estates, pay and divide the same among such of his children as should be then living, *and the legal representative or representatives of him, her, or them, as should be then dead;* and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should, at that time, be entitled to receive their shares, in case he, she, or they had been then living, *and, if dead, then to his, her, or their legal representatives:* Sir *J. Leach,* V. C., was of opinion that these words operated as words of limitation, and that a child attaining twenty-three, who died during the widowhood of the wife, took a vested interest.

(*y*) This term was thought by Sir *J. K. Bruce,* V. C., to be less precise than "personal" or "legal personal representatives," *Topping* v. *Howard,* 4 De G. & S. 268: *Smith* v. *Barneby,* 2 Coll. 736. But other judges have not observed the same distinction. See 2 Hare, 523, 524; 2 Drew. 235; 4 De G. & J. 484.]

(*z*) 6 Madd. 159. [See also *Corbyn* v. *French,* 4 Ves. 418; *Hinchcliffe* v. *Westwood,* 2 De G. & S. 216; *In re Crawford,* 2 Drew. 230.

[And again in *Saberton* v. *Skeels* (*a*), where a testator gave his daughter 1000*l.*, which he afterwards directed to be settled on her for her separate use for life, with power to appoint it after her death, and in default of appointment for her "personal representatives;" and power was given to invest the 1,000*l.* in a life-annuity for the daughter, the same learned Judge held, that the words "personal representatives" were to be understood in their ordinary sense of executors and administrators, and were mere words of limitation, the daughter being the sole object of the testator's intention.

So "personal representatives;"

So in the case of *Attorney-General* v. *Malkin* (*b*), where a testator bequeathed a sum of money in trust for A. and his wife for their joint lives and the life of the survivor, with power for the wife to appoint by her will, and in default of appointment, "to and for the benefit of her executors and administrators," Lord *Cottenham* decided that those words did not mean next of kin; and while admitting that such a meaning might, in obedience to the testator's intention, be attributed to them, he nevertheless could not refrain from observing that the evidence of such intention ought to be very strong.

and "executors."

And in the case of *Holloway* v. *Clarkson* (*c*), where a testator bequeathed a legacy to each of several persons (naming them) for her separate use for life, and after her decease, as she should by deed or will appoint, and in default of appointment, for her executors, administrators, and assigns, as part of her personal estate, Sir *J. Wigram*, V. C., held, that the legatees, without executing a formal appointment, were entitled to make an immediate disposition of their legacies.

Remarks on the cases.

With regard to the cases of *Saberton* v. *Skeels*, *Holloway* v. *Clarkson*, and others involving bequests of the same form, it is clear that the person to whose executors or representatives the ultimate bequest was made, was the sole person intended to be benefited, and the terms used were clearly words of limitation. As to the other cases mentioned above, such as *Price* v. *Strange*, "they were all cases where the gift to the legatee or his repre-

[(*a*) 1 R. & My. 587. See *Reynell* v. *Reynell*, 10 Beav. 22; *Taylor* v. *Beverley*, 1 Coll. 108.

(*b*) 2 Phill. 64. See *Allen* v. *Thorp*, 7 Beav. 72.

(*c*) 2 Hare, 521; *Devall* v. *Dickens*, 9 Jur. 550: *Page* v. *Soper*, 11 Hare, 321. If the person to whose executors or administrators the fund is so given becomes bankrupt during the preceding life estate, the assignees are entitled to the fund as part of the bankrupt's estate, *Re Seymour's Trusts*, 1 Johns. 472.

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[sentatives was to take effect after a previous life estate, i. e., where the testator was contemplating and providing for the event of the legatee surviving him (the testator), but dying in the lifetime of the tenant for life (*d*). In any such case there is no improbability in supposing the testator to have intended that the legacy should go to the legatee's executors or administrators as part of his personal estate; for then the legatee gets the benefit of the bequest as a reversionary legacy, though he may not live to receive it. But where the legacy or gift is immediate," continued the learned Judge whose remarks we are now citing, "without any prior life estate, as where the testator gives a legacy to A. or his 'legal representatives,' he is contemplating and providing for the event of the intended legatee dying in his (the testator's) lifetime. In such event the intended legatee could not under any construction which could be put on the words 'legal representatives' derive any advantage from the bequest; indeed, he would never even know of the bounty or provision made for him by the testator's will, so as to exercise any judgment as to the best mode of disposing of it as part of his own property, or to make any arrangement of his property with reference to it; and therefore it is highly improbable that the testator should intend, that if the intended legatee should die in his lifetime, the legacy should go to his executors or administrators as part of the legatee's general assets, perhaps to benefit no one but the legatee's creditors. And this improbability is such as to furnish sufficient evidence, where the gift to A. or his legal representatives is immediate, of the testator's intention to use the term 'representatives' not in its ordinary legal sense, but as designating the persons who, by virtue of the Statute of Distribution, would be entitled to A.'s personal estate, if he had died intestate" (*e*). For these reasons the learned Judge thought that *Bridge* v. *Abbot* (*f*) and *Cotton* v. *Cotton* (*g*), were reconcilable with the other authorities.

In the case of *Long* v. *Watkinson* (*h*), where a testator bequeathed the residue of his estate to A., but in case of her death then "to the executors or executrixes whom A. by her will may appoint," A. having died in the testator's lifetime; Sir *J.*

[(*d*) If, in such case, the legatee died in the testator's lifetime, the legacy would lapse, *Corbyn* v. *French*, 4 Ves. 418. See post, Ch. xlix.

(*e*) Per Sir *R. T. Kindersley*, *In re Crawford*, 2 Drew. 242.

(*f*) 3 B. C. C. 224, ante, 98.

(*g*) 2 Beav. 67, ante, 98.

(*h*) 17 Beav. 471.

[*Romilly*, M. R., after observing that he could not reconcile the case of *Palin* v. *Hills*, with the later authorities, such as *Daniel* v. *Dudley*, *Allen* v. *Thorp*, *Attorney-General* v. *Malkin*, and *Holloway* v. *Clarkson*, decided that neither the residuary legatee nor the next of kin of A. took the residue as personæ designatæ, but that it went to her executrix. This case, which was decided shortly before, but was not cited in the case of *In re Crawford*, is not perhaps inconsistent with the distinction there taken by Sir *R. T. Kindersley*: for though the bequest was immediate, yet the term "executors" is less ambiguous than "personal representatives" (*i*), and there was an express reference to the will of the intended legatee entirely inconsistent with a title in the next of kin as upon an intestacy. It must, however, be conceded that the observations made by the M. R. in that case are general, and without any apparent contemplation of such a distinction.

Less easily reconcilable with that distinction is the subsequent case of *Hewitson* v. *Todhunter* (*k*), where a legacy was bequeathed to A., and in case he should die in the testator's lifetime, (which happened), the testator directed that the legacy should not lapse, but go or devolve upon the legatee's *personal representatives*; and Sir *J. Stuart*, V. C., decided against the claim as well of the executor as of the next of kin, in favour of the person entitled to the residuary estate of the intended legatee. This appears to be the only case in which residuary legatees have been held entitled as personæ designatæ under a gift to personal representatives.]

Whether executors or administrators are entitled for their own benefit.

Supposing the words "executors" or "administrators" not to be used as words of limitation, [nor as descriptive of next of kin,] the question arises (which has been in some measure anticipated), whether the property so given vests in the persons answering such description for their own benefit, or is to be administered as part of the personal estate of the testator or intestate.

The former result, indeed, is so manifestly contrary to probable intention, that the case of *Evans* v. *Charles* (*l*), in which this construction prevailed, has been generally condemned; and the Judge, whose solitary approbation the decision has elicited, did

[(*i*) See per Lord *Cottenham*, *Daniel* v. *Dudley*, 1 Phill. 6; and per Sir *J. Romilly*, M. R., *Atherton* v. *Crowther*, 19 Beav. 450, 451.

(*k*) 22 L. J. Ch. 76.]

(*l*) 1 Anstr. 128. See also *Churchill* v. *Dibben*, Sugd. Pow. 4th Ed. 276, n.

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Whether executors or administrators are entitled for their own benefit:

not choose to follow its authority (*m*); and such a construction would be the more palpably absurd, now that, by express enactment (*n*), executors are excluded from taking beneficially, by virtue of their office, even the undisposed-of personal estate of their testator. Accordingly, it seems to be established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person vests in them as part of the personal estate of the testator or intestate.

Thus, where (*o*) a testator bequeathed 500*l.* to B. after the death of A., and if B. died in A.'s lifetime, then to such persons as B. should by will appoint, and, in default of appointment, *to his executors or administrators;* Lord *Langdale,* M. R., held, that the executor of B. was bound to apply the legacy according to the purposes of the will. It is singular that no claim was advanced by the next of kin, on the authority of the case of *Palin* v. *Hills.*

[This mode of construction was also applied to a case (*p*), where a testator bequeathed his personal estate to his own executors; Sir *J. Knight Bruce,* V. C., holding that it was not enough to exclude the rule, that, by declaring the executors to be trustees for the next of kin, the bequest to them became altogether inoperative (*q*).

—— in case of real estate.

It has also been held applicable to the case of real estate, the gift in that case being held equivalent to a declaration that the estate shall be held by the executors as part of the personal estate of the person named (*r*).

If, where the bequest is to the executors or representatives of a third person, such person dies in the lifetime of the testator, the question is whether, as his title did not commence until after his own death, his will operates upon the property. If the case of *Palin* v. *Hills* (*s*) be law, it is an authority for answering this question in the negative: but that case has seldom been approved of; and in *Long* v. *Watkinson* (*t*), a contrary decision was made. In that case, although A. died in the testator's lifetime, his exe-

(*m*) See *Long* v. *Blackall,* 3 Ves. 483.

(*n*) 1 Wm. 4, c. 40.

(*o*) *Stocks* v. *Dodsley,* 1 Kee. 325; [See also *Collier* v. *Squire,* 3 Russ. 467; *Morris* v. *Howes,* 4 Hare, 599.

(*p*) *Andrew* v. *Andrew,* 1 Coll. 686. Some (though it is difficult, from the terms of the judgment, to determine how much) reliance was placed by the V. C. on 1 Wm. 4, c. 40, whereby executors are constituted trustees of the *undisposed-of* residue for the next of kin.

(*q*) See *Hinchcliffe* v. *Westwood,* 2 De G & S. 216.

(*r*) *Dixon* v. *Dixon,* 24 Beav. 129; *Wellman* v. *Bowring,* 2 Russ. 374, 3 Sim. 328.

(*s*) 1 My. & K. 470, ante, 101.

(*t*) 17 Beav. 471, ante 104.

[cutor was decreed to hold the legacy upon the trusts declared by the will of A. The M. R., after observing that it was, in his opinion, inaccurate to lay down as a rule, that in such cases the fund belongs either to the residuary legatee or to the next of kin, proceeded to say that it belonged to the persons who were interested in the estate of the person to whose executors it was given; a disposition which would in some cases give the fund to the creditors, in others to the pecuniary legatees, in others to the residuary legatees, and in others to the next of kin.

Construction of gift to the executors of A. without prior gift to A.

On the same principle a gift to the personal representative of the testator himself (*u*), or to the executors or administrators of another person, without any prior gift to such person (*x*), forms part of the general estate of the testator, or such other person.]

Gifts to executors "for their own use."

If, however, the testator explicitly declares that the executors or administrators shall be entitled for their own benefit, this construction must prevail against any suggestion as to the improbability of such a mode of disposition.

As, in *Wallis* v. *Taylor* (*y*), where a testatrix bequeathed a fund to trustees, in trust to pay the interest for the separate use of her daughter for life, and, after her decease, upon trust to transfer the principal to her executors or administrators, *to and for his, her, or their use and benefit absolutely for ever;* Sir *L. Shadwell,* V. C., held, that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit.

Remark on *Wallis* v. *Taylor.*

In this case, the point of contention was not so much whether the administrator was entitled in his own right beneficially, or in his representative character (this being, in regard to a husband-administrator, a matter of no importance, unless there are creditors, as he retains the property for his own benefit), but whether, according to the case of *Palin* v. *Hills,* the bequest was not to be construed as applying to the next of kin. The testator's intimation, that the legatees should take for their own benefit, was not only consistent with, but, perhaps, was rather

[(*u*) *Smith* v. *Barneby,* 2 Coll. 728; and see *Mackenzie* v. *Mackenzie,* 3 Mac. & G. 559.

(*x*) *Morris* v. *Howes,* 4 Hare, 599.]

(*y*) 8 Sim. 241. [See also *Sanders* v. *Franks,* 2 Mad. 147. But see as to marriage settlements, *Hames* v. *Hames,* 2 Kee. 646; *Marshall* v. *Collett,* 1 Y. & C. 232; *Meryon* v. *Collett,* 8 Beav. 386; *Johnson* v. *Routh,* 27 L. J. Ch. 305. In *Smith* v. *Dudley,* 9 Sim. 125, an ultimate limitation in a settlement of the wife's property to "the executors and administrators of her own family" was held to carry it to her next of kin as personæ designatæ, although the ultimate limitation of the husband's property to the executors and administrators of his own family was held to give the husband the absolute interest.]

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favourable to this construction, as tending to shew that the testator had in his view persons who might reasonably be presumed to be intended as beneficial objects of gift.

Gifts to relations, how construed.

The word *relations* taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distribution; and it has been long settled, that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin, or by representation of next of kin (*z*).

It was formerly doubted whether this construction extended to devises of [only] real estate, but the affirmative was decided in the case of *Doe* d. *Thwaites* v. *Over* (*a*), where a testator devised all his freehold estates to his wife for life, and, at her decease, to be equally divided *among the relations on his side;* and it was held, that the three first cousins of the testator, who were his next of kin at his death, were entitled. A counter claim was made by the heir at law, who was the child of a deceased first cousin, and who contended that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words "on my side;" but the Court was of opinion, that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations ex parte paternâ.

Objects of a gift to relations determined by Statute of Distributions.

The rule which makes the Statutes of Distribution the guide in these cases is not departed from on slight grounds. Thus, the exception out of a bequest to relations, of a nephew of the testator (who was the son of a living sister), was not considered a valid ground for holding the gift to include other persons in the same degree of relationship, and thereby let in the children of a living sister, to claim concurrently with their parent, and

(*z*) 2 Ch. Rep. 77; Pre. Ch. 401; Gilb. Eq. Ca. 92; 1 Atk. 469; Ca. t. Talb. 251; 2 Eq. Ab. 368, pl. 13; Dick. 50, 380; Amb. 70; 1 T. R. 435, n., 437, n.; 1 B. C. C. 31; 3 ib. 234; 4 ib. 207; 8 Ves. 38; 9 ib. 319; 16 ib. 27; 19 ib. 423; 3 Mer. 437, 689; [overruling *Jones* v. *Beale*, 2 Vern. 381. So "friends and relations," 2 Ves. 87, 110.] But as to *powers* in favour of relations, see 2 Sugd. Pow., 6th Ed., 255, 262, 7th Ed. 237.

(*a*) 1 Taunt. 263.

other surviving brothers, sisters, and the children of a deceased brother of the testator (*b*).

[On the other hand, in *Greenwood* v. *Greenwood* (*c*), where a testatrix gave the residue "to be divided between her relations, that is, the Greenwoods, the Everits, and the Dows:" the testatrix had herself explained her meaning, and, therefore, the Everits, although not within the degree of relationship limited by the statute, were held to take jointly with the Greenwoods and Dows, who were.]

To "relation" in the singular.

There is, it seems, no difference in effect between a gift to relations in the plural, and *relation* in the singular; the former would apply to a single individual, and the latter to any larger number; the term *relation* being regarded as nomen collectivum. And this construction obtained in one case (*d*) where the expression was "my *nearest* relation of the name of the Pyots."

Distribution is per capita.

[A gift to relations is regulated by the Statute of Distribution, only so far as regards the ascertainment of the objects of the gift; the statute does not determine the proportions in which they take; consequently the property is distributed per capita, or equally among the several individual objects of every degree, not per stirpes, or proportionally among the stocks. A contrary proposition has, indeed, been advanced, chiefly on the authority of the case of *Pope* v. *Whitcombe* (*e*), which, however, it is now discovered decides no such point (*f*). The weight of authority agrees with what would appear à priori to be the correct principle, namely, that in this, as in all other cases of devises or bequests to a class, one general rule prevails, and that the objects, once ascertained, take per capita (*g*). Lord *St. Leonards* has stated that he sees no reason why, when the objects are ascertained, the statute should control the shares in which they take (*h*). And in the case of *Attorney-General* v. *Doyley* (*i*), under a gift implied from an exclusive power of appointing to

(*b*) *Rayner* v. *Mowbray*, 3 B. C. C. 234.

[(*c*) 1 B. C. C. 32, n. See *Stampe* v. *Cooke*, 1 Cox, 234, stated post; *Griffith* v. *Jones*, 2 Freem. 96.]

(*d*) *Pyot* v. *Pyot*, 1 Ves. 337; [and see per Lord *Loughborough*, *Marsh* v. *Marsh*, 1 B. C. C. 294. So of the words "inheritor," "party," &c., *Boys* v. *Bradley*, 17 Jur. 159, 517.

(*e*) 3 Mer. 689, reported ex relatione. See first edition of this work, and 1 Powell's Dev. by Jarm. 290, n. In the case of *Lowndes* v. *Stone*, 4 Ves. 649, referred to in support of the same proposition, the will was held void for uncertainty, and so the case was reduced to one of simple intestacy.

(*f*) 2 Sugd. Pow. 246, 605, 7th Ed.

(*g*) See as to gifts to "descendants," "issue," &c., ante, p. 89; "next of kin," ante, p. 95.

(*h*) 2 Sugd. Pow. 246, 7th Ed.

(*i*) 4 Vin. Ab. 485, 7 Ves. 58, n.

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[the testator's relations, the fund was decreed to be divided among the legatees *share and share alike*, and a similar decision has lately been made by Sir *J. Romilly*, M. R., in *Tiffin* v. *Longman* (*k*).

A fortiori where there are words directing equal distribution.

In several early cases it has happened that] the testator had introduced into the gift expressions pointing at equality of participation, and, of course, it was held that the statutory mode of distribution was excluded, and all the objects of every degree were entitled in equal shares (*l*).

Where all the objects within the line are of equal degree [the question cannot arise: since in either view, and whether there be such expressions as those just noticed or not, the result must be the same (*m*):] for instance, if the testator left no child but nine grandchildren descended from two stocks, the property would be divisible, not into moieties, one to the children of each deceased child, but among all the grandchildren pari passu, *i. e.* each would take one-ninth; the distribution in the one case being per stirpes, and in the other per capita.

"Near" and "nearest" relations.

The objects of a gift to "relations" are not varied by its being associated with the word "near" (*n*). But where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the statute, would have been entitled by representation. Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters (*o*),

Effect of an express reference to the statute.

[(*k*) 15 Beav. 275. Where a bequest, construed to mean a bequest to next of kin, is expressed in terms which have immediate reference to the statute, the whole gift must be regulated thereby, as if a legacy be given to "the persons who would have been entitled under the statute in case the testator had died intestate." Here Sir *J. Knight Bruce* thought the wife and daughter (the persons described) could not take equally, because the description in the will was one not of persons merely, but of interest also, *Martin* v. *Glover*, 1 Coll. 269; *Horn* v. *Coleman*, 1 Sm. & Gif. 169; *Downes* v. *Bullock*, 25 Beav. 55. And, although under a gift to the "legal representatives of A., *share and share alike*," or "*unto and among* the persons entitled in case of intestacy," the legatees take per capita, *Smith* v. *Palmer*, 7 Hare, 225; *Richardson* v. *Richardson*, 14 Sim. 526; yet a bequest to the "next legal representatives of A. and B., share and share alike," was held in *Booth* v. *Vicars*, 1 Coll. 6, to carry the legacy to them per stirpes, the word representatives (combined with other circumstances) rendering that construction necessary, and the words "share and share alike" being referable to the different stocks of A. and B. So *Alker* v. *Barton*, 12 L. J. Ch. 16; *Holloway* v. *Radcliffe*, 23 Beav. 163; *Jacobs* v. *Jacobs*, 16 Beav. 557. See, however, and consider *Walker* v. *Marquis of Camden*, 16 Sim. 331, in which the decision in favour of joint tenancy implies equality of interest, or at least a departure from the statute. *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351, a similar case, has been doubted by the judge who decided it; see 8 Hare, 307.]

(*l*) *Thomas* v. *Hole*, Cas. t. Talb. 251; *Green* v. *Howard*, 1 B. C. C. 31; *Rayner* v. *Mowbray*, 3 ib. 234; *Butler* v. *Stratton*, ib. 369. [*Masters* v. *Hooper*, 4 B. C, C. 207, if contra is not law.

(*m*) *Cole* v. *Wade*, 16 Ves. 27; *Ham's Trust*, 2 Sim. N. S. 106.]

(*n*) *Whithorne* v. *Harris*, 2 Ves. 527. See also 19 Ves. 403.

(*o*) *Pyot* v. *Pyot*, 1 Ves. 335; *Marsh*

or a living child or grandchild, the issue of a deceased child or grandchild. [And on the other hand, upon the same principle, all who stand in the same degree must take under the will, though only some of them would have been entitled under the statute (*p*).] Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir *Lloyd Kenyon*, M. R., directed a distribution according to the statute; and they were held to take per stirpes, though it was contended, that all the relations specified should take per capita, including the children of a living sister. His Honor, however, thought that the testator had a distribution according to the statute in his view; at all events, that the contrary was not sufficiently clear to induce him to depart from the common rule. The children of the living sister, therefore, were excluded (*q*).

Nearest relations, "as sisters, nephews, and nieces."

Relations of the half-blood.

As relations by the half-blood are within the statute, so they are comprehended in gifts to next of kin and to relations; and a bequest to the next of kin of A. "of her own blood and family as if she had died sole, unmarried, and intestate," has received the same construction (*r*).

Relations by affinity.

A gift to next of kin or relations, of course, does not extend to relations by affinity (*s*), unless the testator has subjoined to the gift expressions declaratory of an intention to include them. Such, obviously, is the effect of a bequest expressly to relations "by blood or marriage," (*t*) [or "on both sides" (*u*)] which lets in all persons married to relations. It is clear that a gift to next of kin or relations does not include a husband (*v*) or wife (*x*); and such has been also the adjudged construction of a bequest to "my next of kin, *as if I had died intestate* (*y*);" the latter words being considered not to indicate an intention to give to the persons entitled under the statute at all events; *i. e.* whether next of kin or not. [But under a bequest to "legal" or "personal representatives," (where those words are held to mean persons entitled as upon an intestacy,) the terms not implying

v. *Marsh*, 1 B. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400, Coop. 275. But see *Edge* v. *Salisbury*, Amb. 70.

[(*p*) See *Withy* v. *Mangles*, 4 Beav. 358, 10 Cl. & Fin. 215, ante, 95.]

(*q*) *Stampe* v. *Cooke*, 1 Cox, 234.

(*r*) *Cotton* v. *Sarancke*, 1 Mad. 45.

(*s*) *Maitland* v. *Adair*, 3 Ves. 231; [*Harvey* v. *Harvey*, 5 Beav. 134. See *Craik* v. *Lamb*, 1 Coll. 489, 494.]

(*t*) *Devisme* v. *Mellish*, 5 Ves. 529.

[(*u*) *Frogley* v. *Phillips*, 6 Jur. N. S. 641.]

(*v*) *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 ib. 537; *Bailey* v. *Wright*, 18 ib. 49, 1 Sw. 39.

(*x*) *Nicholls* v. *Savage*, cit. 18 Ves. 53.

(*y*) *Garrick* v. *Lord Camden*, 14 Ves. 372. [See also *Davies* v. *Bailey*, 1 Ves. 84; *Worseley* v. *Johnson*, 3 Atk. 758.

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[kindred or relationship, a wife is entitled to a share (*z*): but not a husband, the constructive reference to the statute excluding him (*a*); for he is not, nor can he take under a bequest as, a person entitled under the Statutes of Distribution to his wife's personal estate (*b*). "He is entitled by a right paramount. The statute of 22 & 23 Charles 2 is in terms so worded that it might have included the husband, not so as to give him a right, but to take away a right from him. That difficulty afterwards having been contemplated, a declaratory clause was introduced into the Statute of Frauds, to say that the Statute of Distribution was not intended to have any such effect. The effect of the clause thus introduced was to leave the husband just in the condition in which he was before the passing of the Statute of Distribution: namely, with a right to appropriate the property to himself, a right which belonged to him independently of any statute. He has the same right now" (*c*). A wife is differently situated: she is entitled to her share under the Statutes of Distribution.]

Husband is entitled paramount, not under, the statute.

Gifts "to poor relations," how construed.

A difficulty in construing the word *relations* sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; or to his *poor or necessitous* relations. In the former case, the addition is disregarded, as being too uncertain (*d*); and the better opinion, according to the authorities is, that the word *poor* also is inoperative to vary the construction, though the cases are somewhat conflicting (*e*). In an early case (*f*) it

[(*z*) *Cotton* v. *Cotton*, 2 Beav. 67, 10 Beav. 365, n.; *Smith* v. *Palmer*, 7 Hare, 225; *Holloway* v. *Radcliffe*, 23 Beav. 163. Although in *Booth* v. *Vicars*, 1 Coll. 6, Sir *J. K. Bruce* made use of the word "consanguinity," he expressly guarded himself on a subsequent occasion, *Wilson* v. *Pilkington*, 11 Jur. 537, against the supposition that he intended thereby to exclude the widow. *Robinson* v. *Smith*, 6 Sim. 49, proceeded on special grounds, in the same manner as *Bulmer* v. *Jay*, 4 Sim. 48, 3 My. & K. 197.

(*a*) *King* v. *Cleaveland*, 26 Beav. 166, 4 De G. and Jo. 477; and see *Re Walton's* estate, 25 L. J. Ch. 569, cited ante, 72, n. But why should a reference to the statute be implied? There appears to be much reason in favour of taking the words to mean those persons who are entitled to the personal estate in case of intestacy. Generally these persons must be ascertained by reference to the statute: but is not that accidental? There is nothing importing consanguinity. If a woman dies leaving a husband, why should his beneficial title be worse because he is also the legal personal representative in the strict legal sense?

(*b*) *Milne* v. *Gilbart*, 2 D. M. & G. 715, affirmed on re-hearing, 5 D. M. & G. 510. And see *Watts* v. *Watts*, 3 Ves. 244.

(*c*) Per Lord *Cranworth*, L. J., *Milne* v. *Gilbart*, 2 D. M. & G. 722. "It may be that he is entitled to administer under the statute of 31 Edw. 3, c. 11, but this is a different right," ib.]

(*d*) *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 485, pl. 16, 2 Eq. Ca. Abr. 194, pl. 15.

(*e*) *Widmore* v. *Woodroffe*, Amb. 636 *S. C. Anon.*, 1 P. W. 327.

(*f*) *Anon.*, 1 P. W. 327. [See also *Gower* v. *Mainwaring*, 2 Ves. 87, 110; *Griffith* v. *Jones*, 2 Ch. Rep. 394, 2 Freem. 96.]

was a said that the word "poor" was frequently used as term of endearment and compassion; as one often says, my poor father, &c.; and accordingly a countess (but who, it seems, had not an estate equal to her rank) was held to be entitled under such a bequest. In *Widmore* v. *Woodroffe* (*g*), a testator bequeathed two-thirds of his property *to the most necessitous of his relations* by his father's and mother's side; and Lord *Camden* said the bequest would stand upon the word "relations" alone, *the word "poor" being added, made no difference;* there was no distinguishing between the degrees of poverty. This decision may be considered to have overruled the earlier case of *Attorney-General* v. *Buckland* (*h*), in which a gift to *poor relations* was extended to necessitous relations *beyond* the Statutes of Distribution.

Gifts to poor relations regarded as charity.

In several cases, gifts to poor relations seem to have been regarded as charitable dispositions. Thus in the case of *Isaac* v. *Defriez* (*i*), where the bequest was to the testator's own and his wife's "poorest relations," to be distributed proportionably, share and share alike, at the discretion of his executors, it seems to have been considered as a charity, but was confined to persons who were within the Statutes of Distribution.

So in *Brunsden* v. *Woolredge* (*k*), where B. bequeathed 500*l.* on a certain event, to be distributed among his mother's poor relations. Also W. (the brother of B.) devised real estates to A. and his heirs, in trust to sell to pay debts, and pay the overplus to such of his mother's *poor relations,* as A., his heirs, &c., should think objects of charity; Sir *Thomas Sewell,* M. R., held, that the true construction of both wills was, "such of my mother's relations as are poor and proper objects." He said the difference was, that the latter gave a discretionary power to the executor, and the former did not.

Again, in the case of *White* v. *White* (*l*), a legacy of 3,000*l.* for the purpose of putting out poor relations apprentices was supported as a charity.

In the case of *Mahon* v. *Savage* (*m*), a testator bequeathed to his executor 1,000*l.*, to be distributed among his (the testator's) *poor relations,* or such other objects of charity as should be

(*g*) Amb. 636. [See also *Goodinge* v. *Goodinge,* 1 Ves. 231.]
(*h*) Cited 1 Ves. 231, Amb. 71, n., Blunt's ed.
(*i*) Amb. 595; more correctly, 17 Ves. 373, n.
(*k*) Amb. 507, Dick. 380.
(*l*) 7 Ves. 423; see *Att.-Gen.* v. *Price,* 17 Ves. 371.
(*m*) 1 Sch. & Lef. 111.

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mentioned in his private instructions. He left no instructions; and it was held by Lord *Redesdale* that the testator's design was to give to them as objects of charity, and not merely as relations. His Lordship thought that the executors had a discretionary power of distribution, and need not include *all* the testator's poor relations.

Remark on *Mahon* v. *Savage*.

This case is clearly distinguishable from a simple gift to poor relations; for the additional words denoted that charity was the main object of the testator. The same remark applies to the will of W. in *Brunsden* v. *Woolredge*; which decision, in regard to the will of B., is not reconcilable with *Widmore* v. *Woodroffe*; but the Court probably allowed itself to be influenced by the terms of the other will.

In a subsequent case (*n*), Sir *J. Leach*, M. R., held that a devise of real estates to trustees "in trust to pay the rents to such of my *poor relations* as my trustees shall think most deserving," was a charitable trust, and consequently was void as a gift of an interest in land.

At what period the next of kin are to be ascertained.

The question, however, which more than any other has been the subject of controversy in gifts to next of kin and relations, refers to the period at which the objects are to be ascertained; in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended. Where a devise or bequest is simply to the testator's own next of kin, it necessarily applies to those who sustain the character at his death. It is equally clear that where a testator gives real or personal estate to A. (a stranger) during his life, or for any other limited interest, and afterwards to his own next of kin, those who stand in that relation at the death of the testator will be entitled, whether living or not at the period of distribution (*o*); there being nothing in the mere circumstance of the gift to the next of kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been "to my next of kin, *subject to a life interest in A.*" The death of A. is the period, not when the objects are to be ascertained, but when the gift takes effect in possession.

(*n*) *Hall* v. *Att.-Gen.*, Rolls, 28 July, 1829.

(*o*) *Harrington* v. *Harte*, 1 Cox, 131. See also 3 B. C. C. 234; 4 ib. 207; 3 East, 278. [Taml. 346; 4 Jur. N. S. 407.]

Next of kin of deceased person.

Where the gift is to the next of kin of a person then actually dead, or who happens to die before the testator, the entire property (at least, if there be no words severing the joint tenancy), vests in such of the objects as survive the testator (*p*). [But where (*q*) a testator directed a sum of money to be "divided between and amongst the relations of his late wife in such manner, shares, and proportions as would have been the case if she had died possessed of the said sum a spinster and intestate," it was held by Sir *R. T. Kindersley*, V.C., that the shares of those who died before the testator lapsed, because the words of the bequest, amounting to an express reference to the Statutes of Distribution, excluded the idea that the legatees should take as a class. The V. C. seems, however, to have thought that without this reference, and notwithstanding the words of severance, the next of kin would have taken as a class, and consequently the survivors alone would have been entitled to the whole (*r*).]

If the gift be to the next of kin or relations of a person who outlives the testator, of course the description cannot apply to any individual or individuals at his (the testator's) decease, or at any other period during the life of the person, whose next of kin are the objects of gift (*s*). The vesting must await his death, and will apply to those who first answer the description, without regard to the fact whether by the terms of the will the distribution is to take place then or at a subsequent period (*t*).

The rule of construction, which makes the death of the testator the period of ascertaining the next of kin, is adhered to, notwithstanding the terms of the will confine the gift to

(*p*) *Vaux* v. *Henderson*, 1 J. & W. 388, n. There being no words of severance, the question, whether the gift could be read as applying to such of the next of kin as survive the testator, did not arise, as they were entitled quâcunque viâ.

[(*q*) *Ham's Trust*, 2 Sim. N. S. 106.

(*r*) See also *Philps* v. *Evans*, 4 De G. & S. 188; where, however, the precise point was not raised, the question lying between the next of kin at the testator's death and those at the death of the tenant for life. And see *Wharton* v. *Barker*, 4 Kay & J. 502.

Sir *R. T. Kindersley* seems to have rested his judgment in some measure on the ground that the gift being, in effect, one to a number of persons, to be ascertained at the death of the testator's late wife, and not at the testator's death, was *therefore* not a gift to a class. See particularly his judgment, as reported, 15 Jur. 1121. It may be material to consider how far such a ground is consistent with the decisions in *Viner* v. *Francis*, 2 B. C. C. 658, 2 Cox, 190; *Lee* v. *Pain*, 4 Hare, 250; *Leigh* v. *Leigh*, 17 Beav. 605.]

Remark on *Ham's Trust.*

(*s*) *Danvers* v. *Earl of Clarendon*, 1 Vern. 35.

(*t*) *Cruwys* v. *Colman*, 9 Ves. 319. [*Smith* v. *Palmer*, 7 Hare, 225; *Gundry* v. *Pinniger*, 14 Beav. 94, 1 D. M. & G. 502; *Walker* v. *Marquis of Camden*, 16 Sim. 329. As to *Booth* v. *Vicars*, 1 Coll. 6, and *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351, see 1 D. M. & G. 504, 8 Hare, 307.]

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next of kin *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no farther change in the construction. Indeed, it rather affords an argument the other way.

Next of kin living at a future period.

Thus, where (*u*) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives *as should be then living*, Lord *Thurlow* held, that the next of kin at the testator's death, *surviving the specified period*, were entitled; *for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years.*

Prior legatee for life, himself one of the next of kin.

The same construction prevails, though the tenant for life, at whose death the distribution is to be made, is himself one of the next of kin. As where (*x*) a testator bequeathed 5,000*l.* in trust for his daughter for life, and after her decease for her children living at her decease, in such shares as she should appoint; and in case she should leave no child, then as to 1,000*l.*, part thereof, in trust for the executors, administrators, and assigns of the daughter; and as to 4,000*l.*, the remainder, in trust for the person or persons who should be his heir or heirs at law. The daughter died without leaving children. She and two other daughters were the testator's heirs at law. Sir *R. P. Arden*, M. R., held the heirs *at the time of the testator's death* to be entitled, from the absence of expression, shewing that these words were necessarily confined to another period, which, he said, required something very special. He thought the word "heirs" was to be construed as next of kin, but this it was unnecessary to determine, the daughters being entitled quâcunque viâ.

Effect where legatee for life is sole next of kin.

[So far the law has long been clearly settled. But it was made a question, notwithstanding the generality of the principle asserted by Sir *R. P. Arden*, whether, if the person taking the life interest were the *sole* next of kin at the death of the testator, an intention was not ipso facto shewn that the gift should vest in the person answering the description at the death of the

(*u*) *Spink* v. *Lewis*, 3 B. C. C. 355. [*Bishop* v. *Cappel*, 1 De G. & S. 411.]

(*x*) *Holloway* v. *Holloway*, 5 Ves. 399. [*Harrington* v. *Harte*, 1 Cox, 131; *Masters* v. *Hooper*, 4 B. C. C. 207; *Doe* d. *Garner* v. *Lawson*, 3 East, 278; *Lasbury* v. *Newport*, 9 Beav. 376; *Jenkins* v. *Gower*, 2 Coll. 537; *Wilkinson* v. *Garrett*, ib. 643; *Wilson* v. *Pilkington*, 11 Jur. 537, case on a settlement; *Holloway* v. *Radcliffe*, 23 Beav. 163; *Starr* v. *Newberry*, ib. 436.]

[tenant for life. And several authorities are to be found favouring this distinction, of which one of the first in time and importance was] the case of *Jones* v. *Colbeck* (*y*), where a testator devised the residue of his estate to the children of his daughter M., and until she should have children, or if she should survive them, then to the separate use of M. during her life; and after the decease of his said daughter and her children, in case they should all die under twenty-one, that the residuum should go and be distributed *among his relations* in a due course of administration. The daughter was the only next of kin at the testator's death. Sir *W. Grant*, M. R., thought it was clear that the testator intended to speak of relations not at the time of his own death, but at that of his daughter or her issue under twenty-one; his Honor deeming it impossible that the testator could mean that the relations who were to take in that event were the daughter herself, who the testator evidently thought would survive him, [and to whom the expression "my relations" was quite inappropriate.]

Effect where prior legatee for life was sole next of kin.

Again, in *Briden* v. *Hewlett* (*z*), where a testator bequeathed all his personalty in trust for his mother for life, and after her decease, unto such persons as she by will should appoint; and in case his mother should die without a will, then *to such person or persons as would be entitled to the same by virtue of the Statute of Distributions*. The mother was the testator's sole next of kin at his death; and Sir *J. Leach*, M. R., held that she was not entitled absolutely in this character, and that the property devolved to the testator's next of kin at the time of the decease of the mother. "It is impossible," said his Honor, "to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the Statute of Distributions. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of his mother."

Bequest in de-

So where property was given to a testator's next of kin in

(*y*) 8 Ves. 38. ["That case has the singular property of being often cited as an authority, always considered as open to observation, and never followed," per Sir *J. Stuart*, V. C., 1 Sm. & Gif. 122.]

(*z*) 2 My. & K. 90. But see *Harvey* v. *Harvey*, 3 Jur. 949, post.

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defeazance of a prior gift in favour of persons, who, if they survived him, would be his next of kin at his death, the gift was considered as pointing to next of kin at a future period. As where (*a*) a testator bequeathed the residue of his personal estate, upon trust (among other things) to raise the sum of 200*l.*, and pay the same to his son J., and he gave the interest of the residue of the personalty to his (testator's) widow for life; and, after her decease, one moiety to his son C., and the other moiety thereof to J. By a codicil he declared, that in case his son C. should die in the lifetime of the testator's widow, and his son J. should be living, he gave to J. the share of C.; but, in case C. and J. should both die in the lifetime of the testator's wife, he directed, that, after her decease, the whole of the residue of his personal estate, after securing a certain annuity, should go to, and be divided among *all and every his (the testator's) next of kin, in equal shares*. C. and J. survived the testator, and died in the lifetime of the widow. Sir *W. Grant*, M. R., held, that, as the testator had given by express bequest to his sons, who were his next of kin living at his death, he must, when he used the term "next of kin," have meant his next of kin at some other period than at his decease, and, therefore, that the next of kin *at the death of the widow*, and not at the death of the testator, were entitled. It is to be observed, however, that the sons, even if they survived the testator, were not *necessarily* his *sole* next of kin at his death, as he might have had other children.

Defeazance of a prior gift to the persons who are presumptive next of kin.

Remark on *Miller* v. *Eaton*.

And the circumstance, that the prior legatee, whose interest, on his death without issue, or other such contingency, is divested in favour of the ulterior gift to the testator's next of kin, was *one* of such next of kin at the time of his (the testator's) death, has been deemed a sufficient ground for construing the words to import next of kin at the happening of the contingency.

Effect where such person was *one* of next of kin.

Thus, in the case of *Butler* v. *Bushnell* (*b*), where a testator bequeathed certain shares in his residuary estate to his daughters, and directed that their respective shares should be held in trust for their separate use for their lives, and, after their respective deceases, for their children; and in case there should be no child or children of his daughters respectively, who should attain

(*a*) *Miller* v. *Eaton*, Coop. 272. (*b*) 3 My & K. 232.

twenty-one or marry, then, *in trust for such person or persons who should happen to be his (the testator's) next of kin, according to the Statute of Distributions.* One of the daughters, who survived the testator, died without issue; and Sir *J. Leach*, M. R., decided that her share devolved to the testator's next of kin at the decease of the daughter, and not to the next of kin at his own death, on the ground of the improbability that the testator should mean to include, as one of his next of kin, the person upon whose death, without issue, he had expressly directed that the property should go over, [and of the prospective nature of the words, "who should happen to be."

Remark on the preceding cases.

In all these cases, indeed, except *Miller* v. *Eaton*, it will be seen that the fact of the prior legatee being the sole next of kin at the testator's death was not the only ground relied upon. In *Jones* v. *Colbeck*, the M. R. remarked on the inapplicability of the term "my relations" (*c*) to an only daughter; and in *Briden* v. *Hewlett* and *Butler* v. *Bushnell*, Sir *J. Leach* laid much stress on the words "would be" in the one case, and "should happen to be" in the other, as importing a future contingency upon which the next of kin were to be ascertained. And, therefore, with the single exception already mentioned, there is no case expressly deciding that the circumstance in question is a sufficient reason for departing from the general rule. But it is nevertheless indisputable that the effect given to those additional grounds of argument is scarcely to be reconciled with the principle which may be considered to be now established, that, as infinite variations may take place in the expectant next of kin, either by deaths, or births, or both, in the interval between the making of the will and the death of the testator, it is not to be assumed, in the absence of clear evidence, that the testator lost sight of the probability of such variation; and without that assumption the testator's supposed intention in favour of or against particular persons as his next of kin can possess little or no weight (*d*). The argument drawn from the inapplicability

[(*c*) It was held by Sir *J. Romilly*, M. R., in *Tiffin* v. *Longman*, 15 Beav. 275, that "relations" had not such necessary reference to the time of the death of the propositus as "next of kin:" and the like of "legal personal representatives" in *Holloway* v. *Radcliffe*, 23 Beav. 163.

(*d*) Secus where the gift is to next of kin of a person who is dead at the date of the will. If in such case there be a prior gift to the person by name who then bears that character, the argument is a valid one: for if that person survives the testator (which the prior gift presumes) the class *cannot* undergo any change, *Wharton* v. *Barker*, 4 Kay & J. 483.

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[of the description used to the person eventually answering to it thus falls to the ground; since the testator may have chosen to give to that person] by a description which, if he died in his lifetime, would carry his bounty to other objects. [Again, words which are expressive of futurity without pointing to any definite period are satisfied when referred to the time of the testator's death; and, being themselves ambiguous, ought not to be allowed to control the known legal meaning of such words as "next of kin." At the present day it is not probable that such decisions would be made as those in *Briden* v. *Hewlett* and *Butler* v. *Bushnell* (*e*).

Tenant for life being sole next of kin, held not sufficient to exclude him from a devise to "next of kin."

One of the earliest cases in which these principles were practically enforced was that of] *Pearce* v. *Vincent* (*f*), where a testator devised lands to his cousin, T. Pearce, *for life*, and, after his decease, to such of the testator's relations of the name of Pearce (being a male) as his cousin T. Pearce should by deed appoint, and, in default of appointment, to such of the testator's relations of the name of Pearce (being a male) as T. Pearce should adopt, if he should be living at the time of the decease of T. Pearce; and, in case T. Pearce should not have adopted any such male relation of the testator, or, in case he should have done so, and there should not be any such male relation living at the decease of T. Pearce, then the testator devised the property to *the next or nearest relation or nearest of kin of himself of the name of Pearce* (*being a male*), *or the elder of such male relations, in case there should be more than one* of equal degree, who should be living *at the testator's decease*, his heirs, executors, administrators, and assigns, for ever. The will also contained a power to T. Pearce to lease for any term not exceeding seven years. T. Pearce, the tenant for life, died without issue, and without having executed the powers of appointment or adoption given by the will. The nearest of kin of the testator living at the time of his decease (which occurred in 1814) were—first, his cousin T. Pearce (the devisee for life) aged sixty-seven; secondly, his cousin Richard Pearce, the son of another uncle, and who was aged sixty-six; and, thirdly, William Pearce, a younger brother of Richard. The testator had a brother named

[(*e*) See *Holloway* v. *Holloway*, 5 Ves. 399; *Doe* d. *Garner* v. *Lawson*, 3 East, 278; *Stert* v. *Platel*, 5 Bing. N. C. 434. And see the analogous cases of *Church* v. *Mundy*, 15 Ves. 396; *Ford* v. *Ford*, 6 Hare, 486; *Lord Braybroke* v. *Inskip*, 8 Ves. 417.]

(*f*) 1 Cr. & M. 598, 2 My. & K. 800, 2 Scott, 347, 2 Bing. N. C. 328, 2 Kee. 230.

Zachary, who, if living at his death, would have been his nearest of kin; but it appeared that he went to sea, and had not been heard of since 1795. The question was, what estate, assuming Zachary to have died without issue in the lifetime of the testator, Thomas or Richard took under the ultimate limitation? Sir *John Leach*, M. R., sent a case on this point to the Judges of the Court of Exchequer, who certified their opinion, that Thomas took an estate in fee in the real estate, and the absolute interest in the personalty. The M. R., being dissatisfied with the certificate, sent a case to the Common Pleas, the Judges of which were of the same opinion; and these certificates, after some argument, were confirmed by Lord *Langdale* (who had in the meantime succeeded Sir *J. Leach* at the Rolls), and whose judgment contains a very clear statement of the principle of the decision. "The question is," said his Lordship, "whether Thomas Pearce, being devisee for life, and filling the character of the person to whom the testator has given his estates in certain events, is, because he is tenant for life, to be excluded from taking under the description in the ultimate limitation, which he afterwards filled? It is tolerably clear, that a vested interest was given to the person who should, at the time of the testator's death, answer the description in the ultimate limitation, which vested interest might have been divested by the appointment of Thomas Pearce, or by his adoption of a male relation of the name of Pearce, but was, in default of such appointment or direction, to take effect. If it should so happen that Thomas Pearce, the devisee for life, should also at the death of the testator answer the description of the person who is to take under the ultimate limitation, ought he, because he fills the two characters, to be excluded from taking under that limitation? It is argued that he ought, because the gift to Thomas Pearce for life and the restrictions put upon him in his character of tenant for life are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply to this case; and I am of opinion that upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended

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by the testator to take, but because he answers the description of the person to whom the estates are ultimately given."

Same construction with regard to bequest of personalty.

[That bequests of personalty are subject to the same rule of construction is also clearly decided. Thus in the case of *Urquhart* v. *Urquhart* (*g*), where a testator bequeathed his personal estate to his daughter if she survived her mother and had issue, but if she died before her mother, then on the wife's death one moiety to belong to his own nearest of kin, and the other moiety to his wife's nearest of kin; the daughter was sole next of kin at the date of the will and of the testator's death, and, she having predeceased the wife without having issue, her representative was held entitled under the ultimate bequest of the first moiety. "The rule is," said his Honor, "that the persons who are designated by any description, must be the persons who answer that description according to the legal sense of those words, unless on the face of the instrument you find that the testator himself has put a construction on those words, and shewn that he does not mean to use them in their natural ordinary and legal sense:" and he thought there was nothing to control that sense except the mere *surmise* arising out of the previous bequest to the daughter.

So, in the case of *Seifferth* v. *Badham* (*h*), where a testator gave personal property in trust, after the decease of the testator's wife, for his children (who were then and at his death his sole next of kin), but if they should die without leaving issue, to assign the property "unto and equally between his next of kin according to the Statute of Distributions," it was held by Lord *Langdale*, M. R., that the children were entitled under the ultimate gift.

Again, in the case of *Nicholson* v. *Wilson* (*i*), where a testator bequeathed a sum of money in trust for his daughter A. for life, remainder to such of his children B., C., and D. as should be living at the death of A., and if only one *then* living, to that one; but if all his children were *then* dead, *then* to his personal representatives, and directed his executors and administrators to transfer the same accordingly: it was contended that as "then" was here clearly used as an adverb of time, the representatives must be such as answered the description when the specified contingency happened; but Sir *L. Shadwell*, V. C.,

[(*g*) 13 Sim. 613. (*h*) 9 Beav. 370.
(*i*) 14 Sim. 549.

[thought the argument was founded entirely upon conjecture, and that conjecture did not authorise the Court to depart from the plain meaning of the words which were found in the will, and which meant next of kin at the testator's death.

And, finally in *Baker* v. *Gibson* (*k*), Lord *Langdale* thought the general question so firmly settled that he would not give leave to amend the bill by adding the parties necessary for opening it afresh. These and other similar cases (*l*) have settled the law on this much disputed point.

Where the devise is to the next of kin of a third person.

The cases hitherto stated have all presented instances of bequests to the testator's own next of kin. But the same rule prevails also in the case of a gift to the next of kin of a third person preceded by an express devise to the individual who is such person's expectant next of kin. Thus, in the case of *Stert* v. *Platel* (*m*), where lands were devised to R. H. for life, remainder to his sons successively in tail, remainder to A. D. H. for life, remainder to his sons in like manner, remainder to "such person bearing the name of H. as *shall* be the male relation nearest in blood to R. H." (*n*): it was held by the Court of C. P., that A. D. H. being the nearest relation of R. H. at the time of the testator's death, had an immediately vested remainder under the ultimate limitation in the will. It will be observed that the same individual being the nearest relation of R. H. at [his death and at the death of the testator, no person was concerned to raise the question at which of those two periods the remainder should be held to vest (*o*).

What expressions and circumstances authorise a departure from the general rule.

It remains to consider those cases of gifts to next of kin preceded by a gift to the individual who happens to answer that description at the death of the testator or other ancestor, in which it has been held that the testator has given satisfactory evidence of his intention to refer to some other persons than those who answer the description at that time. And mention may first be conveniently made of the case of *Bird* v. *Wood* (*p*), generally cited on this point, but which appears to be really an instance

[(*k*) 12 Beav. 101.

(*l*) *Ware* v. *Rowland*, 15 Sim. 587, 2 Phill. 635; *Murphy* v. *Donegan*, 3 Jo. & Lat. 534; *Bird* v. *Luckie*, 8 Hare, 301; *Jennings* v. *Newman*, 10 Sim. 219; *In re Barber*, 1 Sm. & Gif. 118; *Gorbell* v. *Davison*, 18 Beav. 556; *Markham* v. *Ivatt*, 20 ib. 579. And in the case of settlements, *Elmesley* v. *Young*, 2 My. & K. 82, 780; *Smith* v. *Smith*, 12 Sim. 317; *Allen* v. *Thorp*, 7 Beav. 72.

(*m*) 5 Bing. N. C. 434.

(*n*) These terms were considered equivalent to a bequest to next of kin, see per *Bosanquet*, J., 5 Bing. N. C. 441.

[(*o*) Ante, 115, nn. (*s*), (*t*).

(*p*) 2 S. & St. 400, corrected 2 My. & K. 86, 89.

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[rather of the exclusion of the true next of kin in favour of more remote relations than of the postponement of the period at which the legatees should be ascertained. In that case the bequest was to the testatrix's daughter for life, and after her death, as she should appoint, and in default of appointment, to her (the testatrix's) next of kin, *to be considered as a vested interest from the testatrix's death*, except as to any child afterwards born of her daughter. The daughter having died childless and without making any appointment, Sir *J. Leach*, V. C., held, that by the exception the testatrix had shewn what class she meant to designate as her next of kin, namely, her grandchildren; *and they were to take vested interests at her* (the testatrix's) *death*: the daughter was therefore excluded.

But the mere exception, from a gift to the next of kin, of persons who in the absence of the tenant for life would have been some of the next of kin, is not sufficient reason for departing from the general rule: for this would be to assume that the testator expected the state of his family to remain the same at his death as at the date of the will, an assumption which we have already seen ought not to be made. The more legitimate conclusion is that the testator introduced the exception with this view, that if the tenant for life should die in his lifetime and his next of kin should consist of the class to which the excepted persons belonged, those persons should be excluded from the bequest (*q*).

In the case of *Minter* v. *Wraith* (*r*), a testator devised and bequeathed his real and personal estate in trust for sale, the produce to be invested, and one-half of the interest paid to his daughter A. for life, and at her death one moiety of the principal and of such part of his estate as remained unsold (if any) to be assigned and conveyed to her children; and in default of children, then to be assigned and conveyed to his (the testator's) personal representatives, *his, her, or their* heirs, executors, &c. There was a gift of the other moiety in corresponding terms to B., another daughter of the testator, and her children, and a like gift over, and a direction to the trustees to retain B.'s moiety while she continued "under her present affliction," and apply it for her benefit. Sir *L. Shadwell*, V. C., considering that the testator was looking to a period when it was doubtful whether any of his

(*q*) *Lee* v. *Lee*, 1 Drew. & Sm. 85. (*r*) 13 Sim. 52.

[property would remain unsold or not,—a consideration strengthened by the trust "to assign and convey;" that although he assumed his daughters would survive him, he yet applied to his "representatives" the expressions *his*, her, or their; and that the direction to retain B.'s moiety led to the inference that the testator did not contemplate that B. would be one of the persons to take under the assignment and conveyance of the whole (concerning which there was no such direction)—held that the representatives intended were those who should answer the description at the death, without children, of the daughter, concerning whose moiety the question in the cause arose.

Remark on *Minter* v. *Wraith.*

This case was decided but shortly before *Urquhart* v. *Urquhart* (*s*), and by the same Judge; and yet the reliance placed on the testator's assumed intention regarding a particular person in the former case is scarcely consistent with the rule laid down by the learned Judge in the latter.

Again, in the case of *Cooper* v. *Denison* (*t*), where a residue was bequeathed in trust, in case the testator's daughter survived her mother, for her at her mother's death; and in case the mother survived the daughter, then in trust for the mother for life, and at her decease, a third part to be paid and applied according to her will, and the other two-thirds to his *other* the next of kin of his paternal line. The daughter was sole next of kin ex parte paternâ at the death, and the V. C. held that she was excluded by force of the word "other," and that as the widow's power of appointment necessarily postponed the time for ascertaining the persons to take her one-third, while it was clear that the persons to take the other two-thirds were to be ascertained at the same time, he thought the testator's next of kin at his daughter's death were the persons entitled.

There remains to be mentioned the case of *Clapton* v. *Bulmer* (*u*), in which a question arose on a peculiarly worded instrument. The testator bequeathed his residue to trustees in trust for his daughter for life, and after her death for her children; but if she died without leaving any children, he directed his trustees *upon her decease to raise and pay* 3,000*l.* as she should by will appoint, and if his wife survived his daughter and his daughter died childless, *then* his trustees were to raise and pay the

[(*s*) 13 Sim. 613; and see *Wrightson* v. *Macaulay*, 14 M. & Wel. 214, ante, p. 79.

(*t*) 13 Sim. 290.

(*u*) 10 Sim. 426, 5 My. & C. 108.

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[further sum of 2,000*l.* to his wife, and "assign and transfer the residue to the nearest of kin of his own family for ever." Sir *L. Shadwell*, V. C., understanding "family" to mean *children*, held the bequest to be to the next of kin *of the daughter*. Upon appeal, Lord *Cottenham* thought this might have been the testator's meaning, but if not, it meant his own next of kin at his daughter's death, for in no case was there such strong demonstration to be found that the legatee was to be ascertained at a future period. Between these two constructions it was unnecessary to decide, since the same individual answered both descriptions.

Where there is an *express* gift in remainder to next of kin, subject to a power of appointment in the legatee for life, the objects of the gift, in default of appointment, are of course to be ascertained without regard to the existence of the power, which, unless exercised, has no operation on the question. But where such a gift is implied from a power to appoint by will, then the death of the donee is the period to be regarded, and that, whether the power be one of selection (*x*), or only of distribution (*y*).]

Rule where gift to next of kin is implied from a power.

Gift expressly to next of kin at a future period.

Of course, if property be given upon certain events to such persons as shall *then* be next of kin or relations of the testator, the persons standing in that relation at the period in question, whether so or not (*z*), [or not solely so (*a*),] at the death of the testator, are, upon the terms of the gift, entitled; [and such was held to be the effect of a will in which the testator bequeathed certain leaseholds in trust to pay the rents to his son D. till he attained the age of twenty-five years, and then to

[(*x*) *Att.-Gen.* v. *Doyley*, 4 Vin. Abr. 485; *Harding* v. *Glyn*, 1 Atk. 469, cit. 5 Ves. 501; *Cooper* v. *Denison*, 13 *Sim.* 290.

(*y*) *Pope* v. *Whitcombe*, 3 Mer. 689, corrected 2 Sug. Pow. App., No. 29, ante, ch. xvii., s. 3, ad fin.; *Finch* v. *Hollingsworth*, 21 Beav. 112.]

(*z*) *Long* v. *Blackall*, 3 Ves. 486; [*Horn* v. *Coleman*, 1 Sm. & Gif. 169; *Wharton* v. *Barker*, 4 Kay & J. 483, in which all the authorities are reviewed.] It should be observed that the cases of *Jones* v. *Colbeck* and *Miller* v. *Eaton* have been cited by a respectable text writer, as authorities for the position that a bequest to the next of kin, after a life interest, *refers to those who answer the character at that time*, 1 Rob. on Wills, 3rd ed. 432. This is not only directly opposed to the general principles which govern the vesting of estates,* but also to the strong line of authorities before cited in support of the contrary general rule; to which may be added *Holloway* v. *Holloway*, and other cases of the same class before mentioned. It is, moreover, inconsistent with the principle on which Sir *W. Grant* rested his decision in each of the first-mentioned cases themselves, as will be seen by a perusal of his judgments.

[(*a*) *Boys* v. *Bradley*, 10 Hare, 389, 4 D. M. & G. 58.

* As to which, see ante, ch. xxv., s. 1.

[assign the same to him; but in case he should die under twenty-five without children surviving him, then "in trust for such persons as at the time of such failure of issue shall be my next of kin according to the statute made for distribution of intestates' effects, and as if I had survived my said son D. and in the like shares as they would be entitled to under the same statute." Then the testator bequeathed a sum of money in trust for his wife during her life, with remainder to his daughter for life, with remainder over to her children; "and in case my said daughter shall have no children her surviving, then in trust for my next of kin *in manner aforesaid:*" Lord *Cranworth* thought that "in manner aforesaid" meant altogether in manner aforesaid, namely as if the testator had survived his daughter as in the gift to D. (*b*).

"Then" not always an adverb of time.

But if there be any doubt whether the expression relied upon, as the word "then," is used to denote the time for ascertaining the objects, it will be construed as an adverb referring to the event upon which the interest is to vest in possession, more especially if there be in the will an express reference to the Statutes of Distribution. Thus, in the case of *Cable* v. *Cable* (*c*), where a testator bequeathed a fund in trust for his wife for life, and at her death to be paid to his children; but if he left no children at his decease, then to become the property of the person or persons who would *then* become entitled to take out administration as his personal representative or representatives, under the Statute of Distributions, as if he had died intestate and "*unmarried.*" The testator left no children, and Sir *J. Romilly*, M. R., held that, as the word "unmarried" shewed that the testator was contemplating a period before his wife's death, the word "then" should be construed as "thereupon," in order to make the whole consistent (*d*); and in the case of *Moss* v. *Dunlop* (*e*), where a testator gave his property in trust out of the income to pay certain annuities, and to apply the residue, and also such sums as should become available by the determi-

[(*b*) *Bessant* v. *Noble*, 26 L. J. Ch. 236, 2 Jur. N. S. 461. See also *Pinder* v. *Pinder*, 6 Jur. N. S. 489; *Chalmers* v. *North*, ib. 490.

(*c*) 16 Beav. 507; see also *Wheeler* v. *Addams*, 17 Beav. 417; *Downes* v. *Bullock*, 25 ib. 55; *Lees* v. *Massey*, 6 Jur. N. S. 2.

(*d*) But did not "then" refer to the period last mentioned, namely, the testator's own death without leaving children? *Archer* v. *Jegon*, 8 Sim. 446. Besides, the sense of "thereupon" was appropriated by the first "then" in the clause; and by the construction adopted, the will was made tautologous.

(*e*) 1 Johns. 490.]

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[nation of the annuities as the testator should appoint; and in default of appointment to pay the same to his "own next of kin *for the time being;*" it was held by Sir *W. P. Wood*, V. C., that there was no such clear, express, and positive necessity for construing the words used as referring to a future time as to overcome the general rule that the words "next of kin" meant next of kin at the death: he thought the whole residue including the sums set free by the dropping of the annuities was treated as one single fund, and that the argument founded on the fact that, by referring the words "for the time being" to the death, they were reduced to silence was not conclusive.]

Gifts to persons of testator's name.

Sometimes it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name. The word "name," so used, admits of either of the following interpretations:—First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense); and, secondly, as denoting a person of the testator's family; the word "name" being, in this case, synonymous with "family" or "blood." The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the word "name," if otherwise construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

To next of testator's name, or next of kin of his name.

Thus, where a testator gives to the next *of his kin* of his name (*f*), or to the next of his name *and blood* (*g*), it is evident that he does not use the word "name" as descriptive of his relations or family only, because that would be the effect, if the mention of the name were wholly omitted, and the gift had been simply to his next of kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held, that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name (*h*), there is

(*f*) *Jobson's case*, Cro. Eliz. 576.
(*g*) *Leigh* v. *Leigh*, 15 Ves. 92.
(*h*) But see *Bon* v. *Smith*, Cro. El. 532, where a declaration by the testator, that, in a certain event, lands should remain to the next of his name, was

ground to presume that he intends merely to point out the persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in the case of *Pyot* v. *Pyot* (*i*), where a point of this nature underwent much discussion. A testatrix devised her estate, real and personal, to trustees, and their heirs, executors, administrators, and assigns, in trust, first for her daughter Mary, and her heirs, executors, administrators and assigns, for ever; provided that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators, and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix there were three persons then actually of the name of Pyot, namely, the plaintiff, and also his two sisters who were then unmarried, but who married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix, was not of that name. An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir-at-law, but who, of course, was one degree more remote than the others. On behalf of the heir-at-law, it was insisted—First, that this devise to the "nearest relation" was void for uncertainty, because the word "relation" was not nomen collectivum; for no words were of that description, except such as had no plurals: Secondly, that if it was not void, then the heir-at-law was the person meant by "nearest relation;" for the testatrix had in view a single person, and could not intend to give it to all her relations. But Lord *Hardwicke* said, that a devise was never to be construed absolutely void for uncertainty, unless from necessity; and if this necessarily related to a single person, it would be so, as there were several in equal degree of the name of Pyot. But he did not take it so: the term "relation" was nomen collectivum as much as heir or kindred. "Then," continued his Lordship, "taking

To the "nearest relation of the name of the Pyots."

considered to require that the devisee should have borne the testator's name. The point, however, did not call for adjudication; and the propriety of the dictum was (as we shall see) questioned by Lord *Hardwicke*, in the case of *Pyot* v. *Pyot*, 1 Ves. 337, post, who seems to have included in his condemnatory strictures *Jolson's case*, Cro. El. 576, where the language of the will was different; the devise being "to the next *of kin* of my name," and which, therefore, according to the reasoning in the text, was properly construed as importing that the devisee should, in addition to being of the testator's family, bear his name.

(*i*) 1 Ves. 335, Belt's ed.

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this to be nomen collectivum, as I do, there is no ground in reason or law to say, the plaintiff should be the only person to take; because there is no ground to construe this description to refer to the actual bearing the name at that time, but to refer to the stock 'of the Pyots.' If it refers to the name, suppose a person of nearer relation than any of those now before the Court, but originally of another name, changing it to Pyot by Act of Parliament, that would not come within the description of nearest relation of the name of Pyot; for that would be contrary to the intention of the testatrix; and yet that description is answered, being of the name of Pyot, and, perhaps, nearer in blood than the rest. Then suppose a woman nearer in blood than the rest, and marrying a stranger in blood of the name of Pyot; that would not do; and yet, at the time of the contingency, she would be of the name. In *Jobson's case*, and in *Bon* v. *Smith* (which was a case put at the bar by Serjeant *Glanville*, which was often done in those times, but cannot be any authority), *it is next of kin of my name* (*j*), which is a mere designation of the name, and is expressed differently here. It may be a little nice; but, I think, *'the Pyots'* describe a particular stock, and the name stands for the stock; but yet it does not go to the heir-at-law, as in the case of Dyer, because it must be *nearest relation*, taking it out of the stock; from which case it also differs, as the personal is involved with the real; and it was meant that both should go in the same manner; and shall the personal go to the heir-at-law? Then this plainly takes in the plaintiff and his two sisters unmarried at the time of making the will, although married before the contingency; and I think the other sister, not before the Court, is equally entitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the testatrix."

To be kept in the W.'s *name*. "Name" held to mean family.

[So, in the case of *Mortimer* v. *Hartley* (*k*), where a testator devised lands to his son J., on condition that neither he nor his heirs should sell the same, "it being the testator's desire that they should be kept *in the Westerman's name;*" and if J. died without leaving lawful issue, then the testator's *daughter* A. to have her brother's share *subject to the same restrictions*, it was

(*j*) This is not accurate; vide ante, p. 128, n. (*h*).
[(*k*) 6 Exch. 47.

[held that the word "name" must be construed to mean "family" or "right line," for the son J. was held to take an estate tail, and the daughter was to take subject to the same restrictions, that is, an estate tail also, in which case the lands would devolve upon persons not bearing the name of Westerman.

To the next of kin of the surname of C.

It seems to have been thought in the case of *Carpenter* v. *Bott* (*l*), that the word "surname" was more easily convertible with "family" or "stock" than the word "name." T. Crump, the testator in that case, bequeathed a fund, in the event (which happened) of his niece dying without leaving issue, "amongst his *next of kin of the surname of Crump*, who should be living at the decease of his niece, in like manner as if his said next of kin had become entitled thereto under the Statute of Distributions." At the death of the testator, his sole next of kin bearing the name of Crump, was a lady who afterwards married the plaintiff during the life of the niece, and Sir *L. Shadwell*, V.C., thought the expression "of the surname" was to be taken in the sense attributed by Lord *Hardwicke* to the words "of the (name of the) Pyots," namely, "of the stock:" and therefore that Mrs. Carpenter was entitled.

Remark on *Carpenter* v. *Bott*.

It is submitted, however, that it was unnecessary (and if so, improper) to give any but its literal meaning to the word "surname." But the decision is sustainable on independent grounds: for the bequest was to the testator's *next of kin* of the name of C., *as if they had become entitled by the statute*, all which clearly and unambiguously referred to the period of his death (at which time Mrs. C. bore the prescribed name), and was not controlled by the other part of the description, "who should be living at the death of his niece," except in so far as those words added to the other qualities of the legatee, that of being alive at the time specified; and this interpretation completely satisfies them.]

As to females losing name by marriage.

Where a gift to persons of the testator's name is held, according to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage. As in *Jobson's case* (*m*), often before cited, which was a devise of lands in tail, the remainder to the next of kin of the testator's name. The next of kin, at the date of the will,

[(*l*) 15 Sim. 606.] *Smith*, ib. 332; [*Doe* d. *Wright* v.
(*m*) Cro. El. 576. See also *Bon* v. *Plumptre*, 3 B. & Ald. 474.

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and also at the death of the testator, was his brother's daughter, who was then married to J. S.; and, on the death of the tenant in tail, without issue, the question was, whether she should have had the land? and it was held, that she should not, because she was not then of the name of the devisor. [But if a person has acquired a new name by royal licence or by Act of Parliament, he has not therefore lost his original name, for the licence or statute is simply permissive, and leaves the person at liberty to resume his original name: so that a new name so acquired would probably be held no obstacle to his taking by a description of which the old name was a part (*n*).]

Name assumed by licence or Act of Parliament may be laid aside.

Another question is, whether gifts of this nature apply in cases the converse of the last, *i. e.*, to a person who, being originally of another name, has subsequently acquired the prescribed name by marriage, or by voluntary assumption, either under the authority of a royal licence, or the still more solemn sanction of an Act of Parliament, or without any such authority (*o*).

To persons of testator's name and blood.

In the case of *Leigh* v. *Leigh* (*p*), the testator, after limiting estates to his two sisters and their issue in strict settlement, devised the property, on failure of those estates, to the first and nearest of his kindred, being male *and of his name and blood,* that should be living at the determination of the estates before devised, and to the heirs of his body; Lord *Eldon,* with Mr. Baron *Thompson,* and Mr. Justice *Lawrence,* held, that a person, who answered the other parts of the description, but of another name, was not qualified, in respect of the name, by his having, before the determination of the preceding estates, obtained his Majesty's licence that he and his issue might use the surname of Leigh instead of his own name, and having since assumed it. That the design of the testator, in this case, was the exclusion of the female line, and that he was not influenced solely by attachment to the name, (one of which objects he must have had in view,) appeared from his not having imposed the obligation of assuming his name upon the issue of his sisters taking under the prior limitations.

At what period legatee must answer pre-

The remaining question, applicable to the gifts under consideration, is, at what time the devisee or legatee must answer

[(*n*) See per Lord *Eldon*, *Leigh* v. *Leigh*, 15 Ves. 100.]

(*o*) As to the voluntary assumption of a name, ante, p. 50.

(*p*) 15 Ves. 92.

scribed description.

the prescribed qualification or condition in regard to the name, supposing the will to be silent on the point.

If the devise confers an estate in possession at the testator's decease, that obviously is the point of time to which the will refers; and even where the devisee might, in other respects, take at the testator's decease an absolutely vested estate in remainder, it should seem that the same construction prevails. Such was the unanimous opinion of the Court in the two early cases of *Bon* v. *Smith* (*q*), and *Jobson's case* (*r*), where lands were devised to A. in tail, with remainder to the next of the testator's name, or the next of kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had answered the description *at the death of the testator*, would have been entitled.

But in the case of *Pyot* v. *Pyot* (*s*), Lord *Hardwicke* considered, that a different rule is applicable to executory devises, which are fettered with such a condition. The devise there was (as we have seen) to A. and her heirs, and, in case she should die before twenty-one or marriage, then to the testator's nearest relation of the name of the Pyots; and his Lordship expressly distinguished the case before him from *Jobson's case*, where he said it was not a contingent limitation over upon a fee devised precedent, nor was it a contingent but a vested remainder, and therefore referred to the time of making the will [quære, the death of the testator?]; whereas, in the case before the Court, the description of the person must refer to the time of the contingency happening; viz. such as, at that event, should be the testator's nearest relation of the name of the Pyots (*t*).

Remarks upon Lord *Hardwicke's* doctrine in *Pyot* v. *Pyot*.

If such a construction can be sustained, it must embrace all executory gifts to persons answering a prescribed character, as to next of kin, heir, and other such persons; for it is difficult to perceive any valid reason for making the gifts under consideration the subject of any peculiar rule in this respect; and, as general doctrine, his Lordship's proposition would have to contend with a large amount of authority, including those cases in which (as we have seen) the words "next of kin" have been held to designate the next of kin at the time of distribution, on other special grounds (*u*), for it would have been idle to discuss

(*q*) Cro. El. 532.
(*r*) Cro. El. 576.
(*s*) 1 Ves. 335, Belt's ed.; ante, 129.
(*t*) See further, on this point, *Gulliver* v. *Ashby*, 4 Burr. 1940; *Lowndes* v. *Davies*, 2 Scott, 74; ante, p. 50.
(*u*) Ante, p. 116.

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the question, whether an executory gift to the next of kin applied to the person answering the description of next of kin when such gift took effect in possession, on the special ground that the prior legatee was sole next of kin, or one of the next of kin at the death of testator, if, by the general rule, an executory bequest to next of kin applied to the persons answering the description when the bequest took effect in possession.

# CHAPTER XXX.

## DEVISES AND BEQUESTS TO CHILDREN.

I. *Whether they include Grandchildren.*
II. *What class of Objects, as to period of birth, they comprehend; where,* 1*st, The Gift is immediate,* i. e. *in Possession;* 2*ndly, There is an anterior Gift;* 3*rdly, Possession is postponed till a given Age;* 4*thly, Effect where no Object exists at the time of its falling into Possession;* 5*thly, Words* "born" *or* "begotten," *or* "to be born or begotten," *&c.;* 6*thly, As to Children* en ventre.
III. *Clauses substituting Children for Parents.*
IV. *Children described as consisting of a specified number, which differs from the actual number.*
V. *Whether Children take* per stirpes *or* per capita.
VI. *Limitation over, as referring to* having *or* leaving *Children.*
VII. *Gifts to younger Children.*

*Children*, how construed.

I. The legal construction of the word *children* accords with its popular signification (*a*); namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue (*b*). It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child. Thus, in *Crooke* v. *Brookeing* (*c*), though the claim of grandchildren to be entitled in conjunction with a surviving child under a bequest to "children," was rejected, yet the Lords Commissioners considered, that, if there had been no child, they might have taken. Lord *Alvanley*, too, in the subsequent case of *Reeves* v. *Brymer* (*d*), laid it down, that "children may mean grandchildren, where there can be no other construction; but not otherwise." Sir *W. Grant*, also, seems rather to have assented to, than denied the doctrine, though he refused to apply it to a case (*e*) in which there was a

Whether it extends to grandchildren, and when.

(*a*) The French word *enfans* receives the same construction: *Duhamel* v. *Ardouin*, 2 Ves. 162.

(*b*) *Wythe* v. *Blackman*, Amb. 555, 1 Ves. 196; *Gale* v. *Bennett*, Amb. 681; *Chandless* v. *Price*, 3 Ves. 99; *Royle* v. *Hamilton*, 4 Ves. 437; [and other cases, ante, p. 94 (*d*).]

(*c*) 2 Vern. 106.

(*d*) 4 Ves. 698. See also his Lordship's judgment in *Royle* v. *Hamilton*, 4 Ves. 439.

(*e*) *Radcliffe* v. *Buckley*, 10 Ves. 198; [*Moor* v. *Raisbeck*, 12 Sim. 123.]

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gift to the children of several persons deceased equally per stirpes, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same learned Judge, on another occasion (*f*), refused to let in a great-grandchild under the description of "grandchildren," there being grandchildren; though he admitted, that "where there is a total want of children, grandchildren have been let in, under a liberal construction of 'children.'" No such case, however, it is conceived, can be found; and the doctrine appears to rest solely on the dicta of the Lords Commissioners, who decided *Crooke* v. *Brookeing*, Lord *Alvanley*, and Sir *W. Grant*.

Where the gift otherwise *never* could have had an object.

If the extension of gifts to children to more remote descendants were confined to cases in which, but for this construction, the gift, *according to the state of events at the time of its inception*, (*i. e.* of the making of the will,) never could have had an object, as in the case of a gift to the children of A., a person then being, to the testator's knowledge (*g*), dead, leaving grandchildren only (*h*), it is not denied, that a strong argument in favour of such a doctrine might be drawn from cases, in which words have been carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used (*i*), in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object. [Such were the circumstances and such the decision in *Fenn* v. *Death* (*k*).] But this

(*f*) *Earl of Orford* v. *Churchill*, 3 V. & B. 59.

[(*g*) This knowledge must be proved; it cannot be presumed, per Lord *Cranworth*, *Crook* v. *Whitley*, 7 D. M. & G. 496.]

(*h*) Which, as before suggested, occurred in respect of one class of children, in *Radcliffe* v. *Buckley*. The case of *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419, stated next chapter, would probably be considered as aiding the argument for an extension of the bequest to grandchildren *in such a case*.

(*i*) *Day* v. *Trig*, 1 P. W. 286, ante, ch. xii. s. 4; *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ald., 407, ante, ch. xxiv.; [*Gill* v. *Shelley*, 2 R. & My. 336.]

(*k*) 23 Beav. 73. See also *Stringer* v. *Gardiner*, 4 De G. & J. 468. In general, if the word children extends beyond its primary meaning, it will include issue of every degree. See per *Turner*, L. J., *Pride* v. *Focks*, 3 De G. & Jo. 275, and per Lord *Cranworth*, *Crook* v. *Whitley*, 7 D. M. & G. 96; but it need scarcely be added that the special terms of the will may confine it to one degree, as grandchildren; and it was on this ground probably (though it does not appear by the report) that in *Fenn* v. *Death*, 23 Beav. 73, great-grandchildren were excluded, while grandchildren were held entitled.]

Extended construction is confined to such cases.

reasoning does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming in esse; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine in question to such a case, is to allow the construction to be influenced by subsequent circumstances, in opposition to a well-known rule. Besides, it denies to a testator the power of giving to children, to the exclusion of descendants of another generation, (which is certainly a possible intention,) without using words of exclusion, though he might reasonably suppose the intention to exclude them was sufficiently apparent by the mention of another class of objects, and not of them. In the case of a gift to A., and, after his death, to his children living at his decease; and if he dies without leaving children, to B. and his children, the testator may choose to prefer A. and his children, to B. and his children; but it does not follow that he intends the same preference to extend to the *grandchildren* of A. (*l*).

[Accordingly, in the case of *Pride* v. *Fooks* (*m*), where a testator bequeathed his residuary estate in trust for "such child or children as his niece and two nephews should leave at their respective deceases," equally per stirpes; with cross executory limitations in case the niece or either of the nephews should die without leaving any child, to the children of the other or others; and in case all of them, his said nephews and nicce, should die without leaving any "issue" lawfully begotten, the testator directed the whole of the residue to be divided between the three "children" of A. equally, or in case of either of them being then dead, to the survivors or survivor and the "issue" of such as might be dead, such "issue" taking per stirpes and not per capita. The nephews and niece survived the testator, and died without leaving any children living at their respective deceases, but the niece left several grandchildren and one great-grandchild, in whose behalf it was contended,

(*l*) In the case of *Loveday* v. *Hopkins*, Amb. 273, Sir *T. Clarke*, M. R., held that grandchildren were not entitled under a bequest to "heirs," because the term appeared by the context of the will to be used in the sense of children. Sir *Edward Sugden* has shewn, (Pow., 6th ed., vol. ii. 273, 7th Ed., vol. ii. 253,) that a power to appoint among children cannot be exercised in favour of grandchildren. He does not advert to any distinction in the case of there being no children. According to the doctrine which the present writer has endeavoured to refute, such a power would *in that event* extend to grandchildren.

[(*m*) 3 De G. & Jo. 252.

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[that, there being in event no children, the bequest to "children" must be extended to remoter issue: but the Lords Justices held that this could not be done, and that consequently the gift over, not corresponding with the previous bequest (*n*), the residue was undisposed of.

It is true that by using both the words "children" and "issue" the testator gave ground for inferring that the difference in the meaning of the two expressions was present to his mind: but it is clear from the observations of the learned Judges, that they thought the construction of the word children could never depend on the events which might happen after the date of the will.

Whether "grandchildren" includes great grandchildren.

The word "grandchildren" must, on the same principle, be confined to the single line or generation of issue, which it naturally imports. Lord *Northington*, indeed,] in *Hussey* v. *Berkeley* (*o*), expressed an opinion, that the word *grandchildren* would, without further explanation, comprehend great-grandchildren; the term being, he thought, in common parlance used rather in opposition to children, than as confined to the next generation; but, in the case before his Lordship, the testator had explained this to be his construction, by applying in another part of his will the term "grandchild" to a great-grandchild. And the contrary of Lord *Northington's* doctrine was determined by Sir *W. Grant*, in the case of the *Earl of Orford* v. *Churchill* (*p*), in which, however, it is remarkable, that neither his Lordship's dictum or decision was noticed.

"Children" when synonymous with *issue*.

It should be observed, however, that, in a considerable class of cases (*q*), the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with *issue* or *descendants*; in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context. But even if the fact were otherwise, those cases would afford no authority for extending the word "children" to grandchildren in the cases under considera-

[(*n*) As to this, see post, ch. xl. s. 2.
(*o*) 2 Ed. 194; *S. C.* nom. *Hussey* v. *Dillon*, Amb. 603.
(*p*) 3 V. & B. 59.
(*q*) Vide post, chap. xxxviii: [and *In re Crawhall's Trusts*, 2 Jur. N. S. 892, 895.

tion. *There* it was synonymous with issue in *all* events; *here* it is to be so construed only in *certain* events, leaving the signification of the word, therefore, dependent on circumstances arising subsequently to the making of the will, or, it may be, to the death of the testator. The cases, therefore, are not analogous.

"Nephews" "first cousins," &c., do not include great nephews or second cousins.

[Gifts to other classes of relations, as nephews, nieces, cousins, are subject to the same rules, and therefore illustrate the point in question. Thus, a gift to "nephews and nieces" (*r*), or to "first cousins or cousins german" (*s*), will not include great-nephews and great-nieces, or descendants of first cousins; neither can a first cousin once removed take under the description of second cousin (*t*), nor a grand-nephew's child under the description of grand-nephew (*u*).

Unless the will proves an intention so to use them.

But the intention of a testator to use any of these appellations in a less accurate sense will of course prevail, if clearly indicated by explanatory circumstances or by an explanatory context, but not otherwise. Thus, in *Slade* v. *Fooks* (*x*), where a testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead, and it appeared that there were no second cousins, but three first cousins once removed of that name, of whom two were living, and the other dead, leaving children. Sir *L. Shadwell*, V. C., decreed the residue to the two survivors and the children of the other. And in *James* v. *Smith* (*y*), where a testator, after describing a great-niece as his "niece A., daughter of his nephew B.," bequeathed his residue to his nephews and nieces, the same learned Judge held that the testator had unequivocally shewn that he meant the child of a nephew or niece to take, as well as a nephew or a niece. But it was held in *Crook* v. *Whitley* (*z*), that the use of "nieces" (in the plural) would not let in grandnieces and great-grandnieces, merely because at the date of the will there was but one niece and no more could possibly be born.

Construction of a gift to "cousins";

Conversely, the full force of any term of relationship may be so limited as to exclude some of those who would naturally be

[(*r*) *Shelley* v. *Bryer*, Jac. 207; *Falkner* v. *Butler*, Amb. 514.

(*s*) *Sanderson* v. *Bayley*, 4 My. & C. 56.

(*t*) *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 541.

(*u*) *Waring* v. *Lee*, 8 Beav. 247. See *James* v. *Smith*, 14 Sim. 214.

(*x*) 9 Sim. 386. And see *Stringer* v. *Gardiner*, 4 De G. & Jo. 468.

(*y*) 14 Sim. 214; Cf. *Shelley* v. *Bryer*, Jac. 207; *Smith* v. *Lidiard*, 3 Kay & J. 252, stated infra, *Thompson* v. *Robinson*, 27 Beav. 486.

(*z*) 7 D. M. & G. 490.

——to "first and second cousins."

[included in the class where the testator has himself put that interpretation upon the word (*a*). And it is to be observed that a bequest to "first and second cousins" being a loose expression, will comprehend all who are within the same degree (the sixth) as second cousins; and therefore great-nieces and first cousins once (*b*), or twice (*c*) removed, will take shares.

"Children" includes children of different marriages.

Under a gift to the children of a person, his children by different marriages will generally be entitled; and it is not necessary to shew that the testator had in view a future marriage, but only that the terms of the will are not so wholly inconsistent with such a notion as necessarily to limit the generality of the word children (*d*), in which latter case effect will of course be given to the testator's language (*e*). In a case of *Stavers* v. *Barnard* (*f*), where a testator bequeathed his personal estate to trustees in trust, to apply the interest thereof "in the maintenance of his children until the youngest attained twenty-one, and then to divide the same equally between A., B., C., and D., children by his former wife, and E. and F., children by his then present wife, *and such other child or children* as might be living, or as his said wife might be enceinte with at his decease." Sir *J. Knight Bruce*, V. C., held, that two children by the first marriage, not named in the will, but living at the date of the will and of the testator's death, were not entitled under the latter words of the bequest.]

A gift to a class of relations includes those of the half-blood,

——but not relations by affinity.

Again, a gift to brothers and sisters extends to half brothers and sisters (*g*), [and a gift to nephews and nieces to the children of half brothers and sisters (*h*): and so with regard to every other degree of relationship. But relations by affinity are excluded from such gifts;] consequently, a grandson's widow has been held not to be entitled under a devise to grandchildren (*i*).

[And it seems that stronger expressions are needed to include them in a class of relations, than is sufficient to extend a term

[(*a*) *Caldecott* v. *Harrison*, 9 Sim. 457, where the V. C. expressed an opinion that "cousins" unexplained included cousins of every degree: but in *Stoddart* v. *Nelson*, 6 D. M. & G. 68, Lord *Cranworth* held that first cousins only were meant.

(*b*) *Mayott* v. *Mayott*, 2 B. C. C. 125.

(*c*) *Silcox* v. *Bell*, 1 S. & St. 301; *Charge* v. *Goodyer*, 3 Russ. 140.

(*d*) *Barrington* v. *Tristram*, 6 Ves. 345; *Critchett* v. *Taynton*, 1 R. & My. 541; *Peppin* v. *Bickford*, 3 Ves. 570; *Ex parte Ilchester*, 7 Ves. 368; *Re Pickup's Will*, 9 W. R. 251.

(*e*) *Stopford* v. *Chaworth*, 8 Beav. 331.

(*f*) 2 Y. & C. C. C. 539.

(*g*) The point was adverted to, arguendo, in *Leake* v. *Robinson*, 2 Mer. 363, which did not require its determination.

(*h*) *Grieves* v. *Rawley*, 10 Hare, 63.]

(*i*) *Hussey* v. *Berkeley*, 2 Ed. 194. [Secus, if a married testator expressly include relations "on both sides," *Frogley* v. *Phillips*, 6 Jur. N. S. 641.

[of relationship proper to one degree to one more remote. On this ground, Sir *W. P. Wood*, V. C., distinguished a case before him (*k*) from *James* v. *Smith* (*l*), to which in other respects it was very similar. The case was one in which a testatrix having given legacies to several persons by name, describing each as her niece, bequeathed the residue of her personal estate in trust for her respective "nephews and nieces" in equal shares. Two of the legatees in the will, called nieces, were nieces not of the testatrix, but of her late husband; and it was held that the circumstance that the testatrix had called these two her nieces did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest so as to make it include the two legatees, nieces of her late husband. The case of *Owen* v. *Bryant* (*m*) was cited as an authority for the contrary conclusion, but the V. C. distinguished that case because there the word "said" occurred; "which," added the learned Judge, "referred back to the children before designated." But for that word the case, as it regarded the two legatees, appears to be on all fours with the one before his Honor.

It was also decided in the same case (indeed it followed à fortiori) that the residuary bequest did not include the other nephews and nieces of the husband who were not called nephews and nieces in the will.]

As to class of children entitled.

II. But the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or in other words, as to the period within which the objects must be born and existent; supposing the testator himself not to have expressly fixed the period of ascertaining the objects, which, of course, takes the case out of the general rule; for example [where the testator after a gift to "children," proceeded to name them, this, amounting to a designatio personarum, limited the bequest to those who were named (*n*). And so, where the bequest was to the testator's brothers and sister and his wife's brothers and sister, the

[(*k*) *Smith* v. *Lidiard*, 3 Kay & J. 252.

(*l*) 14 Sim. 214, ante, p. 139.

(*m*) 2 D. M. & G. 697, stated post, ch. xxxi.; and see the observation there on the effect given to the word "said."

(*n*) *Bain* v. *Lescher*, 11 Sim. 397. And see *In re Hull's estate*, 21 Beav. 314. But a gift to several children, nominatim in one part of the will, does not confine the generality of a bequest to "children," occurring in another part, *Moffat* v. *Burnie*, 18 Beav. 211. See also *Fullford* v. *Fullford*, 16 Beav. 565; *Fitzroy* v. *Duke of Richmond*, 27 ib. 186. Cf. *White* v. *Wakley*, 26 ib. 23.

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[testator and his wife each having one sister at the date of the will (*o*), and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three other children at the date of the will, it was held that the terms "children," "brothers," &c., were to be understood as confined to those living at the date of the will (*p*).]

A gift to children "now living," applies to such as are in existence at the date of the will (*q*), and those only; and a gift to children living at the decease of A. will extend to children existing at the prescribed period, whether the event happens in the testator's lifetime (supposing that they survive him), or after his decease (*r*). [But these last are still gifts to classes, and if any of the children "now living," or "living at the death of A." (supposing A. to die before the testator), should die in the testator's lifetime, the share which such child would have taken will not lapse, but the surviving children will take the whole. Classes fluctuate both by diminution and by increase: here it would be by diminution only (*s*).] The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

Immediate gifts confined to children living at death of testator.

1st. That an *immediate* gift to children (*i. e.* a gift to take effect in possession immediately on the testator's decease), whether it be to the children of a living (*t*) or a deceased person (*u*), and whether to children simply or to all the

[(*o*) *Havergal* v. *Harrison*, 7 Beav. 49. And see *Hall* v. *Robertson*, 4 D. M. & G. 781.

(*p*) *Leach* v. *Leach*, 2 Y. & C. C. C. 495. See also *Salkeld* v. *Vernon*, 1 Ed. 64. Cf. *Goodfellow* v. *Goodfellow*, 18 Beav. 356; *Stanhope's Trust*, 27 ib. 201.]

(*q*) *James* v. *Richardson*, 1 Vent. 334, 2 Vent. 311; *Burchet* v. *Durdant*, T. Raym. 330. See also *Att.-Gen.* v. *Bury*, 1 Eq. Ca. Ab. 201; *Crosley* v. *Clare*, 3 Sw. 320 n.; *Abney* v. *Miller*, 2 Atk. 593; *Blundell* v. *Dunn*, 1 Mad. 433; [*Cole* v. *Scott*, 1 Mac. & G. 518.]

(*r*) *Allan* v. *Callow*, 3 Ves. 289; [*Turner* v. *Hudson*, 10 Beav. 222.] Where a testator gave a legacy to A. his daughter for life, and after her death to his grandson B.; and if he should die in the lifetime of A., then to the children of C. who should be then living; it was held, that the bequest was confined to the children of C. living at the death of A., and that the point was so clear, that the costs of the suit occasioned by the refusal of the executor to pay the legacy without the opinion of the Court, must fall on himself, *Harvey* v. *Harvey*, 3 Jur. 949. And here it may not be amiss to observe, that a child who is made a legatee for life is not thereby incapacitated from claiming under a bequest of the ulterior interest to the testator's children living at his (the testator's) decease, *Jennings* v. *Newman*, 10 Sim. 219. [See also *Woods* v. *Townley*, 11 Hare, 314; *Carver* v. *Burgess*, 18 Beav. 541, 7 D. M. & G. 97.

Gift to children of A. living at the death of B.

(*s*) *Lee* v. *Pain*, 4 Hare, 250; *Leigh* v. *Leigh*, 17 Beav. 605; *Cruse* v. *Nowell*, 4 Drew. 215. See also *Viner* v. *Francis*, 2 Cox, 190.]

(*t*) 2 Vern. 105; 1 Eq. Ca. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545, 1 Ves. 209; 2 Ves. 83; Amb. 273; ib. 348; 1 B. C. C. 532, n.; ib. 529; 1 Cox, 68; 2 Cox, 190; 2 B. C. C. 658; 3 B. C. C. 352; ib. 391; 14 Ves. 576.

(*u*) *Viner* v. *Francis*, 2 Cox, 190.

children (*x*), and whether there be a gift over in case of the decease of any of the children under age or not (*y*), comprehends *the children living at the testator's death (if any)*, and those only; notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects (*z*).

It is scarcely necessary to observe, that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, &c., though cases to the contrary are to be found, especially at an early period. As in *Cook* v. *Cook* (*a*), where, under an immediate devise (*i. e.* a devise in possession) to the *issue* of J. S. (which was held to apply to the children and grandchildren), a son born after the death of the testator was allowed to participate.

In future gifts, children born before period of distribution let in.

2ndly. That where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, *but all who may subsequently come into existence before the period of distribution* (*b*). Thus in the case of a devise or bequest to A. for life, and after his decease to his children, or (which is a better illustration of the limits of the rule, since, in the case suggested, the parent being the legatee for life, all the children who can ever be born necessarily come in esse during the preceding interest) to A. for life, and after his decease to the children of B., the children (if any) of B. living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled, but not those who may come into existence after the death of A. (*c*). The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title (*d*).

(*x*) *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 B. C. C. 542, n., 1 Cox, 68; *Scott* v. *Harwood*, 5 Mad. 332.

(*y*) *Davidson* v. *Dallas*, 14 Ves. 576; [*Scott* v. *Harwood*, 5 Mad. 332; *Berkeley* v. *Swinburne*, 16 Sim. 279.] But as the gift over necessarily suspends the distribution as to all until the eldest attains twenty-one, ought not the children born in the interval to have been let in, seeing that these rules always aim at including as many objects as possible?

(*z*) See *Northey* v. *Strange*, 1 P. W. 341; *S. C.* nom. *Northey* v. *Burbage*, Gilb. Rep. Eq. 136, Pre. Ch. 470.

(*a*) 2 Vern. 545.

(*b*) 9 Mod. 104; 1 Atk. 509; 2 Atk. 329; Amb. 334; 1 Ves. 111; 1 Cox, 327; Cowp. 309; 1 B. C. C. 537, 542; [3 B. C. C. 352, 434;] 5 Ves. 136; 8 Ves. 375; 15 Ves. 122; 10 East, 503; 1 Mer. 654; 2 Mer. 363; 1 Ba. & Be. 449; 3 Dow, 61; [5 Beav. 45.]

(*c*) *Ayton* v. *Ayton*, 1 Cox, 327.

(*d*) *Walker* v. *Shore*, 15 Ves. 122. [The same rules are applicable to an appointment under a power; and though the power authorises an appointment to children living at the donee's death only,

Children take vested shares, liable to be divested pro tanto.

In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares (*i. e.* to their being divested pro tanto), as the number of objects is augmented by future births, during the life of the tenant for life; and, consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective representatives (*e*); though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential (*f*).

Construction applicable to *executory* gifts.

The preceding rule of construction applies not only where the future devise (*i. e.* future in enjoyment) consists of a limitation of real estate by way of remainder, or a corresponding gift of personalty (of which there cannot be a remainder, properly so called), but also to executory gifts made to take effect in defeazance of a prior gift. Therefore, if a legacy be given to B., son of A., and, if he shall die under the age of twenty-one, to the other children of A., it is clear that on the happening of the contingency all the children who shall *then* have been born (including, of course, the children, if any, who may have been living at the testator's death), are entitled (*g*). The principle, indeed, seems to extend to every future limitation.

But it is to be observed that the subjecting of lands devised to trusts for partial purposes, as the raising of money, payment of annuities, or the like, by which the vesting in possession is not postponed, does not let in children born during the continuance of those trusts.

Mere charging of lands does not let in future children.

Thus, in the case of *Singleton* v. *Gilbert* (*h*), where A. devised her real estate to trustees for 500 years, to raise 200*l.*, and then to other trustees for 1000 years, out of the rents to pay the

Same construction in case of an appointment.

[the Court will not on that account, and to make the appointment fit on to the power, restrain the generality of the expressions used, *Harvey* v. *Stracey*, 1 Drew. 73, see p. 122 et seq. That the construction of appointments by will under powers are generally to be construed in the same way as simple bequests, see *Oke* v. *Heath*, 1 Ves. 135; *Easum* v. *Appleford*, 5 My. & Cr. 56.]

(*e*) *Att.-Gen.* v. *Crispin*, 1 B. C. C. 386; *Devisme* v. *Mello*, ib. 537; *Middleton* v. *Messenger*, 5 Ves. 136; [*Cooke* v. *Bowen*, 4 Y. & C. 244; *Watson* v. *Watson*, 11 Sim. 73; *Locker* v. *Bradley*, 5 Beav. 593; *Salmon* v. *Green*, 13 Jur. 272; *Evans* v. *Jones*, 2 Coll. 516, 524; *Pattison* v. *Pattison*, 19 Beav. 638.]

(*f*) See judgment in *Matthews* v. *Paul*, 3 Sw. 339; *Houghton* v. *Whitgreave*, 1 J. & W. 150. See also *Crooke* v. *Brookeing*, 2 Vern. 106; [*Baldwin* v. *Karver*, Cowp. 309.]

(*g*) *Haughton* v. *Harrison*, 2 Atk. 329; *Ellison* v. *Airey*, 1 Ves. 111; *Stanley* v. *Wise*, 1 Cox, 432; [*Baldwin* v. *Rogers*, 3 D. M. & G. 649.]

(*h*) 1 Cox, 68, 1 B. C. C. 542, n.

interest thereof, and certain life annuities; and, subject to the said terms, she gave the estate to all and every the child and children of her brother T. in tail, as tenants in common. One question was, whether a child born after the death of A., but in the lifetime of the annuitants, could take jointly with two others born before A.'s death. It was insisted, on behalf of such child, that the devise was to be considered as vesting at the time when the trusts of the term were satisfied, and, consequently, that it let in all such children of T. as were then alive. Lord *Thurlow* admitted that where the legacy is given with any suspension of the time, so as to make the gift take place either by a fair or even by a strained construction (for so, he said, some of the cases go), at a future period, then such children shall take as are living at that period. But this was an estate given directly, although given charged with the terms, and therefore he could not consider the after-born children as entitled.

Same construction as to charge on personal estate.

[The same rule is applicable to personal estate; so that where a testator directs that a particular sum shall be set apart for a temporary purpose (as a life-annuity), and that it shall afterwards fall into the residue, and the residue is bequeathed to the children of A., those children who are in existence at the time of the testator's death are alone entitled to the particular sum (subject to the temporary purpose), as well as the residue (*i*).

No doubt a different result would be occasioned by terms shewing the testator's intention to treat the funds separately; a conclusion which is countenanced by the case of *King* v. *Cullen* (*k*), where a testator directed a fund to be set apart to answer an annuity for his wife, for her life; at her death to sink into the residue; and bequeathed the residue to his children as tenants in common; provided that in case any of them should die either in his lifetime or after his decease, before their shares should become vested interests leaving issue, such issue should have their parents' share. One of the children who survived the testator died in the widow's lifetime, leaving a daughter; and Sir *J. K. Bruce*, V. C., held, that although the

[(*i*) *Hill* v. *Chapman*, 3 B. C. C. 391, 1 Ves. jun. 405; *Hagger* v. *Payne*, 23 Beav. 474; see *Cort* v. *Winder*, 1 Coll. 320. See also *Lill* v. *Lill*, 23 Beav. 446, where, after a specific devise for life, the testator gave all the residue of his real and personal estate, including that previously devised for life, to "the *surviving* children" of A.: upon the question, who were entitled to the residue, it was held that the testator meant children who survived himself; and it is presumed that the word "surviving" could not be construed differently with regard to the specific devises.

(*k*) 2 De G. & S. 252. See also *Gardner* v. *James*, 6 Beav. 170, where distribution was by the will expressly postponed.

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[deceased child took absolutely such part of the residue as was not set apart for the annuity, yet her share in the fund that was so set apart went to her daughter. The ground of this opinion must have been that as no child could die *after the testator's decease* without attaining a vested (*m*) interest in the general residue, the clause giving over the shares of the parents in those terms would have been inoperative, unless it had been held to apply to a death during the wife's lifetime, before the ultimate distribution of the annuity fund.

Gifts to other classes of relations governed by same rules.

The rule which makes a gift to children comprehend all who come into existence before the time of distribution is not peculiar to that class of relations; for, that which is held a wise rule with regard to one grade of relationship must also be so held with regard to another (*n*).] Thus a gift to A. for life and after his death to his brothers, will include the brothers born during the life of A. (*o*); and the same has been held with regard to nephews and nieces (*p*), [and cousins (*q*); but with regard to] other classes of objects the gift would clearly apply and be confined to those who were living at the death of the testator (*r*).

Rule where distribution is postponed to a given age.

3rdly. It has been also established, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i. e.*, the period when the fund becomes distributable in respect of *any* one object, or member of the class (*s*). And the result is the same where the expression is "*all* the children (*t*)."

Does not clash

This rule of construction must be taken in connexion with,

[(*m*) The word "vested" was held to mean *vested in possession*, on the same ground.

(*n*) See per Lord Justice *Turner*, 3 D. M. & G. 656.]

(*o*) *Devisme* v. *Mello*, 1 B. C. C. 537; *Doe* d. *Stewart* v. *Sheffield*, 13 East, 526. See also *Leake* v. *Robinson*, 2 Mer. 363.

(*p*) *Balm* v. *Balm*, 3 Sim. 492. [See also *Shuttleworth* v. *Greaves*, 4 My. & C. 35; *Cort* v. *Winder*, 1 Coll. 320.

(*q*) *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

(*r*) As to gifts to next of kin depending as they do on peculiar considerations, see ante, p. 116.] Many cases might be suggested in which a gift to objects in esse would open and let in future objects; as to A. and the heirs of the body of B., a person living, or to A. and any wife whom he shall marry. See *Mutton's case*, Dy. 274 b.

(*s*) 1 Ves. 111; 1 B. C. C. 530; ib. 582; 3 B. C. C. 401; ib. 416; 2 Ves. jun. 690; 3 Ves. 730; 6 Ves. 345; 8 Ves. 380; 10 Ves. 152; 11 Ves. 238; 3 Sim. 417, 492; 2 Beav. 221; [1 Beav. 352; 12 ib. 104; 7 Hare, 473, 477.] But see 5 Sim. 174; [12 Sim. 276; 2 Ves. 83.]

(*t*) *Whitbread* v. *Lord St. John*, 10 Ves. 152, [10 Hare, 441.]

with the preceding rules.

and not as in any measure intrenching upon the two preceding rules. Thus, where a legacy is given to the children, or to all the children of A., *to be payable at the age of twenty-one*, or to Z. for life, and after his decease to the children of A., *to be payable at twenty-one*, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z., have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained twenty-one, then all the children of A. who may subsequently come into existence before one shall have attained that age will be also included (*u*): [in short, whichever event happens last marks the period of distribution and for ascertaining the class.

In the case of *Berkeley* v. *Swinburne* (*x*), a testator made a bequest in trust for his mother for her life, and after her death for the children of his sisters A. and B., to be vested interests in them on their attaining the age of twenty-one years, with a gift over in case of their dying under that age. The Lords Commissioners *Pepys* and *Bosanquet* having decided that the direction as to vesting was to be understood only as meaning that the interests were to be defeasible by death under age, held, that the period of division was not suspended by that direction, but took place at the death of the tenant for life (*y*); and, consequently, that no child born after that period, though before the eldest attained his majority, was entitled to a share.]

And the construction is not varied by the circumstance of the trustees being empowered to apply all or any part of the shares of the children for their advancement before the distribution (the word "shares" being considered as used in the sense of "*presumptive* shares" (*z*)); nor is any such variation produced by a clause of accruer, entitling the survivors or a single survivor, in the event of the death of any or either of the children, as the expression "said children," so occurring, means the children designated by the prior gift, whoever they may be, and is, therefore, applicable no less to an after-born

(*u*) *Clarke* v. *Clarke*, 8 Sim. 59. See also *Matthews* v. *Paul*, 3 Sw. 328; [*Robley v. Ridings*, 11 Jur. 813; *Gillman* v. *Daunt*, 3 Kay & J. 48.

(*x*) 16 Sim. 279.

(*y*) This was according to *Davidson* v. *Dallas*, 14 Ves. 576, the only difference being that occasioned by the gift of a previous life estate in *Berkeley* v. *Swinburne*. *Kevern* v. *Williams*, 5 Sim. 171, was cited by the Court as an authority; but that case seems referable to other grounds, see post, p. 150.]

(*z*) *Titcomb* v. *Butler*, 3 Sim. 417.

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child, whom the ordinary rule of construction admits to be a participator, than to any other (*a*).

Judicial opinions upon rule which excludes children born after eldest attains twenty-one.

The rule in question, as it respects the exclusion of children born after the vesting in possession of *any* of the shares, has been viewed with much disapprobation; and Lord *Thurlow*, in *Andrews* v. *Partington*, said he had often wondered how it came to be so decided; there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children. In marriage settlements, however, one at least of the parents generally takes a life interest, so that the shares do not vest in possession until the number of objects is fixed. The rule has gone, Lord *Eldon* remarked (*b*), upon an anxiety to provide for as many children as possible with convenience. Undoubtedly it would be very inconvenient, especially in the case of legacies payable *instanter*, if the shares of the children were, by reason of the possible accession to the number of objects by future births, unascertainable during the whole life of their parent; and though this inconvenience is actually incurred, as we shall presently see, in some cases (*c*), in which the gift runs through the whole line of objects, born and unborn, even after vesting in possession in the existing children, yet it will be found in such cases either that the construction was adopted ex necessitate rei (there being no alternative but either to admit *all* the children, or hold the gift to fail in toto for want of objects), or, that the admission of all the children was compelled by some expressions of the testator.

The principle of the rule under consideration seems to apply to all cases in which the shares of the children are made to vest *in possession* on a given event, as on marriage; in which case the marriage of the child who happens to marry first, is the period for ascertaining the entire class.

Construction where period of vesting is period of distribution.

[When the legacy is not to vest until the period of distribution, all children, born before the eldest acquires a vested interest,—which he does upon the happening of the contingency as to him individually,—may by possibility be participators in the fund (*d*). Younger children as to whom the contingency has not happened are, of course, not entitled to anything while

(*a*) *Balm* v. *Balm*, 3 Sim. 492; [cf. *Matchwick v. Cock*, 3 Ves. 611; *Freemantle* v. *Taylor*, 15 ib. 363.]

(*b*) In *Barrington* v. *Tristram*, 6 Ves. 348.

(*c*) See post, p. 153, 154.

[(*d*) *Clarke* v. *Clarke*, 8 Sim. 59; *Gillman* v. *Daunt*, 3 Kay & J. 48.

[the contingency is in suspense: it is uncertain, therefore, by how many the class ultimately entitled may fall short of the number of children living when the contingency happens as to the eldest; but as the class cannot, in consequence of the application of the rule, be enlarged, the minimum of each share is immediately fixed.

Distinction between gifts in remainder and immediate gifts.

But a distinction seems to have been taken, in applying the rule for ascertaining classes of children, between the case of a gift to one for life, with a remainder to children, or of a prior gift with an executory bequest over to children, on the one hand, and the case of postponed payment, or of an immediate contingent bequest (*i. e.*, not preceded by any other gift), on the other hand; the rule being considered as more flexible in the latter cases than in the former. Accordingly, in *Leake* v. *Robinson* (*e*), Sir *W. Grant*, M. R., refused to hold children or brothers living at the testator's death to be solely entitled to the exclusion of those born during the continuance of the prior life-interest, although the consequence was that the whole gift was void; for he conceived it to have been the actual intention of the testator, that all who were living at the determination of the prior interest should be comprehended in the description (*f*).

But the rule fixing the attainment of a given age by the eldest of a class as the period for finally ascertaining the class, is an artificial one introduced by necessity. It is not pretended that it answers the testator's intention; the argument is this:—where a testator has given two inconsistent directions, and has said that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division as soon as each attains twenty-one, in that case you must do one of two things—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The Court has, in such cases, determined in favour of the eldest child taking at the age of twenty-one, as the will

[(*e*) 2 Mer. 363. See also *Comport* v. *Austen*, 12 Sim. 218; *Arnold* v. *Congreve*, 1 R. & My. 209. In *Leake* v. *Robinson*, the M. R. fixed the death of the tenant for life as the period for ascertaining the class; but why (apart from the objection of remoteness) should not all who were born before the eldest attained the age of twenty-five (if that event happened after the death of the tenant for life) have been let in, as in *Clarke* v. *Clarke*, 8 Sim. 59? Under the circumstances, however, the point did not arise, since either principle would have led to the same result.

(*f*) See also *Jee* v. *Audley*, 1 Cox, 324, stated ante, ch. ix. s. 2.

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[directs, and sacrificed the intention that all the children shall take (*g*). The rule is framed to include as many as may be with convenience. But the question is, whether the comprehensiveness given by the rule to a description of legatees is to be enforced at the expense of rendering the whole disposition invalid? The case of *Kevern* v. *Williams* (*h*) is an authority against that conclusion. There a testator bequeathed the residue of his personal estate in trust for A. for life, with remainder to the grandchildren of B., "to be by them received in equal proportions when they should severally attain the age of twenty-five years." If the rules above laid down were applicable to this case, all grandchildren who were born before the eldest attained the age of twenty-five (that event having happened after the death of A.) were entitled to the residue. But then the bequest would have been void for remoteness; and Sir *L. Shadwell*, V. C., declared (though not expressly for the reasons here indicated) that the grandchildren living at A.'s death were alone entitled.

Gift to A. for life, remainder to children of B., payable at twenty-five; class held ascertainable at death of A.

Again, in the case of *Elliot* v. *Elliot* (*i*), where there was a residuary bequest to the children of A., "as and when they should attain their respective ages of twenty-two years," it was argued that the gift being contingent was void for remoteness; but the same learned Judge saw no objection in principle to holding that by this description the testator meant those children who were then living, or might be living, at his death; and then there was no objection to the gift. Whatever may be thought of this case as an authority that, where the terms are thus general, the Court may, of two possible constructions of a will, choose that which renders it valid, that course is denied if the testator has, in express terms, denoted an intention to comprehend after-born children in the description (*k*).]

Gift to children of A. at twenty-two, held to include children living at testator's death only.

Another important exception obtains in the case of legacies which are to come out of the general personal estate, and are made payable at a given age (say twenty-one); in which case it seems that the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of postponing the distribution of the general personal estate until the majority of the eldest legatee, which would be the

Exception as to general legacies.

[(*g*) Per Sir *J. Wigram*, *Mainwaring* v. *Beevor*, 8 Hare, 49.
(*h*) 5 Sim. 171.
(*i*) 12 Sim. 276. See *Mainwaring* v. *Beevor*, 8 Hare, 48, post, 153.
(*k*) *Boughton* v. *James*, 1 Coll. 26.]

inevitable effect of keeping open the number of pecuniary legatees (*l*). But this argument of inconvenience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount (*m*).

Cases in which the rule has been departed from.

The rule in question, so far as regards the exclusion of children born after the vesting in possession of any one of the distributive shares, has been sometimes departed from upon grounds which can scarcely be considered as warranting that departure. Thus, where (*n*) a testator bequeathed 300*l.* to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage,* with interest, and failing the share of any, to the survivors, and failing the share of *all,* then to G. One of the questions was, whether the legacy belonged to a child of S., born at the making of the will, to the exclusion of those since born, or to be born? Lord *Hardwicke* thought it was meant for the benefit of *all the children S. should have;* for the testator, knowing she had but one then, had yet given it to *children,* had pointed out survivors, and given it over to another branch of the family, which he could not mean, till all failed.

Remark on *Maddison* v. *Andrew.*

It is clear that none of these circumstances would now be held to take the bequest out of the ordinary rule. Its being to children in the plural, with a provision for survivorship, was consistent with that construction; as was the word "all," which was satisfied by referring it to the children of any class who took shares.

Gift over in case parent die *without issue.*

Lord *Loughborough* seems to have thought that where a devise or bequest of the nature of those under consideration is followed by a gift over, in case the parent die without issue, all children, without reference to the period of vesting in possession, are entitled. Thus, where (*o*) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. & R., such of the children as should be sons *to be paid at their respective ages of twenty-one,* and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively; and the testator bequeathed the residue of his personal estate to be equally

(*l*) *Ringrose* v. *Bramham,* 2 Cox, 384; [*Peyton* v. *Hughes,* 7 Jur. 311; *Mann* v. *Thompson,* 1 Kay, 638.] And see *Storrs* v. *Benbow,* 2 My. & K. 46.

(*m*) *Gilmore* v. *Severn,* 1 B. C. C. 582.

(*n*) *Maddison* v. *Andrew,* 1 Ves. 58.

(*o*) *Mills* v. *Norris,* 5 Ves. 335.

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divided between *the child and children* of his said two daughters, *in like manner as the money to arise from his real estate;* and, in case any child of his said daughters should marry and die in the lifetime of their respective mothers, then he directed that the issue of such child should stand in the place of their parent; *and, in case his said daughters should die without issue,* or such issue should die without issue in the lifetime of his said daughters, then over. It appeared, in the consideration of another question, that Lord *Loughborough* had previously decided, that the latter disposition extended to all the children of testator's daughter, without reference to the age of twenty-one, by force of the clause limiting it over in case of the failure of issue of the daughters.

Remark on *Mills* v. *Norris.*

It is not easy to perceive any solid ground for allowing to these words such an effect upon the construction. They either mean a failure of issue generally, in which case the gift over is void, or, which seems to be the better construction, they refer to children (*p*), and, according to the opinion of Sir *W. Grant* in *Godfrey* v. *Davis* (*q*), and the established rules of construction, the words importing a failure of issue are referable to the objects included in the previous gift.

It is to be observed, that *Maddison* v. *Andrew,* and *Mills* v. *Norris,* were decided at a period when the rule against which they seem to militate was not so well settled, or, at all events, they shew that it was not so uniformly adhered to, as it now is. The uncertainty in which these cases tended to involve the doctrine has been completely removed by subsequent decisions (*r*).

Gift to grandchildren when youngest attains twenty-one.

In *Hughes* v. *Hughes* (*s*), a testator gave real and personal estate in trust for the maintenance of all the children of his three daughters A., B., and C., share and share alike, until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of them before the youngest should attain twenty-one, leaving children, then to such children, and when such youngest grandchild should have attained twenty-one, then he gave one full proportionable share to such of his said grandchildren as should be then living, and the children of such as should be then dead. A question arose on the claim of the

(*p*) See *Vandergucht* v. *Blake,* 2 Ves. jun. 534, and other cases treated of in ch. xl. s. 2.

(*q*) 6 Ves. 43.

(*r*) See cases referred to, ante, p. 146.

(*s*) 3 B. C. C. 352, 434. See *S. C.,* though not *S. P.,* 14 Ves. 256.

subsequently born grandchildren to be admitted to a participation with those living at the testator's death. Lord *Thurlow*, during the argument, said, when the gift is general, it is always confined to the death of the testator. Where there is a gift for life, or the distribution is postponed to a future time, then children born during the life or before that time are let in. But his Lordship on a subsequent day decided in favour of the after-born grandchildren, the gift being to *all the grandchildren*. But according to the decree as stated by Mr. *Eden* (afterwards Lord *Henley*), which corrects the seeming inaccuracy of the case, it was declared that the residue should be divisible among the grandchildren living at his death, and who had been since born and who should be born, until the youngest of such (*t*) grandchildren should attain the age of twenty-one. The expression "*all the children*," noticed by Lord *Thurlow*, has been held, we have seen, to be inadequate to enlarge the construction (*u*).

Rule which excludes children born after the eldest attains the age named not to be extended.

[It is doubtful, however, taking the judgment and the decree together, whether this case can be claimed as an authority in confirmation and extension of the ordinary rule (*x*). The rule is an artificial one, and only to be adopted when necessity requires; and Lord *Eldon*, in cases coming very near it, but distinguishable from it, held after-born children to be entitled (*y*): for, as was said by Lord *Rosslyn*, though it is an extremely convenient construction, it is convenient only to the parties who profit by it, not to the children who are excluded (*z*). And, therefore, the Courts have refused to extend it to cases which, if it had been thought to promote the testator's intention, might well have borne its application.

Gift to grandchildren when all have attained twenty-one.

Thus, in the case of *Mainwaring* v. *Beevor* (*a*), where a testator bequeathed the residue of his stock to trustees in trust thereout to maintain his "grandchildren, the children of his sons

(*t*) "Such," it is presumed, refers to the grandchildren living at the testator's death; [or to those, and also to others born after his death at any time before the youngest *for the time being* should attain twenty-one.]

(*u*) *Whitbread* v. *St. John*, 10 Ves. 152; see also *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 Cox, 68, 1 B. C. C. 542, n.; *Scott* v. *Harwood*, 5 Mad. 332.

[(*x*) Sir *J. Wigram*, V. C., thought the decree was open to the construction that every grandchild, whenever born, should take a distributive share; see *Mainwaring* v. *Beevor*, 8 Hare, 50, post. But in that case it would have been unnecessary to allow in the decree for grandchildren born between the birth and the coming of age of the youngest grandchild, for none could be born after the birth of the youngest of all.

(*y*) Per Sir *J. K. Bruce*, V. C., *Brandon* v. *Aston*, 2 Y. & C. C. C. 30; see also *Darker* v. *Darker*, 1 Cr. & Mee. 850.

(*z*) *Hoste* v. *Pratt*, 3 Ves. 732.

(*a*) 8 Hare, 44. See also *Bateman* v. *Foster*, 1 Coll. 118, 126.

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[A. and B., until they should severally attain twenty-one," and accumulate the surplus dividends, "and when and so soon as all and every his said grandchildren should have attained twenty-one," in trust to pay and divide the fund among them, Sir *James Wigram*, V. C., refused to decree an immediate division of the fund, merely because the youngest grandchild for the time being had attained the age of twenty-one. "If," said his Honor, "the objects of the testator's bounty could be confined to children of his sons living at his death,—which he was clear could not be done in that case,—it might be possible to get at the conclusion that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it were once admitted that a child born after the death of the testator might take, all the inconvenience (*b*) was let in, and the eldest child might have to wait an indefinite time, so long as children might continue to be born. The words of the will did not require an immediate distribution."]

Rule where no object exists at period of distribution.

4thly. We are now to consider the effect upon *immediate* and *future* gifts to children of a failure of objects at the period when such gift would have vested in possession. With regard to immediate gifts (*c*), it is well settled that if there be no object in esse at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift.

Where the gift is immediate.

Thus, in *Weld* v. *Bradbury* (*d*), a testator bequeathed certain monies to be put out at interest; one moiety to be paid to the younger children of M. living at his (the testator's) death, and the other moiety *to the children of S. and N.* Neither S. nor N. had any child living at the date of the will (*e*), or at the death of the testator. It was held to be an executory devise, (qu. bequest?) to such children as they or either of them should *at any time* have.

So, in *Shepherd* v. *Ingram* (*f*), a gift of the residue of the tes-

[(*b*) That is to say, the provision for the maintenance of the children ceased when they severally attained twenty-one; though, as it could not be said that the youngest had attained twenty-one, they could not claim a distributive share of the fund. Where the maintenance is to continue notwithstanding majority, the inconvenience does not arise, and the case is clear in favour of letting in all children, *Iredell* v. *Iredell*, 25 Beav. 485.]

(*c*) Where a person taking a preceding life interest dies in the testator's lifetime, the gift is of course treated as immediate; [*Browne* v. *Groombridge*, 4 Mad. 495.]

(*d*) 2 Vern. 705. See also *Haughton* v. *Harrison*, 2 Atk. 329.

(*e*) This was immaterial.

(*f*) Amb. 448. [See also *Armitage* v. *Williams*, 27 Beav. 346.]

tator's real and personal estate to such child or children as A. should have, taking upon them the name of S., was held to embrace all after-born children, there being no child at the testator's death.

Devises and bequests of this nature have given rise to two questions: 1st, As to the destination of the income between the period of the testator's death and the birth of a child: 2ndly, As to the appropriation of the income between the birth of the first and the birth of the last child.

Destination of income until birth of child.

With respect to the first, if the subject of gift be a sum of money, it is sufficient to say that the legacy is not payable until the birth of a child. It is also clear, that where a *residue* of personalty is given in this manner, the bequest will carry the intermediate produce as part of such residue (*g*). On the other hand, if it were a devise of real estate, the rents accruing between the death of the testator and the birth of a child would devolve upon the heir as real estate undisposed of, unless there was a general residuary devise (*h*); nor would the circumstance of there being an immediate devise of the real estate to trustees (*i*) vary the principle, the only difference being, that the heir would take the equitable, instead of the legal interest. The great difficulty, however, in these cases, is to determine whether the will indicates an intention to accumulate the immediate rents for the benefit of unborn objects. A question of this kind was much considered in the case of *Gibson* v. *Lord Montfort* (*k*), where A. gave his freehold and personal estate to trustees, in trust to pay certain annuities and legacies out of the produce of his personal, and, in case of deficiency, out of his real estate, and he gave the residue of his real and personal estate *to such child or children as his daughter B. should have,* whether male or female, equally to be divided between or among them. If B. should die without issue of her body, then over. By another clause, A. directed, that, upon the deaths of the persons to whom the annuities for lives were given, such annuities as should fall in from time to time should go back to the residue, *and go to those in remainder over.* By a codicil, he added, provided his daughter died without issue, but *if she should leave a child or children, such annuities as fell in should be divided among them,*

Immediate income was held to accumulate.

(*g*) *Harris* v. *Lloyd*, T. & R. 310. See *Bullock* v. *Stones*, 2 Ves. 521; [*Genery* v. *Fitzgerald*, Jac. 468, and other cases, ante, ch. xx.]

(*h*) *Harris* v. *Lloyd*, T. & R. 310, and *Hopkins* v. *Hopkins*, Cas. t. Talb. 44.

(*i*) *Bullock* v. *Stones*, 2 Ves. 521.

(*k*) 1 Ves. 485.

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*share and share alike.* B. having no child at the death of the testator, it became necessary to determine the destination of the immediate income. It was admitted, that, as to the personal estate, it passed by the residuary clause, but the accruing profits of the real estate subject to the charges were claimed by the heir as undisposed of. Lord *Hardwicke*, after a long argument on the terms of the will, and, after admitting that the heir was entitled to what was not given away by express words or necessary implication, held that the intermediate profits passed to the trustees for the benefit of the devisees; his Lordship thinking, upon the whole, there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause (*l*), and on the expression in the will and codicil respecting the annuities.

Children for the time being take the whole income.

The other question arising on these gifts to children is, as to the destination of the income accruing in the interval between the births of the eldest and the youngest child, with respect to which it is settled, (nor could it have been doubted upon principle,) that the children for the time being take the whole.

This question came before Lord *Northington*, in the case of *Shepherd* v. *Ingram* (*m*), on the construction of the will already stated, at the instance of three of the children of the testator's daughter, who had, subsequently to the judicial consideration of the will on the former occasion, come into existence, and now prayed (their parent being yet alive) to have an account of the profits, and that so much as became due from the birth of the first child, until the second was born, might be declared to belong to the first, and after the birth of the second, until a third was born, to belong to the first and second child, and so on to the others; and his Lordship was very clearly of opinion, that the children (*n*) took a defeasible interest in the residue, suggesting the case of a legal devise of a residue to the daughters, with a subsequent clause declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters in that case would be clearly entitled to the interest and profits till that contingency happened.

(*l*) On this point, vide *Ackers* v. *Phipps*, 9 Bligh, N. S., 430, and other cases commented on, ch. xx. s. 1, ad fin.

(*m*) Amb. 448, ante, 154.

(*n*) The word in the report is "daughters;" but this was evidently used in mistake for children.

[So,] in a subsequent case (*o*), it was held by Lord *Loughborough* that a child subsequently born was [not] entitled to a share in the by-gone income, in equal participation with children antecedently in existence; the special terms of the gift, which expressly comprised the "interest and produce," [being considered insufficient to control] the general rule, which was also followed by Lord *Langdale* in the case of *Scott* v. *Earl of Scarborough* (*p*), [and by Sir *J. Wigram*, V. C., in the case of *Mainwaring* v. *Beevor* (*q*).

Disposition of income before contingent legacy vests.

If the bequest be contingent, a child only presumptively or contingently entitled is, for the purpose of answering either of the above questions, to be considered as not in existence; so that in the first case the intermediate profits will go to the next of kin or heir at law, or to the residuary legatee or devisee (*r*), and in the second, to the children who have attained a vested interest, notwithstanding the existence of children who may be eventually entitled to a share (*s*).]

Effect where there is no object at or before time of distribution.

The next inquiry is as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A. for life, and, after his decease, to the children of B.; and B. has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B. were a legal remainder of freehold lands, it would fail by the determination of the preceding particular estate before the objects of the remainder came in esse (*t*). This rule, however, originating in feudal principles, is not applicable to equitable limitations of freehold estate, and accordingly it has been held, that in a similar devise, by way of trust, the ulterior limitation does not fail by the non-existence of objects during the life of A., the tenant for life, but takes effect in favour of such objects whenever they come into existence. Thus in the case of *Chapman* v. *Blisset* (*u*), where lands were devised to trustees upon certain trusts during the life of A., and at his decease as to one moiety in trust for the children of A., and as to the other moiety in trust for the children of B. B. had no child born until after

(*o*) *Mills* v. *Norris*, 5 Ves. 335.

(*p*) 1 Beav. 154.

[(*q*) 8 Hare, 44, see minute of decree, p. 51; *Ellis* v. *Maxwell*, 12 Beav. 104.

(*r*) *Haughton* v. *Harrison*, 3 Atk. 329; *Shaw* v. *Cunliffe*, 4 B. C. C. 144.

(*s*) This seems a necessary conclusion, though no express authority has been found. See *Stone* v. *Harrison*, 2 Coll. 715; but see *Brandon* v. *Aston*, 2 Y. & C. C. C. 30.]

(*t*) Ante, ch. xxvi.

(*u*) Cas. t. Talb. 145.

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the decease of A.; and it was held that such after-born child was entitled to the latter moiety; Lord *Talbot* observing, that, "in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen is thereby prevented." The same doctrine would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable. As some of the positions, however, advanced by a very learned Judge, in the case of *Godfrey* v. *Davis* (*x*), may seem to be inimical to such a conclusion, it will be necessary to examine that case.

Case of *Godfrey* v. *Davis* considered.

A. bequeathed annuities to several persons for life, and directed that the first annuity that dropped in *should devolve upon the eldest child,* male or female for life, of H.; and he directed, that as the annuities dropped in, they should go to increase the annuities of the survivors, and so to the last survivor, except as to two individuals named; and when the said annuitants were all dead, the whole property to devolve upon the heirs male of P. *At the death of the first annuitant, H. had no legitimate child* (the claim of a natural child was disallowed (*y*)); but he afterwards married, and had a child, who claimed the annuity. Sir *R. P. Arden,* M. R., said,—"It is clearly established by *Devisme* v. *Mello* (*z*), and many other cases, that where a testator gives any legacy or benefit, not as persona designata, but under a qualification and description at any particular time, the person answering the description at that time is the person to claim; and, if there are any persons answering the description, they are not to wait to see whether any other persons shall come in esse, but it is to be divided among those capable of taking, when by the tenor of the will he intended the property to vest in possession (*a*). That case was much considered by Lord *Thurlow,* and seems to have settled the law upon the subject. The first question is, whether it is clear the testator meant any given set of persons should take at any given time: if so, it is clear that all persons answering that description, whether born before *or afterwards* (*b*), shall take; but, if there are no such

(*x*) 6 Ves. 43.
(*y*) See next chapter.
(*z*) 1 B. C. C. 537.
(*a*) This is indisputable, see ante, p. 143.
(*b*) The words "or afterwards" are

persons, it shall not suspend the right of others, but they shall take as if no such persons were substituted. Before that case, this point was not quite so clear (*c*). Where the gift is to all the children of A. at twenty-one, if there is no estate for life, it will vest in all the children coming into existence until one attains the age of twenty-one (*d*). Then that one has a right to claim a share, admitting into participation all the children then existing. So if it is to a person for life, and, after the death of that person, then to the children of A., the intention is marked, that until the death of the person entitled for life no interest vests [qu. in possession ?]. When that person dies, the question arises whether there are then any other persons answering that description; if so they take, without waiting to see whether any others will come in esse answering the description. *If it is given over in the event that there are no children, and there are no children at that period, the person to whom it is given over takes.* It is clear this testator meant these annuities to commence at his death, and that each annuitant should receive a proportionable share of his fortune, with benefit of survivorship and right of accruer, subject upon the death of the first annuitant to the substitution of the eldest child of H. Upon the death, therefore, of the first annuitant, unless there was some person who had a right of substitution in the room of that person, and there was no such person, it was to go among the survivors. *The person substituted, namely, the first child of H., cannot now claim.* That construction is much fortified by the manner in which it is given over, for it is perfectly clear that he meant the persons to whom it was given over under the description of the heirs of P. to take upon the death of the persons to whom it was first given over. If the first construction contended for is to prevail, those persons, supposing all the other annuitants claiming by survivorship were dead, must wait not only the death of the survivor, but also the death of H., for during his life there would be a possibility that a child might be born who upon that construction might say he was the survivor."

It is evident, therefore, that the judgment of the M. R. was partly founded upon the particular circumstances of the case; and yet no one can read that judgment without seeing that in

not consistent with the preceding position or with the general rule.

(*c*) *Singleton* v. *Singleton*, *Ayton* v. *Ayton*, 1 B. C. C. 542, n.

(*d*) See ante, p. 146.

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his opinion the rule was universal, that a bequest to children as a class, to fall into possession on the determination of an anterior interest, failed, *if there was no object at that period:* and he seems to have considered this as a necessary consequence of holding that such objects (if any) would have taken to the exclusion of subsequently born children. That the one proposition is not invariably a corollary of the other, is established, we have seen, by the cases respecting *immediate* gifts to children, which although they extend only to such children (if any) as are in existence at the death of the testator, yet, in case of there being at that period no child, will embrace the *whole* range of unborn children (*e*). Upon what principle a different construction could be supported, in the case of an executory bequest preceded by a bequest for life, it is difficult to discover, unless it were for the sake of assimilating the construction to that of a legal remainder, but which is decisively negatived by the construction that has been applied to equitable limitations, as to which we have seen the rule is different; and the inevitable conclusion, it is conceived, is that, by analogy to the latter class of devises, *a bequest to A. for life, and after his death to the children of B., is not defeated by the non-existence of an object at the death of A., but will take effect in favour of* ALL *the subsequently born children as they arise;* assuming, of course, that the terms of the bequest do not bring it within the restrictive rule stated in the third division of the present section.

Suggested result of the cases.

The doctrine above suggested is tacitly recognised in the case *Wyndham* v. *Wyndham* (*f*), where a testator bequeathed the residue of his estate to A. for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A. should die without any child or children, then he left the residue *to the younger children of B.*, if he should have any, and if not, he left it to C. A. died without children before B. had any, and B. afterwards died without having had a child; and the question in this cause was, as to what became of the income in the interval between the deaths of

(*e*) Ante, 154.

(*f*) 3 B. C. C. 58. [See *Shawe* v. *Cunliffe*, 4 B. C. C. 144, where a gift to the children of A. after the death (without children) of B., and in default of children of A. to fall into the residue, was construed a gift to the children who survived A. by the controlling force of a prior gift, made expressly to such last-mentioned children. B. having died in the lifetime of A. the same question, and consequent recognition of the doctrine advocated in the text, occurred here as in *Wyndham* v. *Wyndham*. See also *Conduitt* v. *Soane*, 4 Jur. N. S. 502.]

A. and B.; which question of course assumes, that the property did not go over to C. immediately on the death of A. without a child, but remained in expectancy during the whole life of B., to await the event of his having children.

Executory gift not defeated by failure of objects until after the time of vesting in possession.

This view of the subject, too, seems to derive some support from a more recent decision, establishing that an executory bequest to children, to arise on an event which was to defeat a prior gift, did *not* fail by the absence of any object at the determination of such prior interest.

The case (*g*) alluded to is, where a testator devised the reversion in a moiety of certain real estate to his sister A., subject to a charge in the following terms :—"The sum of 500*l.* I also deduct out of the said part of my estate to my niece M., daughter of my brother R., to be paid when most convenient to my sister A., bearing interest three months after my decease. Whenever this 500*l.* shall be paid by my sister A., I do require that it be put into government or any other security by her trustee P., whom I appoint to act as such, as he shall think most to her advantage; and that the said M. shall receive the said 500*l.*, with the accumulated interest, either *on the day of marriage or at the age of twenty-one* as shall be thought best. *Should the said M. not survive either of those periods, and there be no child or children of the said R., then I would have the said sum of* 500*l. revert to my sister A.; but, in case of other children of R., I would have the said sum equally divided, share and share alike.*" M. died under age, and unmarried. R. had no other child at that time, but other children were born afterwards; and the question was, whether such subsequently-born children were entitled. Sir *T. Plumer*, V. C., adverted to *Godfrey* v. *Davis* as having been decided upon the principle, that a period being distinctly fixed when the distribution was to take place, the children born after that period were not entitled. "Are there," said his Honor, "any words in this will fixing the time when a share is to vest, so as to exclude after-born children? The property is not given on the children attaining twenty-one, or marriage; it is a reversionary fund, which is a strong circumstance, and the gift to A. is expressed in unambiguous terms. If the after-born children are excluded, it must be in the teeth of the words of the will, which only give it to A. 'if there be no

(*g*) *Hutcheson* v. *Jones*, 2 Mad. 124 ; [*Haughton* v. *Harrison*, 2 Atk. 329.]

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child or children of the said R. (*h*)?" And his Honor accordingly decided in favour of the children of R.

Remark on *Hutcheson* v. *Jones.*

This case shews that an executory bequest, in derogation of a preceding gift, does not fail for want of objects at the period of taking effect (though, if there had been any such, it would have been confined to them (*i*); and that, in the opinion of the learned Judge who decided it, the case of *Godfrey* v. *Davis* sustains no general doctrine to the contrary, but is referable to its special circumstances.

In another case (*k*), where lands were by settlement limited to A. for life, remainder to B. for life, remainder to trustees for 500 years, in trust to raise 1000*l.* for such persons as B. should appoint, and, in default of appointment, *to the executors, administrators and assigns of C.;* and A. and B. died in the lifetime of C., without any appointment by B., it was argued that there was at the determination of their estates no object of the trust of the term, since C. could have no executor or administrator in her lifetime, and, therefore, that the limitation failed, as in the case of a devise of real estate to the heirs of a person living at the determination of the prior estates: but Sir *T. Plumer,* M. R., said, *he did not see that the analogy could be applied.* The case, however, was not distinctly decided upon this point.

So, in the earlier case of *Lord Beaulieu* v. *Lord Cardigan* (*l*), where the testator bequeathed an Exchequer annuity, which was granted for a term of years to his grandson, Lord Montague, for so many years as he should live, and after his death for such person as, "*at the time of Lord Montague's death,* should be heir male of Lord Montague's body, to take lands of inheritance from him by course of descent, for the residue of the term; *and in case there should be no such heir male, then in trust for such person as should be heir male of the body of Duke John,* to take lands by course of descent, for the residue of the term; and, in case there should be no such person as should be such heir male, then in trust for Duke John for life, with remainder to such person and persons as should be entitled by virtue of his said will to the rents of the real estate thereby devised." Lord Montague died without issue before Duke John had a son; and

(*h*) As to this, see post, p. 164.

(*i*) *Ellison* v. *Airey,* 1 Ves. 111, and other cases cited ante, 144.

(*k*) *Horseman* v. *Abbey,* 1 J. & W. 381.

(*l*) Amb. 533.

it was held by Lord *Northington*, that the gift in question took effect in favour of a son who was born six years after this event; his Lordship observing, that if the limitation to the son of Duke John was to depend on the words "*living at the time of the death of Lord Montague*," it would defeat the intention of the testator; for he meant that the sons of Duke John should take after (qu. in substitution for?) the sons of Lord Montague.

General conclusion from the cases.

The weight of authority, therefore, is decidedly in favour of the position, that all gifts to children, preceded by an anterior interest, will embrace the objects existing at the death of the testator, and those who may come in esse before the determination of such interest; *and that in all such cases, except in the instance of a legal remainder of real estate, if there be no object at the time of the vesting in possession, all the children subsequently born will be let in,* unless the terms of the gift restrict it to a *narrower* class of objects.

The doctrine, however, of the preceding cases may seem to be encountered by some remarks occurring in the case of *Bartleman* v. *Murchison* (*m*), where an annuity was bequeathed to A. for life, and, after her decease, to B. "*if a widow,* but not otherwise, but to revert back to any child or children after her death;" and it was held, that B., who was married at the death of A., and afterwards became a widow, was not entitled on such subsequent widowhood; Lord *Brougham* observing,—"Although, in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, his Lordship remarked, —"It is only following out the same principles, to hold, *that a person,* to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character and answer that description at the moment when the legacy might vest in possession."

Remark on *Bartleman* v. *Murchison.*

It will be observed, that, in this case, the bequest was to an individual named, if then answering a certain description and not to a class, though perhaps the principle applicable to the respective cases is not widely different.

(*m*) 2 R. & My. 136.

Existence up to time of distribution not necessary.

And here the student should be reminded, that where, in the preceding observations, mention is made of the *objects at the period of distribution*, this is not intended to designate children *existing* at that period; for it has been already shewn, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may therefore not improperly be termed objects *at that period;* their decease, before the period of distribution, having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

Whether gift over in default of children enlarges class of objects entitled.

It is to be observed, that the rules fixing the class of objects entitled under gifts to children are not in general varied by a limitation over, in case the parent should die without children, or in case *all* the children die, &c., as these words are construed merely to refer to the objects of the preceding gift. It is true, indeed, that in *Hutcheson* v. *Jones*, some stress was laid by Sir *T. Plumer*, V. C., on the words giving the property over in default of child or children, as importing that the ulterior gift was not to take effect unless in the event of the failure of *all* the children; but in *Andrews* v. *Partington* (*n*), a pecuniary legacy to *all* the children of A., payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were in esse when the first share became payable. So, in the more recent case of *Scott* v. *Harwood* (*o*), where the devise was to the use and behoof of all and every the child and children of A. lawfully begotten, and their heirs for ever; and in case the said children of A. should all die before they attained the age of twenty-one years, then over; Sir *J. Leach*, V. C., held, that the children of A. living at the testator's death were exclusively entitled, and that *in the devise over "the testator must, by necessary inference, be considered as speaking of the children to whom the estate is given."* If it be objected, that in this case the expression "the said children" required such a construction, the answer is, that the preceding gift being to *all* the children, the referential expression had the same force as if the same terms were repeated, and consequently the effect of the whole would be, according to Sir *T. Plumer's* doctrine in *Hutcheson* v.

Remark on *Scott* v. *Harwood*.

(*n*) 3 B. C. C. 401. (*o*) 5 Mad. 332.

*Jones*, that the estate was not to go over until the failure of *all* the children.

Gift to children *to be born* or *to be begotten.*

5thly. We are now to consider how the construction is affected by the words "*to be born*" or "*to be begotten*," annexed to a devise or bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would, but for the words in question, have been confined to children if any) existing at the testator's death, they will have the effect of extending it to *all* the children who shall ever come into existence (*p*); since, in order to give to the words in question *some* operation, the gift is necessarily made to comprehend the whole.

Where they extend the class.

Thus, in the well-known and important case of *Mogg* v. *Mogg* (*q*), where a testator devised a certain property called the Mark Estate to trustees, in trust to pay the rents towards the support and maintenance of the child and children begotten *and to be begotten* of his daughter, Sarah Mogg: it was contended, that, notwithstanding the words "to be begotten," the devise could apply only to the children born before the testator's death, as those words might be satisfied by letting in the children born after the date of the will before the death of the testator; but the Court of King's Bench (on a case from Chancery) certified, that all the nine children of Sarah Mogg, including five who were born after the death of the testator, took under the devise; and Sir *W. Grant*, M. R., expressed his concurrence in the certificate.

[And in the case of *Gooch* v. *Gooch* (*r*), where a testator devised lands to trustees in trust "during the lives and life of the survivor or longest liver of all the children which his daughter A. hath or shall have," to apply the rents for the support of A. and "of all her children which she shall from time to time have living;" and when his grandchildren, the children of his said daughter, should have attained the age of twenty-one, the testator directed the rents to be paid among the

(*p*) *Mogg* v. *Mogg*, 1 Mer. 654. In the marginal note of the report, these words are omitted. The case is deserving of attentive perusal, as it illustrates almost every rule regulating the class of children entitled under immediate and future devisees.

(*q*) 1 Mer. 658. [The case of *Sprackling* v. *Ranier*, 1 Dick. 344, unless referable to the distinction noticed post, p. 166. (which, upon the statement in the report, is doubtful), appears to be inconsistent with this and the following case, and must consequently be considered as overruled.

(*r*) 14 Beav. 565. This being the case of a continuing trust, and not a simple direction to distribute the corpus of a fund, may be thought an aid to the construction adopted.

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[said children, and the issue of such as should die leaving issue, and the survivors and survivor of them, during the life of the longest liver of the said children; Sir *J. Romilly*, M. R., on the authority of the case of *Mogg* v. *Mogg*, in which he expressed his concurrence, held, that children born after the death of the testator were entitled under the trust for children during the minority of the youngest. He also held, however, that the time up to which such after-born children were admissible was, not the death of A., but the period when the youngest child for the time being attained the age of twenty-one years: and this upon the ground (besides a variety of expressions tending to the same conclusion) that the will had provided for the event of the youngest child attaining that age in the lifetime of A., and that it was inconsistent with the provision that it should in all events remain a matter of uncertainty until the death of A. which was or might be her youngest child. This decision was affirmed on both points by Lord *Cranworth* (*s*).]

Distinction in regard to general pecuniary legacies,

This rule of construction, however, does not apply to general pecuniary legacies, where the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable), until the death of the parent of the legatees.

Thus, in the case of *Storrs* v. *Benbow* (*t*), where a testator bequeathed 500*l.* "to each child *that may be born* to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship;" Sir *J. Leach*, M. R., held, that the gift was confined to children living at the testator's death, his Honor considering that the words "may be born," provided for the birth of children between the making of the will and the death of the testator; and he observed, that to give a different meaning to the words would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of his brothers' children (*u*).

[A different opinion, indeed, seems to have been held by Sir

[(*s*) 3 D. M. & G. 366.]

(*t*) 2 My. & K. 46, [affirmed 3 D. M. & G. 390.] See also *Butler* v. *Lowe*, 10 Sim. 317; [*Ringrose* v. *Bramham*, 2 Cox, 384; *Mann* v. *Thompson*, Kay, 638.]

(*u*) The reason lastly assigned by the M. R. is the only one which characterises this class of excepted cases. The former argument would apply equally to cases within the general rule stated ante, p. 165.

[*W. Grant*, M. R., who in the case of *Defflis* v. *Goldschmidt* (*x*), where a testator bequeathed to all the children then born, or thereafter to be born of his sister 2,000*l.* each, payable on attaining the age of twenty-one years, said, "it was admitted that under the bequest every child who might come into esse would be entitled, if nothing appeared in the will to shew that not to have been the intention: he did not recollect any case, and none was cited, in which these words were construed children born after making the will, and before the death of the testator." It is true that to meet an argument in support of a different conclusion drawn from a clause in the will, the M. R. relied upon a provision which he thought shewed clearly that the testator meant all the children of his sister, born at any time, to have legacies (*y*), but that does not affect his construction of the words of the bequest when standing unexplained. The case is generally cited as depending on the ground that if the testator has shewn a manifest intention to make an inconvenient arrangement it must be made (*z*).]

——and cases where distribution is otherwise postponed.

It seems to be established, too, that the expression children *to be* born or children *to be* begotten, when occurring in a gift, under which *some* class of children born after the death of the testator would, independently of this expression of futurity, be entitled, so that the words may be satisfied without departing from the ordinary construction, that construction is unaffected by them.

Words "to be born" do not vary the construction of a *future* gift.

Thus, in the case of *Paul* v. *Compton* (*a*), where a testator bequeathed the residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her "to provide for such child or children as may *hereafter be born* of my said two daughters;" and, in default of such disposition, then in trust for the children of the daughters; Lord *Eldon* held, that this power to the wife did not authorise her to appoint to children *not born in her lifetime.*

So, in *Whitbread* v. *Lord St. John* (*b*), his Lordship decided,

[(*x*) 19 Ves. 566, 1 Mer. 417.

(*y*) The testator provided, that in case his sister should die before all her children had attained twenty-one, the interest of the legacies provided for such children as should be under age, or a competent part thereof, should be applied in their maintenance. But in *Butler* v. *Lowe*, 10 Sim. 317, a similar provision was disregarded.

(*z*) See *Mann* v. *Thompson*, Kay, 643.]

(*a*) 8 Ves. 375.

(*b*) 10 Ves. 152.

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that a bequest unto and among the child and children of A. born *and to be born*, as many as there might be, *when and as they should attain their age of twenty-one years, or be married* with consent, was confined to his children living at the death of the testator and those who afterwards came in esse before the first share vested in possession, according to the rule before adverted to (*c*). But if the bequest is to "such children as shall hereafter be born during the lives of their respective parents," of course this construction is excluded by the express terms of the will, and all the after-born children will be let in, whether born before the period of distribution (*d*) or not.

Do not confine devise to *future* children.

It has been decided, too, that the words "which shall be begotten," or "to be begotten," annexed to the description of children or issue, do not *confine* the devise to future children; but that the description will, notwithstanding these words, include the children or issue in existence antecedently to the making of the will (*e*).

This doctrine is as old as the time of Lord *Coke*, who says (*f*); that as procreatis shall extend to the issues begotten *afterwards*, so procreandis shall extend to the issues begotten *before*.

"Hereafter to be born," does *not* exclude existing children.

And it seems that even the words "*hereafter* to be born" will not exclude previously-born issue (*g*), [at least where, as in *Hebblethwaite* v. *Cartwright*, and the case put by Lord *Coke*, the word heirs or issue, to which the phrase in question is added, is a word of limitation, not giving an estate or interest by purchase to any other person than to him whose heirs are mentioned; and this] Lord *Talbot* said was to prevent the great confusion which would arise in descents by letting in the younger before the elder. But, as a rule of construction, it must be founded on presumed intention; it supposes that the testator, by mentioning future children, and them only, does not thereby indicate an intention to exclude other objects, and in this view is certainly an exception to the maxim, expressio unius est exclusio alterius.

[In a recent case (*h*) where by a codicil a testatrix revoked

(*c*) See ante, p. 146.

(*d*) *Scott* v. *Earl of Scarborough*, 1 Beav. 156.

(*e*) *Doe* d. *James* v. *Hallett*, 1 M. & Sel. 124. See the same principle applied to a deed, *Hewet* v. *Ireland*, 1 P. W. 426, [2 Coll. 344, n.]

(*f*) Co. Lit. 20 b.

(*g*) *Hebblethwaite* v. *Cartwright*, Cas. t. Talb. 31; which seems to overrule the position of Lord *Hale*, that the words "in posterum procreandis" exclude sons born before, on account of the peculiar force of "in posterum;" Hal. MSS. cit. Co. Lit. 20 b, n. 3; 3 Leon. 87.

[(*h*) *Re Pickup's Will*, 9 W. R. 251.]

[a legacy given by her will to her sister A., and gave a like sum in trust for her during her life, and after her death for "the child or, if more than one, for all and every the children of A., whether by her *present or any future* husband," it was held by Sir *W. P. Wood* that a child, who was the only child of A. by a former husband (who was dead at the date of the will) was entitled. "Neither internally nor externally," said the V. C., "was there any evidence of an intention to exclude this child by a former husband. The testatrix who had by her will given the legacy to her sister absolutely, revoked by codicil the absolute gift, and after giving her a life interest, introduced the provision for the children. She knew that her sister had one child living. There might be more, and it was immaterial to her whether those others should be by the present or any future husband of her sister"] (*i*).

"*Shall* happen to die."

Sir *William Grant* thought (*k*), that a gift over, in case certain persons "*shall* happen to die in my lifetime," though strictly importing futurity, might be understood as speaking of the event at whatever time it may happen, whether before or after the will; [applying the rule that the prior limitation being, by what means soever, out of the case, the subsequent limitation takes place.

Unless the will shew an intention to exclude them.

It is obvious, however, that such a construction, if universally applied, would often defeat a testator's intention. And, therefore, full force will be given to an explanatory context or explanatory circumstances, in deciding what sense is attributable to such words. Thus, in the case of *Early* v. *Benbow* (*l*), where a testator gave legacies of 500*l.* each to A., B., C., and D., four of the grandchildren of his brother Henry, and by a codicil bequeathed 500*l.* "to each child *that may be born* to either of the children of either of my brothers lawfully begotten:" it appeared that at the date of the codicil and of the testator's

(*i*) Compare the principle of these cases with that of *Shuldam* v. *Smith*, 6 Dow, 22 ante, ch. xxv. s. 3. The cases in the text strongly exemplify the anxiety of the Courts to avoid giving devises to children, an operation that will restrict them to certain classes of children. See judgment in *Matchwick* v. *Cock*, 3 Ves. 611, where after-born children were admitted to participate in a provision for maintenance out of income in favour of "children" generally, though the disposition of the property itself, out of which the income was to arise (and the objects of which, it might be presumed, were intended to be the same as those of the maintenance provision), was confined to the existing children. [*Freemantle* v. *Taylor*, 15 Ves. 363.]

(*k*) In *Christopherson* v. *Naylor*, 1 Mer. 326. [See also *In re Sheppard's Trust*, 1 Kay & J. 269.

(*l*) 2 Coll. 342. And see *Wilkinson* v. *Adam*, 1 V. & B. 422, 468.

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[death, there were living, to his knowledge, several grandchildren of his brothers besides A., B., C., and D., (and for whom no provision was made except by the codicil,) and various children of brothers, one at least of which brothers survived the testator. Under these circumstances, Sir *J. K. Bruce*, V. C., held that neither of the legatees named in the will was intended to take any benefit by the codicil; and appeared to entertain an opinion equally adverse to all grandchildren living at the date of the codicil, although not named. Sir *J. Romilly*, M. R., before whom this point was afterwards argued (*m*), decided it in conformity with that opinion. The question, he said, amounted to this,—whether he could read the word "may" to the extent of letting in those children who, being alive when the codicil was executed, were not mentioned in it: he thought this question was concluded by the decision of the V. C., in which he concurred.]

Words "born" and "begotten" do not exclude after-born children.

The preceding citation from Lord *Coke* has anticipated the observation (which properly finds a place here), that a gift to children "born" or "begotten" will extend to children coming in esse subsequently to the making of the will. Thus, where(*n*) a testator bequeathed certain funds to trustees in trust for his wife for life; and, after her decease, in trust to transfer the same unto and among all and every the child and children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband: Sir *J. Leach*, V. C., held, that the bequest comprehended children [born between the date of the will and the testator's death.]

Legacy to every child E. *hath* extended to future children.

So, in the case of *Ringrose* v. *Bramham* (*o*), children born in the interval between the making of the will and the death of the testator were let in under a bequest to A.'s children; "50*l.* to every child he *hath* by his wife E., to be paid to them by my executors as they shall come of age." It was even contended that the bequest extended to children born after the death of the testator and before the majority of the eldest; and the Master of the Rolls (Sir *R. P. Arden*) rested his objection to this construction, not solely on the force of the word "hath," but on other grounds; particularly that it would have the effect of postponing the distribution of the general residue, until the number of pecuniary legatees could be ascertained.

[(*m*) *Early* v. *Middleton*, 14 Beav. 453.]

(*n*) *Browne* v. *Groombridge*, 4 Mad. 495.

(*o*) 2 Cox, 384.

Legacy to children "who *have* issues," read as have at testator's death.

[And in *Doe* d. *Burton* v. *White* (*p*), where a testator gave his residue "to be equally divided between his wife and the children who *have* issues," the Court of Exchequer held this to mean "who have issue when the will takes effect," that is, at the testator's death. It was argued here, as in the last case, that "have" was to be read "shall have," so as to embrace children who should at any future time have issue. But the argument wanted the foundation which it had in *Ringrose* v. *Bramham*, namely, the postponement of distribution, and was rejected by the Court, who compared it to a devise to children *simpliciter*, where children living at the testator's death are alone included.]

It is not to be inferred, however, that because the Courts in the preceding cases have refused to allow the claims of after-born children to be negatived by expressions of a loose and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent: as in the instance of a gift to children "now living," which we have seen is confined to children in existence at the date of the will (*q*).

Gift to children *born* at a time named: they need not survive.

[And here it may be observed that, under a devise to children *born* at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period (*r*).]

Children en ventre, when included.

Held to take as objects *living* at a given period.

6thly. It should be observed, that in the application of the preceding rules, and, indeed, for all purposes of construction, a child en ventre sa mere is considered as a child in esse. This was finally established in the case of *Doe* v. *Clarke* (*s*), which was an ejectment directed by Lord *Thurlow*, in consequence of a difference of opinion between his Lordship and Sir *Lloyd Kenyon*, M. R., on the claim of a posthumous child under a gift to all the children of C. who should be *living* at the time of his death; his Lordship maintaining the competency, and his Honor the incompetency of the child en ventre sa mere to take as a "living" child (*t*).

The case of *Clarke* v. *Blake* afterwards came before Lord

[(*p*) 1 Exch. 526, 2 ib. 797.]
(*q*) Vide ante, ch. x.
[(*r*) *Paterson* v. *Mills*, 18 L. J. Ch. 449, 14 Jur. 126.]
(*s*) 2 H. Bl. 399.
(*t*) *Clarke* v. *Blake*, 2 B. C. C. 321; overruling *Pierson* v. *Garnett*, 2 B. C. C. 47; *Cooper* v. *Forbes*, ib. 63; *Freemantle* v. *Freemantle*, 1 Cox, 248.

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*Loughborough* (*u*), on the equity reserved, and his Lordship, in conformity to the decision of the Court of Common Pleas, held the posthumous child to be entitled. Indeed so completely is the point now set at rest, that the claim of a child en ventre sa mere under a bequest "to the child and children begotten and to be begotten on the body of A., who should be *living* at B.'s decease," was admitted sub silentio in the much-discussed case of *Mogg* v. *Mogg* (*x*).

Child en ventre entitled under description of children *born*.

It being thus settled that children en ventre were entitled under the description of children *living*, the only doubt that remained, was whether they would be held to come under the description of children *born*; and that question also has been decided in the affirmative (*y*). The result then is to read the words "living," and "born," as synonymous with *procreated*; and, to support a narrower signification of such terms, words pointedly expressive of an intention to employ them in a special and restricted sense must be used.

Whether children en ventre take under a gift to *relations*.

It should be observed, that in *Bennett* v. *Honeywood* (*z*), Lord *Apsley* considered that the admission of children en ventre was confined to devises to children, and refused to let in such a child under a devise to relations. This decision does not appear to have been expressly overruled; but it is conceived that the present doctrine, and the principle upon which the late cases have proceeded, that a child en ventre sa mere is for all purposes a child in existence, and even *born*, conclusively negative any such distinction (*a*).

Clauses of substitution.

III. Sometimes questions arise on the construction of clauses substituting the children of legatees who die before the period of distribution or enjoyment. Most of these questions will be found in other parts of the present work, especially in a subsequent chapter, which treats of the period to which words providing against the death of a prior devisee or legatee, coupled with a contingency, are to be considered as referring. But

(*u*) 2 Ves. jun. 673.

(*x*) 1 Mer. 654. See also *Rawlins* v. *Rawlins*, 2 Cox, 425. These cases demonstrate that the distinction laid down in *Northey* v. *Strange*, 1 P. W. 341, between a devise to children generally and to children living at a given period, with reference to the admission of children en ventre, is unfounded; nor would it have been deemed worthy of remark had not the case been cited (1 Belt's Ves. 113, Editor's note), without an explicit denial of its authority.

(*y*) *Trower* v. *Butts*, 1 S. & St. 181. See also *Whitelock* v. *Heddon*, 1 B. & P. 243.

(*z*) Amb. 708.

[(*a*) See acc. 2 Sugd. Pow. 237, 7th Ed.; *Baldwin* v. *Rogers*, 3 D. M. & G. 649, ante, 146.

Whether shares of children are by necessary implication subject to the same contingency as their parents.

there is one point which it is convenient to notice in this place, because [it has been supposed that the cases] establish a construction hardly reconcilable with the principles of analogous cases, and therefore to be treated as peculiar to clauses of substitution in favour of *children*. The point occurs where children are substituted for legatees dying before a given period (usually the period of distribution), without any express requisition that the children thus substituted shall survive such period. The question is, whether the substituted gift is by necessary intendment to be construed as applying only to such issue as may happen to be living at such period, or whether the issue surviving the parents are absolutely entitled; in other words, whether the gift to the issue is by implication subject to the same contingency of survivorship as the gift to the parents. The [weight of authority seems to favour the position] that in such cases it is not allowable to engraft on the gift to the issue an implied qualification, in order to assimilate their interest to that of their parents; and this strictness of construction [seems] to be warranted by the apparently analogous cases establishing that accruing shares are not, by necessary implication, subject to clauses of accruer which the testator has in terms applied to original shares only; there being, it is thought, no such irresistible inference that the testator has the same intention in regard to original and the accruing shares, as to supply the defect of expression. [Arguments, founded on the testator's positive intention in such a case, are not, in the absence of an explanatory context, wholly satisfactory: for it is probable he did not contemplate the precise event. Yet so far as they go they lead to the same conclusion: for to the objection that there is no satisfactory reason why a condition of survivorship should attach to a parent and not to a child, it may be answered that "there is very considerable difference in the positions of the parents and their issue. It is intelligible that a gift to children should be limited to those who survive the tenant for life, there being a gift over to their issue; but in the case of issue, why a share should be distributed among surviving issue, giving nothing to the representatives of those who may be dead, is not so clear. If all are to participate, any of them, in making arrangements on marriage, or otherwise, may rely upon this, that should he die before the share falls in, his family will take it. This observation does not apply to the

[case of children, under a condition that they must survive the tenant for life, with substituted gifts to issue, because, notwithstanding the condition of survivorship, their families are provided for. On the construction that would limit the issue entitled to those who survive the tenant for life, the objects of the testator's bounty are placed in a position which is not such as the testator would desire. To these considerations must be added the inclination of the Court to avoid the suspense of shares, as far as can be done consistently with the expressed intention, and to favour early vesting" (*b*). Under these circumstances the Courts have, in the majority of cases, confined their attention strictly to the words of the will as they actually stand, and have refused to extend the qualification affecting the shares of the original objects of gift to their children; in other words, they have determined that the children are not simply substituted in the place of their parents, but take under a distinct and independent clause of the will.

Children not required to survive period of distribution as provided in regard to their parents.

Thus, in the case of *Stanley* v. *Wise* (*c*), a testator having four daughters, A., B., C., and D., gave to his two daughters A. and B. 4,000*l.* each, and in case either of them died unmarried, her legacy was to be divided amongst his *surviving* daughters, and the child or children of such of them as should be then dead, such child or children to have their mother's share. C. died in the lifetime of A., who afterwards died unmarried, and it was held that, as well those children of C. who died before as those who survived A. took an interest in their mother's share of A.'s legacy.

So, in the case of *Lyon* v. *Coward* (*d*), where the bequest was to trustees in trust for the testator's wife for her life, and at her death in trust to pay and divide unto and equally among such of the children of the testator's sisters as should be living at the death of the wife, and the issue of such of them as should be then dead in equal shares; such issue respectively only to take the share which the parent would have taken if living: Sir *L. Shadwell*, V. C., made a declaration in favour of the children of the deceased children, whether living at the death of the tenant for life or not.

[(*b*) Per Sir *W. P. Wood*, V. C., *Wildman's Trusts*, 1 Johns. & H. 302.

(*c*) 1 Cox, 432.

(*d*) 15 Sim. 287. In *Bridge* v. *Yates*, 12 Sim. 645, the point must have been assumed; otherwise the whole argument would have been unnecessary.

[Again, in the case of *Masters* v. *Scales* (*e*), where a testator gave a sum of money in trust for his wife for her life, and after her death "to go and belong to his four brothers and his sister, or such of them as should be then living, share and share alike; and in case any of his said brothers, or his said sister should be then dead, leaving children, then he gave the share of such deceased brother or sister to his or her children, share and share alike, to be paid at the time before mentioned." The brothers and sister died in the lifetime of the widow, and Lord *Langdale*, M. R., held their children to be entitled whether they survived her or not.

The fact that the gift to the brothers and sister was not contingent on their surviving the widow, but vested, subject to be divested on their dying before her, did not, in the opinion of Sir *J. Parker*, V. C., render the case distinguishable from the previous examples of contingent gifts: for he treated it as a clear authority in favour of a similar decision in the case of *Barker* v. *Barker* (*f*), where a fund was bequeathed in trust for E. for life, and after her decease, in trust to be divided equally between all and every the children of E., who should be living at the time of her decease, and the issue of such of them as should be then dead leaving issue, and so as that the issue should take the share the parent would have taken if living, as tenants in common: and the learned Judge held that the issue of E.'s deceased children need not survive E. in order to participate in the fund. "The general rule of law," he said, "is not to import a contingency into gifts of this kind. . . . . The question is, whether in the words of the will there is enough—not upon a conjectural ground merely—to take the death of the tenant for life as the period for ascertaining the class, and not the death of the stirps concerning whose issue there is this question. I do not think there is enough in this will to confine the gift."

Contingency not extended by implication.

On the other hand] in the case of *Eyre* v. *Marsden* (*g*), where a testator gave his real and personal estate to trustees, upon trust to sell, and out of the income of his estate to pay certain life annuities to his children; and the testator then directed his trustees to accumulate the income of his realty and personalty for the benefit of his grandchildren, and after the

Children required to survive period of distribution, as provided in regard to their parents.

[(*e*) 13 Beav. 60. See also *Buckle* v. *Fawcett*, 4 Hare, 536, 545.

(*f*) 5 De G. & S. 753.]

(*g*) 2 Kee. 564.

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decease of his surviving child, if not sold before, to sell and distribute the proceeds among his grandchildren who should be living at the time of his (the testator's) decease, in equal shares, except the share of F. M., the son of a deceased daughter, half of whose share in his (the testator's) estate and effects he gave to his brother G. M.; *and in case any of his grandchildren should die before his, her, or their share or shares should become payable, leaving lawful issue, then such issue should be entitled to the share which, his, her, or their deceased parent would be entitled to if then living;* but in case of the death of any of the grandchildren without leaving issue before he, she, or they should become entitled to receive his, her, or their share or respective shares, in manner aforesaid, the testator then gave the share or shares of such grandchild or grandchildren among his surviving grandchildren, *to be paid at the same time and in the same manner as before mentioned, touching the original share or shares of his said grandchildren.* One of the questions was, whether the shares of grandchildren dying leaving children, *who also died before the period of distribution,* vested in those deceased children, or passed over to the surviving grandchildren. Lord *Langdale,* M. R., considered that the children of dying grandchildren were not entitled to stand in the place of their parents, unless they were living at the period of distribution. His Lordship said, "He (the testator) meant an aggregate and previously undivided fund, to be distributed and divided on the death of his surviving child. Interests were previously vested; but up to that time, the vested interests were subject to be divested: and I think the plain intention of the testator cannot be carried into effect, without applying this principle to every interest which became vested under this part of the will, in the different events which happened; to the interests in the accrued shares which became vested in the grandchildren, and to the interests in the original or accrued shares, which became vested in the children of grandchildren."

[This conclusion was fully justified by the reference which the will contained to the anterior gift to the parents (*h*). So where there was an *executory* trust to settle property on the testator's daughter for life, which was "to be secured for the benefit of her children equally after her death, so that the issue of any

(*h*) See *Smith* v. *Palmer*, 7 Hare, 229.

[such child dying in my daughter's lifetime may take his or her parent's share; and in default of such children or other issue," then over, the M. R. held that the time of the daughter's death was the period at which both the children and issue were to be ascertained (*i*).

Contingency extended by implication.

But a similar construction has been adopted in other cases, where the testator's intention to ensure such a result has not been so clearly manifested. Thus in the case of *Bennett* v. *Merriman* (*k*), where a testator gave the proceeds of his real and personal estate in trust for his wife for life, and, at her death, in trust to pay, assign and transfer to all and every his children who should then be living, or if dead leaving lawful issue, in equal shares; the issue of any of his said children to take in equal proportions only the share their parent would have been entitled to. Lord *Langdale*, M. R., thought the issue of children were not entitled unless they survived the tenant for life: he thought so because the gift was to be by transfer and payment only (*l*); and also because the words, directing the issue to take only the share the parent would have been entitled to, shewed that the testator intended the issue to take by substitution (*m*).

But perhaps the strongest authority on this side of the question is the case of *Macgregor* v. *Macgregor* (*n*), where a testator bequeathed one moiety of the residue of his estate in trust for his children for their lives and afterwards for their issue; but in case of any child dying without leaving issue, the trustees were to hold his share in trust for and equally to be divided between the testator's other children *then* living, and the issue of such of them as might be *then* dead, such issue only taking the share the parent would have taken if living. Sir *J. K. Bruce*, V. C., thought that the rational, though not the literal, construction was, that as no child, so no issue, who was not then in existence, became entitled to a share of a child dying without leaving issue.

Result of the cases.

The opposite opinion, however, has been so frequently main-

(*i*) *Turner* v. *Sargent*, 17 Beav. 515.

(*k*) 6 Beav. 360. The terms of the bequest were very inaccurate, but the M. R. considered it clear that they implied a gift to the issue of children who died before the widow.

(*l*) The gift was in very similar terms in *Lyon* v. *Coward*, but the V. C. gave no effect to a similar argument founded thereon. See also *Smith* v. *Palmer*, 7 Hare, 225.

(*m*) The same might be said of all the cases where a contrary decision was made.

(*n*) 2 Coll. 192.

[tained by later cases that they might have been taken to establish as the general rule, that without special words in the will the gift to the issue will not be held to depend on the contingency annexed to the gift to the parent (*o*). But as the learned judge who decided the case of *Macgregor* v. *Macgregor* still retains and acts upon the opinion which he then expressed (*p*), it is not probable that the question will be finally settled without further litigation, and perhaps not until it has been complicated by some minute distinctions (*q*).

It should be observed, however, that in these cases no interest will in general vest in the issue who predecease their parent (*r*)].

Rule where number of children is erroneously referred to.

IV. It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases, it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.

Gift to A.'s *three* children, there being four, held to comprehend *all*.

Thus, in *Tomkins* v. *Tomkins* (*s*), where a testator, after bequeathing 20*l.* to his sister, gave to her *three* children 50*l.* each; and the legatee had *four*; Lord *Hardwicke* held, that they were *all* entitled.

So, in *Scott* v. *Fenoulhett* (*t*), a bequest to C. of 500*l.* "and

[(*o*) *Hodgson* v. *Smithson*, 21 Beav. 355; *In re Bennett's Trust*, 3 Kay & J. 280; *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536; *Bellamy* v. *Sabine*, 2 Sm. & Gif. 328; *Wildman's Trusts*, 1 Johns. & H. 299.

(*p*) See *Kirkman's Trust*, 3 De G. & Jo. 558; *Penny* v. *Clarke*, 29 L. J. Ch. 370. In the former, Sir *G. J. Turner*, L. J., did not concur; and in the latter he concurred in the judgment on a different ground.

(*q*) *Crause* v. *Cooper*, 1 Johns. & H. 207. *Pearson* v. *Stephen*, 5 Bli. N. S. 203, 2 D. & Cl. 328, was cited as an authority for the construction adopted in *Macgregor* v. *Macgregor*. But the only point there argued was whether under a gift of personalty to several, and their issue per stirpes, the parents took absolutely or for life.

(*r*) *Thompson* v. *Clive*, 23 Beav. 282; *In re Bennett's Trust*, 3 Kay & J. 280; *Crause* v. *Cooper*, 1 Johns. & H. 207.]

(*s*) Cit. 2 Ves. 564, cit. 3 Atk. 257, and stated from the Register's Book, 19 Ves. 126; [*Morrison* v. *Martin*, 5 Hare, 507.] See the same principle applied to bequests to servants, in *Sleech* v. *Thorington*, 2 Ves. 561.

(*t*) 1 Cox, 79, cit. 2 B. C. C. 86, where it is erroneously stated to be a bequest to *two* daughters.

the like sum to each of his daughters, if *both* or *either* of them should survive Lady C.," was held to belong to *three* daughters who were living when the will was made. It was contended, in this case, that the bequest was intended for two daughters, who resided very near the testator, the third living at a great distance from him; but as the point had not previously been raised in the cause, and it appeared that the testator knew the last-mentioned daughter, Lord *Thurlow* refused an inquiry.

Bequest to the *two* daughters of T., there being three.

Again, in *Stebbing* v. *Walkey* (*u*), where a testator bequeathed certain stock unto "the *two* daughters of T. in equal shares," during their lives; and if *either* of them should die, then to pay the whole to the survivor during her life, and in case *both* should depart this life, then the whole to fall into the residue. T. had *three* daughters, all of whom were held to be entitled; the M. R., Sir *Lloyd Kenyon*, declaring, that he yielded to the authority of the cases, and not to the reason of them.

Pecuniary legacy given to *three*, held that the fourth took one of equal amount.

So, in *Garvey* v. *Hibbert* (*x*), Sir *W. Grant*, on the authority of the last case, held *four* children to be entitled under a bequest "to the *three* children of D." of 600*l.* each. In this case, a question arose, whether, in the adoption of this construction, the aggregate amount of the three legacies was to be divided among the four, or each of the four was to take a legacy of the same amount as was given to each of the three: the counsel for the legatees contended only for the former; but the M. R., on the authority of *Tomkins* v. *Tomkins* (*y*), adopted the latter construction.

Division into *eight*, there being seven objects only.

Again, in *Berkeley* v. *Pulling* (*z*), where a testator directed his property to be "divided into *eight* equal shares, and disposed as follows among the children of A. and B.," and then proceeded to give to some two shares, and to others one, but enumerating seven shares only; Lord *Gifford*, M. R., considering that this was evidently a mistake, held, that the property should be divided into seven shares.

In cases the converse of the preceding, *i. e.* where the number of children mentioned in the will exceeds the actual number, of course there is no hesitation in holding all the children to be entitled; and, in a recent case (*a*), a trust for the five daughters

(*u*) 2 B. C. C. 85, 1 Cox, 250; [*Lee* v. *Pain*, 4 Hare, 249.]
(*x*) 19 Ves. 125.
(*y*) Supra, 178.
(*z*) 1 Russ. 496.
(*a*) *Lord Selsey* v. *Lord Lake*, 1 Beav. 151.

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"To the *five* daughters of E.," there being one daughter and five sons.

of the testator's niece, E., was held to apply to a daughter of E. (and who was the only daughter at the date of the will), and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word "daughters" was written by mistake for *sons*.

To the four sons of A., there being three sons and one daughter.

[But, in *Lane* v. *Green* (*b*), under a bequest of 100*l.* apiece to the four sons of A., A. having, in fact, three sons and a daughter; Sir *J. K. Bruce*, V. C., thinking it clear that the testator intended to give four legacies of 100*l.*, held the daughter entitled to a legacy as well as the sons.]

The case of *Harrison* v. *Harrison* (*c*) presents an example of both the preceding rules; the bequest being to "the two sons and the daughter of T. L., 50*l.* each." There were one son and five daughters living at the date of the will, all of whom were held to be entitled.

Testator's knowledge of the real number does not affect the rule.

[The circumstance that the testator knows the true number of children is not a sufficient reason for refusing to follow the rule; and, therefore, where a testatrix bequeathed to the three children of her niece, A., 500*l.* each, knowing that A. had nine children, all the children were held entitled to a legacy (*d*). It was also in evidence, that when A. had only three children, the testatrix being aware of that fact, had made a will in the terms stated above, and had, in the intervals, after the births (of which she was regularly informed) of a fourth and ninth child, made a second and third will, and finally the will which was the subject of discussion in the cause: and all these wills were in the same words. But Sir *J. K. Bruce*, V. C., thought that even assuming the admissibility of the whole of the evidence (which he purposely avoided deciding), it was not sufficient to exclude the claim of the six younger children to be legatees as well as the three elder.

And on the same principle, where (*e*) there was actual evidence of the testator having been informed that there were seven children; whereupon, after some interval, he made his will, bequeathing 40*l.* a year "to each of the seven children now living of A.," and it turned out that two more children were born in the interval before the will was made; it was held, that

[(*b*) 4 De G. & S. 239.]
(*c*) 1 R. & My. 72. [And see *Hare* *Cartridge*, 13 Sim. 165.
(*d*) *Daniell* v. *Daniell*, 3 De G. & S. 337; *Scott* v. *Fenoulhett*, 1 Cox, 79.
(*e*) *Yeats* v. *Yeats*, 16 Beav. 170.]

[the general rule was not to be departed from, and that all the nine were entitled to annuities.]

Of course, if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to after-born children (*f*).

Gift to testator's *seven* children, naming only *six*, there being in fact eight.

On the same principle as that which governed the preceding cases, it has been decided, that where (*g*) a testator bequeathed the residue of his personal estate to be divided equally among his *seven* children, A., B., C., D., E., and F. (naming only *six*), and it turned out that he had eight children when he made his will, but from other parts of his will it appeared that he considered one of his children as fully provided for; the *seven* other children were entitled.

Rule inapplicable unless there is uncertainty in the objects.

[But where a testator gave a legacy to the two grandchildren of A., adding, "they live at X.," and it appeared that A. had three grandchildren, of whom only two in fact lived at X., it was held that the foregoing cases did not apply; for the testator had, by pointing out which of the grandchildren he meant, removed all uncertainty (*h*)].

Whether children take *per stirpes* or *per capita*.

V. Where a gift is to the children of several persons, whether it be to the children of A. and B. (*i*), or to the children of A. and the children of B. (*k*), they take per capita, not per stirpes.

To A. and the children of B.

The same rule applies, where a devise or bequest is [made to A. and the children of B. (*l*); and that, too, although it be in the form of a gift] to a person described as standing in a certain relation to the testator, and *the children* of another person standing in the same relation, as to "my son A. and the children of my son B. (*m*);" in which case A. takes only a share equal to that

(*f*) *Sherer* v. *Bishop*, 4 B. C. C. 55.

(*g*) *Humphreys* v. *Humphreys*, 2 Cox, 184. See also *Garth* v. *Meyrick*, 1 B. C. C. 30; [*Eddels* v. *Johnson*, 1 Giff. 22.

(*h*) *Wrightson* v. *Calvert*, 1 Johns. & H. 250.]

(*i*) *Weld* v. *Bradbury*, 2 Vern. 705; *Lugar* v. *Harman*, 1 Cox, 250; [*Pattison* v. *Pattison*, 19 Beav. 638; *Armitage* v. *Williams*, 27 ib. 346.]

(*k*) *Lady Lincoln* v. *Pelham*, 10 Ves. 166; see also *Barnes* v. *Patch*, 8 Ves. 604; *Walker* v. *Moore*, 1 Beav. 607; [*Bolger* v. *Mackell*, 5 Ves. 509; *Eccard* v. *Brooke*, 2 Cox, 213; *Heron* v. *Stokes*, 2 D. & War. 89.

(*l*) *Butler* v. *Stratton*, 3 B. C. C. 367; *Dowding* v. *Smith*, 3 Beav. 541; *Rickabe* v. *Garwood*, 8 ib. 579; *Paine* v. *Wagner*, 12 Sim. 184; *Amson* v. *Harris*, 19 Beav. 210.]

(*m*) *Blackler* v. *Webb*, 2 P. W. 383; *Williams* v. *Yates*, 1 C. P. Coop. 177, 1 Jur. 510; [*Hyde* v. *Cullen*, ib. 100; *Linden* v. *Blackmore*, 10 Sim. 626; *Tomlin* v. *Hatfield*, 12 Sim. 167; *Tyndale* v. *Wilkinson*, 23 Beav. 74. In *Blackler* v. *Webb*, Lord *King*, C., said that A. and the children of B. "should each of them take per capita, as if all the children had been named by their respective names." This is not to be understood as limiting the class of children capable of taking to those living at the date of the will; on the contrary, the

of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view. [So, also, if the gift be, not simply to the children of A. and B., but to A. and B., and their children, or to a class and their children, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund; that is, the distribution will be made per capita (*n*).]

But this mode of construction [is, of course, excluded where the bequest to the children is merely substitutional (*o*), and] will yield to a very faint glimpse of a different intention in the context. Thus the mere fact, that the annual income, until the distribution of the capital, is applicable per stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital (*p*). [And the same result was held by Sir *J. K. Bruce*, V. C., to follow from the share of one stock being, in case of death before the period of distribution, given over to the others, per stirpes (*q*); and a residue given to the children of a testator's son and daughters, A., B., C. and D., was held by Sir *L. Shadwell*, V. C., to be divisible per stirpes, by reason of a gift over of the shares of any of the son and daughters (who had previous life-interests) dying without leaving issue, to the survivors and their issue (*r*). By this clause the testator shewed he did not intend a distribution per capita, since, in that case, the whole residue would, by force of the original gift, have gone among the children of those who had children in equal shares (*s*). So, where a testator bequeathed

[general rule applies here, according to which, all children born before the period of distribution are admitted to share, *Dowding* v. *Smith*, 3 Beav. 541; *Linden* v. *Blackmore*, 10 Sim. 626; *Cooke* v. *Bowen*, 4 Y. & C. 244. See, however, *Parkinson's Trust*, 1 Sim. N. S. 242; where, however, the point seems not to have been raised. *Scott* v. *Scott*, 15 Sim. 47, seems to have been decided upon the rule in *Wild's case*.

(*n*) *Cunningham* v. *Murray*, 1 De G. & S. 366; *Abbay* v. *Howe*, ib. 470; *Northey* v. *Strange*, 1 P. W. 340; *Murray* v. *Murray*, 3 Ir. Ch. Rep. 120; *Law* v. *Thorp*, 4 Jur. N. S. 447, 27 L. J. Ch. 649. So where a gift is implied from a power to appoint to children *or* issue, *White's Trust*, 1 Johns. 656. As to the question whether the parents take an equal share with their children, or a life interest in the whole with remainder amongst the children, see post, ch. xxxviii.

(*o*) *Price* v. *Lockley*, 6 Beav. 180; *Armstrong* v. *Stockham*, 7 Jur. 230; *Shailer* v. *Groves*, 6 Hare, 162; see *Burrell* v. *Baskerfield*, 11 Beav. 525; *Blackstock* v. *Sharp*, 2 De G. & S. 484; *Congreve* v. *Palmer*, 16 Beav. 435; *Timins* v. *Stackhouse*, 27 ib. 434.]

(*p*) *Brett* v. *Horton*, 4 Beav. 239; [see *Crone* v. *Odell*, 1 Ba. & Be. 449, 3 Dow, 61; *Overton* v. *Bannister*, 4 Beav. 205. Otherwise, it seems, where so much only of the income as the trustees may think sufficient is so applicable, *Nockolds* v. *Locke*, 3 Kay & J. 6.

(*q*) *Nettleton* v. *Stephenson*, 18 L. J. Ch. 191.

(*r*) *Hawkins* v. *Hamerton*, 16 Sim. 410.

(*s*) *Smith* v. *Streatfield*, 1 Mer. 358; *Bolger* v. *Mackell*, 5 Ves. 509.

[the residue of his personal estate to A. for life, and after his decease, unto and equally amongst all the children of A., except his eldest son J., and amongst the issue of any children of A. who should be then dead, and also among the issue of the said J., *such issue taking their respective parents' share*, it was held, that the issue of J. took, per stirpes, with the other children of A. (*t*).

To A. and B. for their lives, remainder to their children: whether children take per capita or per stirpes.

This question often arises upon devises or bequests to two or more persons for their lives, with remainder to their children. The result then depends in a great measure upon the solution of the previous question, whether the tenants for life take several or joint estates. If the former, then, as the share of any one must, on his decease, go over immediately, without waiting for the other shares, it is reasonable to suppose that the testator intended it to continue separate and distinct from the other shares, and consequently, to devolve on the children per stirpes (*u*). If otherwise, then it would follow that the different shares would go to different classes of children; for, after the death of the tenant for life who first died, another might have more children, who would certainly be entitled to participate in a share of any tenant for life who died afterwards.

First, where A. and B. are tenants in common.

But such a construction, however improbable the intention which it imputes to the testator, must prevail if clearly indicated. Therefore, in the case of *Stephens* v. *Hide* (*x*), where a portion of the residue was bequeathed in trust for the testator's two daughters for their lives, as tenants in common, "and afterwards to their or either of their child or children," and one of the daughters died without children; it was held, that the only child of the other daughter was entitled to the whole fund, since the testator had used plain words to shew his intent, that whether there was one or more children, in either case the child or children should take the whole. So in the case of *Abrey* v. *Newman* (*y*), where a testator bequeathed property "to be

[(*t*) *Minchell* v. *Lee*, 17 Jur. 727. See also *Hunt* v. *Dorsett*, 5 D. M. & G. 570; *Shand* v. *Kidd*, 19 Beav. 310; but it seems that the issue (grandchildren, great grandchildren, &c.) would take inter se per capita, *Birdsall* v. *York*, 5 Jur. N. S. 1237.

(*u*) See accordingly *Pery* v. *White*, Cowp. 777; *Taniere* v. *Pearkes*, 2 S. & St. 383; *Willes* v. *Douglas*, 10 Beav. 47; *Flinn* v. *Jenkins*, 1 Coll. 365; *Arrow* v. *Mellish*, 1 De G. & S. 355; *Doe* d. *Patrick* v. *Royle*, 12 Q. B. 100; *In re Laverick's estate*, 18 Jur. 304; *Bradshaw* v. *Melling*, 19 Beav. 417; *Hunt* v. *Dorsett*, 5 D. M. & G. 570; *Coles* v. *Witt*, 2 Jur. N. S. 1226; *Turner* v. *Whittaker*, 23 Beav. 196.

(*x*) Ca. t. Talb. 27. But see *Waldron* v. *Boulter*, 22 Beav. 284.

(*y*) 16 Beav. 431.

[equally divided between A. and B. for the period of their natural lives, after which to be equally divided between their children, *that is to say, the children of A. and B., above named.*" Sir *J. Romilly*, M. R., held, that on the death of A. one half of the fund was divisible per capita among the children of both A. and B.: he thought the last words of the bequest prevented him from reading the preceding words as their respective children.

Where the property is given to several for life and afterwards to the children of some only of the tenants for life, there is no difficulty in holding the children to be entitled per capita (*z*).

Secondly, where A. and B. are joint tenants.

On the other hand, if the tenants for life take jointly, or (which is for this purpose equivalent) as tenants in common with implied survivorship, the whole subject of the devise remains undivided until the death of the survivor, and then goes over in a mass. In this case it seems to be reasonable that the children should take per capita (*a*). And the same argument is applicable although the life interest do not survive, if the general distribution among the children be postponed until after the death of the last surviving tenant for life (*b*).

The case of *Smith* v. *Streatfield* (*c*) may perhaps be referred to a similar principle, where, after a gift of 4,000*l.* in trust for A. and B., for their lives, as tenants in common, the testator proceded,—"And as their lives drop and expire, I direct that the principal and interest be reserved, and be equally divided among their children when they shall severally attain the age of twenty-one years;" and A. having died childless, it was held that the children of B. (who had all attained twenty-one) were entitled to the whole sum. The reasons of this decision do not appear, but the direction to *reserve* and divide at twenty-one seems to render the limitations over independent of the period when the previous interests might be determined.]

To the younger sons of J. and S., J. having none.

Where (*d*) a testator bequeathed his "fortune" to be equally divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should

[(*z*) *Swan* v. *Holmes*, 19 Beav. 471. See also *Sarel* v. *Sarel*, 23 Beav. 87.

(*a*) *Malcolm* v. *Martin*, 3 B. C. C. 50; *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Stevenson* v. *Gullan*, 18 Beav. 590; *Parker* v. *Clarke*, 6 D. M. & G. 110. Compare *Shand* v. *Kidd*, 19 Beav. 310; *Begley* v. *Cook*, 3 Drew. 662.

(*b*) *Nockolds* v. *Locke*, 3 Kay & J. 6.

(*c*) 1 Mer. 358.]

(*d*) *Wicker* v. *Mitford*, 3 B. P. C. Toml. 442. And see *Malcolm* v. *Martin*, 3 B. C. C. 50.

not leave any second or younger son, the testator gave and bequeathed his said fortune to his said brother and sister; it was held, that there being no son of J., and but one younger son of S., such younger son took the whole.

Gift to A. and B.'s children.

Here it may be observed, that where the gift is to A. and B.'s children, or to "my brother and sister's children," (the possessive case being confined to B. and the sister,) it is read as a gift to A. and the children of B., or to the brother and the children of the sister, as it strictly and properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify (*e*).

"To the children of my cousin A. and my cousin B."

So a bequest of a residue to be divided among "the children of my late cousin A., and my cousin B., and their lawful representatives," has been held to apply to B., not to his children (*f*).

[But although where the intention is to extend the bequest to the children of each, the word "of" should, to make the expression correct, be supplied before the words "my cousin B." yet the sentence is also incomplete as it stands, if it is intended as a bequest "to the children of my late cousin A. and *to* my cousin B." Slight indications therefore of an intention to use it in its former sense will be attended to; and effect was accordingly given to such intentions evidenced by the parents (A. and B.) having equal legacies given to them in a former part of the will (*g*)—a circumstance which the more readily distinguishes the case from *Lugar* v. *Harman*, when it is observed that there A. was dead and could not be put on an equality with B.]

Whether dying without children means *having* or *leaving* a child.

VI. Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without *children* (*h*), means without *having had* or without *leaving* a child.

In *Hughes* v. *Sayer* (*i*), a testator bequeathed personalty to A. and B., and upon either of them dying without children, then to the survivor; and if both should die without children,

(*e*) See *Doe* d. *Hayter* v. *Joinville*, 3 East, 172. If, however, A. and B. were husband and wife (as if the bequest were to John and Mary Thomas's children), no doubt the construction would be different; it would apply to the children of both.

(*f*) *Lugar* v. *Harman*, 1 Cox, 250; [*Peacock* v. *Stockford*, 3 D. M. & G. 78: but see *Wicker* v. *Mitford*, ubi sup.; *Trail* v. *Kibblewhite*, 12 Sim. 5.

(*g*). *Mason* v. *Baker*, 2 Kay & J. 567. See also *Re Davies' Will*, 7 Jur. N. S. 118.]

(*h*) Of course this question *may* arise where the person whose issue is referred to is not the prior legatee, but it happens rarely to have presented itself in such a shape.

(*i*) 1 P. W. 534.

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then over; and it was held to mean children living at the death.

Upon A. and B. both dying without children.

The great question in this case was, whether the word "children" was not used as synonymous with *issue* (*k*) indefinitely, in which case the bequest over would have been void; and the M. R. seems to have thought that, whether it meant *issue* or *children*, it referred to the period of the death (*l*).

So, in the case of *Thicknesse* v. *Liege* (*m*), where a testator devised the residue of his estate in trust for his daughter for life, and after her decease among her issue, the division to be when the youngest should attain twenty-one; and if any of them should be then dead, leaving lawful issue, the guardian of such issue to take his or her share. *But if his daughter happened to die without any child,* or the youngest of them should not arrive to twenty-one, and none of them should have left issue, then over. The testator's daughter at the time of his death had one child, who had four children, but they, as well as their mother, all died in the lifetime of the daughter, so that she died without leaving issue at her death; and it was held, that the devise over took effect.

If A. happened to die without any child.

[And this construction is more easily adopted when, in another part of the will, the testator has used other words signifying death without having ever had any children (*n*).]

Without having children, how construed.

But the words *without having children* are construed to mean, as they obviously import, without having *had* a child.

Thus, in the case of *Weakley* d. *Knight* v. *Rugg* (*o*), where leasehold property was bequeathed to A., "and in case she died without *having* children," over; it was held, that the legatee's interest became indefeasible on the birth of a child.

In *Wall* v. *Tomlinson* (*p*), a residue which was given to A. "in case she should have legitimate children, in failure of which," over, was held to belong absolutely to A. on the birth of a child, who died before the parent. "Failure" here evidently referred not to the child, but to the event of "having children."

[So, in the case of *Bell* v. *Phyn* (*q*), where the bequest was to the testator's three children A., B., and C., but in case of the

(*k*) As to which, see *Doe* d. *Smith* v. *Webber*, 1 B. & Ald. 713, and ante, 89.

(*l*) But see *Massey* v. *Hudson*, 2 Mer. 135.

(*m*) 3 B. P. C. Toml. 365.

[(*n*) *Jeffreys* v. *Connor*, 6 Jur. N. S. 986.]

(*o*) 7 T. R. 322. See also *Stone* v. *Maule*, 2 Sim. 490; [*Findon* v. *Findon*, 1 De G. & Jo. 380.]

(*p*) 16 Ves. 413.

[(*q*) 7 Ves. 453.

[death of any of them without being married (*r*) and having children, then over, Sir *W. Grant*, M. R., held, that the share of A. was absolutely vested in her upon the birth of a child.

Difference whether absolute or life interest is given to the prior taker.

In these cases, it will be observed, the corpus of the property was bequeathed to the legatee, from whom it was given away upon his not having children: and it was said by the learned Judge who decided the last case, that if the *interest* of a fund were given to the parent, and the capital to the children, but given over in case the parent died without (having) children, leaving children at the time of his death was undoubtedly the only construction that could be put upon the words "dying without having children:" for it was at the death that the provision was intended to be made (*s*).]

Construction of the word "leaving."

The word *leaving* obviously points at the period of death (*t*). Thus a gift to such children or issue as a person may leave is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; and this construction was applied in a case (*u*) where there was a gift to the lawful issue of A. and B., and of such of them as should *leave* issue, the latter words being considered as explaining, that the word "issue," in the first part of the sentence, meant those who were left by the parent; the consequence of which was, that the children, who did not survive the parent, were not entitled to participate with those who did.

Word "leaving" refers to period of death;

Although, as we have seen, the word "leaving" primâ facie points to the period of death, yet this term, like all others, may receive a different interpretation by force of an explanatory context. Where a gift over is to take effect in case of a prior legatee for life, whose children are made objects of gift, dying without *leaving* children, it is sometimes construed as meaning, in default of objects of the prior gift, even though such gift should not have been confined to children living at the death of the parent. [And in the case of a devise of real estate, a limitation over if the devisee should die without *leaving* children, may sometimes give him an estate tail (*x*).]

——except where entail is created.

In case of two persons, husband and wife,

Where the gift over is in the event of *two* persons, husband and wife, not leaving children, the question arises, whether the

[(*r*) "Without being married" was construed to mean "without having ever been married;" and the word "and" as "or," ante, vol. i., ch. xvi., s. 3.

(*s*) Page 459.

(*t*) *Read* v. *Snell*, 2 Atk. 647.]

(*u*) *Cross* v. *Cross*, 7 Sim. 201.

[(*x*) See *Raggett* v. *Beatty*, 5 Bing. 243, and other cases stated post, chap.

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leaving no children.

words are to be construed in case both shall die without leaving a child living at the death of *either*, or in case both shall die without leaving a child, who shall survive *both*.

As in the case of *Doe* d. *Nesmyth* v. *Knowls* (*y*), where the devise was to *William Smyth* and *Mary* his wife, and the survivor of them, during their lives, then to Mary their daughter, or, if more children by *Mary*, equal between them; and, *in case they leave no children*, to their heirs and assigns for ever; it was held, that the fee simple became vested under the last devise, when the survivor of *William* and *Mary* (namely William), died leaving no children of their marriage surviving him, though a child was living at the death of Mary; Mr. Justice *Bayley* observing—"they cannot be said to leave no children till both are gone."

Distinction where they are not husband and wife.

If the several persons on whose decease, without children, the gift over is to take effect be not husband and wife, the obvious construction is to read the words as signifying, "in case each or every such person shall die without leaving a child living at his or her own respective decease," supposing, of course, that the testator is not contemplating a marriage between these persons, and their having children, the offspring of such marriage; a question which can only arise when the persons are of different sexes, and not related within the prohibited degrees of consanguinity; for the law will not presume that a marriage between such persons, *i. e.* an illegal marriage, was in the testator's contemplation.

Gifts to younger children.

VII. We are now to consider the construction of *gifts to younger children*, the peculiarity of which consists in this, that as the term *younger children* generally comprehends the branches not provided for of a family (younger sons being excluded by the law of primogeniture from taking by descent), the supposition that these are the objects of the testator's contemplation so far prevails, and controls the literal import of the language of the gift, that it has been held to apply to children who do *not* take the family estate, *whether younger or not* (*z*), to the exclusion of a child taking the estate, whether

xxxviii. The same may be said of the words "dying without children," *Bacon* v. *Cosby*, 4 De G. & S. 261, stated post, same chap.]

(*y*) 1 B. & Ad. 324.

(*z*) *Chadwick* v. *Doleman*, 2 Vern. 528; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncombe*, ib. 451; *Heneage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnett*, 2 B. C. C. 38.

elder or not (*a*). Thus the eldest daughter, or the eldest son being unprovided for, has frequently been held to be entitled under the description of a younger child.

"Younger" construed as synonymous with *unprovided for.*

As where a parent, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for *younger children,* appoints the estate to a younger son, the elder will be entitled to a portion under the trusts of the term (*b*); and, by parity of reason, the appointee of the estate, though a younger son, will be excluded. But it should be observed, that where the portions are to be raised for *children* generally, the child taking the estate is allowed to participate (*c*); [and where the will purports to exclude those only who come into possession of the estate, a child (or his executor) will not be excluded if he dies before coming into possession, and the estate derived through the deceased child devolves on his heir-in-tail (*d*).

Whether rule applies where estate is diverted by subsequent dealings.

Where the father and the eldest son have barred the remainders, and, on the death of the latter in his father's lifetime, the estate comes by a new title to the second son who has thus become the eldest, a question arises whether the second son is entitled to participate in younger children's portions (*e*). In the case of *Peacocke* v. *Pares* (*f*), Lord *Langdale,* M. R., held, that he was not so entitled, because the event (namely, the second son becoming the eldest,) had happened, though in a way not contemplated by the settlement, upon which it was intended he should be excluded from the provision made for younger children: and the fact that he did not eventually succeed to the estate by force of the settlement, but independently of it, could not affect the construction to be put upon the settlement. On the other hand, in *Spencer* v. *Spencer* (*g*), Sir *L. Shadwell,* V. C., held the second son not to have forfeited his right to a younger child's portion, by reason of his having become the eldest, because in event the estate had not devolved upon him; the settlement, in the learned Judge's opinion, not intending him to be excluded unless he

(*a*) *Bretton* v. *Bretton,* Freem. Ch. 158, pl. 204, 3 Ch. Rep. 1, 1 Eq. Ca. Ab. 202, pl. 18.
(*b*) *Duke* v. *Doidge,* 2 Ves. 203.
(*c*) *Incledon* v. *Northcote,* 3 Atk. 438.
[(*d*) *Wyndham* v. *Fane,* 11 Hare, 287.
(*e*) *Tayleur* v. *Dickinson,* 1 Russ. 521; *Taylor* v. *Earl of Harewood,* 3 Hare, 372; *Harrison* v. *Round,* 2 D. M. & G. 190; *Smith* v. *Osborne,* 6 H. of L. 375, 3 Jur. N. S. 1181.
(*f*) 2 Kee. 689.
(*g*) 8 Sim. 87.

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[actually took the estate by virtue of the limitations in the settlement.

It is to be observed that in the former case the portions had not vested when the second son became the eldest; so that there was no devesting of a vested interest, a circumstance considered by the M. R. not immaterial; while, in the latter case, the reverse was the fact. To this, however, the V. C. made no allusion: and in the recent case of *Macoubrey* v. *Jones* (*h*), Sir *W. P. Wood*, V. C., held that the distinction was immaterial; and treating the authorities as clearly in conflict with each other, decided the case before him in accordance with *Spencer* v. *Spencer*. Both Lord *Langdale* and Sir *L. Shadwell* agreed that a devolution of the estate on the son under a distinct title was not such as was contemplated by the settlement, and would not therefore of itself bar him of his portion as younger child. The real difference of opinion was, whether the party taking the estate under the recovery could be considered as taking under the settlement. Lord *Langdale*, thinking a recovery not to be such an event as could be within the contemplation of the parties making the settlement, held that he could not. Sir *L. Shadwell* and Sir *W. P. Wood* held the contrary. "It seems to me," said the latter judge, "to be a fallacy to say that a party, who takes the fee under a recovery or a disentailing deed, does not take under the settlement; or that the younger son, who by the recovery is excluded from taking, is not excluded by the settlement. The recovery is an incident to the settlement, and an incident from which it cannot be exempted. The parties know this when they make the settlement, and I cannot concur with Lord Langdale in viewing the recovery as an event which cannot reasonably be supposed to have been in contemplation when the settlement was made" (*i*).]

Rule confined to parental provisions.

The rule under consideration, however, applies only to gifts by parents or persons standing in loco parentis, and not to dispositions by strangers, in which the words *younger children* receive their ordinary literal interpretation (*k*). [To authorise

[(*h*) 2 Kay & J. 684.
(*i*) 2 Kay & J. 697.]
(*k*) See *Lord Teynham* v. *Webb*, 2 Ves. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166. [It is said, 2 Sug. Pow. 271, 7th ed., that this distinction does not appear to be attended to at the present day; but it was recognised in the recent case of *Wilbraham* v. *Scarisbrick*, 4 Y. & C. 116.

What will extend the rule to provisions not parental.

[the application of the rule to such dispositions, satisfactory evidence of an intention to adopt the rule must be found on the face of the will as explained by the surrounding circumstances. A question of this nature arose in the case of *Livesey* v. *Livesey* (*l*), where a second son, who at the time when the legacy vested (*m*), had become the eldest, was held not to be exempted from the operation of a clause, excluding an eldest son from participation in the gift, by the fact that the testatrix had bequeathed a merely nominal legacy to the eldest son living at the time of her decease, and had declared that she gave such eldest son no more because he would have a handsome provision from the will of his grandfather and father; the fact being that this reason applied only to the eldest by birth: since under the grandfather's will the second son took nothing on becoming the eldest; and although some provision was made for him on his elder brother's death, without issue, by the will of his father (who was then living), yet the testatrix was to be taken to know that such provision was revocable at any time before the father's death. There was, therefore, no alternative but to read "eldest" in its ordinary sense and without reference to the succession to property.]

Whether the rule is applicable to a devise of *lands*.

Nor is there any instance of its having been applied to a devise of *lands* without some indication in the context (*n*) of an intention, on the part of the testator, to use the term *younger children* as contradistinguished from an elder or provided-for son (*o*). Therefore it is conceived, that, if real estate were devised simply to the younger children of A., the devise would apply to such children as would be entitled under a devise to children generally, with the exception of the child (whether a son or daughter) being the eldest at the time of the vesting. [In *Wilbraham* v. *Scarisbrick* (*p*), where a father devised his estates A., B. and C., for the benefit of his children, giving to the eldest and his issue estate A., to the second and his issue estate B., and estate C. to the third son and his issue, with remainders in each case to the other children, and a clause shifting estate C. in case his third son should become entitled to estate B., and any *younger* son should be then living; the

[(*l*) 13 Sim. 33, 2 H. of L. Ca. 419, 13 Jur. 371. See also *Lyddon* v. *Ellison*, 18 Jur. 1066.

(*m*) See post, p. 192.]

(*n*) See *Heneage* v. *Hunloke*, 2 Atk. 456.

(*o*) *Hall* v. *Luckup*, 4 Sim. 5, seems to be a case of this kind.

[(*p*) 2 H. of L. Ca. 167.]

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[second son having died in the testator's lifetime, the third son became entitled to estate B., and it was then contended that the estate C. went over to the eldest son, as being younger in regard to the limitations of that estate, though elder by birth. But it was held in D. P., affirming the decision of the Court below, that the natural sense of "younger" was younger in order of birth, and that in this case, as there was nothing in the will to shew that it was more in accordance with the testator's intention that the eldest son should have estates A. and C., than that the third should have B. and C., the word could not be understood in the sense contended for. The case is clearly not within the authority of those before cited, the question being wholly free from the consideration whether a testator could have intended an eldest child unprovided for to remain wholly portionless.] It may be observed, that a bequest to "the youngest child of" A. has been held to apply to an *only* child (*q*).

*Only* child held to take as *youngest* child.

As to period of ascertaining who are "younger children."

Another question, which has been much agitated in construing gifts to younger children, respects the period at which the objects are to be ascertained.

*Immediate* gifts.

It is clear that an immediate devise or bequest to younger children applies to those who answer the description at the death of the testator, there being no other period to which the words can be referred (*r*).

Gifts by way of remainder.

It might seem, too, not to admit of doubt upon principle, that where a gift is made to a person for life, and after his decease to the younger children of B., it vests at the death of the testator in those who then sustain this character; subject to be divested pro tanto in favour of future objects coming in esse during the life of the tenant for life.

In the case of *Lady Lincoln* v. *Pelham* (*s*), the bequest was to A. for life, and, after her death to her children; and, in case she should have none, or they should all die under twenty-one, then to the *younger children of B.*; and A. having no child, the younger children of B. at the death of the testator were held entitled to a vested interest. Lord *Eldon*, however, seems to have thought that this construction was aided by the terms of another bequest; and his Lordship laid

(*q*) *Emery* v. *England*, 3 Ves. 232.
(*r*) *Coleman* v. *Seymour*, 1 Ves. 209. [So of any other description of children, as "unmarried," *Jubber* v. *Jubber*, 9 Sim. 503.]
(*s*) 10 Ves. 166.

some stress on the circumstance, that the bequest did not proceed from a parent, or a person standing in loco parentis.

Appointment to younger children held subject to implied condition of their not becoming elder.

In regard to parental provisions of this nature, certainly a peculiarity of construction seems to have obtained, the leading authority for which is *Chadwick* v. *Doleman* (*t*), where a father, having a power to appoint portions among his younger children, to be raised within six months after his death, by deed appointed 2,600*l.*, part of the entire sum, to his son T., describing him as his second son. No power of revocation was reserved. T. afterwards became an elder son, whereupon the father made a new appointment in favour of another son; and the Lord Keeper held, that the second was valid, the first appointment being made upon the tacit or implied condition of the appointee not becoming an elder son before the time of payment.

Rule as to parental provision for younger children.

It should seem, then, that a gift by a father or a person assuming the parental office, in favour of younger children, is, without any aid from the context, to be construed as applying to the persons who shall answer the description at the time when the portions became payable. The object of thus keeping open the vesting during the suspense of payment, probably is to prevent a child from taking a portion as younger child, who has become, in event, an elder child (*u*), and also, perhaps, to

(*t*) 2 Vern. 528. See also *Loder* v. *Loder*, 2 Ves. 531; *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 Ba. & Be. 265; [*Gray* v. *Earl of Limerick*, 2 De G. & S. 370, a very special case; *Macoubrey* v. *Jones*, 2 Kay & J. 692. It is immaterial that an appointment be made to a child by name, *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 Ba. & Be. 265. In *Jermyn* v. *Fellowes*, Ca. t. Talb. 93, a child named in the *power* as an object did not lose his share as younger child, though he afterwards became eldest; but as to this case, see 2 Sug. Pow. 269, 7th ed. It seems that if a portion be actually *paid* to a child, he will not be obliged to refund upon becoming the eldest son, *Leake* v. *Leake*, 10 Ves. 477; and see *Glyn* v. *Glyn*, 3 Jur. N. S. 179, 26 L. J. Ch. 409.]

Effect where younger child becomes elder without taking the estate.

(*u*) Under this rule, however, a younger child might happen to lose his portion by becoming an elder child, without acquiring the family estate. For instance, suppose lands to be devised to A. for life, with remainder to his first and other sons in tail male, charged with portions to his younger children, payable at the decease of A. A. has three sons, the eldest of whom dies in the lifetime of A., leaving issue male; the second son, having by the decease of his elder brother become in event the eldest son, would lose his portion as younger son, though the estate had devolved to the issue of his elder brother; probably, however, it would be held, that under such circumstances the second son was not such an elder son as the rule contemplated, namely, the elder son *taking the estate*. [See accordingly per Sir *W. P. Wood*, 2 Kay & J. 698.] From some remarks of Sir *Thomas Plumer*, in the case of *Matthews* v. *Paul*, it is to be inferred that his Honor did not consider that the construction could be carried to this extent; but in this and some other parts of his judgment the line is not very distinctly drawn between parental provisions and dispositions by a stranger in favour of younger children. It is to the former only that the construction here suggested could, it is conceived, apply.

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prevent the inheritance (which is often charged with portions to younger children) from being burdened with the payment of portions which are not eventually wanted. Shutting out of view these particular cases of parental provision (the propriety of which it is too late to question), and applying to bequests to younger children the principles established by the cases respecting gifts to children in general, it would seem, that, in every case of a future gift to younger children, whether vested or contingent, provided its contingent quality did not arise from its being limited in terms to the persons who should be younger children at the time of distribution (*x*), or any other period, the gift would take effect in favour of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded by his or her becoming an elder before the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Whether objects must sustain the character at period of distribution.

Case of *Hall* v. *Hewer*.

Thus, in *Hall* v. *Hewer* (*y*), A. having devised lands to trustees, to raise 6,000*l*., afterwards wrote a letter (which was proved as a codicil) to J., one of his trustees, which contained the following passage:—"I have given you and W. a power to mortgage for payment of 6,000*l*., and I beg that that sum may be lent to W., and that you will take such securities from him as he can give, to indemnify you and your children from payment of it; and, in case of your death without children, I desire it may be *secured to the younger children of W.*" Lord *Hardwicke* held, that the 6,000*l*. did not vest until the death of J., and then in such persons as were at that time younger children of W., and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

Case of *Ellison* v. *Airey*.

In *Ellison* v. *Airey* (*z*), 300*l*. was bequeathed to E., to be

[(*x*) *Livesey* v. *Livesey*, 13 Sim. 33, 13 Jur. 371, n., 2 H. of L. Ca. 419.]

(*y*) Amb. 203.

(*z*) 1 Ves. 111. This case has been frequently cited in the present chapter as an authority for admitting children born before the time of distribution. As such, it is unquestionable, and has always been regarded as a leading case; but this is quite distinct from the point now under consideration.

paid at her age of twenty-one or marriage, and interest in the mean time for her maintenance and education; but if she died before twenty-one or marriage, then to the *younger children of testatrix's nephew F.*, equally to be divided to or among them, the eldest son being excluded from any part thereof. Lord *Hardwicke* was of opinion, that it meant such as should be younger children at the death of E. before twenty-one or marriage, *the legacy being contingent until that period.*

Remarks on *Hall* v. *Hewer*, and *Ellison* v. *Airey*.

But as the fact of their being younger children at the period of distribution was no part of their qualification, could it properly form a ground for varying the construction? In the case of a devise to A. in fee, and if he die under twenty-one, to B., it has long been established that B. takes an executory interest, transmissible to his representatives (*a*), and it cannot be material whether the executory devise is in favour of a person nominatim, or as the member of a class upon whom the interest has devolved at the death of the testator, or at any subsequent period before the happening of the contingency (*b*).

It does not appear that the case of *Ellison* v. *Airey* involved the application of the peculiar rule respecting parental provisions, or that Lord *Hardwicke* so regarded it; [any more than the case of *Hall* v. *Hewer*, which he expressly said was the case of a stranger, and not between parent and child:] nor is it even clear that his Lordship considered the construction exclusively applicable to gifts to younger children; for it will be remembered, that, in the case of *Pyot* v. *Pyot* (*c*), the same eminent Judge laid down the rule generally, that an executory or contingent gift to persons by a certain description, applied to such of them only as answered the description at the happening of the contingency. If there is any such rule, of course the cases under consideration do not exist as a distinct class. [But there is no such rule (*d*).] We are too much in the dark as to the ground of decision in *Hall* v. *Hewer*, and *Ellison* v. *Airey*, to found any general conclusion upon those cases, nor, on the other hand, is it safe wholly to disregard them.

Exception of elder son at the time of distribution.

It is clear, however, that an express exclusion of the son who shall be elder *at the time of death of the tenant for life*, will have

(*a*) *Goodtitle* v. *Wood*, Willes, 21.

(*b*) As to the general distinctions between gifts to classes and individuals, see ante, ch. xi.

(*c*) Ante, 129.

[(*d*) Per Sir *G. J. Turner*, L. J., *Bolton* v. *Beard*, 3 D. M. & G. 612.]

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the effect in like manner of restricting a gift to younger children to such as shall *then* sustain the character (*e*).

Expression "an elder son" construed to mean elder son at time of distribution.

Case of *Matthews* v. *Paul.*

And the same construction was given to the expression "an eldest son," in the case of *Matthews* v. *Paul* (*f*), which deserves some consideration. A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and, after her decease, to P., her husband, for his life, and, after his decease, upon trust to transfer the said stock unto all the children of M., if more than one (*except an eldest son*), share and share alike, *the same to be vested interests,* and transferable *at their, his, or her ages, or age of twenty-one years,* and in the mean time to invest their respective shares of the dividends for such children's future benefit; and, in case any such children or child should die under the said age, leaving any children or child, then the share of every such child to go among their, his, or her children; otherwise to go to the survivors or survivor, and to be transferable in like manner as their original share; and, in case M. should leave no children or child at her decease, or, leaving such, they should all die under the age of twenty-one years without children as aforesaid, then over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stocks, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one (*except an eldest son*), equally, share and share alike; and if but one, then the whole to such one or only child, the same to be vested interests, and transferable, at such times and in such manner as the bank stock thereinbefore given. One of the younger children became an elder between the periods of the death of the testatrix and the expiration of the imperial annuities, but before any younger child had attained twenty-one, which raised the question as to the point of time to which the exception of an elder son was referable. Sir *T. Plumer,* M. R., held, first, that the shares vested when one of the younger children attained twenty-one, and not before.

Time of vesting.

"Eldest son," to what period referable.

With respect to the period at which the phrase "an eldest son" was to be applied, he considered that three different times might

(*e*) *Billingsley* v. *Wills,* 3 Atk. 219. (*f*) 3 Swanst. 328.

be proposed; the date of the will, the death of the testatrix, and the time when the fund was directed to be distributed. After shewing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies payable to a class of persons at a future period, the constant rule has been, that all persons coming in esse, and answering the description at the period of distribution, should take. The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.

Observations upon *Matthews* v. *Paul.*

But it is to be observed, that though in gifts to children, the time of distribution is the period of ascertaining the number of objects to be admitted, yet it is not necessary to wait until this period in order to see whether children living at the death of the testator, or at any other period to which the vesting is expressly postponed, be objects or not; and it would seem, therefore, upon the principle of his Honor's own reasoning, to be equally unnecessary to wait until the period of distribution, in order to know whether an elder son, in existence at the time of the vesting, would be excluded. In the case of a gift to A. for life, and after his death to the children of B., to vest at twenty-one, it may be affirmed of every child who has attained twenty-one in the lifetime of B., that he is an object (*g*); and, by parity of reasoning, it would seem to follow that if any child who would, but for the clause of exclusion, have been an object, comes in esse, the exception is ascertained to apply to him (*h*).

Gifts to younger children.

Whether period of vesting is not the time to ascertain who is excluded as an elder child.

It is singular, that though the M. R. took some pains to shew that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator, yet he never once addresses himself to the inquiry, whether *the period of vesting* was not that to which the term "eldest son" was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord *Eldon* to a bequest to younger children, in *Lady Lincoln* v. *Pelham*, that this *was* the period of ascertaining the individual upon whom the character of eldest son had

(*g*) Ante, 146.

(*h*) But if the *youngest* were excepted, it would obviously be necessary to wait until the period of distribution, in order to know who would be the youngest, the exception embracing the last-born object of the class.

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devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it (*i*). If the gift had been to A. for life, and after her decease to "an eldest son" of A., to be vested and transferable when the younger children or child of A. should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A. or not, was absolutely entitled, and yet this is precisely the case of *Matthews* v. *Paul*, substituting a gift for the exception. Another remark occurs on this judgment: that though at the outset his Honor treats the case as one in which the provision proceeded from a stranger (being by a grandmother in the lifetime of a parent, without any indication of an intention to stand in loco parentis), yet he afterwards cites, in support of his decision, *Chadwick* v. *Doleman* (*k*), and other cases of provisions by parents.

Effect of gift to the elder son for the time being.

And here it may be remarked, that where there is a gift to the elder son in terms which would carry it to the eldest *for the time being* (*l*), and there is another gift in the same will to younger children generally, the latter will receive a similar construction, to prevent the same individual taking under each character (*m*). Such seems at least to be the effect of the case of *Bowles* v. *Bowles*, though in the judgment of Lord *Eldon* no general position of this nature is distinctly advanced.

It is clear that if there be an express limitation over in case of a younger son becoming the eldest before a given age or period, this prevents his being excluded by becoming the eldest son under *other* circumstances, by force of the often-cited principle (*n*) exclusio unius est inclusio alterius. Indeed Lord *Gifford*, in the case referred to, was of opinion that a declaration that the children attaining twenty-one, &c., in the lifetime of the parent, should take vested interests, was sufficient to entitle a child who was a younger child at this period, but subsequently became the eldest. This conclusion, it is con-

[(*i*) See acc. *In re Theed's settlement*, 3 Kay & J. 375.]

(*k*) Ante, 193.

[(*l*) In *Harvey* v. *Towell*, 7 Hare, 231 (better rep. 12 Jur. 242), an express gift to eldest sons "for the time being" of different parents, was held to be controlled by a subsequent reference to the time of the testator's death, when speaking of an only eldest son.]

(*m*) *Bowles* v. *Bowles*, 10 Ves. 177. See *Sansbury* v. *Read*, 12 Ves. 175, where younger children were held to be entitled on a very obscure will.

(*n*) *Windham* v. *Graham*, 1 Russ. 331. This case arose on the construction of a marriage settlement, but the principle seems not to be different on that account.

ceived, goes far to support the doctrine which has been here contended for, in opposition to *Matthews* v. *Paul;* for as the doubt is not as to the period of vesting, but whether such period is the time of ascertaining the object to be excluded, the declaration in question seems not to be very material. Besides, whatever is its effect, the declaration as to vesting in *Matthews* v. *Paul,* seems to be equivalent in principle. The result of Lord *Gifford's* determination is, that in the case of gifts to younger children, not involving the peculiar doctrine applicable to parental provisions, the time of vesting is the period of ascertaining who are to take under the description of younger children, and who is to be excluded as an elder child (*o*).

Exception of an eldest child in devise of real estate;

That this is the rule in regard to devises of real estate appears by the recent case of *Adams* v. *Bush* (*p*), where a testator devised freehold estate to his uncle A. for life, remainder to the wife of A. for life, remainder to all and every the child and children of A., *other than and except an eldest or only son,* and their heirs, and if there should be no such child *other than an elder or only son,* or being such, all should die under twenty-one, then over. At the death of the testator A. had two sons, B. and C.; B. died in A.'s lifetime, and it was contended that according to the cases respecting gifts to younger children, especially *Matthews* v. *Paul,* C. was not entitled, as he did not answer the description of younger child when the remainder vested in possession; but the Court certified (it being a case from Chancery), that [C. took, on his father's death, an estate in fee-simple in possession defeasible on his dying under the age of twenty-one.

——in a bequest of personal estate.

And a similar decision was made with respect to a bequest of personal estate in the recent case of *Bryan* v. *Collins* (*q*), where a testatrix bequeathed a legacy in trust for the eldest daughter of M. D., to be paid when she attained her majority, and if there should be no such daughter, then to the eldest daughter of G. B., payable in like manner: G. B. had a daughter A., born soon after the death of the testatrix, but who died in 1827, and another daughter B., who was still living; and M. D. having

[(*o*) In *Ellison* v. *Airey,* 1 Ves. 111, ante, 194, Lord *Hardwicke,* after deciding what was the period of ascertaining who were to take as younger children, added, "This construction also finds out who is the eldest, viz., such as should be so at the same period." Indeed, the point is almost self-evident.]

(*p*) 8 Scott, 405, 6 Bing. N. C. 164. [See also *Malcolm* v. *Malcolm,* 21 Beav. 225.

(*q*) 16 Beav. 14. See also *Adams* v. *Adams,* 25 Beav. 652.

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[died unmarried, in 1851, the second daughter claimed to be the eldest within the meaning of the will, but Sir *J. Romilly*, M. R., decided that the legacy vested in A. at her birth, liable only to be divested on the birth of a daughter to M. D.

Where eldest for the time being becomes a younger child as to the estate.

A son who is de facto the eldest as regards the limitations of the estate, and as such presumptively entitled to the first estate in the settled property, cannot, so long as he remains eldest, have a vested interest in younger children's portions, although his estate may be always liable to postponement by the event of a son to whom the will gives a prior interest coming in esse, as where the estate is given successively to the children of several parents (*r*). But when that event happens, he will acquire the rights of a younger child (*s*), to which he seems as clearly entitled as an after-born child, who would unquestionably be admitted to a share.

Gifts to *first* or *second* sons.

In gifts to the *first* or *second* son of A., two questions are to be answered; one, whether the will refers to the first or second by birth, or, to the first or second son capable of taking under that denomination at the time to which the will refers; and if the latter, then what is the time referred to.

Devise to "second son" held to mean second born.

In the case of *Trafford* v. *Ashton* (*t*), where a testator, about the time of his daughter's marriage, devised his estate in trust for her for life, remainder to the second son of her body in tail male, and so to every younger son; and added, that he did not devise the estate to the eldest son, because he expected his daughter would marry so prudently that the eldest son would be provided for; Lord *Cowper* said the *second* son was the second in order of birth, and held such son to be entitled, though not born until after the death of the first.]

Bequest to "seventh or youngest child;" seventh surviving, but eighth born, held not entitled.

In *West* v. *Lord Primate of Ireland* (*u*), Sir Septimus R. desired that his executor would, at his (the executor's) decease, bequeath 1,000 guineas to Lord C. "for the use of his seventh or youngest child, in case he should not have a seventh child living." At the testator's death Lord C. had six children living, [and he had had a seventh who died before the testator:] and, at the death of the executor, he had ten. The executor bequeathed the money in the words of the original will, and Lord *Thurlow* held that the [seventh child living at the executor's

[(*r*) *Ellis* v. *Maxwell*, 3 Beav. 587.
(*s*) Per Lord *Langdale*, M. R., ib. 594.
(*t*) 2 Vern. 660.]
(*u*) 2 Cox, 258, 3 B. C. C. 148.

[death, being in fact the eighth child born, could not take by the description of seventh child, and decreed in favour of the youngest child then living (*x*).

Construction of "first" or "second" child, where held not to refer to order of birth.

But the disposition of the Courts appears from the cases presently stated to be to construe these words in the second sense referred to above: and then the other question arises, namely, at what period are the objects to be ascertained?

"First son" held to mean first at date of will, or at testator's death, according to circumstances.

In *Lomax* v. *Holmden* (*y*), a testator devised hands to the first son of C. in tail; at the date of the will C. had no son, but afterwards had one, who died young, and then another, A., who was the first son alive at the testator's death; Lord *Hardwicke*, holding that "first" meant "eldest," decided that A. took the estate; because "the making and the death only, not the intermediate time, were to be regarded in construing wills," and the idea that the testator meant a first son in being at the date of his will was excluded by the fact that there was then no son of C.

So, in *King* v. *Bennett* (*z*), where, after successive life estates to A. and her husband B., the testator devised lands to their second son in fee, and it appeared that of three sons which A. and B. had had, the third alone survived at the date of the will; that they afterwards had a fourth son, who died in the testator's lifetime; and subsequently a fifth, who survived him; it was held, upon the principle of the last case, that the fifth son, being second at the date of the testator's death, took under the devise. It was thought clear that the testator did not mean the second in order of birth, because at the date of the will that son had died.

If "first" son living at date of will die before testator, whether there is lapse.

If there be living at the date of the will a son answering the description used in it, there is reason to suppose that he is the person designated (*a*), and that if he dies before the testator the bequest will lapse; a conclusion, however, which is of course subject to the indication of a contrary intention. And, therefore, in *Thompson* v. *Thompson* (*b*), where a testator gave a share in his property to the eldest son of his sister A., and

[(*x*) But the fact that a seventh-born child had come into existence, and to the testator's knowledge had died in his lifetime, would now be held sufficient evidence that the testator used the word seventh in some other sense. See *King* v. *Bennett*, 4 M. & Wel. 36, post.

(*y*) 1 Ves. 290.

(*z*) 4 M. & Wel. 36. See *West* v. *Primate of Ireland*, 2 Cox, 258, 3 B. C. C. 148.

(*a*) See *Saunders* v. *Richardson*, 18 Jur. 714.

(*b*) 1 Coll. 388. See *Perkins* v. *Micklethwaite*, ante, vol. i. p. 185; and see ante, ch. x.

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[another share to the eldest son of his sister B., and it appeared that each sister had living at the date of the will an eldest son, and other children, but that the eldest son of A. died before the testator (who knew of his death) made a codicil whereby he bequeathed a legacy to all the children then living of A. and B., except the two provided for in the will. Sir *J. K. Bruce*, V. C., without saying what he might have thought right, had the codicil not existed, held that the eldest son of A. who survived the testator, became entitled under the bequest.

If none at date of will or testator's death, first after-born child takes.

But if there be no child answering the description at either period, then the estate will vest (if at all) in the one to whom the term "first" or "second," first becomes applicable; as in the case of *Driver* v. *Frank* (*c*), where a testator devised lands to the second son of F. in tail, with remainder to the third, fourth, and other sons, except the first or eldest; and it was held that the first son who was born, living an elder, was entitled to the lands.]

The present chapter will be concluded with the case of *Langston* v. *Langston* (*d*), which is remarkable for the great difference of opinion that existed in regard to the true construction of the will. The question was, whether the first son of the testator's son A. was excluded, under a clause which directed trustees to convey to him (A.) for life, with remainder to trustees to preserve, with remainder to the *second*, third, fourth, fifth, and all and every *other* son and sons of A. successively, as they should be in seniority of age and priority of birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. The eldest son of A. claimed an estate tail male expectant on the decease of A. The Court of King's Bench, on a case from Chancery, certified that he took no estate. Sir *J. Leach*, M. R. (being, as it should seem, dissatisfied with this opinion), sent a case to the Judges of the Common Pleas, who certified that the first son of A. took an estate tail male, and the M. R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the Court below. Lord *Brougham* founded his conclusion, that the eldest son took an estate tail male [partly] upon the

Devise to first son supplied by implication from the entire will.

[(*c*) 3 M. & Sel. 25, 8 Taunt. 468. See also *Alexander* v. *Alexander*, 16 C. B. 59.]

(*d*) 8 Bligh, N. S. 16, 2 Cl. & Fin. 194.

general context of the will, in which various terms of years and limitations were made dependent on the existence or non-existence of an eldest son, in a manner which rendered them in the highest degree absurd, if the eldest son took no estate, and his Lordship even considered that the language of the particular devise itself bore out the construction, as the words "other" sons extended to the whole range, including the eldest (*e*). "But it is said," observed his Lordship, "that 'other' always means 'younger,' 'posterior,' and I leaned at first towards this view of the subject: it is a very plausible argument, and, in ordinary cases, it is true in point of fact. If you were to say (in the usual way), first, second, third, fourth, and *other* sons, 'other' must mean the sons after the fourth. But why does it mean those after the fourth? Only because you had before enumerated all that come before the fourth, for you had said first, second, third, and fourth. But suppose you had happened to omit the first, and instead of saying first, second, third, fourth, and other sons, you had said second, third, fourth, and other sons, leaving out the first, then it is perfectly clear that 'other' no longer is of necessity confined to the fifth, sixth, and seventh; but rather, ex vi termini, includes the first, because the first is literally the one who answers the description of some thing other than the second, third, and fourth. The word 'other' would then just as grammatically, as strictly, and as correctly, describe the first as the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why 'other,' in all ordinary cases, and in the common strain of conveyancing, means a younger son, is, that no one ever thinks of leaving out the elder, and to begin with the second, then 'other' would of course always suggest to one's mind the idea of the unnamed elder son, as well as the unnamed younger sons."

Devise to second and other sons includes the first, *semble*.

[(*e*) See ante, ch. xvi., s. 1.]

# CHAPTER XXXI.

## DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN.

I. *Children in existence when the Will is made, capable of taking. What is a sufficient Description of them.*
II. *Gifts to Children en ventre.*
III. *Gifts to Children not in esse.*
IV. *General Conclusions from the Cases.*

Existing illegitimate children capable of taking.

I. ILLEGITIMATE children, born at the time of the making of the will, may be objects of a devise or bequest, by any description which will identify them (*a*). Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact* (for that the law will not inquire into), *but the reputation of the fact,* which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty; for, let it be remembered, that though illegitimate children in esse may take, under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters or issue, imports, primâ facie, *legitimate* children or issue, excluding those who are illegitimate, agreeably to the rule, "Qui ex damnato coitu nascuntur, inter liberos non computentur" (*b*). Nor will expressions, or a mode of disposition affording mere conjecture of intention, be a ground for their admission.

Gifts to children, primâ facie, mean legitimate children.

Not extended to illegitimate children upon mere conjecture.

This is well illustrated by the case of *Cartwright* v. *Vawdry* (*c*), where A. having *four* children, *three legitimate and one*

(*a*) *Metham* v. *Duke of Devon*, 1 P. W. 529.

(*b*) *Hart* v. *Durand*, 3 Anst. 684, post, p. 210. See also *Cartwright* v. *Vawdry*, 5 Ves. 530. *Harris* v. *Stewart*, cit. 1 V. & B. 434. [On the same principle, a surrender of copyholds to the use of a will was never supplied in equity in favour of illegitimate children. *Fursaker* v. *Robinson*, Pre. Cha. 475; *Tudor* v. *Anson*, 2 Ves. 582.]

(*c*) 5 Ves. 530.

*illegitimate* (the latter being an ante-nuptial child of himself and his wife), bequeathed to *all and every such child or children*, as he might happen to leave at his death, for maintenance until twenty-one or marriage, and then in trust to pay *such child or children one-fourth* part of the income of his estates; but in case there should be only one such child who should attain that age or marriage as aforesaid, then to pay the whole income to such only child, if the others should have died without issue: and there was a limitation to survivors in case of the death of any of the children under age, unmarried and without issue. It was contended that the distribution into fourths plainly indicated, that the illegitimate daughter was in the testator's contemplation, *there being four children including her* when the will was made, and that all the expressions applied to females, shewing that he meant existing daughters, not future issue, which might be male or female. But Lord *Loughborough* decided against the illegitimate daughter. He said it was impossible that an illegitimate child could take equally with lawful children in a devise to children. This decision has been commended by Lord *Eldon*, who, in a subsequent case, addressing himself to the argument, urged on behalf of the illegitimate daughter (*d*), observed, "That the direction to apply the income in fourths only afforded conjecture; as if between the time of his will and his death one or two of these children had died, the division into fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the Court to hold, by necessary implication, that the illegitimate child was to take by implication with the others, as much as if she had been in the plainest and clearest terms persona designata; *and my opinion is, that this circumstance is by no means sufficient.* The will would have operated in favour of all his children, however numerous they might have been, and in favour of subsequent legitimate children, even if every legitimate child he had before had died. *It was therefore impossible to say he necessarily means the illegitimate child; as it is not possible to say he meant those legitimate children.* That will would have provided for children living at the time of his death, though not at the date

Lord *Eldon's* observations upon *Cartwright* v. *Vawdry.*

(*d*) See judgment in *Wilkinson* v. *Adam*, 1 V. & B. 464, which is replete with learning on this subject.

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of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence, it was impossible to raise the question. The will itself furnished no question whether legitimate or illegitimate children were intended; the question upon which the Court was to decide was furnished by matter arising out of, not in, the will."

These observations afford a more satisfactory explanation of the grounds of Lord *Loughborough's* decision, than is to be found in his Lordship's own judgment. It will be useful to keep in view the circumstances of the case, and Lord *Eldon's* comment upon them, when we proceed to examine some recent adjudications noticed in the sequel.

Illegitimate children not let in merely from absence of other objects.

And it is clear that the fact of there being no other than illegitimate children when the will takes effect, or at any other period, so that the gift, if confined to legitimate children, has eventually failed for want of objects, does not warrant the application of the word "children" to the former objects.

Thus, in *Godfrey* v. *Davis* (*e*), where a testator, after giving certain annuities, desired that the first annuity that dropped in might devolve upon the "*eldest child*, male or female, for life of W." At the time the will was made, W. had several illegitimate children, who were known to the testator, but no others; and he had no legitimate child then, or when the first annuitant died (*f*). Sir *R. P. Arden*, M. R., held, that there was not sufficient to entitle any of the illegitimate children; for, whatever the real intention of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were "the eldest *child*," *such persons only could be intended as could entitle themselves as children by the strict rule of law;* and no illegitimate child could claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character.

So, in *Kenebel* v. *Scrafton* (*g*), where a testator being unmarried directed that, *in case he should have any child or*

(*e*) 6 Ves. 43.

(*f*) As to question arising out of this, see *supra*, 158.

(*g*) 2 East, 530; [see also the cases of *Dover* v. *Alexander*, 2 Hare, 275, and *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657, where similar points upon settlements received like decisions.]

*children by M.* (a woman with whom he cohabited), a sum of money should be raised *for such child or children;* it was held that he contemplated a marriage with her, and making a provision for the issue of such marriage; and consequently that the will was not revoked by his marriage with M. (*h*), and the birth of a child. Lord *Eldon,* in reference to this case (*i*), has said, "We may conjecture that he meant illegitimate children if he did not marry, yet notwithstanding that may be conjectured, the opinion of the Court was, as mine is, that *where an unmarried man,* describing an unmarried woman as dearly beloved by him, *does no more than make a provision for her and her children, he must be considered as intending legitimate children, as there is not enough upon the will itself to shew that he meant illegitimate children;* and my opinion is, that *such intention must appear, by necessary implication, upon the will itself.*"

Testator's recognition of illegitimate children not sufficient.

Again, in the more recent case of *Harris* v. *Lloyd* (*k*), a trust "for *all and every the child and children*" of the testator's son, was held not to apply to illegitimate children, though he had no other than illegitimate children at the date of the will, and these had always been treated and recognised by the testator as his grandchildren. [And in the case of *Warner* v. *Warner* (*l*), where a testator bequeathed a share of the residue of his personal estate in trust for his son C. for life, remainder in trust for the maintenance of his wife and the education of his children; and at his wife's death the principal to be equally divided among his children then living. At the date of the will C. was living with a woman named M., who was not married to him, and by her he had four illegitimate children (who it was proved had always been called and treated by the testator as the children of C.), and no legitimate children; but Sir *J. K. Bruce,* V. C., observed, that, assuming all those facts, the question still was, whether, if the testator had meant that legitimate children only should take, he could have expressed himself more clearly than he had done. He answered an argument which might have been founded on the use of the term "wife" of C., by the remark, that wife was a name rather of character than indi-

(*h*) As to this, ante, vol. i. p. 116.

(*i*) In *Wilkinson* v. *Adam,* 1 V. & B. 465.

(*k*) T. & R. 310.

[(*l*) 15 Jur. 141. See also *Durrant* v. *Friend,* 5 De G. & S. 343; *In re Davenport,* 1 Sm. & Gif. 126; *In re Overhill,* ib. 362; *Kelly* v. *Hammond,* 26 Beav. 36.]

[viduality, and decided that the illegitimate children were not entitled.]

So, in the case of *Mortimer* v. *West* (*m*), where a testator, after bequeathing an annuity to his wife and M. (a woman with whom he lived), created a trust of his real and personal estate in favour of certain illegitimate children of M. by himself, naming them, and describing them as the children of M., "together with every *other* child born of the body of the said M.;" it was held, that this description did not embrace two illegitimate children of M. born subsequently to the will and before the execution of a codicil (which was contended to be a republication of the will, thereby bringing the terms of the description down to the date of the codicil); the Lord Chancellor (*Lyndhurst*) being of opinion that there was nothing to shew by necessary implication that the testator intended the bequest to be to illegitimate children.

Recognition of an illegitimate child in a subsequent codicil not sufficient.

And even if the testator, in such codicil, recognise as his own an illegitimate child born since the execution of his will, this is not sufficient to entitle such child to claim under a bequest in the will, in favour of the future children of the testator by a particular woman (*n*).

But the strongest case of this kind is *Bagley* v. *Mollard* (*o*), where a testator gave the residue of his property equally between the children of his son W. and of two other children; and it was held, that an illegitimate child of W. was not entitled to share in the residue; *though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son.*

Or even in the will itself.

Principle not varied by the fact of testator being unmarried.

In all the preceding cases legitimate children were, or might have been, entitled under the bequest; and this possibility (according to the principles of construction already laid down) was fatal to the claim of the illegitimate children. In none of the wills was there such a manifestation of an intention to use the word *children* in any other than its ordinary legal signification (namely, legitimate offspring), as could form the ground of a judicial determination; and they shew that the circumstances of the testator being a bachelor, and having illegitimate children at the time of the will, and of some of such children being the express objects of his bounty, and described as the "children" of

(*m*) 3 Russ. 370.
(*n*) *Arnold* v. *Preston*, 18 Ves. 288.
(*o*) 1 R. & My. 581. [But see *Owen* v. *Bryant*, 2 D. M. & G. 697, post.]

the person to whose "other" children the gift in question is made, are not sufficient to divert the word from its established signification. In such cases, the conjecture, though highly reasonable, that the testator meant by the devise to discharge the moral obligation of providing for his illegitimate offspring is sacrificed to the general principle that "children," in its primary and unexplained sense, imports legitimate children only.

Bastards take under description of children, where.

It is of course no objection to the claim of illegitimate children that they are styled children, if they are otherwise identified, as in the case of a legacy to "my son John, or my granddaughter Mary," the testator having no child or grandchild of those names, except such as are illegitimate (*p*).

Gift to children "now living."

It is equally clear, that where the devise is to the children "*now living*" of a person who has no other than illegitimate children at the date of the will, they are entitled (*q*).

[So in *Gabb* v. *Prendergast* (*r*), where the ultimate limitation in a settlement was "to all the children as well those already born as hereafter to be born of A. and B. his wife," and it appeared that B. had illegitimate children living at the date of the settlement, of whom A. was the reputed father, but no legitimate children by him. Sir *W. P. Wood*, V. C., held the illegitimate children to be entitled.]

Children of a *deceased* person.

Upon the same principle, a gift to "the children of *the late* C.," a person who, at the date of the will, was dead, leaving illegitimate, *but no legitimate*, children, has been held to be good as to such illegitimate children (*s*).

Gift to a person till marriage, then to her children.

[And where (*t*) a testator, who at the time he made his will cohabited with a woman named A., and had by her two children W. and R., gave a sum of money in trust to pay to A. the

(*p*) *Rivers's case*, 1 Atk. 410; [*Bentley* v. *Blizard*, 4 Jur. N. S. 652.]

(*q*) *Blundell* v. *Dunn*, cit. 1 Mad. 433, though the construction was somewhat aided by the context.

[(*r*) 1 Kay & J. 439. The V. C. expressed an opinion that the construction would have been different in the case of a will, because a will would point to a class of persons at the testator's death. But considering the word "already," qu.]

(*s*) *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419. The terms of the bequest shew that the fact of C.'s death was known to the testator. [Otherwise it must have been proved aliunde, see *Herbert's Trusts*, 1 Johns. & H. 121. It seems to have been the opinion of Sir *J. Stuart*, V. C., that if the gift were to the children of a woman who at the date of the will had only illegitimate children, and was presumably past childbearing, the case would have been the same; for, in a case involving such circumstances (*In re Overhill*, 1 Sm. & Gif. 362), he received evidence of the woman's age. But in *Jee* v. *Audley*, 1 Cox, 324, Sir *L. Kenyon*, M. R., would not allow himself to be influenced in the construction of a will by the presumption that two persons, husband and wife, of a very advanced age, could not have children.

(*t*) *In re Connor*, 2 Jo. & Lat. 456.]

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[annual interest "during her life or until she married, for the support of her children W. and R.; and in case of her death or marriage to apply it to the use of *her children;* and, on their coming to the age of twenty-one, to divide the same sum between them:" it was held, upon the construction of the will, that the only children intended by the testator to take the capital were those named in the provision for support during A.'s lifetime. It could not mean children by marriage, for the right of the children to the present enjoyment of the fund was to depend on the happening of the very event from which the legitimate children were to spring.]

The characteristic feature of these cases, as distinguished from those of the former class, is, that, according to the state of facts existing when the will was made, legitimate children *never could have claimed* under the gift.

To children (in the plural) of a deceased person, there being only one legitimate child.

In some instances, however, of gifts to the children of a *deceased* person, illegitimate objects have been excluded, though such exclusion was not called for by the principle which negatives the claim of objects of this description, if in any event such claim might have come into competition with, and have been superseded by, the claim of legitimate children.

As, in *Hart* v. *Durand* (*u*), where the bequest was "to the sons and daughters of the *late* J. D.," and there was only one legitimate child (a daughter), to whom, it was contended, the words "sons and daughters" in the plural could not apply; and, consequently, that an illegitimate son and daughter then existing might be admitted; but the Court decided against their claim; the Chief Baron (*Macdonald*) observing, that the introduction of these objects would not satisfy both the words, i.e., sons and daughters.

So, in *Swaine* v. *Kennerley* (*v*), Lord *Eldon* decided, that, under a devise to all and every the child and children of the testator's *late* son, a single legitimate child was entitled, to the exclusion of two children, who were illegitimate, but all of whom were living at the date of the will; and his Lordship refused to receive extrinsic evidence, to shew that the illegitimate children were intended.

Remark upon *Hart* v. *Durand*, and

It will be observed, that, in both these cases, as there was only one legitimate child living at the time of the making of

(*u*) 3 Anst. 684. (*v*) 1 V. & B. 469.

the will, the terms of the gift, which embraced a plurality of objects, could not be satisfied without letting in the illegitimate children; and the argument (which is conclusive in the case of a gift to the children of a *living* person) that the testator *may* have contemplated an accession to the number of objects by future births, or their total change by means of births and deaths, is inapplicable where (as in this instance) the parent was dead when the will was made. These cases, therefore, appear to have carried the exclusion of illegitimate children a step too far; and it is not surprising to find that they have been since departed from.

Thus, in the case of *Gill* v. *Shelley* (*x*), where A. by a testamentary appointment gave her real and personal estate to her husband M. for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her will; adding, "amongst whom I include the children of the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir *J. Leach*, M. R., said, that, if *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed, that the illegitimate child was entitled to share in the residue.

Remark on *Gill* v. *Shelley.*

The only apparent distinction between these cases and *Gill* v. *Shelley*, is, that in them the bequest was to *child* and children, but which, it is conceived, makes no real difference, since the testator evidently uses the singular number, not with a view to the then existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. [And, accordingly, in the case of *Leigh* v. *Byron* (*y*), where a testator made a bequest unto and equally amongst all and every the children of his late nephew A. who should attain twenty-one; and if there should be but one such child, then to such one child; and it appeared that A. was dead at the date of the will, having left one legitimate and two illegitimate children: Sir *J. Stuart*, V. C., held the two latter entitled to share in the bequest; thinking that the words "if there should be but one such child" only cut down the previous

(*x*) 2 R. & My. 336, [Cf. *Crook* v. *Whitley*, 7 D. M. & G. 490, ante, p. 139.
(*y*) 1 Sm. & Gif. 486.]

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[words of gift in the event of all the other children afterwards dying under twenty-one.] It is submitted, therefore, that the cases of *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, may be considered as overruled.

What shews that testator does not contemplate marriage.

It has been shewn, that where a testator, married or unmarried, gives to his children by a woman not then his wife, he will be presumed (the contrary not appearing) to mean legitimate children, and, by necessary consequence, to contemplate marriage with her. But it is settled, that if a married man, after making a disposition in favour of his children by a particular woman, shews, by the context of the will, that he expects both his wife and the woman in question to survive him, this, being incompatible with the supposition of his contemplating marriage with her, is considered to indicate that he means *illegitimate* children only.

Thus, in the well-known case of *Wilkinson* v. *Adam* (*z*), where a testator, being married, but having children by a woman named Ann Lewis, devised *to his wife* for life a certain mansion-house, and, after her decease, to Ann Lewis (who then lived with him) for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate (after limiting a term of years thereout), *in trust for the children which he might have by the said Ann Lewis*, share and share alike, and to his, her, and their heirs for ever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil, (but which, being unattested, was inoperative to affect the construction of the devise (*a*)), the testator declared that his meaning was to include three children of the said Ann Lewis, (naming them.) The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis, and having legitimate children by her; that the intention was clear that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already

(*z*) 1 V. & B. 422. [Of this case, Sir *J. K. Bruce* said it had often been considered to go to the extreme verge of the law, *Warner* v. *Warner*, 15 Jur. 142.]

(*a*) Supra, vol. i. 72.

born, and not as to those afterwards born. But Lord *Eldon*, assisted by *Thompson*, B., and *Le Blanc*, J., and *Gibbs*, J., held, that the three children were entitled, by the effect of the whole will. The Judges grounded their opinion on the manner in which the testator described the children themselves, and Ann Lewis, their mother, as living with him whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship to the time of her continuing single and unmarried (*b*), with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife for life, and, after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate* (*c*). Lord *Eldon* concurred generally with the Judges as to illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to designatio personarum, his Lordship considered that as decided by *Metham* v. *Duke of Devon* (*d*), whatever might have been his opinion if it were res integra. In concluding an elaborate judgment, his Lordship expressed his opinion, that it was impossible that the testator, a married man, with a wife, who, he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean anything but illegitimate children. They took, therefore, by necessary implication, on the face of the will (*e*).

Effect where testator provides for his wife and his children by another woman in same will.

Lord *Eldon's* doctrine, that the intention to give to illegitimate children (as distinguished from legitimate children) must appear on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family (*f*).

Parol evidence admissible, to what extent.

(*b*) These circumstances alone were clearly insufficient to vary the construction.

(*c*) Unless in the case of a divorce, which a man, especially when making a provision for his wife, can hardly be supposed to contemplate. It is singular, however, that this possible event was not adverted to in a case which underwent such elaborate discussion.

(*d*) 1 P. W. 529.

(*e*) This is a very brief summary of the grounds of the judgment, which should be perused by every inquirer into this subject.

[(*f*) Lord *Eldon* stated his opinion to be, that "taking the fact as established, that there were children who had gained the reputation of being his children, it did necessarily appear on the will itself that the testator intended those children." Therefore, to prove the existence and

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Thus, in the case of a devise to "my children now living" (*g*), or "to the children of A.," a *deceased person* (*h*), it is not known by a mere perusal of the will, whether legitimate or illegitimate children were intended; and yet, when it is ascertained that there were no other than the latter objects in existence, the conclusion, that he meant illegitimate children, is irresistible.

Rule with suggested qualification.

The characteristic of these cases is, that, according to the events existing *at the making of the will*, legitimate children never could have claimed under the bequest, and, therefore, could not have been in the testator's contemplation. The rule (expressed in accommodation to the cases in question) may be stated thus: *In order to let in illegitimate children under a gift to children, it must be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.* This, it is submitted, is the spirit and meaning of Lord *Eldon's* position in *Wilkinson* v. *Adam*, and forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to; and even the anxious effort of Lord *Eldon*, to place the doctrine on a firm and intelligible basis, has not had the effect of securing uniformity of decision on this important subject.

"To my children;"

"To the mother of my children;"

Thus, in *Beachcroft* v. *Beachcroft* (*i*), where a testator who resided in the East Indies, and was a bachelor, and had had several children by a native woman, bequeathed as follows:— "*To my children*, the sum of pounds sterling, 5,000 each; *to the mother of my children*, the sum of sicca rupees 6,000, which I request my executors will secure to her in the most advantageous way." The question was, whether the illegitimate children were entitled? Sir *T. Plumer*, V. C., decided in the affirmative. He referred to *Goodinge* v. *Goodinge* (*k*), and *Crone* v. *Odell* (*l*), as authorities that parol evidence was admissible as to the state of the testator's family when he made his will; and observed, that, in the case of a latent ambiguity, parol evidence was admissible to prove the identity of the person intended to take, whether an individual or a class. That it had been established

[reputation of the children, he did, in perfect accordance with the current of authority, admit extrinsic evidence. See 1 V. & B. 462, 463.]

(*g*) *Blundell* v. *Dunn*, cit. 1 Mad. 433, ante, p. 209.

(*h*) *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419, ante, p. 209.

(*i*) 1 Mad. 430.

(*k*) 1 Ves. 231.

(*l*) 1 Ba. & Be. 481.

——held to extend to illegitimate children.

by *Metham* v. *Duke of Devon*, and *Wilkinson* v. *Adam*, that illegitimate children might take as a class; that if the words had been "my present children," they might have taken as a class, to be ascertained by evidence, and, being unmarried (*m*), he must have meant his illegitimate children. His Honor admitted that the word "present" was not introduced in this will; but he observed, that the general presumption is, that a man, sitting down to make his will, designs a benefit to some existing object, and it was extravagant to suppose that the testator had only future possible children in view, disregarding those whom he was in the habit of denominating and treating as his children. Giving to each a definite portion, 5,000*l.*, and the ultimate residue to his collaterals, shewed that he had a definite number in view, and that he recognised his legitimate relatives as having a preferable title to a part of his fortune. That was rational enough, if he was providing for illegitimate children, but was very unlikely, if he was providing for future legitimate children. "For all these reasons," said his Honor, "I think it is reasonable to interpret the words 'my children' in the same way as if he had said, 'my *present* children.' But this construction of the will does not depend merely upon the first clause of it; for the next clause clearly shews what was meant, 'To the mother of my children the sum of sicca rupees 6,000, which I request,' &c. Was that a provision proper for the intended wife of a man of his fortune? Is it probable that, after giving one whom he thought fit to be his wife so small a sum, he should think it necessary that his executors should secure it for her (*n*)? Did anybody ever describe his wife by the term 'mother of my children?' If she had no children she would not have taken under this bequest. This second clause of the will is explanatory of the first; for, when once it is understood he therein meant to describe some person who had already become the mother of his children he then had, he must, under the term 'children,' have comprehended children already born, and, consequently, as he was unmarried, his illegitimate children; and he must be supposed to have used the same word 'children' in the preceding clause in the like sense. I think, therefore, it is clear that existing persons were meant, and that

Judgment in *Beachcroft* v. *Beachcroft*.

(*m*) That this circumstance alone will not let in illegitimate children, see *Kenebel* v. *Scrafton*, 3 East, 530.

(*n*) Compare the general scope of this reasoning with that of Lord *Eldon*, in *Wilkinson* v. *Adam*, 1 V. & B. 460.

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they take, as in the case of *Wilkinson* v. *Adam*, as designated persons."

Strictures on *Beachcroft* v. *Beachcroft*.

A case more embarrassing to a Judge could hardly have occurred, for no man, reading this will with the knowledge of the testator's situation, could really entertain a doubt as to illegitimate children being the objects intended; but that there was ground for holding *judicially* that such objects, and such alone, were "*upon the face of the will*" manifestly and incontrovertibly pointed out, is not equally clear. The circumstance of the amount of the bequest to the children and their mother, and the terms in which it was given, as differing from the mode in which a testator would refer to and provide for his future wife and her children, furnished exactly that species of conjecture, which in *Cartwright* v. *Vawdry* (*o*) was held insufficient to let in the illegitimate child. Indeed the division into fourths in that case supplied a stronger argument than the frame of the will in the case under consideration; and with respect to the argument founded on the bequest to the mother of the children, as shewing that the testator referred to existing children, that is, children then having a "mother," it is to be observed that the bequest to the mother is wholly dependent on, and is regulated by, the construction of the gift to the children; for, if the gift to the children standing alone would extend to future legitimate children, then the gift to their mother would be a gift to the mother of the testator's legitimate children,—in other words, to his wife.

Construction not to be made to depend on the fact whether legitimate children come in esse.

In the course of his judgment the Vice-Chancellor is made to say, "That no case has been found, where, when the word children has been used in the will of a putative father, who has no legitimate children, it has been held that illegitimate children cannot take;" [nor, it may be added, can any such case be found at the present day: and] the case of *Beachcroft* v. *Beachcroft* has even been cited by a text-writer (*p*) in support of the general proposition, that a bequest to children by a bachelor having illegitimate children applies to such children. [But clearly that case does not go so far; since the decision of the learned Judge was rested on the ground that the whole tenor of the will shewed that *present* children were referred to. In any other view the case is opposed to all the authorities; for, as there was a provision both for the children and their mother, the will

(*o*) Ante, 204. (*p*) Preston on Legacies, 201.

[would not have been revoked by marriage with her and the subsequent birth of children (*q*): thus legitimate children might have taken; and illegitimate children must, therefore, have been excluded.

Effect of 1 Vict. c. 26, on construction of gifts to illegitimate children.

Since the statute, 1 Vict. c. 26, a will not operating as an appointment is under all circumstances absolutely revoked by marriage (*r*), and a gift by a bachelor to his children can never, therefore, take effect in favour of legitimate children (*s*); consequently, and as the testator must be presumed to be aware of the law, such a gift seems to come under precisely the same head as a gift to the children of a person whom the testator knows to be dead, which, as we have seen, will, in default of legitimate children, take effect in favour of those who are illegitimate.]

Illegitimate children held entitled under gift to children

Another modern case, which it is difficult to reconcile with the principles deducible from the general current of the authorities, is *Fraser* v. *Pigott* (*t*), where a testator, after bequeathing certain bank annuities to the legitimate and illegitimate children by name of his two sons William and John, gave the residue of his estate to his said sons equally, and directed that if either of them should die in his lifetime the moiety of his deceased son should go to his *children*; but if both his sons should die in his lifetime, he gave the same to and amongst all their *children* equally. Both the sons died in the testator's lifetime, John leaving three legitimate and two illegitimate children, and William leaving three illegitimate but no legitimate children. It was held, that the illegitimate children of John were not entitled to share with the legitimate children in the residue, but that the illegitimate children of William, who left no legitimate child, were to be admitted. Lord *Lyndhurst*, C. B., said, "It seems to be clear, upon the cases, that where there are any legitimate children to answer this description of children, then, according to the rule of law, the legitimate children only will take. If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended; but where there are legitimate and illegitimate children, legitimate children only will take under the description of children. In this case the illegitimate

[(*q*) Ante, vol. i. p. 116.
(*r*) Ib. 120.
(*s*) This appears to have been overlooked in *Pratt* v. *Mathew*, 22 Beav. 340: although in a former page (338) the point had been referred to as it affected a gift to a "wife."]
(*t*) 1 Younge, 354.

children of William Fraser, and the legitimate children only of John Fraser, appear to me to be entitled."

Remarks on *Fraser* v. *Pigott.*

This decision, so far as it operated to admit the illegitimate children of William to participate in the residue, stands directly opposed to the principles and doctrines of the long line of cases treated of in this chapter, from *Cartwright* v. *Vawdry* to *Bagley* v. *Mollard*, including a decision of the noble Chief Baron himself, when Lord Chancellor (*u*). To say that illegitimate children can take under a bequest which would have applied to legitimate objects if there had been any such, makes the construction of the will dependent on subsequent events, as the testator's son William, who was then living, might have had legitimate children in the interval between the making of the will and the testator's death; and as such children would have taken, the illegitimate children, according to the established doctrine of the cases, clearly could not. His Lordship's remark, as to the admissibility of extrinsic evidence, is no less exceptionable than his decision. The office of extrinsic evidence in these cases is, to ascertain the state of facts existing at the date of the will, which often throws light upon a testator's intention, and is properly admissible for that purpose (*v*). But if this eminent Judge is to be understood to mean, that because in event no legitimate child happens to claim under a bequest to children, extrinsic evidence is admissible to shew that the testator actually meant to comprise illegitimate children under the description of children, his position is directly encountered by a crowd of decisions and dicta, including those of Lord *Eldon*, who, we have seen, in his elaborate judgment in *Wilkinson* v. *Adam*, earnestly and repeatedly inculcated the doctrine, that the intention in favour of illegitimate children must appear by necessary implication on the face of the will itself. If the testator's sons, John and William, had been dead at the date of the will, the decision would have been consistent with antecedent adjudications; and as they are called in the statement of the will, in the report of the case, the testator's *late* sons, a cursory perusal of the case is likely to lead to an impression that such was the fact; but from the tenor of the whole statement it is evident, that the sons died *after* the making of the will, and therefore the attempt, in this manner, to reconcile the case with anterior determinations, fails (*x*).

(*u*) See *Mortimer* v. *West*, 3 Russ. 370.

(*v*) Ante, ch. xiii.

[(*x*) In the case of *James* v. *Smith*, 14

Legitimate and illegitimate children cannot take under same description.

It is a consequence of the doctrine which excludes illegitimate children, if legitimate children could have taken under the gift, that they cannot both take under the same description, or as belonging to the same class. This was pressed as an argument against the illegitimate children in *Wilkinson* v. *Adam*, for it was said, that if the testator had had legitimate children by Ann Lewis, they would have taken, and it was clear that both could not take under the same description. The Judges who decided that case did not assent to this as a general rule, but they were of opinion that if, in the event suggested, both could not take, the illegitimate children would take exclusively. Lord *Eldon* said it was very difficult to persuade him that both could take under the same description; but, he added, that if, upon the context of the will, illegitimate children were proved to be intended, *the question would never have arisen*, as then marriage and the birth of children would have been a revocation. With great deference to his Lordship, however, it is submitted, that the question would have been precisely the same on the point of revocation; for, as marriage and the birth of children did not, even in the then state of the law, revoke a will in which the wife and children were provided for, it followed that, if legitimate children could take under the description of children, the will would not be revoked; if otherwise, it would.

But may take under a designatio personarum applicable to both.

But legitimate and illegitimate children may of course be comprehended in the same devise, under a designatio personarum applicable to both; as where a testator, having four children, two of each kind, gives to his *four* children *then living*. This would be a gift to them, not as a fluctuating class, with a possibility of future accessions, but to four designated individuals; and it being found that, to make up the specified number, it was necessary to include as well those who strictly and properly answered to that character, as those who had obtained a reputation of being such persons, the inevitable conclusion is, that the latter were included in the testator's contemplation. [It is equally clear that where a testator includes an illegitimate child, in a nominal enumeration of "his children," and then gives property to "his said children," the illegitimate child is entitled

[Sim. 216, Sir *L. Shadwell*, V. C., said he thought the decision was not right. Upon the terms of the will, it is open to the application of the principle involved in the cases of *Meredith* v. *Farr* and *Owen* v. *Bryant*, stated presently; but Lord *Lyndhurst's* judgment goes on other grounds.

[to share with the legitimate, it being the same thing as if the testator had repeated the names (*y*).

Where testator shews by context that he does not use "child" in its strict sense.

In some recent cases, indeed, a similar result has been attained without the aid of such an express term of reference as the word "said." Thus, in the case of *Meredith* v. *Farr* (*z*), a testator first bequeathed a sum of 300*l.* in trust for his daughter E. W. for life, and after her death to be equally divided amongst the children of his daughters M. and C., that was to say, one moiety between the children of M., and the other moiety between the children of C. And then the testator gave a second sum of 300*l.* in trust for C. for life, and after her death "in trust for all and every the children and child of C., namely, William, John, Angelina, Sarah." A third sum of 300*l.* he gave in trust for M. for life, and after her death "for all and every the children and child lawfully to be begotten of M., and including her daughter Elizabeth, aged about fourteen." Of the enumerated children of C. William was legitimate, the remaining three illegitimate. And M., besides Elizabeth (who was illegitimate), had several legitimate children at the date of the will. It was held by Sir *J. Knight Bruce*, V. C., that these four illegitimate children took interests in the *first* bequest of 300*l.*

Again, in the case of *Owen* v. *Bryant* (*a*), where a testator reciting that he had nine children by his then present wife, viz. A., B., &c., and that he had made certain provisions for his four married daughters, and wished to make a similar provision for his unmarried daughters, which he accordingly did in manner appearing by the will, proceeded to give the proceeds of his residuary real estate in trust for his wife for life, remainder between all and every his children by his said present wife who should be living at her decease, and directed his trustees to hold the shares of such of his *said* children as should be daughters upon certain specified trusts. It appeared that A. was a daughter of the testator's wife by him before his marriage with her; but it was held nevertheless by the Lords Justices, that this child was entitled to share in the residuary bequest to children living at the wife's decease. Lord *Cranworth*, indeed, relied solely on the last passage containing the terms "*said* children," coupled

[(*y*) *Evans* v. *Davies*, 7 Hare, 498. And see *Hartley* v. *Tribber*, 16 Beav. 510.

(*z*) 2 Y. & C. C. C. 525.

(*a*) 2 D. M. & G. 697. See also *Worts* v. *Cubitt*, 19 Beav. 421; *Tugwell* v. *Scott*, 24 ib. 141; *Allen* v. *Webster*, 6 Jur. N. S. 574.

[with the passage which, as he said, preceded it, and in which the testator enumerated his children by name: but for that clause he should have thought that legitimate children only were intended. It is submitted, however, that the case cannot stand on this ground; for those terms clearly referred to the last antecedent, namely, "children of my present wife," in the sentence immediately preceding, and not to the former passage in which the names of the children occurred. Sir *J. Knight Bruce*, on the other hand, thought the intention of the testator sufficiently apparent without the aid of those words, and that consistently with the authorities, except, perhaps, *Bagley* v. *Mollard*, the case might be decided according to the plain intention of the testator.

Now, it is not forgotten that primâ facie the word "children" means legitimate children; but the presumption in favour of a testator using a word in its primary sense is rebutted by an intention appearing on the face of the will to use it in a different sense. If, therefore, it thus appears that the word children is intended to include illegitimate as well as legitimate children, the Court is bound so to construe it (*b*). Lord *Eldon's* rule against legitimate and illegitimate children taking together as a class is not hereby impugned: the class of legitimate children entitled may indeed be extended by future accessions; but the illegitimate take as personæ designatæ. There is no question that a gift "to the children of A. including M." (M. being an illegitimate child) will be effectual to give M. an interest, and yet include future legitimate children. Then the question is, if the testator includes the illegitimate child under the term "children" in one part of his will, but not expressly so in the very clause of bequest, whether a different construction is to prevail? This, it is conceived, is a question that must be answered on general principles, and if there is nothing else in the case those principles will give an answer in the negative; for when words occur more than once in a will they shall be presumed to be used always in the same sense (*c*). The existence of these cases will, at all events, render it unsafe to rely implicitly on the case of *Bagley* v. *Mollard*. The cases of

[(*b*) Wigr. Wills, Prop. ii.

(*c*) See General Rules of Construction, xviii., post; and see *Hussey* v. *Berkeley*, 2 Ed. 194; *Williams* v. *Evans*, 22 L. J., Q. B., 241. But see *Smith* v. *Lidiard*, 3 Kay & J. 252, ante, p. 141; *Thompson* v. *Robinson*, 27 Beav. 486.

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[*Meredith* v. *Farr* and *Owen* v. *Bryant*, it is to be observed, go no further than to admit as children the very persons who have been described as children by the testator; and it does not follow, nor is it here contended, that all illegitimate children, if not elsewhere individually designated as "children," should be admitted. In other words, by calling *some* illegitimate children of A. his "children," the testator does not necessarily prove that he means *all* illegitimate children of A. to be included (*d*).]

On the same principle, where it is to be collected from the language of the will that the testator intends to give to the children of himself by another person, whether they shall turn out to be legitimate or not, they are entitled in either character.

Children of testator's wife to take, whether his marriage be valid or not.

As where (*e*) a testator, reciting that he had lately married, in Scotland, Jane W., the sister of his late wife, bequeathed personal estate in trust for his said wife Jane for life, and after her decease, to the children of him and his said wife Jane; and he declared that his wife Jane *and her children should take the provisions thereinbefore made for them, in the same manner as if she had been married to him according to the usage of the Church of England,* and such marriage had been valid according to the law of England. It appeared that the marriage was void, according to the law of Scotland, which nullifies every marriage between persons within the prohibited degrees of propinquity or affinity: and the question then was, whether the child born at the date of the will, being illegitimate, could take under the bequest; which Sir *J. Leach,* V. C., decided in the affirmative.

Observations upon *Bayley* v. *Snelham.*

Even though it were clear, (and it would certainly be difficult to deny,) that, had the testator subsequently married Jane W., and had legitimate children by her, they would have taken under the bequest; the case, it is conceived, forms no exception to, or contradiction of, the doctrine that both legitimate and illegitimate children cannot take, as belonging to the same class; since the latter, it is evident, took, not by virtue of the bequest to children simply as such, *but under the clause providing for the event of the marriage proving to be*

[(*d*) See *Meredith* v. *Farr* as to the child Keziah; and *Dover* v. *Alexander*, 2 Hare, 281, where the argument in favour of the inclusion of bastards, even if otherwise effectual, would have left behind the question whether a gift to the future bastards of a woman is valid; as to which see post, sect. 3.]

(*e*) *Bayley* v. *Snelham*, 1 S. & St. 78.

*invalid*, and which must be considered as extending the bequest to illegitimate as well as legitimate children. In effect, therefore, it was a gift to the children, legitimate or illegitimate, of A.; and the case merely shews that they may take under a designatio personarum applicable to both.

But though the decision, it is conceived, may *thus* be rendered consistent with the general principles of the authorities, yet it should not be concealed that the Vice-Chancellor, as his judgment is reported, decided it upon the broad ground, that a bequest in those terms to the testator's children by Jane would apply to any child who had acquired the reputation of being such; and his Honor is even made to cite *Wilkinson* v. *Adam* as authorising the proposition, that illegitimate children might take under such a bequest as occurred in that case, without at all adverting to its special circumstances, which Lord *Eldon* so elaborately commented on and distinctly made the ground of his decision; which rendered the case the strongest authority against his Honor's doctrine; though some of his Lordship's positions, we have seen, require to be a little modified in regard to gifts to the children of a deceased person.

Illegitimate children en ventre.

II. It is now clear that a gift to a natural child of which a particular woman is enceinte, *without reference to any person as the father*, is good. Thus, in *Gordon* v. *Gordon* (*f*), where a testator recited that he had reason to believe that A. was then pregnant *by him*, and subsequently directed that the child *of which she was then pregnant* (not repeating the words "by me") should be sent to England, and the expense paid for by an annuity, &c. Two questions were raised; first, whether the bequest was not void, on the principle of the early authorities, as a gift to an unborn bastard; secondly, whether it was not invalid as a gift to an illegitimate child en ventre sa mère, *by a particular man* (*g*). Lord *Eldon* said, "Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the opinion of Lord *Coke*, that, if an illegitimate child en ventre sa mère is described, so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I stu-

Where described as the children of the mother only, gifts valid.

(*f*) 1 Mer. 141. See also judgment in *Earle* v. *Wilson*, 17 Ves. 532.
(*g*) See infra.

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diously abstain from expressing any opinion as to what it would be if the words were 'to my child,' while I decide that the words being only 'the child with which A. is now pregnant,' those words will do, so as to give effect to the will in its favour."

[So, where a testator, after reciting that A. (an unmarried woman) was in the family-way, bequeathed the residue of his personal estate to the child with which she might be enceinte at the time of his decease, it was held that the obvious intention of the testator was to give to the child with whom A. was then enceinte, if born after his death, and that the child took therefore by particular description (*h*).]

Distinction, where description of children en ventre refers to the father.

The distinction between the preceding case and those in which the parentage of the father forms part of the description is obvious. Where the gift is to the child with which a particular woman is enceinte, generally, the fact of birth is the sole ground of title, and that is easy of ascertainment. On the other hand, a gift to the child with which a woman is enceinte, *by a particular man*, introduces into the description of the object a circumstance which the law treats as uncertain (a bastard being, in respect of his paternal parent at least, filius nullius), and which it cannot, properly, permit to be inquired into; and the devise is therefore, unless the fact in question can be assumed, necessarily void. And this principle, it seems, extends even to gifts by a testator to his own child, if the fact of his parental relation to the object be unequivocally made part of the qualification.

Gift to illegitimate child en ventre of a woman, by a particular man, bad.

Such a gift held invalid, though proceeding from the father.

Thus, in the case of *Earle* v. *Wilson* (*i*), where a testator bequeathed to "such child or children, if more than one, as M. may happen to be enceinte of *by me*," Sir *W. Grant* held it to be void. There was no gift, he said, to the child of which M. might be enceinte, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was required, that is, reject the words "by me" as superfluous. "Suppose," the learned Judge observed, "the words 'as she may happen to be enceinte of by me,' could be taken to mean, 'as she is now enceinte of by me,' in which there is considerable difficulty; yet if the rule of law does not ac-

[(*h*) *Dawson* v. *Dawson*, 6 Mad 292.] (*i*) 17 Ves. 528.

knowledge a natural child to have any father before its birth, the change of phrase would not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the description, non constat that the gift would ever have been made."

It will be observed that Lord *Eldon*, in the case of *Gordon* v. *Gordon* (*k*), cautiously abstains from giving an opinion on the point decided by Sir *W. Grant*, in *Earle* v. *Wilson*, and had, it seems, obtained the concurrence of that learned Judge in the opinion he then pronounced. But the authority of *Earle* v. *Wilson* has been since questioned in the case of *Evans* v. *Massey* (*l*), in which a testator, who resided in India, devised as follows:—"Having two natural children, *and the mother supposed to be now carrying a third child*, I bequeath the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them; that is to say, if another child should be born by the mother of the other two, in proper time, that such child is to have one-third of such property." The testator appointed certain persons guardians of *his* children, and in the bequest of the residue expressed himself thus, "after paying *my* natural children as aforesaid." The question was, whether the bequest to the child en ventre sa mère was made to it as the child of the testator, or whether, on the other hand, it was not to the child with which the woman was enceinte, without reference to the father, as an essential part of the description. *Richards*, C. B., was of opinion, that the bequest was good. He considered the case to be distinguished from *Earle* v. *Wilson*, as to which, however, he observed, that he did not understand the grounds upon which it proceeded, and therefore could not entirely accede to it; that the decision excited surprise at the time, and that some of the Judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord *Eldon* in *Gordon* v. *Gordon*, the learned Chief Baron proceeded: "We have therefore only to inquire, in this case, whether there be in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires, that in order to give effect to the bequest,

Case of *Evans* v. *Massey*.

Gift to illegitimate children ventre held good.

*Earle* v. *Wilson* questioned by *Richards*, C. B.

(*k*) 1 Mer. 141, stated ante, p. 223.

(*l*) 8 Pri. 22.

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the child must be shewn to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, 'Having two natural children, and the mother supposed to be now carrying a third child.' Now he does not say, 'with which she is pregnant *by me*,' but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact; then he bequeaths to such child the legacy in question. It is quite clear that there is nothing in the words of the bequest *so far*, asserting that the child was his, or that he thought so; for, although there can be no doubt that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularising the child that she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then supposition should turn out to have been incorrect. Now the only difficulty arises from the testator having afterwards, in alluding to the children, called them *his;* and upon that it has been considered that this case is within the reasoning and the principle of the decision in *Earle* v. *Wilson,* because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child as one of his children, and that it is given to it entirely on that consideration, as the basis and condition precedent of the gift. I do not, however, think that these subsequent words can be considered as so applying to the bequest itself, as to modify and control it. They were merely a reference to it, and were not intended to have any effect upon it. The allusion does not shew that he meant the child to take only in case of its being his, nor does it amount to an assertion that the child was his, or that the testator considered he was giving to it the legacy solely as his child."

Judgment in *Evans* v. *Massey.*

It is to be inferred from the observations of the Chief Baron, that the principle upon which he founded his objection to the case of *Earle* v. *Wilson* is this: that where a testator gives to the child or children with which a particular woman is enceinte *by him,* although he describes the child as his own, yet that he intends to make it the object of his bounty at all events, assuming his parental relation to the child as a fact *not farther to be inquired into:* but, as the learned Judge thought that in the case before him the child was not so described, the case of

Remarks on *Evans* v. *Massey.*

*Earle* v. *Wilson* remains uncontradicted by his decision. It is clear, however, that the Courts will not act upon the principle of that case, unless the testator's intention to make the fact of his parentage to the unborn infant an essential part of its description be unequivocally demonstrated. [If, indeed, such an intention can be collected, then the objection grounded on the impolicy of entering into evidence to verify the description has full force, and the testator having assigned certain reasons for his bequest, which do not exist, the bequest itself fails. For, as Lord *Eldon* himself said (*m*), "if the words were, whereas A. is now pregnant by me," this would imply a positive assertion of a fact, the truth of which it could not, on grounds of public policy, be suffered to sustain by evidence.

Whether child en ventre may have a name by reputation.

It has been said, however, by a distinguished Judge, that a child en ventre sa mère is a child in esse, and may have a name by *reputation* (*n*). If so, and the reputation of paternity as distinguished from the fact is to be the subject of inquiry under such circumstances, then a case like *Earle* v. *Wilson* will rest on exactly the same species of evidence as a gift to a bastard of mature age, although of course the evidence will in practice be more difficult to obtain in the former case than in the latter.]

Whether gifts to bastards not in esse good.

III. The preceding sections leave untouched the question respecting the validity of a devise or bequest to the illegitimate children, *not* in esse, of a particular woman, without reference to the father. The state of the law on the subject seems to be this: the early authorities are opposed to gifts to such objects, on the ground "that the law will not favour such a generation, nor expect that such shall be" (*o*). Dicta, however, have been thrown out by recent Judges which cast a doubt upon the old opinion. In *Wilkinson* v. *Adam* (*p*), Lord *Eldon* observed, that he knew no law against such a devise; but his Lordship afterwards said (*q*), that whether the cases in Lord *Coke* (*r*), which are all cases of deeds, had necessarily established, that no future illegitimate child could take under any description in a will, whether that was to be taken as the law it was not necessary to

[(*m*) *Gordon* v. *Gordon*, 1 Mer. 148.
(*n*) Per Sir *E. Sugden*, 2 Jo. & Lat. 460; also per Sir *J. Romilly*, M. R., 22 Beav. 339, 340; 25 ib. 73: contra per Lord *Eldon*, 1 Mer. 152.]
(*o*) See Cro. El. 510.
(*p*) 1 V. & B. 446.
(*q*) 1 V. & B. 468.
(*r*) Co. Lit. 3 b.

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decide in that case. He would leave that point where he found it, without any adjudication.

Undoubtedly, if the objection to gifts of this description was referable simply to the ground of uncertainty, there would be no difficulty in saying, in opposition to the early authorities, that such a devise might be sustained, as it is evident that a gift to the future illegitimate children of a *woman* does not involve greater uncertainty than such a devise to legitimate children. But it is conceived that there remains a serious objection to the validity of such dispositions, on grounds of public policy.

Objection on grounds of public policy.

To support the great interests of morality is part of the policy of every well-regulated State, and has long been a principle of the law of England, which has uniformly refused validity to provisions offering a direct incentive to vice; as in the case of bonds given with a view to cohabitation, the fate of which is well known. The same principle, it may be contended, applies to gifts in favour of the objects in question. It is true that *here* the unoffending offspring, and not the delinquent parent, is the subject of them; but it requires no great insight into the ordinary springs and motives of human action, to perceive that bounty to the offspring may act as a powerful engine to subvert the chastity of the parent. Suppose a large estate to be devised to every future *illegitimate* child of an indigent woman, would not such a provision hold out a strong encouragement to incontinency? Cases might be suggested which would place the argument of immoral tendency in a strong point of view; but as such a question is not likely to occur, since in gifts to future illegitimate children they are generally described as the offspring of a particular man, which renders them indisputably void, the writer will only further observe, that the view which has been taken of the subject is not at all prejudiced by the decisions establishing the validity of gifts to bastards en ventre; for as in these cases the immoral act, which it is the policy of the law to discourage, has been done, the argument on which the objection is founded, does not apply, and they fall within the principle which allows validity to provisions founded on the consideration of *past* cohabitation.

[The opinion that public policy, and not uncertainty, is the ground of objection to gifts to future illegitimate children, is borne out by what fell from Lord *St. Leonards,* when Chancellor

[of Ireland, in the case before mentioned of *In re Connor* (*s*). His observations were, indeed, extrajudicial; but he referred to his own argument in *Mortimer* v. *West*, and said he still retained the same opinion as he had then formed after a careful search into the authorities. According to his impression of the authorities, they authorised the position that it made no difference whether the father was referred to or not. That it was on the ground of public policy that such gifts were held to be void, not because of the difficulty or indelicacy which might ensue in pursuing an inquiry as to the paternity of the child: and in *Medworth* v. *Pope* (*t*), Sir *J. Romilly* decided the question accordingly. In *Mason* v. *Bateson* (*u*), where a testator bequeathed a legacy to A. for life, and after her death "to the children of his sister B., including" one or more illegitimate child or children of B., but had left a blank for their names, it was held, that even if it had appeared on the will what illegitimate children were intended, the gift would, nevertheless, have been invalid, because it would in terms include after-born illegitimate children.]

General conclusions.

IV. Upon the whole, the general conclusions from the cases seem to be:—

1st. That illegitimate children may take by any name or description which they have acquired by reputation *at the time of the making of the will;* but that,

2nd. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest upon the face of the will; and if, by possibility, *legitimate* children could have taken as a class under such gift, illegitimate children *cannot;* though children, legitimate and illegitimate, may take concurrently under a [description which necessarily includes the latter.]

3rd. That a gift to an illegitimate child en ventre sa mère *without reference to the father*, is indisputably good.

4th. That a gift to the future, *i. e.*, the unprocreated illegitimate children of a *man*, or of a woman by a particular man, *is clearly void* (*x*).

[(*s*) 2 Jo. & Lat. 459.
(*t*) 27 Beav. 71.
(*u*) 26 Beav. 404.
(*x*) *Metham* v. *Duke of Devon*, 1 P.W. 529; *Lomas v. Wright*, 9 My. & K. 775; *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657; *Bentley* v. *Blizard*, 4 Jur. N. S. 652; *Pratt* v. *Mathew*, 22 Beav. 328.]

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5th. That a gift by a testator to his *own* illegitimate child en ventre sa mère has been decided in one instance (namely, in *Earle* v. *Wilson*) to be also void; but the point admits of considerable doubt.

6th. That a gift to *future* illegitimate children of a particular woman, even irrespective of the father, cannot be sustained, against the objection founded on the immoral tendency of such a disposition.

# CHAPTER XXXII.

## JOINT TENANCY, AND TENANCY IN COMMON.

I. *Joint-tenancy, Tenancies by Entireties, and Tenancy in Common.*
II. *What Words create a Tenancy in Common.*
III. *Some Miscellaneous Questions.*

Joint-tenancy and tenancy in common.

1. UNDER a devise or bequest to a plurality of persons concurrently, it becomes necessary to consider whether they take joint or several interests; and that question derives its importance mainly from the fact, that survivorship is incidental to a joint-tenancy, but not to a tenancy in common (*a*).

Devisees joint-tenants, when.

A devise to two or more persons simply, it has been long settled, makes the devisees joint-tenants (*b*); but it should be observed, that where the objects of the devise are husband and wife, who are in law regarded as one person, they take not as joint-tenants, but *by entireties;* the consequence of which is, that neither can, by his or her own separate conveyance, affect the estate of the other (*c*). [The same rules have been held applicable to personalty (*d*).]

Husband and wife tenants by *entireties*, when;

——and take the share of *one* only;

Another consequence of this unity of person in husband and wife is, that where a gift is made to them concurrently with other persons, they are considered as, and take the share of, *one* only. Thus, if property be given to A., and B. his wife, and C. (a third person), A. and B. will take one moiety, and C. the other, not A. and B. two-thirds, and C. the remaining third (*e*).

(*a*) Any joint-tenant may, however, by his own conveyance, sever the tenancy as to his own share, and consequently destroy the jus accrescendi between himself and his companions.

[(*b*) A limitation to two persons and the survivor of them, and the heirs of such survivor, does not create a joint-tenancy; it gives a contingent remainder to the survivor, *Vick* v. *Edwards*, 3 P.W. 372; *In re Harrison*, 3 Anst. 836. But if the gift were to two and the survivor, and *their* heirs, they would probably be held to take jointly. *Oakeley* v. *Young*, 2 Eq. Ca. Ab. 537, pl. 6; *Doe* d. *Young* v. *Sotheron*, 2 B. & Ad. 628.]

(*c*) *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652; [*Back* v. *Andrew*, 2 Vern. 120, Pre. Ch. 1.

(*d*) *Atcheson* v. *Atcheson*, 11 Beav. 485; *Moffat* v. *Burnie*, 18 Beav. 211.]

(*e*) See *Lewin* v. *Cox*, Moore, 558, pl. 759; *Anon.*, Skinn. 182; Co. Lit. 187 a; [*Bricker* v. *Whatley*, 1 Vern. 233.]

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——although the bequest create a tenancy in common.

[It was said by *Popham*, C. J., that if the gift were to husband and wife and another *as tenants in common*, they would each take a third part (*f*); and Sir *L. Shadwell*, V. C., seems to have been of that opinion (*g*); but in *Warrington* v. *Warrington* (*h*), Sir *J. Wigram*, V. C., refused to allow any effect to such a distinction, thinking that the quantity which the husband and wife took, as between them and third parties, was a different question from that of the manner in which they took it as between each other. And in the case of *In re Wylde* (*i*), a decision to the same effect was made, although in another part of the will three legacies of equal amount each were given to the husband and wife and the third person. Some nice distinctions depending upon the husband and wife being named *after* the other legatee, the omission of the word "and" before the husband's name, and the near relationship to the testator of both husband and wife, and not of one of them only, have been thought sufficient in some recent cases (*k*) to authorise a departure from this rule, so as to treat the husband and wife as each entitled to share equally with the other legatees. How far such distinctions can be relied upon may be thought doubtful (*l*).]

Devisees in tail tenants in common, when;

But an exception to the rule, that a devise to two or more creates a joint tenancy, exists in certain cases where the estate conferred by the devise is an *estate tail*: for where lands are devised to several persons, and the heirs of their bodies, who are not husband and wife de facto, or capable of becoming such de jure, either from their being of the same sex, or standing related within the prohibited degrees of consanguinity, inasmuch as the devisees cannot, either in fact or in contemplation of law (as the case may be) have common heirs of their bodies,

—— though made joint-tenants of the freehold.

they are "by necessity of reason," as Littleton says, "tenants in common in respect of the estate tail" (*m*). As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint-tenants *for life*, with several inheritances in tail; so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes

Would it make any difference, as regards this doctrine, that the wife was described without reference to her conjugal character? It is conceived not.

[(*f*) *Lewin* v. *Cox*, Moo. 558.
(*g*) *Paine* v. *Wagner*, 12 Sim. 184.
(*h*) 2 Hare, 54.
(*i*) 2 D. M. & G. 724.
(*k*) *Warrington* v. *Warrington*, 2 Hare, 54; *Paine* v. *Wagner*, 12 Sim. 184. See *Bricker* v. *Whatley*, 1 Vern. 233.
(*l*) *Gordon* v. *Whieldon*, 11 Beav. 170.]
(*m*) Co. Lit. 184 a. See also *Huntley's case*, Dyer, 326 a; *Cook* v. *Cook*, 2 Vern. 545; *Pery* v. *White*, Cowp. 777; [*Forrest* v. *Whiteway*, 3 Exch. 367.]

entitled for life to his share under the joint-tenancy (*n*), and the inheritance in tail descends to the issue (if any) subject to such estate for life (*o*).

Devise to "first, second, &c. sons," they take successively.

[Another exception to the rule occurs where the devise is in form to the first, second, and other sons of A. in tail; for in such cases the devisees will take successively and not contemporaneously (*p*).]

Joint-tenancy in chattels;

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest (*q*), and that whether the gift be by way of trust or not (*r*); and, notwithstanding the disposition of the Courts of late years to favour tenancies in common, the same rule is now established as to money legacies, and residuary bequests (*s*), in opposition to some early authorities (*t*), and the doubts thrown out by Lord *Thurlow*, in *Perkins* v. *Baynton* (*u*). It is observable, however, that, in another case which came before his Lordship (*v*), he relied wholly upon the words of severance, as constituting the legatees of a money legacy tenants in common; from which Lord *Alvanley* inferred, that he had never made the observations imputed to him (*x*); but Lord *Eldon* has referred to them in a manner which leaves no doubt of the fact, although his Lordship has now placed the general question beyond controversy, by stating his own opinion generally to be, "that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint-tenancy" (*y*).

—— in pecuniary legacies and residues of personalty.

(*n*) *Wilkinson* v. *Spearman*, in D. P., cit. *Cook* v. *Cook*, 2 Vern. 545, and *Cray* v. *Willis*, 2 P. W. 529. See also Co. Lit. 182 a; [*Edwards* v. *Champion*, 3 D. M. & G. 202.]

(*o*) Sometimes a result of this kind is produced by the terms of the will, of which an example is afforded by the case of *Doe* d. *Littlewood* v. *Green*, 4 M. & Wels. 229, where a testator devised his real estates to his nieces E. and J., equally between them, to take as joint-tenants, and their several and respective heirs and assigns for ever; and it was held that they took estates as joint-tenants for life, with remainder, expectant on the decease of the survivor, to them as tenants in common. [See also *Folkes* v. *Western*, 9 Ves. 456; *Ex parte Tanner*, 20 Beav. 374; *Haddelsey* v. *Adams*, 22 ib. 266.

(*p*) *Cradock* v. *Cradock*, 4 Jur. N. S. 626, citing *Lewis* d. *Ormond* v. *Waters*, 6 East, 336.

(*q*) Lit. s. 381;] *Shore* v. *Billingsley*, 1 Vern. 482; *Willing* v. *Baine*, 3 P. W. 113; *Barnes* v. *Allen*, 1 B. C. C. 181.

(*r*) *Aston* v. *Smallman*, 2 Vern. 556; [*Bustard* v. *Saunders*, 7 Beav. 92.]

(*s*) 1 Vern. 482; 2 P. W. 347, 529; 3 ib. 113; 4 B. C. C. 15; 3 Ves. 629, 632; 6 Ves. 129; 9 Ves. 197; [2 Y. & C. C. C. 372].

(*t*) *Cox* v. *Quantoch*, 1 Ch. Cas. 238; *Sanders* v. *Ballard*, 3 Ch. Rep. 214; 2 P. W. 489; [*Taylor* v. *Shore*, T. Jones, 162.]

(*u*) 1 B. C. C. 118. The case of *Warner* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10, cited by his Lordship, does not apply, as it was the bequest of a leasehold house, and there were words of severance.

(*v*) *Jolliffe* v. *East*, 3 B. C. C. 25.

(*x*) See *Morley* v. *Bird*, 3 Ves. 630.

(*y*) *Crooke* v. *De Vandes*, 9 Ves. 204.

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Rule where objects of a concurrent gift may become entitled at different times.

The rule, that a gift to two or more simply creates a joint-tenancy, applies indiscriminately to gifts to individuals and gifts to classes (*z*), including, it should seem, dispositions in favour of children, notwithstanding Lord *Hardwicke's* objection, in *Rigden* v. *Vallier* (*a*), to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship. However, a gift by will, under which all the members of the class are not necessarily entitled at the same instant of time, but which vests the property in such as are living at the death of the testator, with a liability to be divested pro tanto in favour of after-born objects, was recently decided to create a tenancy in common. A. bequeathed stock in the public funds to B. for life, and after her decease, the capital to the children when they arrived at the age of twenty-one years: it was contended that the legatees were tenants in common, according to the position in Coke on Litt. 188 a, that "if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue, and dieth, and after J. N. hath issue, and dieth, the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time." Sir *L. Shadwell*, V. C., said, "It is contrary to the rule of law, that persons, who are to take at different times, can take as joint-tenants; the property must vest at once. From the necessity of this case, the children who attained twenty-one must take as tenants in common" (*b*).

Gift to children as a class without words of severance, joint tenancy, or tenancy in common.

It is observable that, in the case of [*Oates* d. *Hatterley* v. *Jackson* (*c*),] a contrary rule was applied to the limitations of a [will by which lands were devised to A. for life, remainder to B. and her children and their heirs; and it was held that B. took as joint-tenant with her children, and that it was no objection that the estates might commence at different times. And a similar decision was made in the case (*d*) of a conveyance by deed to the use of husband and wife successively for their

[(*z*) "Family," *Wood* v. *Wood*, 3 Hare, 65; *Gregory* v. *Smith*, 9 Hare, 708. "Next of kin," *Withy* v. *Mangles*, 4 Beav. 358; *Baker* v. *Gibson*, 12 Beav. 101. "Issue," *Hill* v. *Nalder*, 17 Jur. 224; *Williams* v. *Jekyll*, 2 Ves. 681. "Legal representatives," *Walker* v. *Marquis of Camden*, 16 Sim. 329.]

(*a*) 2 Ves. 258.

(*b*) *Woodgate* v. *Unwin*, 4 Sim. 129.

[(*c*) 2 Str. 1172. This and the two next cases were not cited in *Woodgate* v. *Unwin*; nor was *Bateman* v. *Roach*, 9 Mod. 104, in its favour, where a tenancy in common was decreed under similar circumstances, but without the assignment of any reason for the decision.

(*d*) *Matthews* v. *Temple*, Comb. 467; *S. C.* nom. *Earl of Sussex* v. *Temple*, 1 Ld. Raym. 311.

[lives (they not then having issue female), remainder to the issues female of their two bodies, and the heirs of the bodies of such issues female; for it was held that the daughters were joint-tenants of the freehold, and tenants in common of the inheritance (*e*). So in the case of] *Stratton* v. *Best* (*f*), where, by a marriage settlement, lands were limited in trust for the intended husband for ninety-nine years, if he should so long live, with remainder, subject to a power of appointment, in trust for the intended wife for life, with remainder in trust for all and every the child and children of the husband by the intended wife, and their heirs for ever. It was contended, that as the shares of children would vest at different times, they were tenants in common; but Lord *Thurlow* held that a joint-tenancy was created; observing that, whether the settlement was to be considered as the conveyance of a legal estate (qu. to the trustees?) or a deed to uses, would make no difference, and that the vesting at different times would not prevent its being a joint-tenancy.

[Again, in the case of *Mence* v. *Bagster* (*g*), where a testatrix bequeathed her residue "for her daughter S. L., and, after her decease, to be left to her children," it was held by Sir *J. K. Bruce*, V. C., that the gift to the children was one in joint-tenancy. And lastly, in the case of *Kenworthy* v. *Ward* (*h*), where a testatrix gave the interest of the residue of her property to H. for life, and "should she marry and have a child or children," the testatrix gave "to it or them the principal for ever," it was held by Sir *W. P. Wood*, V. C., that the children took as joint-tenants.]

In the passage cited from Lord *Coke*, the great commentator refers to a demise at common law, and his doctrine has been usually considered as not applying to conveyances to uses or to wills; but both Lord *Thurlow* and Sir *L. Shadwell* concurred (and this was their only point of agreement) in disregarding this distinction. [Sir *W. P. Wood*, however, treated it as a valid one, and as dependent on the following considerations. Under a limitation in remainder of a use to children, they are not, as they come in esse, let in with other persons who have not the whole interest; but the whole body always hold the whole

[(*e*) Vid. ante, p. 232.]
(*f*) 2 B. C. C. 233; [see also Sugd. Gilb. Uses, 134, 135, and n. (10), and *Doe* d. *Allen* v. *Ironmonger*, 3 East, 533.

(*g*) 4 De G. & S. 162. See also *Noble* v. *Stow*, 5 Jur. N. S. 1115.
(*h*) 11 Hare, 196.

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[interest, letting in other members of the body as they come in esse. But at common law, when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the cestui que use comes in esse. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety: the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust a Court of Equity will follow what is said to be the reason of the rule on uses and devises, viz. the intent; and the intent, as appearing by the words, is to create a joint-tenancy (*i*).

Distinct gifts of same lands to different persons, creates a joint-tenancy.

We have seen that where one devises his lands to A. in fee, and in another part of his will devises the same lands to B. in fee, the weight of authority inclines to a joint-tenancy between A. and B. (*k*).]

Executory trusts.

It should be observed, that, in carrying into effect executory trusts, the Courts will not make the objects joint-tenants, without a positive and unequivocal expression of intention to that effect. Thus, where (*l*) trustees were directed, as soon as the testator's three daughters attained their respective ages of twenty-one, to convey to them, and the heirs of their bodies, and their heirs, as joint-tenants, and, for want of such issue, over; Lord *Hardwicke* decreed, that the conveyance should be made to the daughters as tenants in common, in tail with cross-remainders, which he thought was the best mode of giving effect to these words. [And in the case of *Alloway* v. *Alloway* (*m*), where 6000*l.* having been given to and among such children as A. should appoint, A. made her will thus: "Robert give three of the 6000*l.* I wish to have given to the two elder girls;" on the ground that this was a direction to Robert to deliver to each of

[(*i*) See also *Samme's case*, 13 Rep. 55, 57; *Shelley's case*, 1 Rep. 101.

(*k*) Ante, ch. xv.]

(*l*) *Marryat* v. *Townly*, 1 Ves. 102. [See also *Synge* v. *Hales*, 2 Ba. & Be. 499; *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; *Owen* v. *Penny*, 14 Jur. 359; *Head* v. *Randall*, 2 Y. & C. C. C. 231. But see *White* v. *Briggs*, 2 Phill. 585.

(*m*) 4 Dr. & War. 380. See *Mathews* v. *Bowman*, 3 Anst. 727.

[the two appointees her separate share, it was held that they took in common.

Tenancy in common not implied in substituted gift;

But where the children or issue of legatees are in certain events substituted for their parents, the fact of the parents being made tenants in common, does not involve the necessity of holding that the issue also are to take inter se in the same manner. Thus, in *Bridge* v. *Yates* (*n*), where a testator gave the produce of his real and personal estate in trust for his wife for her life, and after her death "to be equally divided among his children who should be then living, and the issue of such of them as should be then dead, such issue taking only" the deceased parent's share; with some assistance from the context, it was held that the terms of severance referred only to the children, and, therefore, that the issue of a child that died, though taking in common with the surviving children, yet inter se were joint-tenants of their parent's share. In like manner accruing shares will not be held in common merely because that quality is attached to the original shares (*o*). Neither will words importing a tenancy in common in one bequest be extended by implication to another bequest which is connected with the former by the term "also" (*p*).]

——nor in gift of accruing shares;

——nor from another gift connected by the word "also."

II. The question next to be considered is, what words will operate to create a tenancy in common. It may be stated generally, that all expressions importing division by equal or unequal (*q*) shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will have this effect. Thus, it has been long settled that the words "equally to be divided" (*r*), [or "to be

What words create a tenancy in common.

Expressions which create a tenancy in common.

[(*n*) 12 Sim. 645; see also *Amies* v. *Skillern*, 14 Sim. 428. (*Woodgate* v. *Unwin* was cited as in point in these cases; but inasmuch as in *Amies* v. *Skillern* the V. C. thought none of the children took vested interests till the death of their mother, and in *Bridge* v. *Yates*, whether the death of the parent or of the tenant for life were the period for ascertaining the class (see ante, p. 174), the fund in either case vested in all the issue at the same time, the question decided in *Woodgate* v. *Unwin* did not arise.) *Penny* v. *Clarke*, 29 L. J. Ch. 370, per *Turner*, L. J.

(*o*) *Webster's case*, 3 Leo. 19, pl. 45; *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Beav. 605.

(*p*) *Cookson* v. *Bingham*, 17 Beav. 262; and see cases cited ante, ch. xvi. s. 1, ad fin.

(*q*) *Gibbon* v. *Warner*, 14 Vin. Ab. 484, 485.

(*r*) 3 Rep. 39 b;] 1 Salk. 226; 1 Vern. 65; 2 Vern. 430; 1 Eq. Ca. Ab. 292, pl. 6; Moore, 594; 1 P. W. 34, 14; 1 Ld. Raym. 622; 12 Mod. 296; 2 P. W. 280; 3 B. P. C. Toml. 104; 1 Wils. 165; [1 Ves. 13, 165; 1 Atk. 493, 494;] 3 B. C. C. 25; ib. 215; 1 D. & Ryl. 52; 5 B. & Ald. 464, 636.

"In joint and equal proportions." "Equally." "In equal moieties." "Share and share alike." "Severally." "Each of their respective heirs." "Between." "Amongst." "Each" of several. "All to have part alike," &c.

[divided" (*s*),] will create a tenancy in common; and so, of course, will a direction that the subject of gift shall "be distributed in joint and equal proportions" (*t*).

A devise or bequest to several persons, "equally amongst them" (*u*), or "equally" (*x*), [or "in equal moieties" (*y*), or "share and share alike" (*z*),] or "respectively" (*a*), or with a limitation to their heirs "as they shall severally die" (*b*), [or "to *each* of their respective heirs" (*c*),] or to several "between" (*d*), [or "amongst" them (*e*), or to "each" of several persons (*f*),] has been held, in contradiction of some of the very early cases (*g*), to make the objects tenants in common. And a similar construction has been given (*h*) to a devise to several their heirs and assigns, "all to have part alike, and every of them to have as much as the other." So, where (*i*) the devise was to A. and B. of lands, "to be enjoyed alike," Lord *Mansfield* held that they were tenants in common, considering that word as synonymous with *equally*.

Charge upon the legatees in moieties.

Again, where (*k*) A. bequeathed a term of years to her two daughters, they paying yearly to her son 25*l.* by quarterly payments, viz. *each of them* 12*l.* 10*s.* yearly, out of the rents of the premises, during his life, if the term so long continued; Lord Chancellor *Jefferies* held this to be a tenancy in common, *the* 25*l. being to be paid by the daughters in moieties.*

Direction in respect of one

In another case (*l*), A. bequeathed his personal estate to his

[(*s*) *Chapman* v. *Peat*, 1 Ves. 542; *Ackerman* v. *Burrows*, 3 V. & B. 54.]

(*t*) *Ettricke* v. *Ettricke*, Amb. 656.

(*u*) *Warner* v. *Hone*, 1 Eq. Ca. Ab. 293, pl. 10.

(*x*) *Lewen* v. *Dodd*, Cro. El. 443; *S. C.* nom. *Lewen* v. *Cox*, 695; *S. C.* Moore, 558, pl. 759; *Donn* v. *Gaskin*, Cowp. 657.

[(*y*) *Harrison* v. *Foreman*, 5 Ves. 206.

(*z*) *Rudge* v. *Barker*, Ca. t. Talb. 124; *Heathe* v. *Heathe*, 2 Atk. 122; *Perry* v. *Woods*, 3 Ves. 204.]

(*a*) *Torrett* v. *Frampton*, Sty. 434; [*Stephens* v. *Hide*, Ca. t. Talb. 27;] *Folkes* v. *Western*, 9 Ves. 456. See also *Marryat* v. *Townly*, 1 Ves. 102; [*Hawes* v. *Hawes*, ib. 13, 1 Wils. 165; *Vanderplank* v. *King*, 3 Hare, 1.]

(*b*) *Sheppard* v. *Gibbons*, 2 Atk. 441.

[(*c*) *Gordon* v. *Atkinson*, 1 De G. & S. 478. Compare *Ex party Tanner*, 20 Beav. 374.]

(*d*) *Lashbrook* v. *Cock*, 2 Mer. 70.

[(*e*) *Campbell* v. *Campbell*, 4 B. C. C. 15; *Richardson* v. *Richardson*, 14 Sim. 526.

(*f*) *Eales* v. *Cardigan*, 9 Sim. 384; *Hatton* v. *Finch*, 4 Beav. 186.]

(*g*) See *Lowen* v. *Bedd*, 2 And. 17. [But from the correspondence in date (Mich. T. 37, 38 Eliz.), this seems to be the same case as *Lewen* v. *Dodd*, in C. B. Cro. Eliz. 443; in which latter report it appears that *Anderson*, C. J. (the reporter of *Lowen* v. *Bedd*), and *Walmesley*, J., were for the joint-tenancy, against *Owen* and *Beaumont*, JJ. In Toth. 143, is cited a case of *Lowen* v. *Lowen*, also apparently the same case, and held a tenancy in common.]

(*h*) *Thorowgood* v. *Collins*, Cro. Car. 75. See also *Page* v. *Page*, 2 P. W. 489.

(*i*) *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352.

(*k*) *Kew* v. *Rouse*, 1 Vern. 353, 1 Eq. Ca. Ab. 292, pl. 7. [See also *Milward* v. *Milward*, cited 2 Atk. 309.]

(*l*) *Gnat* v. *Laurence*, Wight. 395. [See also *Ive* v. *King*, 16 Beav. 46.]

sons R. & J., and provided, that if J. should be desirous to be put out apprentice, a competent sum should be raised "in part of the *share*," to which he would become entitled; and *Macdonald*, C. B., held that the latter words were decisive of the testator's intention to create a tenancy in common.

legatee's "share."

The preceding cases evince the anxiety of later judges to give effect to the slightest expressions affording an argument in favour of a tenancy in common; an anxiety which has been dictated by the conviction, that this species of interest is better adapted to answer the exigencies of families than a joint-tenancy, of which the best quality is, that the right of survivorship may, at the pleasure of either of the co-owners (if personally competent), be defeated by a severance of the tenancy.

Leaning in favour of tenancy in common.

This leaning to a tenancy in common was acknowledged in a case (*m*) where a testator bequeathed to A. and B. 10,000*l.*, to be equally divided between them, when they should arrive at twenty-one years, and to carry interest until they should arrive at that age. It was contended that the fund was to be divided *at twenty-one*, the legatees in the mean time taking it jointly; and that, therefore, by the death of one under age, it survived to the other; but Lord *Thurlow* decided otherwise; observing, that the Court decrees a tenancy in common as much as it can.

[And, accordingly, in a case where a testator bequeathed a sum to trustees in trust "to pay, assign, and *divide* the same equally between all the children" of his daughter, "if more than one as *joint-tenants*, and if but one then to that one child" (*n*); Sir *J. Stuart*, V. C., held that the children took as tenants in common, although the testator had elsewhere bequeathed the residue of his estate unto and equally between two of his grandchildren "as tenants in common."

However, in the case of *Barker* v. *Giles* (*o*), where a testator devised "to A. and B., and the survivor of them, and their heirs and assigns, to be equally divided between them, share and share alike," it was held that the words equally to be divided referred only to the heirs, and, therefore, that A. and B. were joint-tenants for life, with several inheritances to them in common. But where the terms which give the whole interest are not capable of such a separation, the words of survivorship will

(*m*) *Jolliffe* v. *East*, 3 B. C. C. 25.

[(*n*) *Booth* v. *Alington*, 27 L. J. Ch. 117, 3 Jur. N. S. 835.

(*o*) 2 P. W. 280, 3 B. P. C. Toml. 104.

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[not in general be held to defeat the tenancy in common, but rather to point out a particular period for ascertaining who are to be the devisees; leaving such devisees, when ascertained, to take as tenants in common (*p*).

And in a gift to the children of several persons "respectively," the word may have the effect only of attributing to each parent his own children, and the children will take as joint-tenants (*q*).

Annuity to several in common "for their lives and the life of the "survivor."

When annuities are given to two or more persons in terms which constitute a tenancy in common, the interests of the annuitants will not be varied merely by reason of the annuities being given "for their lives and for the life of the survivor;" these words are sufficiently satisfied by their literal interpretation as fixing the duration of the annuities, and, therefore, upon the death of each annuitant his annuity will devolve upon his representative during the life of the survivor (*r*). But where such an annuity was given to *each* of two persons "for their lives, or the life of the longest liver of them, for their *or her* own absolute use and benefit," it was held that reddendo singula singulis, the two annuities were to be for the benefit of the annuitants during their joint lives; and after the death of either, then during the life of the other, "for her own use and benefit" (*s*).]

Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralised by the context: and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee, or legatee, until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall, in the mean time, devolve to the survivors, under the jus accrescendi which is incidental to a joint-tenancy.

Words creating a tenancy in

Thus, in *Armstrong* v. *Eldridge* (*t*), where a testator devised the residue of his real and personal estate to trustees, in trust to

[(*p*) *Bindon* v. *Earl of Suffolk*, 1 P.W. 96; *Perry* v. *Woods*, 3 Ves. 204; *Russell* v. *Long*, 4 Ves. 551; *Smith* v. *Horlock*, 7 Taunt. 129; *Ashford* v. *Haines*, 21 L. J. Ch. 496. But see *Moore* v. *Cleghorn*, 10 Beav. 423, as to which qu. *Haddelsey* v. *Adams*, 22 ib. 266. In *Brown* v. *Oakshot*, 24 Beav. 254, there was a devise of a term to trustees upon trust to pay certain annuities, and the surplus to A. and B. in equal shares, and subject thereto a devise to A. and B. in fee, and it was held they took the surplus rents during the term as tenants in common, but the fee as joint-tenants.

(*q*) *In re Hodgson's Trust*, 1 Kay & J. 178.

(*r*) *Jones* v. *Randall*, 1 J. & W. 100; *Eales* v. *Cardigan*, 9 Sim. 384.

(*s*) *Hatton* v. *Finch*, 4 Beav. 186.]

(*t*) 3 B. C. C. 215. See also *Doe* d. *Calkin* v. *Tomkinson*, 2 M. & Sel. 165.

sell, and apply the interest from time to time to the use of his grandchildren F., C., R., and M., *equally between them share and share alike,* for and during their several and respective natural lives, *and after the decease of the survivor of them,* in trust to apply the principal to and among the children of his grandchildren: Lord *Thurlow* said, that although the words "equally to be divided," and "share and share alike," were, in general, construed in a will to create a tenancy in common, yet where the context shewed a joint-tenancy to be intended, the words should be construed accordingly; and in this case the interest was to be divided among four while four were living, among three while three were alive, and nothing was to go to the children while any of the mothers were living.

common rejected by force of context.

And the same construction has prevailed even where the ulterior devise was not in terms, after the decease of the survivor, but after the decease or the deceases of the prior legatees; it being considered that the property is not to go over until the decease of all the legatees, though the words, especially in the latter case, might seem to admit of being construed after the "respective" deceases, if the Court had felt particularly anxious to avoid the rejection of the words creating a tenancy in common.

Thus, in *Tuckerman* v. *Jefferies* (*u*), where the testator devised to A. and B., to be equally divided between them during their natural lives, *and after the decease of A. and B.* to the right heirs of A. for ever: it was held, that they were joint-tenants, notwithstanding the words "equally to be divided;" it being considered that the whole was to go over to the heirs of A. at once on the decease of the survivor, not that they should take by moieties at several times.

So, in the case of *Pearce* v. *Edmeades* (*x*), where a testator bequeathed the residue of his estate to trustees, in trust to pay

"After decease of E. and

(*u*) 3 Bac. Ab. Joint-Tenants (F), 681, 6th ed., [Holt, 370, 11 Mod. 108-9. See also *Stephens* v. *Hide*, Ca. t. Talb. 27; *Malcolm* v. *Martin*, 3 B. C. C. 50; *Townley* v. *Bolton*, 1 My. & K. 148; *M'Dermott* v. *Wallace*, 5 Beav. 142; *Alt* v. *Gregory*, 2 Jur. N. S. 577; *Begley* v. *Cook*, 3 Drew. 662. See and compare *In re Laverick's estate*, 18 Jur. 304; *In re Drakeley's estate*, 19 Beav. 395; *Turner* v. *Whittaker*, 23 Beav. 196. There will be no implied survivorship where such a gift over is preceded by separate gifts of distinct properties for life, *Swan* v. *Holmes*, 19 Beav. 471; *Sarel* v. *Sarel*, 23 Beav. 87; *Lill* v. *Lill*, ib. 446; *Brown* v. *Jarvis*, 29 L. J. Ch. 595 (where the gift over was, "after the decease of every of them"): nor, if there is no limitation expressly for the lives of the donees, but the gifts are still separate; in such case the interest passes to the respective representatives till the gift over takes effect, *Bignold* v. *Giles*, 4 Drew. 343.]

(*x*) 3 Y. & C. 246; [*Ashley* v. *Ashley*, 6 Sim. 358.]

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G." read after decease of *survivor.*

the interest, dividends and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. G. and G. G., during their *respective* lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust, to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said E. G. and G. G., in equal shares; and if but one then to such only child, and if there should be no child of the said E. G. and G. G. living at the time of their decease, or born in due time after the death of the said G. G., then upon further trust for the testator's legal personal representatives. The testator and E. G. died, the latter leaving children, whereupon the entire income was claimed by G. G. as the only survivor; and Lord *Abinger*, C. B., held that he was entitled. "It has been settled," said his Lordship, "by a series of decisions, that the words 'respectively,' and 'in equal shares,' when not controlled by other words in a will, shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with, or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. In the present case the bequest to G. G. and E. G., during their lives, is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a tenancy in common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shews that he meant to die intestate of no part of it; but as the interest and dividends only are devised to his grandchildren G. G. and E. G., and nothing is devised to their children till the death of both, it would follow that if G. G. is not entitled to the whole interest and dividends accruing after the death of

E. G. during his life, the portions of interest and dividends which she took in her lifetime would be undevised during the remainder of G. G.'s life."

Remark on preceding cases.

As in the three preceding cases no act had been done to sever the joint-tenancy (if any) between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint-interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to the latter point, except in *Pearce* v. *Edmeades*, and even there it does not appear to have formed the prevailing ground of determination, though perhaps less violence is done to the language of the will by implying a positive gift to the survivor than by rejecting the words of severance (*y*).

Intention must be clear.

[But the Courts will not construe the will as postponing the distribution of every part until the death of the surviving tenant for life, unless an intention so to do is clearly indicated, and, therefore, although the gift in remainder be in terms of the *whole* fund, and appearing therefore to have a simultaneous distribution in view, yet, if a tenancy in common is more consistent with the general context, it will be established especially in favour of children, in spite of the apparently antagonistic terms (*z*).

Tenancy in common, with express survivorship, not a joint-tenancy.

Where the will creates a tenancy in common with *express* survivorship, there is, of course, no pretence for implying a joint-tenancy (*a*), and each devisee or legatee will have, not a severable interest, but an interest with a contingent gift over to be ascertained only by the event. But in the recent case of

[(*y*) *Hurd* v. *Lenthall*, Sty. 211, 14 Vin. Ab. 182, pl. 5.] Where the objects are more than two, the implication, in order to complete the purpose of filling up the chasm which would otherwise occur between the decease of the first and last of the tenants for life, must either give joint estates carrying the right of survivorship, or, which would seem better, must, on the decease of each tenant for life after the first, deal with the accruing share or shares of such deceased tenant or tenants for life in like manner. For instance, suppose the devise to be to A., B., and C., as tenants in common for life, and after the decease of the survivor over. A. dies; upon which A.'s share passes to B. and C., it is presumed, as tenants in common. Next B. dies; his original share devolves by implied devise to C., but unless his accruing share (i.e. the one-half of A.'s share which came to B. on A.'s decease) can pass to C., such share would be undisposed of during the remainder of his (C.'s) life. The implication therefore, if admissible at all, must, it is presumed, in order to complete its purpose, give B.'s accruing share, as well as the original one, to C. [*Minton* v. *Cave*, 10 Jur. 86. See also *Marryat* v. *Townly*, 1 Ves. 102.

(*z*) *Hawkins* v. *Hamerton*, 16 Sim. 410; *Ewington* v. *Fenn*, 16 Jur. 398; *Doe* d. *Patrick* v. *Royle*, 12 Q. B. 100; *Arrow* v. *Mellish*, 1 De G. & S. 355; *Willes* v. *Douglas*, 10 Beav. 47.

(*a*) *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428; *Hatton* v. *Finch*, 4 Beav. 186; *Haddelsey* v. *Adams*, 22 Beav. 275.

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[*Cookson* v. *Bingham* (*b*), where a testator devised his estates to his daughters, A., B., and C., to be jointly and equally enjoyed, or divided in the case of the marriage of any of them; and they, or the survivor in case of death, were authorized to dispose of the same by will or assignment as they should think proper, the daughters were held by Sir *J. Romilly*, M. R., to have joint estates in fee; and on appeal Lord *Cranworth* inclined to the same opinion, but as he thought that if it were not so the survivor alone had power under the latter clause to dispose of the fee by will, it was unnecessary to decide the point.]

Distinction between joint-tenancy and tenancy in common as to lapse, &c.

III. It follows as a consequence of the survivorship which is incidental to a joint-tenancy, that if the devise fail as to one of the devisees, from its being originally void (*c*), or subsequently revoked (*d*), or by reason of the decease of the devisee in the testator's lifetime (*e*), the other or others will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure (*f*) or revocation of the devise to any of them, descend to the heir-at-law (or if the will is subject to the new law, the residuary devisee) of the testator (*g*): unless the devise be to the objects as a class, in which case the individuals composing the class at the death of the testator are entitled among them, whatever be their number, to the entirety of the subject of gift (*h*).

Gift implied from power creates a tenancy in common.

Here it may be observed, that where, in the absence of an express gift, a trust is raised by implication in default of execution of a power of distribution (*i*), it is now settled that the objects take *as tenants in common* (*k*); [and] it should seem that under an implied gift resulting from a power of *selection*, [the same rule prevails (*l*).]

[(*b*) 17 Beav. 262, 3 D. M. & G. 668.]

(*c*) *Dowset* v. *Sweet*, Amb. 176.

(*d*) *Humphrey* v. *Tayleur*, Amb. 136; [*Larkins* v. *Larkins*, 3 B. & P. 16; *Short* v. *Smith*, 4 East, 419; see ante, Chap. XI.]

(*e*) *Davis* v. *Kemp*, Cart. 2, 1 Eq. Ca. Ab. 216, pl. 7; | *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628.

(*f*) *Owen* v. *Owen*, 1 Atk. 494; *Norman* v. *Frazer*, 3 Hare, 84.]

(*g*) *Creswell* v. *Cheslyn*, 2 Ed. 123, 3 B. P. C. Toml. 246; [*Boulcott* v. *Boulcott*, 2 Drew. 25.

(*h*) *Shaw* v. *M'Mahon*, 4 Dr. & War. 431; *Clark* v. *Phillips*, 17 Jur. 886; *Knight* v. *Gould*, 2 My. & K. 295.] But see ante, Chap. X.

(*i*) See ante, Chap. XVII. sect. 5.

(*k*) *Reade* v. *Reade*, 5 Ves. 744; [*Casterton* v. *Sutherland*, 9 Ves. 445;] overruling *Maddison* v. *Andrew*, 1 Ves. 57, [and Lord *Hardwicke's* dictum in *Duke of Marlborough* v. *Lord Godolphin*, 2 ib. 81.

(*l*) *Att.-Gen.* v. *Doyley*, 4 Vin. Ab. 485, pl. 16; *Harding* v. *Glyn*, 1 Atk. 469.]

Effect upon power of lapse of some of the shares.

Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) *as tenants in common*, a question sometimes arises whether, by the death of any of the objects, the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains as to the whole (*m*). But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses pro tanto, the power is defeated to the same extent (*n*).

If, however, under the gift in default of appointment, the objects are joint-tenants, or the gift is to a class, of course the decease of any object, even in the testator's lifetime, as it does not occasion any lapse, leaves the power wholly unaffected.

It may be observed, that, as an appointment cannot be made in favour of a deceased child, whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course *only* his share) in the unappointed portion. Lord *Eldon*, it is true, expressed his disapproval of this "device," in *Butcher* v. *Butcher* (*o*); but his Lordship appears to have objected to it as proceeding upon the erroneous notion that it was necessary to enable the donee to appoint the remainder of the fund to the surviving objects: whereas, according to *Boyle* v. *Bishop of Peterborough*, his power extended over *the whole* fund. It may be observed that, to avoid all such questions, powers should always be framed so as to authorize an exclusive appointment to one or

(*m*) *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299; *Butcher* v. *Butcher*, 9 Ves. 382, 1 V. & B. 79.

(*n*) *Reade* v. *Reade*, 5 Ves. 744; see also 1 Sugd. Pow. 7th Ed. 505, where great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to the third edition of Powell on Devises (p. 374), which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before* and where it takes place *after* the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favour such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.

(*o*) 1 V. & B. 92.

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more of the objects, notwithstanding the recent enactment (*p*), which enables the donee of a power of distribution to appoint nominal shares to any of the objects. It must not be forgotten that the omission to give a share to each object would still be fatal to the appointment.

(*p*) 1 Will. 4, c. 46.

# CHAPTER XXXIII.

## ESTATES IN FEE, WITHOUT WORDS OF LIMITATION.

I. *What Estate passes by an indefinite Devise under Wills made before* 1838.
II. *When enlarged to a Fee by a Charge of Debts, Legacies, or Annuities.*
III. ——————— *by a Devise over in case of Death of prior Devisee under Age, &c.*
IV. *Effect of words "Estate," "Property," "Real Effects," "Inheritance," "Remainder," "Reversion," "Interest," "Part," "Share," "Perpetual Advowson," &c.*
V. *Effect of recent Enactment as to Wills made or republished since* 1837.

Devise without words of limitation under old law.

I. NOTHING is better settled than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the newly enacted rules of testamentary construction, confers on the devisee an estate for life only (*a*), notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate (*b*), or may have given a nominal legacy to his heir (*c*), or may have declared an intention wholly to disinherit him, or the will may contain an antecedent devise to the heir for life of the testator's property, which is the subject of dispute (*d*), or the devise in question may be to a class, embracing the heir, as to the testator's children (*e*), [or may have devised the same property to the same persons in another event in fee (*f*)]; or, lastly, notwithstanding there may, in another part of the will, or in the immediate context, be a devise expressly for life, affording the argument, therefore,

(*a*) *Taylor* v. *Hodges*, cit. 3 Ch. Rep. 87; [*Canning* v. *Canning*, Mose. 242;] *Deacon* v. *Marsh*, Moore, 594; *Bullock* v. *Bullock*, 8 Vin. Ab. 238, pl. 10; *Roe* d. *Kirby* v. *Holmes*, 2 Wils. 80; *Doe* d. *Bowes* v. *Blackett*, Cowp. 235; *Doe* d. *Crutchfield* v. *Pearce*, 1 Pri. 353; [*Doe* d. *Burton* v. *White*, 1 Exch. 526; 2 Exch. 797; *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382.]

(*b*) *Denn* v. *Gaskin*, Cowp. 657; Doug. 760; [*Frogmorton* v. *Kershaw*, 3 Wils. 414; 2 W. Bl. 889;] *Doe* d. *Child* v. *Wright*, 8 T. R. 64; 1 B. & P. N. R. 335; *Doe* d. *Small* v. *Allen*, 8 T. R. 497; [*Doe* d. *Knocker* v. *Ravell*, 2 Cr. & J. 617.]

(*c*) *Roe* d. *Callow* v. *Bolton*, 2 W. Bl. 1045: *Right* v. *Sidebotham*, Doug. 759; *Roe* d. *Peter* v. *Daw*, 3 M. & Sel. 518.

(*d*) *Awse* v. *Melhuish*, 1 B. C. C. 519; *Right* d. *Compton* v. *Compton*, 9 East, 267.

(*e*) *Dickins* v. *Marshall*, Cro. El. 330; [*Taylor* v. *Hodges*, cit. 3 Ch. Rep. 87; *Bowen* v. *Scowcroft*, 2 Y. & C. 640; *Harding* v. *Roberts*, 10 Exch. 819.

(*f*) *Sturgis* v. *Dunn*, 19 Beav. 135.]

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that the testator meant something more, or at least different, by an indefinite devise (*g*); though any, or, it is conceived, the whole of these circumstances concur in the same will, it is indisputably clear that such a devise will confer only an estate for life. [The same holds as to devises of lands held for an estate pur autre vie where the heir would have been special occupant (*h*).]

Grounds for enlarging indefinite devise to a fee.

This rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply comprehends all the interest therein. A conviction that the rule is generally subversive of the actual intention of testators, always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication, enlarged to a fee-simple, which cases form the next subject of consideration.

Charge of a gross sum on the devisee.

II. It has been long settled that where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee, on the ground that if he took an estate for life only he might be damnified by the determination of his interest before reimbursement of his expenditure; and the fact that actual loss is rendered highly improbable by the disparity in the amount of the sum charged relatively to the value of the land, does not prevent the enlargement of the estate (*i*).

As to contingent charges.

For the same reason the future, or contingent nature of the charge, does not, as sometimes contended (*j*), prevent it from enlarging the estate. In the cases of *Abrams* v. *Winshup* (*k*) and *Doe* v. *Phillips* (*l*), the charge was contingent in effect, though not in express terms (being liable, under the general

(*g*) *Goodtitle* d. *Richards* v. *Edmonds*, 7 T. R. 635; *Awse* v. *Melhuish*, 1 B. C. C. 519; *Doe* d. *Briscoe* v. *Clarke*, 2 B. & P. N. R. 343; *Doe* d. *Viner* v. *Eve*, 5 Ad. & Ell. 317; *Silvey* v. *Howard*, 6 Ad. & Ell. 253; [*Matthews* v. *Windross*, 2 Kay & J. 406; *Tidball* v. *James*, 29 L. J. Ex. 91.

(*h*) *Doe* d. *Jeff* v. *Robinson*, 2 M. & Ryl. 249; 8 B. & Cr. 296, approved of by Sir *E. Sugden*, in *Allen* v. *Allen*, 2 D. & War. 327. And see *Doe* d. *Lewis* v. *Lewis*, 9 M. & Wels. 662. But if the devise of the estate pur autre vie be to A. during the life of the cestui que vie, A. will of course take the whole estate, and not merely for his own life, *Philips* v. *Philips*, 1 P. W. 39; *Doe* d. *Lewis* v. *Lewis*, supra. See also 2 Hayes, Conv. 83.

(*i*) Co. Lit. 9 b; 6 Rep. 16 a; Cro. El. 379; Com. Rep. 323;] *Moone* v. *Heaseman*, Willes, 138; *Doe* v. *Holmes*, 8 T. R. 1; *Goodtitle* v. *Maddern*, 4 East, 496; [*Blinston* v. *Warburton*, 2 Kay & J. 400.]

(*j*) *Merson* v. *Blackmore*, 2 Atk. 341; *Doe* v. *Allen*, 8 T. R. 497.

(*k*) 3 Russ. 350.

(*l*) 3 B. & Ad. 753.

rule (*m*), to failure in the event of the devisee's dying before majority), and no attempt was made to found a distinction on this circumstance, which indeed seems precluded by the principle that makes the *possibility* of loss the ground of the enlargement of the estate, as such possibility evidently exists as well where the charge is contingent as where it is absolute. So it is wholly immaterial whether the devisee is directed to pay simply, or to pay out of the land (*n*).

As to devisee being also executor.

Where a devisee, who is directed to pay the testator's debts, is also appointed executor, the injunction is considered to have relation, not to his duty as executor to discharge the debts, but to his character of devisee of the land in which, therefore, he takes a fee (*o*).

Express estate for life or estate tail not enlarged.

The rule under consideration, however, is confined to indefinite devises; for where the direction to pay is imposed on a person to whom there is given an express estate for life (*p*), or an estate tail, (whether limited in express terms, or arising constructively by implication from words introducing the devise over (*q*),) the charge is inoperative to enlarge such estate for life or estate tail to a fee-simple.

No enlargement where the charge is upon the land merely.

It is well established, too, that the mere imposition of a burden on the land (without saying by whom it is to be borne) has not the effect of enlarging the estate of any devisee; as where lands are devised to A., after debts and legacies are paid, or subject to, or charged with the payment of debts or legacies, which, in a will that is subject to the old law, confers only an estate for life (*r*). And though undoubtedly two cases may be adduced (*s*), in which devises seeming to belong to this class were held to carry the fee, yet one of these cases professedly recognized, while it actually departed from (*t*), the principle which distinguishes between charges on the land merely, and charges on the devisee in respect of the land; and in the other case the Lord Chief Justice *Best* broadly laid it

(*m*) Ante, Chap. XXV. sect. 5.

(*n*) *Doe* v. *Snelling*, 5 East, 87; [*Matthews* v. *Windross*, 2 Kay & J. 406.]

(*o*) *Dolton* v. *Hewer*, 6 Mad. 9; also *Doe* v. *Phillips*, 3 B. & Ad. 753; [*Johnson* v. *Brady*, 11 Ir. Eq. Rep. 386.]

(*p*) *Willis* v. *Lucas*, 1 P. W. 474; [*Doe* d. *Burdett* v. *Wrighte*, 2 B. & Ald. 710.

(*q*) *Legatt* v. *Sewell*, 2 Vern. 551;] *Denn* v. *Slater*, 5 T. R. 335; *Doe* v. *Owens*, 1 B. & Ad. 318.

(*r*) *Denn* v. *Mellor*, 5 T. R. 558; *S. C.* in D. P. 1 B. & P. 247; see also *Fairfax* v. *Heron*, Pre. Ch. 67; [*Canning* v. *Canning*, Mose. 240; *Doe* d. *Sams* v. *Garlick*, 14 M. & Wels. 698; *Vick* v. *Sueter*, 3 Ell. & Bl. 219; *Burton* v. *Powers*, 3 Kay & J. 170.]

(*s*) *Doe* v. *Richards*, 3 T. R. 356; *Gully* v. *Bishop of Exeter*, 12 J. B. Moo. 591, 4 Bing. 293.

(*t*) But see 1 Cr. & Mees. 41.

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down that every charge of the land, without distinction, converted an indefinite devise into a gift of the fee; a position which stands directly opposed to the general doctrine of prior cases, and is also irreconcilable with, and must therefore be considered as overruled by, a more recent adjudication (*u*).

As to annual charges.

The same principle applies to annual sums charged on real estate, which, if directed to be paid by the devisee of an undefined estate, will enlarge that estate to a fee-simple, whether the will directs the annual sum to be paid by the devisee, without more, or by the devisee, out of the land (*x*).

As to current income exceeding annuity.

And it is immaterial that the current income of the property exceeds the annual sum charged, unless such sum ceases with the estate of the devisee, because, leaving out of consideration possible fluctuations in value, the devisee might, notwithstanding such excess, be damnified, if the annuity should happen to endure beyond his life estate.

Whether annuity enlarges estate of devisee or ceases at his death.

Where the annuity and the estate of the devisee are both indefinite, the alternative presented itself either to restrict the annuity to the life of the devisee of the land, or to enlarge the estate of the devisee of the land to a fee; and the latter hypothesis was adopted, as being most consistent with probable intention. Where the devise is to a person expressly for life, he paying an annuity to another also expressly for life, the direction to pay the annuity is inoperative (as we have seen the charge of a gross sum is under similar circumstances) to enlarge the devisee's estate; and, in such case, it seems that the annuity continues a burden on the land during the life of the annuitant, even after the determination of the estate of the devisee, who was, in the first instance, made the medium of payment (*y*). These positions, it will be observed, leave open the question as to the effect of directing a person, who takes an express estate for life, to pay an annuity to another indefinitely. There would seem to be some ground, in such a case, to contend that the annuity was intended to be co-extensive only with the estate of the person who is directed to pay it, and consequently ceased on the death of the payer, being in fact an annuity for the joint

(*u*) *Doe* d. *Clarke* v. *Clarke*, 1 Cr. & Mees. 39.

(*x*) *Spicer* v. *Spicer*, Cro. Jac. 527; [*Shailard* v. *Baker*, Cro. El. 744;] *Baddeley* v. *Leapingwell*, 3 Burr. 1533; *Jenkins* v. *Jenkins*, Willes, 650; [*Goodright* v. *Allen*, W. Bl. 1041;] *Goodright* v. *Stocker*, 5 T. R. 13; *Right* v. *Compton*, 9 East, 267, overruling *Ansley* v. *Chapman*, Cro. Car. 157. [And see *Crozier* v. *Crozier*, 3 D. & War. 384; *Morrough* v. *Lord Dufferin*, 2 Jones, Ir. Exch. 719.]

(*y*) *Willis* v. *Lucas*, 1 P. W. 474.

lives of himself and the annuitant; but the writer is not aware of any decision on the point.

As to annuities charged on land.

In consistency with the principle which applies, as we have seen, to charges of gross sums, the imposition of an annuity on any devised lands, in terms which do not make its payment the personal duty of any devisee, leaves the estate created by the will wholly unenlarged and unaffected (*z*); which doctrine is so well settled, that the difficulty of reconciling every decision (*a*) does not cast the slightest shade of doubt over the principle.

Enlargement to a fee by the effect of a devise over.

III. The fee-simple is also held to pass by an indefinite devise, where it is succeeded by a gift over in the event of the devisee dying under the age of twenty-one years; such devise over being considered to denote that the prior devisee is to have the inheritance in the alternative event of his attaining the age in question, since, in any other supposition, the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age is very capricious if not absurd (*b*).

Extent of the rule.

The force of this reasoning is somewhat diminished where the devise over confers an estate for life only; but the rule nevertheless applies to such cases (*c*), as it also does where the contingency is the dying of the prior devisee under any other age than majority (*d*); and it is not restrained (as has been sometimes laid down by text writers) to cases in which the prior devise is to the children of a devisee for life (*e*); nor does it matter that another contingency is associated with that of death under the prescribed age: for instance, an indefinite devise would be enlarged to a fee-simple by means of a devise over to take effect on the prior devisee dying under age, *and without leaving lawful issue* (*f*). In fact, the implication may be plausibly contended for, even where the contingency with which death is associated does not relate to the age of the devisee at all; as in the case of a devise to A., and, if he dies without leaving issue living at his decease, then to B. in fee (*g*). How-

(*z*) See *Doe* v. *Clayton*, 8 East, 141; [*Turnough* v. *Stock*, 11 Exch. 37.]

(*a*) See *Andrew* v. *Southouse*, 5 T. R. 292; [*Peppercorn* v. *Peacock*, 3 M. & Gr. 356; 3 Scott, N. R. 651, in Ch. 4 Jur. 1122.]

(*b*) *Doe* v. *Cundall*, 9 East, 400; *Marshall* v. *Hill*, 2 M. & Sel. 608; *Doe* v. *Coleman*, 6 Pri. 179, [*Burke* v. *Annis*, 11 Ha. 232;] overruling *Fowler* v. *Blackwell*, 1 Com. Rep. 353.

(*c*) See *Frogmorton* v. *Holyday*, 3 Burr. 1618, 1 W. Bl. 535.

(*d*) See *Doe* v. *Coleman*, 6 Pri. 179.

(*e*) *Doe* v. *Cundall*, 9 East, 400.

(*f*) *Toovey* v. *Bassett*, 10 East, 460.

(*g*) See *Moone* v. *Heaseman*, Willes, 142; also *Hutchinson* v. *Stephens*, 1 Kee.

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Devise over enlarges the prior devise, when.

cver this may be, authority forbids the extension of the doctrine to cases in which the devise over in fee arises on a collateral event wholly unconnected with the decease of the prior devisee; for, in a case where lands were devised to the testator's wife, with remainder to A. and B. as tenants in common, and the testator provided that in case C. should disturb his said wife in the enjoyment of the premises, the same should go to D. in fee; it was held that A. and B. took estates for life only (*h*).

Indefinite devise substituted for devise in fee confers life estate only.

It is also abundantly clear that, where an indefinite devise is to take effect in derogation of, or in substitution for, a previous devise in fee (being the converse of the cases just mentioned), no enlargement of estate takes place. Thus, if lands are devised to A. and his heirs, and, in the event of his dying under the age of twenty-one and without issue, to B., B. will take an estate for life only (*i*). Indeed, the seeming absurdity that a testator should mean to defeat an estate in fee for the purpose of substituting a mere life interest (which would be the gist of the argument for expanding the second devise to a fee-simple) is wholly avoided, by holding that the second devise defeats the first pro tanto only, which appears to be the sound construction (*j*).

[Nor if a testator by codicil revokes a devise, which he had made by will to A. in fee, and leaves the property to B. indefinitely, will B. take more than an estate for life. For though it may probably have been the testator's intention to put B. in all respects in the place of A., yet something more than the mere revocation and new devise must appear in writing, or in the circumstances of the case to enable a court of law to adopt that conclusion (*k*).

Devise to A. in fee, in trust for B. indefinitely, gives B. a fee.

It is now settled] that where lands are devised to trustees in fee, in trust for a person, without any words of limitation, the

240. In this case, though it is difficult to discover any other ground for the decision than such as is furnished by the doctrine suggested, yet the judgment of Lord *Langdale*, M. R., does not distinctly recognise that doctrine.

The several points briefly stated in the text will be found very fully discussed in the writer's volume appended to the 3rd Edition of Powell on Devises, p. 399, et seq.; but as such points cannot arise under wills made or republished since the year 1837, and may therefore never arise at all, the writer has thought the space occupied by the discussion may, in the present work, be more usefully appropriated to the consideration of questions of more enduring utility.

(*h*) *Roe* v. *Blackett*, Cowp. 235.

(*i*) *Middleton* v. *Swain*, Skinn. 339; *Beviston* v. *Hussey*, ib. 385, 562; *Fairfax* v. *Heron*, Pre. Ch. 67; *Doe* v. *Holmes*, 2 Wils. 80.

(*j*) As to the substituted devise for life defeating the prior fee pro tanto, vide ante, Chap. XXVI.

[(*k*) *Doe* d. *Brodbelt* v. *Thomson*, 12 Moo. P. C. C. 116.]

cestui que trust takes an equitable interest co-extensive with the legal estate of the trustees, *i. e.* a fee (*l*).

[The converse case is also true, that where lands are devised to trustees, without words of inheritance, upon trust for one in fee, the trustees take the fee (*m*).]

Fee implied from a limitation of the trust during minority.

In the case of *Newland* v. *Sheppard* (*n*), Lord *Macclesfield* held that, under a devise by a testator to trustees in fee, upon trust to pay the *produce* and interest to such of his grandchildren as should be living at the time of his decease, until they should come to the age of twenty-one years, or be married, the grandchildren took the fee, his Lordship reasoning much on the testator's having vested the fee in the trustees, and given the "*produce*" to the children; though it appears by the Registrar's book (*o*) that the word "produce" was not in the will. In either case, the construction was altogether unwarranted, and the soundness of the decision has been denied by Lord *Hardwicke* (*p*).

Upon its authority, however, Lord Keeper *Henley*, in *Peat* v. *Powell* (*q*), held that where a testator gave all his real and personal estate to his executors, in trust for his younger son G. till he should attain twenty-one, and then the trust to cease, G. took the whole beneficial interest; his Lordship observing, that *the trust only* was to continue during the minority, and that the case of *Newland* v. *Sheppard* was much stronger.

What words create an estate in fee-simple.

IV. The proper and technical mode of limiting an estate in fee-simple is to give the property to the devisee and his heirs or to him, his heirs and assigns for ever; but such an estate may, even under wills made before 1838, be created by any expressions, however informal, which denote the intention. Thus, the inheritance in fee was held to pass by a devise to A. *in fee-simple* (*r*), to A. *for ever* (*s*), or to him *and his assigns for ever* (*t*),

(*l*) *Challenger* v. *Sheppard*, 8 T. R. 597; [*Knight* v. *Selby*, 3 M. & Gr. 92, 3 Scott, N. R. 409; *Moore* v. *Cleghorn*, 10 Beav. 423; affirmed on appeal, 12 Jur. 591; 17 L. J. Ch. 400; *Hodson* v. *Ball*, 14 Sim. 558; and see *Hutchinson* v. *Stephens*, 1 Keen, 240. But contra as to limitations in a deed, *Holliday* v. *Overton*, 14 Beav. 467.

(*m*) *Shaw* v. *Weigh*, 2 Str. 798.]

(*n*) 2 P. W. 194, 2 Eq. Ca. Ab. 329, pl. 4. Mr. Cruise, 6 Dig. 641, has inaccurately stated this case to have been recognised in *Challenger* v. *Sheppard*, 8 T. R. 597.

(*o*) See Mr. Cox's n., 2 P. W. 194.

(*p*) In *Fonereau* v. *Fonereau*, 3 Atk. 316.

(*q*) Amb. 387, 1 Ed. 479.

(*r*) *Baker* v. *Raymond*, And. 51, 8 Vin. Ab. 206, pl. 8.

(*s*) Co. Lit. 9 b; *Whiting* v. *Wilkings*, 8 Vin. Ab. 206, pl. 6; 2 Ld. Raym. 1152; [*Chamberlaine* v. *Turner*, Cro. Car. 129, Jones, 195.] See also *Heath* v. *Heath*, 1 B. C. C. 148.

(*t*) Co. Lit. 9 b.

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(but not to a person and his assigns simply, which gives an estate for life only (*u*),) or to A. *and his successors* (*x*), or to A. *et sanguini suo* (*y*); [to A. and *his house*, or A. and *his family* (*z*), or *stock* (*a*), to A. *or* his heirs (*b*), to A. and his executors (*c*)], to two *et heredibus* (omitting suis) (*d*); to a man *and his, and to do what he will with it* (*e*), and even to him *and his* simply (*f*) to A. *to give and sell* (*g*); to A. *to give and sell, and do therewith at his will and pleasure* (*h*); or to a person to her own use, *to give away at her death to whom she pleases* (*i*); or *to be at the discretion of* a person (*k*).

And in a case (*l*) where a testator, after giving to his wife, and her heirs and assigns for ever, all the residue of his personal estate, made her "full and whole executrix of a freehold" house, it was held that the fee passed to the wife. [And the appointment by a testator of his nephew "to be his universal heir" would also be sufficient to give him the fee-simple (*m*).]

But it has been decided that a devise of lands to a person by her "*freely to be possessed and enjoyed*" (*n*), passes only an estate for life; though in an earlier case similar words were held to give a fee (*o*), but there were other grounds for the construction, particularly an annuity to be paid *by the devisees* out of the estate (*p*); which charge, in the opinion of Lord *Mansfield*, also shewed that the word "freely" could not refer to exemption from incumbrances; and to this Lord *Ellenborough* also adverted in *Goodright* v. *Barron*.

(*u*) Co Lit. 9 b.

(*x*) *Webb* v. *Herring*, Roll. Rep. 399, pl. 25, 8 Vin. Ab. 209, pl. 1; 3 Bulst. 194; [*Att.-Gen.* v. *Gilbert*, 10 Beav. 517.]

(*y*) Co. Litt. 9 b; *Downhall* v. *Catesby*, 8 Vin. Ab. 206, pl. 10.

[(*z*) *Chapman's case*, Dy. 333; *Wright* v. *Atkyns*, 17 Ves. 261.

(*a*) *Counden* v. *Clerke*, Hob. 33.

(*b*) *Read* v. *Snell*, 2 Atk. 645; and see Plowd. 289.

(*c*) *Rose* d. *Vere* v. *Hill*, 3 Burr. 1881; and see *Reynell* v. *Reynell*, 10 Beav. 21.]

(*d*) Br. Estates, pl. 4; 8 Vin. Ab. 208, pl. 18.

(*e*) Latch, 36, [Benloe, 11, pl. 9.]

(*f*) Ib. In some manors, copyholds are so limited.

(*g*) Co. Lit. 9 b; 8 Vin. Ab. 206, pl. 7.

(*h*) *Whiskon* v. *Cleyton*, Br. Dev. pl. 39, 1 Leon. 156, 8 Vin. Ab. 234, pl. 2; *Jennor* v. *Hardy*, ib., 1 Leon. 283.

(*i*) *Timewell* v. *Perkins*, 2 Atk. 103. [See also *Brooke* v. *Brooke*, 3 Sm. & G. 280; *Mortlock's Trust*, 3 Kay & J. 456.] Where such a phrase is added to an *express* estate for life, it confers a power only. See *Tomlinson* v. *Dighton*, 1 P. W. 149, 1 Salk. 239; *Doe* v. *Thorley*, 10 East, 438; [but see *Maxwell's Will*, 24 Beav. 246; *Re David's Trust*, 1 Johns. 495.]

(*k*) *Whiskon* v. *Cleyton*, 1 Leon. 156, 8 Vin. Ab. 235, pl. 7. See also *Goodtitle* v. *Otway*, 2 Wils. 6.

(*l*) *Doe* d. *Hickman* v. *Hazlewood*, 6 Ad. & Ell. 167, 1 Nev. & P. 352; [*Doe* d. *Pratt* v. *Pratt*, 6 Ad. & Ell. 180.

(*m*) *Jenkins* v. *Lord Clinton*, 26 Beav. 121, per Sir *J. Romilly*, M. R.]

(*n*) *Goodright* d. *Drewry* v. *Barron*, 11 East, 220; [*Doe* d. *Ashby* v. *Baines*, 2 C. M. & R. 23, 5 Tyr. 655; *Bromitt* v. *Moor*, 9 Hare, 378.]

(*o*) *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352.

(*p*) Ante, p. 250.

Word *estate* carries a fee, when.

"Estates."

It has been long established that a devise of a testator's *estate* includes not only the *corpus* of the property, but the whole of his interest therein (*q*); and the same effect has been given to the word "estates" in the plural number (*r*), notwithstanding the doubts expressed by Lord *Hardwicke* in *Goodwyn* v. *Goodwyn* (*s*).

Not restrained by words pointing at locality.

And it is now settled that the word *estate* will carry the inheritance, though it be accompanied by words of locality, or other expressions referable exclusively to the *corpus* of the property. Thus the fee has been held to pass by a devise of "my estate" or "my estates" (*t*), "*at* A." or "*in* A." (*u*), (for the idle distinction between *at* and *in*, would not now be endured,) or "my estate *of Ashton*" (*x*), or (which it was said would have been the same in construction), "my *Ashton estate*" (*y*), and so of "all my *estate*, lands, &c., *called* or known *by the name of the Coal Yard, in the parish of St. Giles, London*" (*z*), or of "all that estate *I bought of A.*" (*a*); [or of "my landed estates in W. of whatever description, with their appurtenances and all allotments of common" (*b*).]

Or other expressions applicable to corpus only.

Reference to occupancy not restrictive of word *estate*.

So, in the case of *Gardner* v. *Harding* (*c*), it was held that a devise to G. of "my freehold *estate*, *consisting of* thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situate at ——, in the county of ——, *now in the occupation of G.*" vested in G. an estate in fee-simple.

"Estates, that is to say, my lands," situate, &c.

So, where (*d*) a testator gave to his wife H. all his real and personal *estates* whatsoever, *that is to say, his land, houses, and*

(*q*) 2 Lev. 91; 3 Keb. 180; 1 Mod. 100; 3 Mod. 45, 228; 3 Keb. 49; 4 Mod. 89; 1 Show. 349; 1 Salk. 236; 1 Com. 337; 2 Vern. 690; Pre. Ch. 264; 2 Vern. 564; 12 Mod. 594; 2 Ld. Raym. 1324; 2 P. W. 524; 1 Eq. Ca. Ab. 178, pl. 18; 3 P. W. 294; Cas. t. Talb. 157; Amb. 181; 2 Atk. 38, 102; 3 Atk. 486; 1 Ves. 10; 2 ib. 48; 2 W. Bl. 938; 1 H. Bl. 223; Willes, 296; Lofft, 95, 100; 4 T. R. 89; 1 B. & P. N. R. 335; 11 East, 518; 3 V. & B. 160; 3 Br. & B. 85; 2 Sim. 264; [8 Bing. 323; 1 Moo. & Sc. 466; 9 Ad. & Ell. 719; 1 Per. & D. 472; 15 Q. B. 28; 1 Exch. 414.]

(*r*) *Macaree* v. *Tall*, Amb. 181; *Fletcher* v. *Smiton*, 2 T. R. 656; *Roe* d. *Allport* v. *Bacon*, 4 M. & Sel. 366; [*White* v. *Coram*, 3 Kay & J. 652.] See also *Jongsma* v. *Jongsma*, 1 Cox, 362.

(*s*) 1 Ves. 226.

(*t*) *Macaree* v. *Tall*, Amb. 181.

(*u*) *Ibbetson* v. *Beckwith*, Cas. t. Talb. 157; *Barry* v. *Edgeworth*, 2 P. W. 523; *Tuffnell* v. *Page*, 2 Atk. 37, Barn. Ch. Rep. 9; *Holdfast* d. *Cowper* v. *Marten*, 1 T. R. 411; *Uthwatt* v. *Bryant*, 6 Taunt. 317, stated infra.

(*x*) *Chichester* v. *Oxenden*, 4 Taunt. 176; 4 Dow, 92.

(*y*) 4 Taunt. 177.

(*z*) *Roe* d. *Child* v. *Wright*, 7 East, 259; and see *Price* v. *Gibson*, 2 Ed. 115; *Stewart* v. *Garnett*, 3 Sim. 398; [*White* v. *Coram*, 3 Kay & J. 652.]

(*a*) *Bailis* v. *Gale*, 2 Ves. 48.

[(*b*) *Cookson* v. *Bingham*, 3 D. M. & G. 668, overruling the doubt of *Lawrence*, J., in *Pierson* v. *Vickers*, 5 East, 554.]

(*c*) 3 J. B. Moo. 565, 1 Br. & B. 72. See also *Paris* v. *Miller*, 5 M. & Sel. 408, but vide infra.

(*d*) *Denn* d. *Richardson* v. *Hood*, 7 Taunt. 35.

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*all other buildings situate in Stamford Bridge, in the county of York upon his estate*, and likewise all his household furniture and stock in trade unto the said H., it was decided that H. took the fee in the real estate.

"H. my estate that I now live on."

[In the case of *Doe* d. *Pottow* v. *Fricker* (*e*), the words came in an order the reverse of that in the last two cases, thus, "I give Horsecroft, my estate that I now live on, to J. P.;" but it was held that no distinction was to be made on that account, and that J. P. took the fee.

*Pettiward* v. *Prescott* overruled.

The preceding cases seem to overrule *Pettiward* v. *Prescott* (*f*), where Sir *W. Grant*, M. R., held, that a devise to R. P. of the testator's "*copyhold estate at Putney, consisting of three tenements, and now under lease to A. B.* for a term," &c., conferred an estate for life only, his Honor being of opinion that the testator did not mean to speak of the quantity of interest, but merely of the corpus or subject of disposition. The M. R. relied upon the dictum of Lord *Kenyon*, in *Fletcher* v. *Smiton* (*g*), who cited Lord *Hardwicke's* observation in *Goodwyn* v. *Goodwyn* (*h*), that no case had occurred in which it had been held that the fee passed by the devise of an estate, if the testator added, *in the occupation of any particular tenant;* but Lord *Kenyon* omits the subsequent remark of this great lawyer, *that there was no reason why such words should restrain it more than locality*, which he observed would not.

Rule which makes words of locality inoperative to restrain "estate," defended.

The rule which reads the word "estate," as comprising the testator's interest in the land, though accompanied with words referring to locality, has sometimes been considered as going too far; but the censure seems unjust. The additional expressions only shew that the testator had the corpus of the land in his contemplation, to describe which is unquestionably always *one* of the offices of the term *estate* so used. The interest cannot be included without the locality, but the locality may without the whole interest. Why, then, should the word be deprived of the larger meaning by expressions shewing that the testator had the other in his view?

As to *estate* being elsewhere used in an express devise for life.

It is clear that the word *estate* is not prevented from carrying the fee, by the circumstance of the testator having used the

[(*e*) 6 Exch. 510.]

(*f*) 7 Ves. 541. See also *Chorlton* v. *Taylor*, 3 V. & B. 160, where his Honour avoided deciding whether a reference to the occupation restrained the operation of the word "estate."

(*g*) 2 T. R. 658.

(*h*) 1 Ves. 228.

same word in another devise, where it can have no such operation, because the devisee's interest is there expressly confined to his life.

Thus, in *Randall* v. *Tuchin* (*i*), where a testator devised to his niece J. fourteen dwelling-houses, with their appurtenances (minutely describing them), *all which estates,* being copyhold, and held of the manor of K., he devised to the said J., for her separate use, *for her life,* and after her decease to her son M.; it was held that M. took the fee by force of the word *estates;* which it was considered was further strengthened by a direction introduced into the devise, that so long as W. should choose to live in a certain house (part of the devised property), and should keep the same in repair, he should not be charged more than his present rent (*k*).

Or in an express devise in fee, immaterial.

By parity of reason, too, it is clear that where the word *estate* occurs elsewhere in the same will, in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained (*l*).

And as neither the association of the word "estate" with words of locality, nor its being used elsewhere in conjunction with express words of limitation, prevents it from passing the fee, so those circumstances conjointly occurring in the same will are equally inoperative to produce this effect.

Preceding grounds occurring conjointly, inoperative to neutralize effect of word "estate."

Thus, where (*m*) a testator devised a rent charge to be issuing out of all his real *estate,* lands, tenements and hereditaments in P., and then devised his said estate, lands, &c., to M., her heirs and assigns for ever; but in case she should die under twenty-one, and without lawful issue, then he devised his said *estate,* lands, &c., unto A. during her life, and after her decease the testator devised all his said *estate,* &c., to the children of H. as tenants in common: Lord *Gifford,* M. R., held that notwith-

(*i*) 6 Taunt. 410, and *Ibbetson* v. *Beckwith,* Cas. t. Talb. 157; [*Arminer's case,* Lofft, 95;] but see the observation of *Willes,* C. J., in *Moone* v. *Heaseman,* Willes, 138, in regard to the word "inheritance," which is inconsistent with the principle of these and many other cases; [and see *Doe* v. *Lean,* 1 Q. B. 229, post.]

(*k*) The cases stated in the text seem to overrule *Awse* v. *Melhuish,* 1 B. C. C. 519, where Mr. Baron *Eyre* held that a devise by a testator of all his estates and effects, lands and hereditaments, to A. and B. during their joint lives, *and to the survivor of them,* did not carry a fee to the survivor, because the same word were used in devising the express esta during the joint lives; but see *Doe* v. *Gwillim,* 2 Nev. & M. 247, 5 B. & Ad. 122, stated post, p. 261.

(*l*) *Uthwatt* v. *Bryant,* 6 Taunt. 317, stated infra. See also *Ibbetson* v. *Beckwith,* Cas. t. Talb. 157, [which overrules] *Chester* v. *Painter,* 2 P. W. 336. The principle stated in the text extends to all words having the force of including the interest; *Norton* v. *Ladd,* 1 Lutw. 755, infra, post, p. 263.

(*m*) *Wilkinson* v. *Chapman,* 3 145.

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standing the connexion of the word estate with locality and words of limitation, it was sufficient to carry a fee to the children of H. His Lordship, however, hesitated to compel a purchaser to take a title depending on that construction, but the purchaser consented to a case being sent to the Court of King's Bench, and that Court being of opinion that the children of H. took the fee, a specific performance was decreed.

So, where (*n*) a testator devised the moiety of the rents of his *estate*, named Islington and Cove's Penn, in the parish of St. Mary, Islington, to be divided equally among his grandchildren; the other moiety of the rents of his said estate and Penn he devised to his son, R. Stewart, and his heirs for ever: Sir *L. Shadwell*, V. C., held, that the grandchildren took the fee, on the ground that the devise of the rents of the estate was the same as a devise of the estate itself.

Word "estate" must occur among the very words of gift.

[With respect to the word "estate," and other words of similarly extensive signification, it seems now settled that it is sufficient, but at the same time necessary that] (although their operation is not restricted by being used as synonymous with and referential to an anterior term of description not capable of carrying the fee) [they should be contained amongst the very words of the gift; for if the words of gift operate directly only upon "house," "land," and other words of like limited force, a fee will not pass merely from the subject of devise being elsewhere devised or described by the term "estate." "The principle," said *Heath*, J., in *Randall* v. *Tuchin* (*o*), "is, that where the word 'estate' is an operative word, it passes the fee, and to try whether it be operative or not the test is to strike it out of the will."

Instances of "estate" occurring in the words of gift, *Doe* v. *Bacon*.

That it is sufficient appears from the case of *Doe* d. *Allport* v. *Bacon* (*p*), where the testator devised all his freehold lands, messuages and tenements to his wife for her life, and after her decease, then all *the said estates* to be divided among his four sons and his son-in-law, share and share alike. It was held, that the sons and son-in-law took in fee-simple.] So, in the

*Uthwatt* v. *Bryant*.

case of *Uthwatt* v. *Bryant* (*q*), where a testator devised all his freehold lands, tenements, tithes, hereditaments and premises in the parish of B. to certain persons for life, with remainders over, and on a given event devised his said freehold estate in the

(*n*) *Stewart* v. *Garnett*, 3 Sim. 398.
[(*o*) 6 Taunt. 410.
(*p*) 4 M. & Sel. 366.]
(*q*) 6 Taunt. 317.

parish of B. to his daughters, as tenants in common; and in case such his said children should die in the lifetime of his wife, then he devised all his said freehold estate in the parish of B. to his wife and her heirs for ever: it was contended that, inasmuch as the testator had twice described the subject of devise by words not capable of carrying the fee, when he afterwards devised it by the term, "the said freehold estate in the parish of B.," he thereby gave only the same thing as he had before given, and that therefore the daughters took estates for life only; but the Court certified that they took the fee.

Instances where estate did not occur in words of gift.

[That it is necessary appears from] the case of *Doe* d. *Bates* v. *Clayton* (*r*), where a testator devised to his daughter 20*l.* a year out of the profits of his *estate* or lands *at Eaton*, and then devised to his grandson B. *his messuage at Eaton, with the houses and hereditaments thereunto belonging, and certain parcels of land at Eaton;* and he declared his further will to be, that B., when he arrived at the age of twenty-one years, should enter upon and enjoy *the above-mentioned estate,* with the hereditaments thereunto belonging, situate at Eaton aforesaid. But he provided that if B. should run away from his profession, all his right, title and claim to the *estate* of lands and houses devised to him should devolve and *descend* to his brother M.; it was held, that the word *estate,* being by its reference restricted to the antecedent words of devise, did not pass a fee, as those antecedent words would not do so: though the Court decided that other expressions in the will had that effect (*s*). [So, in the case of *Doe* d. *Clarke* v. *Clarke* (*t*), the testator devised to his brother a dwelling-house and garden, with all lands appertaining to the same, *the said property* lying and being in the township of W.; the Court said the word "property" was not used to describe the quantum of estate to be taken, but the local situation, and thus the devisee only took an estate for life.]

*Doe* v. *Clarke.*

Word "estate" occurring in introductory clause.

It [follows from these authorities] that the word *estate* occurring merely in the introductory clause in the will, by which the testator professes in the usual manner his intention to dispose of all his worldly and temporal estate, will not have

(*r*) 8 East, 141.

(*s*) Principally a direction that N. B. (the husband of one of the testator's co-heiresses-at-law) should not come upon any of his hereditaments.

[(*t*) 1 Cr. & Mees. 39. See also *Doe* d. *Burton* v. *White*, 1 Exch. 526, 2 Exch. 797; *Vick* v. *Sueter*, 3 Ell. & Bl. 219.]

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the effect of enlarging the subsequent devises in the will (*u*). As where a testator says, "As to all my worldly estate, I dispose thereof as follows;" and then proceeds to devise his real estate by a description which will not include the interest, as "lands, tenements, hereditaments," &c.

[But, in the case of *Gall* v. *Esdaile* (*x*), the testator devised "his worldly estate as follows," and then gave some legacies, and proceeded, "As to the rest of my estate, the two houses, one in L. and the other in T., I give to my wife for her life, and after her decease that in L. to my daughter, and the other between my two sons." The Court of Common Pleas held, the daughter took a fee in the house devised to her. In this case the words "as to the rest of my estate" evidently overrode the whole clause, and the subsequent words only parcelled out the different portions.

Whether "estate" applies to more than one devise.

Neither can] the word *estate*, occurring in a devise which gives an express life estate only, be extended by implication to a subsequent limitation of the same property, wherein the subject of devise is described by some other term. Thus it has been decided (*y*), that where a testator devised to his wife E. all his freehold and leasehold messuages, houses, lands, and tenements, and *all his estate and interest therein*, for her natural life, and after her decease he devised *his said messuages, houses, lands and tenements*, to S. and M. as tenants in common, the latter devisees took estates for life only, the words *estate and interest* being left out in the devise to them.

Force of the word "estate" not communicated to other words by which subject of gift was subsequently described.

So, in the case of *Doe* d. *Norris* v. *Tucker* (*z*), where a testator devised "unto my dearly beloved wife Jane, my freehold *estate*, called Pouncetts, during her natural life," and then after bequeathing his stock, goods and chattels to her for life, he added, "Item, all the above *bequeathed lands*, goods and chattels, I give and devise to," &c., mentioning his children, without words of limitation. The question was, whether a fee passed

(*u*) *Ibbetson* v. *Beckwith*, Cas. t. Talb. 157; *Frogmorton* v. *Wright*, 2 Bl. 889, 3 Wils. 414; *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352; *Denn* d. *Gaskin* v. *Gaskin*, ib. 657; *Wright* v. *Russell*, cited Cowp. 661; *Doe* d. *Small* v. *Allen*, 8 T. R. 503; but see *Grayson* v. *Atkinson*, 1 Wils. 333.

[(*x*) 8 Bing. 323, 1 Moo. & Sc. 466. A different decision had previously been given by the Court of Chancery on this will, 1 R. & My. 540.]

(*y*) *Roe* d. *Bowes* v. *Blackett*, Cowp. 235; [and see *Vick* v. *Sueter*, 3 Ell. & Bl. 219; *Sturgis* v. *Dunn*, 19 Beav. 135.]

(*z*) 3 B. & Ad. 473. See this case referred to 7 Ad. & Ell. 206; and see some remarks 2 Hay. & Jarm. Conc. Wills, 3rd Ed. 240.

by the devise to the children, and it was decided in the negative.

A nice question of this nature occurred in the case of *Doe* v. *Gwillim* (*a*), where the testator thus expressed himself:—"As touching such worldly *estate* wherewith it has pleased God to bless me, I give, demise and dispose of the same in the following manner." He then gave the whole of his *estates* and chattels to his wife during her widowhood, adding, "but demeatly to go to my dear children as I have appointed and disposed to them, in lots and in money: Second, to my son J., I leave ten pounds out of my goods and chattels to be paid him: Thirdly, to my son H., I leave the pece of ground called, &c., to him, his lawful aires for ever, and if no aires, to his next brother and his lawful aires for ever: Fourthly, to my son G., I leave the pece of ground, &c. (similar devises to other sons, with words of inheritance); also to my son J., I leave my *dwelling-house and nail-shop, and sider-mill, stables, and pigs-cot, garden, brew-house, and the pece of ground adjoining it;* also, my goods and chattels and living stock that I shall leave; also, to my daughter M., I leave the house called, &c., and to her son H. and her lawful aires for ever." The Court of King's Bench held, that J. took an estate for life only in the dwelling-house, nail-shop, &c.; the Court relying chiefly on the circumstance, that the testator had used words of limitation in every other instance; and one learned Judge expressed his indisposition to carry the effect of the word "estate" further than had been done already.

"Estate" to A. for life, and after his death "the same" to B.

Where a testator devises an estate called Blackacre to A. for life, and then gives "*the same*" to B., the latter devise [has been held not to give the fee to B. (*b*). The ground of this construction is not very clear, but appears to be that as the word "estate" in the first gift clearly does not mean all the testator's interest, but is only a description of the subject of gift, a different signification could not be given to the word "same." The omission of words of locality would seem not to vary this construction.]

Of course the operation of the word "estate" to confer an

(*a*) 5 B. & Ad. 122, 2 Nev. & M. 247.

[(*b*) *Doe* d. *Lean* v. *Lean*, 1 Q. B. 229, 4 Per. & D. 662; *Wight* v. *Leigh*, 15 Ves. 564. But see *Challenger* v. *Shepard*, 8 T. R. 597. In the first case, some stress was laid on the devise being of "an estate," not "my estate;" see *Bailis* v. *Gale*, 2 Ves. 48.]

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"Estate" restrained by the context.

estate in fee, may be controlled by the context. As where (*c*) the testator devised to his nephew G. all his *estates*, lands, tenements and hereditaments in H., with a general limitation over in case any of his nephews died under twenty-one (*d*); and in a subsequent part of his will declared it to be his intent to prevent waste by making his nephews *tenants for life only*; and authorized them, in case they married, to make settlements upon their wives, and dispose of their estates among the issue of such marriages: it was held, that G. took only an estate for life.

[Again, in the case of *Key* v. *Key* (*e*), where a testator devised his estate at A. to S. K. for life, and after his decease he gave "the aforesaid estate" to the eldest surviving son of S. K., but in default of issue male to T. K., and to his eldest surviving son; and in default of issue male the testator's will was that the premises should devolve to his own right heirs: it was held that "the eldest surviving son" of S. K. did not take an estate in fee-simple by force of the word "estate;" for if he did, then in the event (which was probable and actually happened) of there being "an eldest surviving son" of S. K. who became entitled to the property, every subsequent limitation was, from the moment of S. K.'s death, annihilated.]

But it has been held (*f*), that the mere circumstance of the testator's subjecting the property to a certain annuity during the life of the devisee, *with a considerable augmentation of it after her decease*, did not evince an intention to give her only an estate for life, under a devise *of all his property both real and personal for ever*.

"Property."

This leads to the remark, that the word *property* is equivalent to *estate*, in its operation to pass the interest as well as the land (*g*); and the same construction has also been given to a devise of the residue of the testator's "real effects" (*h*):

"Real effects."

(*c*) *Bruce* v. *Bainbridge*, 5 J. B. Moo. 1, 2 Br. & B. 123. The principle above stated seems to be the true ground of this decision, though it was much urged as turning on the effect of the word "issue." In the devise in question, however, the mention of issue occurs only in the power, [and compare *Spry* v. *Bromfield*, 7 M. & Wels. 545, 10 Sim. 94.]

(*d*) That this would also have given the devisee an implied fee, see ante, p. 251.

[(*e*) 4 D. M. & G. 73. See also *Martin* v. *M'Causland*, 4 Ir. Law Rep. 540; *Earl of Tyrone* v. *Marquis of Waterford*, 29 L. J. Ch. 486.]

(*f*) *Doe* d. *Lady Dacre* v. *Roper*, 11 East, 518.

(*g*) *Roe* d. *Shell* v. *Pattison*, 16 East, 221; *Nicholls* v. *Butcher*, 18 Ves. 193; *Patton* v. *Randall*, 1 J. & W. 189; [*Doe* d. *Booley* v. *Roberts*, 11 Ad. & Ell. 1000, 3 Per. & D. 578; *Footner* v. *Cooper*, 2 Drew. 7; *Bentley* v. *Oldfield*, 19 Beav. 225.]

(*h*) *Hogan* v. *Jackson*, Cowp. 299, 3

though it will be remembered that the word *effects* will not, unaided by the context, comprehend land (*i*), which of course is always a preliminary inquiry.

And here the reader is referred to a former chapter (*j*), for many instances in which the fee has been held to pass by very informal expressions, such as "all I am worth," and other similar phrases, which were adjudged not only to embrace real estate (this being, in fact, the principal point of contest), but also to confer on the devisee an estate of inheritance.

"Inheritance."

It is clear that the word *inheritance* will carry the fee (*k*); and Lord *Holt* seems to have considered the word *hereditaments* (*l*) to be equivalent; but it is now established that a devise of hereditaments carries only an estate for life (*m*). A devise of "all my copyhold in the said hamlet of H.," has received a similar construction (*n*).

"Hereditaments."

"Remainder."

It has been held, that a remainder in fee will pass by the word *remainder*. Thus, in the early case of *Norton* v. *Ladd* (*o*), A. having the remainder in fee, subject to a life estate in his mother, devised the lands to his sister for life after the decease of his mother, then he gave to J. C. the *whole remainder of all those lands* he had devised to his sister, if he should survive his sister; but if he died before his sister, then his will was, that the whole remainder and reversion of all the said lands should be to the use of his sisters and their heirs for ever. It was contended that J. C. took only an estate for life, for that these words referred merely to the remainder of the lands, and not of the interest; but the Court said that could not be, as the whole of the lands had been before devised. It referred to the residue of the estate undisposed of to his sister, and consequently a fee passed to J. C.

B. P. C. Toml. 388, stated ante, Chap. XXII. sect. 2; [*Macnamara* v. *Lord Whitworth*, Coop. 241: *Lord Torrington* v. *Bowman*, 22 L. J. Ch. 236.] See also *Grayson* v. *Atkinson*, 1 Wils. 333, stated ante, Chap. XXII. sect. 2.

(*i*) Ante, Chap. XXII. sect. 2.

(*j*) Chap. XXII.

(*k*) *Widlake* v. *Harding*, Hob. 2, Godb. 207; *S. C.* nom. *Whitlock* v. *Harding*, Moore, 873, Ca. 1218. According to the report in Moore, the expression was "my lands of inheritance," which it is pretty clear would not now be held to confer more than an estate for life, as the word "inheritance" is merely to identify the lands. As to the expression "trustees of inheritance," see post, next chapter.

(*l*) *Smith* v. *Tindal*, 11 Mod. 103. See also *Lydcott* v. *Willows*, 3 Mod. 229.

(*m*) *Hopewell* v. *Ackland*, 1 Salk. 239; *Canning* v. *Canning*, Mose. 240; *Denn* d. *Mellor* v. *Moor*, 5 T. R. 558, 6 ib. 175, 1 B. & P. 558, 2 ib. 247; *Doe* d. *Small* v. *Allen*, 8 T. R. 503.

(*n*) *Doe* d. *Winder* v. *Lawes*, 7 Ad. & Ell. 195.

(*o*) 1 Lut. 755; [*Baker* v. *Wall*, 1 Ld. Raym. 187.]

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"Reversion."

So, in the case of *Bailis* v. *Gale* (*p*), a reversion *in fee* was held to pass under a devise of the "*reversion*" of certain tenements. But in the anterior case of *Peiton* v. *Banks* (*q*) (which was not cited in *Bailis* v. *Gale*), where a man devised lands to his wife for life, and, as to the said lands, he gave *the reversion* to A. and B., to be equally divided betwixt them; it was held, that A. and B. were tenants in common *for life* only; and Serjeant *Maynard*, at the bar, said he remembered a stronger case, in which a man, having given lands to his wife for life, devised *the reversion* to A. and B., *A. being his heir at law;* yet it was adjudged that B. took an estate for life only.

Remark on *Peiton* v. *Banks*, and *Bailis* v. *Gale*.

The only distinction between these cases and *Bailis* v. *Gale* is that, in the latter, the testator's estate consisted of a reversion, whereas, in the two cases just stated, the subject to which the word "reversion" was applied, was the interest remaining *undevised*, after the limitations created by the will. This circumstance, however, seems not to vary the principle, and it is probable that the word *reversion* would now be held, on the authority of *Bailis* v. *Gale*, to pass a fee, even in cases of the latter class.

"Residue" and "remainder" as used in residuary clause.

But though the words *remainder* and *reversion*, applied to property of this description, will pass the testator's entire interest therein, yet it is clear that the terms *residue* and *remainder*, as ordinarily used in residuary clauses, will not have such effect (*r*).

"Right and title."

"Interest."

It has been held, that a devise of freehold lands, with *all right and title to the same*, carries the fee (*s*); and the word "interest" would unquestionably have the same effect (*t*).

When words "part," "share," "moiety," carry a fee.

When they do not.

[It was at one time a question whether under a devise by a testator of his "moiety," "part," or "share," the devisee would take an estate in fee, but it seems now settled that he will (*u*). The force of such words, however, applies solely where the moiety, part, or share, belongs as such to the testator himself. Thus, where houses were given among the testator's children as tenants in common in tail, and if any of his children died

(*p*) 2 Ves. 48. But see And. 284.

(*q*) 1 Vern. 65.

[(*r*) *Canning* v. *Canning*, Mose. 240; *Denn* d. *Moor* v. *Mellor*, 5 T. R. 558, 2 B. & P. 247.]

(*s*) *Sharp* v. *Sharp*, 4 M. & Pay. 445, 6 Bing. 630.

(*t*) *Andrew* v. *Southouse*, 5 T. R. 292.

[(*u*) *Doe* d. *Atkinson* v. *Fawcett*, 3 C. B. 274: *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; *Green* v. *Marsden*, 1 Drew. 646, 653; but see *Middleton* v. *Swain*, post, p. 265, as to the word "share" in a different sense.

[before twenty-one, or unmarried, the *part or share of him or her* so dying to go over to the survivors, it was held, that by the devise over, the survivors took life estates only (*x*).

Estate in fee given by force of words of exception.

An estate in fee may also be conferred by force of words of exception. Thus, where a testator devised to his two sons the *estate* he occupied, with the factory thereon, except the *house* he occupied, which he gave to his daughters share and share alike, it was held that the daughters took an estate in fee in the house. *Tindal*, C. J., said, the exception out of the devise by necessary intendment carried the same quantity of estate as that from which it was excepted (*y*).

Estate in fee given by force of substitutional gift.

Similarly, if lands be devised to A., without words of limitation, and, on a certain event, those lands are devised away from him to another in fee, and other lands substituted in which an express estate in fee is given to A., A. will take a fee under the first devise, by reason of the apparent intendment that his interest in the respective lands should be the same (*z*).

By force of clause against alienation.

A devise to A. (simply), provided that if he *or his heirs* alien the devise shall be void, confers a fee by force of the words of the condition, though the condition itself is void (*a*).

"Perpetual advowson."

It may here be added, that a devise of a "perpetual advowson" (*b*), or of a "manor" (*c*) to A., conferred only a life estate, those words, like the words "lands," "hereditaments," &c., being considered descriptive of the subject of devise, and not of the entire interest in it. So a devise of a share in the New River Company (which is a freehold of inheritance) to A., has been held to confer only a life estate (*d*).

Manor.

"Share" in a company.

Fee-simple conditional in lands not within the statute *De Donis*.

In conclusion, it may be noticed that where copyholds of a manor, in which there is no custom to entail, are devised in terms which, if applied to lands held in fee-simple, would create an estate tail, the devisee takes a fee-simple conditional, which becomes absolute on the birth of issue inheritable under

[(*x*) *Woodward* v. *Glassbrook*, 2 Vern. 388; *Pettywood* v. *Cooke*, Cro. Eliz. 52; *Sturgis* v. *Dunn*, 19 Beav. 135; *Doe* d. *Orpe* v. *Frost*, 2 D. & Ry. 678, 1 B. & Cr. 638. In the last case, the fee was held to pass under other words. But see *Bentley* v. *Oldfield*, 19 Beav. 225.

(*y*) *Doe* d. *Knott* v. *Lawton*, 6 Scott, 303, 4 Bing. N. C. 455.

(*z*) *Greene* v. *Armsteed*, Hob. 65, and compare *Doe* d. *Payne* v. *Plyer*, 14 Jur. 326, 19 L. J. Q. B. 29.

(*a*) *Shailard* v. *Baker*, Cro. Eliz. 744.

(*b*) *Pocock* v. *Bishop of Lincoln*, 3 Br. & B. 27. The word "Living" is ambiguous, and may mean the whole advowson, either in fee or for life, or only the next presentation, according to the context, *Webb* v. *Byng*, 2 Kay & J. 669.

(*c*) *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364.

(*d*) *Middleton* v. *Swain*, Skinn. 339.

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Or in a personal inheritance.

[the entail (*e*), and the same rule applies to a similar gift of a personal inheritance, which is not capable of being entailed (*f*).]

Effect of recent enactment (1 Vict. c. 26, s. 28).

V. Perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views as that which required words of limitation, or some equivalent expression to pass the inheritance; and hence the attention of the framer of the recent act of 1 Vict. c. 26, was naturally directed to the abolition of this technical doctrine.

A devise without words of limitation, to pass the fee.

Accordingly, by section 28, it is enacted, "That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

Remarks on new rule.

The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." The onus probandi (so to speak) will, under the new law, lie on those who contend for the restricted construction; [and will not be discharged by shewing that another devise in the will contains formal words of limitation (*g*), or that a special power of appointment is (in terms) given to the devisee (*h*).] Indeed the restricted construction rarely accords with the actual intention of a testator, and it will probably not often occur that the Courts will be called on to apply the proviso which saves the effect of a restrictive context; so that there seems no reason to apprehend that the newly-enacted rule will be so prolific of qualifications and exceptions as the doctrine which it has superseded. Upon the whole, the enlargement of the operation of an indefinite devise may be

(*e*) [*Doe* d. *Simpson* v. *Simpson*, 4 Bing. N. C. 333, 5 Scott, 770; *Doe* d. *Blesard* v. *Simpson*, 3 Scott, N. R. 774, 3 M. & Gr. 929; *Doe* d. *Spencer* v. *Clarke*, 5 B. & Ald. 458.

(*f*) *Stafford* v. *Buckley*, 2 Ves. 170.

(*g*) *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.

(*h*) *Brooke* v. *Brooke*, 3 Sm. & Gif. 280.

regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature.

[This new rule of construction has been held not to apply to interests created *de novo;* thus a devise of a rent-charge to A. simply, will only give him a rent-charge for life (*i*); and a devise to A. of a house and grass for a cow in a certain meadow belonging to the testator, though it will pass the fee-simple in the house, will confer only a life estate in the easement (*k*).]

New rule does not apply to interests created *de novo.*

[(*i*) *Nichols* v. *Hawkes*, 10 Hare, 342. As to what words are sufficient to create a perpetual rent-charge, see *Mansergh* v. *Campbell*, 25 Beav. 544, 3 De G. & Jo, 232.

(*k*) *Reay* v. *Rawlinson*, 7 Jur. N. S. 118.]

# CHAPTER XXXIV.

## ESTATES OF TRUSTEES.

Whether devisees are within the Statute of Uses.

THE question whether a devise to uses operates by virtue of the Statutes of Wills alone, or by force of those statutes concurrently with the Statutes of Uses, has been the subject of much learned controversy (*a*). The prevailing, and, it is conceived, the better opinion is in favour of the latter hypothesis; the only objection to which seems to be, that, as the Statute of Uses preceded the Statutes of Wills, uses created under the testamentary power conferred by the latter statutes could not, at the time of the passing of the Statute of Uses, have been in the contemplation of the legislature. The futility of this objection has been so often exposed, that it is not intended here to revive the discussion, more especially as the point has not, in general, any practical influence on the construction of wills; for even those who assert that the Statute of Uses does not apply, admit, and the authorities conclusively shew (*b*), that a devise to A. and his heirs, simply to the use of B. and his heirs, would vest the fee-simple in B., if not by force of the statute, yet in order to give effect to the manifest intention of the testator. Such intention, however, seems to be apparent only when examined through the medium of the Statute of Uses. We must suppose the testator to be acquainted with the effect of that statute, in order to gather from such a devise an intention to confer the legal estate on the ulterior devisee. On the other hand, it is clear, that a devise to the use of A. and his heirs in trust, for or for the use of B. and his heirs, would vest the legal inheritance in A. in trust for B., and not carry it on

(*a*) 1 Sand. Uses, 195; 2 Fonbl. Treat. Eq. 24; and 1 Sugd. Pow. 6th Ed. 173.

(*b*) *Symson* v. *Turner*, 1 Eq. Ca. Ab. 383, pl. 1, n.; *Harris* v. *Pugh*, 4 Bing. 335, 12 J. B. Moo. 577. And see *Hawkins* v. *Luscombe*, 2 Sw. 392; *Doe* v. *Field*, 2 B. & Ad. 564.

to B. Either this must be by the effect of the Statute of Uses forbidding the limitation of a use upon a use, or, supposing that statute not to operate upon wills, it must be (as in the former case) the result of presuming the testator to intend by the devise in question to produce the same effect as such limitation introduced into a deed would have done by force of that statute. It is evident, therefore, that, in such cases, the question, whether the Statute of Uses applies to wills, does not arise. And in practice, little or no attention seems to have been paid to the difficulty suggested by an eminent writer (*c*), that, under a devise to A. and his heirs, to the use of B. and his heirs, if A. should die in the testator's lifetime, the devise to B. might possibly, under the Statute of Uses, fail at law for want of a seisin to serve the use. Indeed, the writer in question himself observes, in solution of his own difficulty, that, as every testator has a power to raise uses either by the joint operation of both statutes, or by force of the Statute of Wills only, possibly the Courts would, in favour of the intention, construe the devise as a disposition, not affected by the Statute of Uses, but as giving the fee to B. immediately. Perhaps, however, there would be some difficulty, in principle, in adopting this construction; for, if, in the event of A. surviving the testator, the use would have been executed by the operation of the Statute of Uses, to hold the result to be different, in consequence of the death of A. in the lifetime of the testator, would be to make the construction of the devise dependent on events subsequent to its inception. Supposing the devise to be void at law, it is clear that equity would compel the heir to convey; but probably the Courts would struggle hard against adopting a construction which would invalidate it even at law. The occurrence of the question may of course be easily avoided by devising the estate immediately to uses, and not to a devisee to uses (*d*).

Principle which determines whether persons, apparently so, are trustees.

Where property, in which a testator has an estate of freehold, is devised to one person in trust for or for the benefit of another, the question necessarily arises, whether the legal estate remains in the first-named person, or passes over to, and becomes vested in, the beneficial or ulterior devisee. If the devise is to the use of A., in trust for B., the legal estate (we have seen) is

[(*c*) Butl. Co. Lit. 272 a, VIII. 1;] 1 Sugd. Pow. 6th Ed. 175.

(*d*) See further on this subject, Sugd. Pow. 4th Ed. 173, where it is shewn that an important question on the construction of powers created by will depends upon this point.

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vested in A., even though no duty may have been assigned to him which requires that he should have the estate. Where, however, the property is devised to A. and his heirs, to the use of, or in trust for, B. and his heirs, the question, whether A. does or does not take the legal estate, depends chiefly on the fact whether the testator has imposed upon him any trust or duty, the performance of which requires that the estate should be vested in him. If he has not, the legal ownership passes to the beneficial devisee; and the first-named person is regarded as a mere devisee to uses, filling the same passive office as a releasee to uses in an ordinary conveyance by lease and release. And the fact, that the testator, in a series of limitations, employs sometimes the word *use*, and sometimes the word *trust*, is not considered to indicate that he had a different intention in the respective cases.

Words *use* and *trust* used indifferently.

Thus, where (*e*) a testator devised lands to A. and his heirs in trust, and for the several uses and purposes after-mentioned, viz. to pay the rents to certain persons for the life of B., and, after her decease, *to the use* of C. and D. during their lives and the life of the longest liver, remainder to the use of A. and his heirs during the lives of C. and D., and the life of the longest liver, to preserve contingent remainders; and, after the several deceases of C. and D., then *in trust* for the heirs male of the bodies of C. and D.; remainder to the use of T. in fee. After B.'s death, C. and D. suffered a recovery, which it was contended was void, on the ground that the limitation to the heirs male of their bodies was equitable, and therefore did not make them tenants in tail (a point which is discussed in a future chapter); but Lord *Ellenborough* observed, that the testator employed the words "use" and "trust" indifferently, and both were within the operation of the statute (*f*).

Effect of changing language of limitations by introducing words of direct gift.

So, it is clear, that the mere change of language, in a series of limitations, by substituting words of direct gift to the persons taking the beneficial interest, for the phrase "in trust for," will not clothe such persons with the legal estate, if the purposes of the will, in any possible event, require that the legal estate should be in the trustees (*g*).

(*e*) *Doe* d. *Collier* v. *Terry*, 11 East, 377.

(*f*) It is evident, therefore, that his Lordship concurred in the doctrine that uses created by will are within the Statute of Uses.

(*g*) *Doe* d. *Tomkyns* v. *Willan*, 2 B. & Ald. 84; *Murthwaite* v. *Jenkinson*, 3 D.

But the Courts are strongly inclined to give the devise such a construction as will confer on the trustees estates co-extensive with those interests which are limited in the terms of trust estates, if the other parts of the will can by any means be made consistent.

Restrictive operation of words of gift.

Thus, where (*h*) the testator's real estate was devised to trustees, their survivors or survivor, and their or his heirs, &c., to secure a life annuity (which was to be paid out of the annual income), and then in trust for the testator's children, until they should attain twenty-one, "and then *unto* and among them, share and share alike, as tenants in common, and not as joint-tenants;" and the will contained clauses empowering the trustees to grant leases of the estates, and, if they should think it advisable, to sell any part thereof, *at any time after his* (the testator's) *decease*. It was held, notwithstanding this expression, that the estate of the trustees was confined to the minority of the children, being so restricted by the express devise to them.

Devise of copyholds "to be transferred" to A. at majority.

A devise of copyhold lands in trust for a minor, and *to be transferred* to him at twenty-one, has been held to give to the trustees a chattel interest only, determinable at the majority of the cestui que trust; the Court thinking that the words, "to be transferred," did not refer to a legal transfer of the estate by surrender (in which case the trustees must have taken the fee to enable them to make such surrender), but merely to the delivery of possession, and admission on the rolls of the manor (*i*).

Trustee takes legal estate, when directed to apply the rents.

Where the person to whom the real estate is devised for the benefit of another is intrusted with the application of the rents, he must, according to the principle before laid down, take the legal estate, in order that he may have a command over the possession and income.

Direction to pay taxes and repairs.

In the case of *Shapland* v. *Smith* (*k*), the trust was out of the rents, after deducting rates, taxes, repairs and expenses, to pay such clear sum as remained, to S. during his life, and, after his death, to the use of the heirs male of his body. The question

& Ryl. 765, 2 B. & Cr. 357. See also *Sandford* v. *Irby*, 3 B. & Ald. 654; [*Blagrave* v. *Blagrave*, 4 Exch. 550; *Hodson* v. *Ball*, 14 Sim. 558; *Watson* v. *Pearson*, 2 Exch. 581.]

(*h*) *Doe* d. *Budden* v. *Harris*, 2 D. & Ryl. 36. See also *Goodtitle* d. *Haward* v. *Whitby*, 1 Burr. 228; *Edwards* v. *Symons*, 6 Taunt. 212; *Ackland* v. *Lutley*, 1 Per. & D. 636, 9 Ad. & Ell. 879; [*Tucker* v. *Johnson*, 16 Sim. 341; *Plenty* v. *West*, 6 C. B. 201.]

(*i*) *Doe* d. *Player* v. *Nicholls*, 1 B. & Cr. 336.

(*k*) 1 B. C. C. 74. See also *Browne* v. *Ramsden*, 2 J. B. Moo. 612; *Tenny* d. *Gibbs* v. *Moody*, 3 Bing. 3, 10 J. B. Moo. 252.

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was, whether the use for life was executed in S., who, if it were, was tenant in tail male, by force of the rule in *Shelley's case* (*l*). Mr. Baron *Eyre*, sitting for Lord *Thurlow*, thought there was no difference between a trust to pay the rents to a person, and a trust to permit him to receive them (see contra in the sequel), and, therefore, that the use, in this case, was vested in S.; but Lord *Thurlow*, on resuming his seat, determined, that as the trustees were to pay taxes and repairs, the legal estate during the life of S. was in them.

To apply rents for maintenance of cestui que trust.

In *Silvester* v. *Wilson* (*m*), the testator devised that the trustees should yearly, during the life of his son J. W., receive the rents; and he ordered that they should be applied for the maintenance of the said J. W. The Court thought that it was intended that the trustees should have a sort of discretion in the application of the money, and, therefore, that they took the legal estate.

Indeed, without regard to the exact degree of discretionary power lodged in the trustees, the mere fact that they are made agents in the application of the rents, is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B. And it is immaterial in such a case, that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence a devise to the intent that A. shall receive the rents and pay them over to B. would clearly vest the legal estate in A. (*n*).

Trust to pay rents to a person.

To permit beneficial devisee to receive rents.

But where real estate is devised to one person upon trust, to permit and suffer another to receive the rents, the beneficial devisee takes the legal estate and not the trustee (*o*). The distinction between a direction to pay the rents to a person, and a direction to permit him to receive them, though often condemned, cannot now be questioned. In the case of *Doe* d. *Leicester* v. *Biggs* (*p*), Sir *James Mansfield* said it was miraculous how it came to be established, since good sense requires in each

(*l*) The question whether the trustees take any and what estate is often raised in this manner. See *Jones* v. *Lord Say & Sele*, 3 Vin. Ab. 262, pl. 19, 1 Eq. Ca. Abr. 383, pl. 4; *Silvester* d. *Law* v. *Wilson*, 2 T. R. 444; *Curtis* v. *Price*, 12 Ves. 89; *Wykham* v. *Wykham*, 18 Ves. 395; *Biscoe* v. *Perkins*, 1 V. & B. 485; [*Adams* v. *Adams*, 6 Q. B. 860.]

(*m*) 2 T. R. 444. See also *Doe* v. *Ironmonger*, 3 East, 533; [*Reynell* v. *Reynell*, 10 Beav. 21; and see *Plenty* v. *West*, 6 C. B. 201.]

(*n*) *Doe* v. *Homfray*, 6 Ad. & Ell. 206.

(*o*) *Right* d. *Phillips* v. *Smith*, 12 East, 455; [*Doe* d. *Noble* v. *Bolton*, 11 Ad. & Ell. 188;] but see *Gregory* v. *Henderson*, 4 Taunt. 772, post.

(*p*) 2 Taunt. 109; [and see 1 Ed. 36, note, and 1 B. C. C. by Eden, 75, note.]

case that it should be equally a trust, and that the estate should be executed in the trustee; for how could a man be said to permit and suffer who has no estate, and no power to hinder the cestui que trust from receiving?

Effect where both expressions are used.

Where the expressions to *pay unto* and *permit and suffer to receive* are both used, it seems that the construction will (in conformity to a rule discussed in a preceding chapter (*q*), be governed by the posterior expression.

Thus, in *Doe* d. *Leicester* v. *Biggs*, where the trust was "to pay unto or permit and suffer A. to receive the rents," it was held that the words "permit and suffer," coming last, controlled the former trust, "to pay," and consequently that the estate was vested in A. (*r*).

In the proposition that a devise to a person upon trust to permit another to receive the rents, vests the legal estate in the latter, it is assumed that no duty is imposed on the trustee, either expressly or by implication, requiring that he should have the estate, for in such case it is clear the trustees will take the legal estate.

Trust to preserve contingent remainders.

Thus, in *Biscoe* v. *Perkins* (*s*), where a testator devised his real estate to his executors, their heirs, &c., for the life of his son A., to the intent to support the contingent remainders after limited, but in trust, nevertheless, to permit and suffer his said son to receive the rents for his own use during his natural life; and after his decease the testator devised the same to the first son of A. in tail. Lord *Eldon* held, that A. did not take the legal estate, as the purpose of preserving the contingent remainders required that it should be in the trustees.

To permit feme covert to receive.

Upon the same principle, it has been often decided that a trust to permit a feme covert to receive the rents for her separate use, vests the estate in the trustees (*t*).

(*q*) Ante, Chap. XV.

(*r*) But might not the alternative terms of the devise in such a case have been considered as giving the trustees an option? This would have avoided the repugnancy.

(*s*) 1 V. & B. 485. See also *White* v. *Parker*, 1 Bing. N. C. 573, 1 Scott, 542. [In *Riley* v. *Garnett*, 3 De G. & S. 629, there would have been contingent remainders if the trustees had been held not to take the legal estate, but there was no express trust to preserve, see per *Parke*, B., 4 M. & Wels. 431.]

(*t*) *Harton* v. *Harton*, 7 T. R. 652; *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382. See also *Doe* d. *Stephens* v. *Scott*, 4 Bing. 505, 1 M. & Pay. 317; à fortiori, where the direction is to pay them to her, *Nevil* v. *Sanders*, 1 Vern. 415, 1 Eq. Ca. Ab. 382, pl. 1; *Robinson* v. *Grey*, 9 East, 1; *Hawkins* v. *Luscombe*, 2 Sw. 375; [and see *Toller* v. *Attwood*, 15 Q. B. 929; *Plenty* v. *West*, 6 C. B. 201; but as to a deed, see *Williams* v. *Waters*, 14 M. & Wels. 166.]

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Receipts with the approbation of trustees to be good.

And where (*u*) a trust to permit and suffer the testator's wife to receive the rents during her widowhood was followed by a direction, that her receipts, *with the approbation of any one of his trustees,* should be good; it was held, that the legal estate was vested in the trustees, it being clearly intended that they should exercise a control.

To permit A. to receive net rents.

And in a more recent case (*x*), a similar construction was given to a direction to the trustees to permit the beneficial devisee to receive the *net* rents and profits; this term being used, it was thought in contradistinction to the *gross* profits, which were intended to be received by the trustees, and the surplus paid over to the person beneficially entitled, both purposes evidently requiring that the trustees should have an estate.

Direction to sell or convey.

Where the duty imposed on the devisee is to sell or convey (*y*) the fee-simple, he is held to take the inheritance to enable him to comply with the direction; though in such a case it is too much to affirm that the testator's intention cannot in any other manner be effected; for, by means of a power, the trustee might be authorised to convey without himself having an estate. It seems to be a more reasonable conclusion, however, that the testator, by devising the property to the person who is directed to make the conveyance or sale, intended not merely to make him the medium or instrument through which to vest the estate in the beneficial devisee, but that he should take an estate commensurate with the duty which was assigned to him; and the ground for this construction is obviously strengthened, when there are other purposes requiring that the trustee should have *some* estate.

In *Bagshaw* v. *Spencer* (*z*), a devise to trustees and their heirs, upon trust out of the rents, or by sale or mortgage, to raise so much as should be sufficient for the payment of debts, legacies and funeral expenses, and then as to one moiety upon trust for and to the use of B. for life, remainder to trustees to preserve

(*u*) *Gregory* v. *Henderson*, 4 Taunt. 772, which compare with *Broughton* v. *Langley*, Salk. 679, 2 Ld. Raym. 873, 1 Lutw. 823.

(*x*) *Barker* v. *Greenwood*, 4 M. & Wels. 421.

(*y*) *Garth* v. *Baldwin*, 2 Ves. 646; *Doe* d. *Booth* v. *Field*, 2 B. & Ad. 564; *Doe* d. *Shelley* v. *Edlin*, 4 Ad. & Ell. 582.

(*z*) 1 Ves. 142, 2 Atk. 570. See also *Gibson* v. *Rogers*, Amb. 93; *Sanford* v. *Irby*, 3 B. & Ald. 654; [*Watson* v. *Pearson*, 2 Exch. 581; *Blagrave* v. *Blagrave*, 4 Exch. 550; *Reynell* v. *Reynell*, 10 Beav. 21; *Rackham* v. *Siddall*, 1 M. & Gord. 607, 2 H. & Tw. 44; *Doe* d. *Noble* v. *Bolton*, 11 Ad. & Ell. 188;] but see *Hawker* v. *Hawker*, 3 B. & Ald. 537.

contingent uses, &c., was held, by Lord *Hardwicke*, to vest the fee in the trustees, as they were "to sell the lands" by virtue of their estate.

Remark on *Bagshaw* v. *Spencer*.

In this case the testator evidently intended the trustees to take the inheritance, as they were to raise the money either out of the rents, or by sale or mortgage of the estate, and the former purpose could not be answered by a mere power; though it is observable that the construction adopted by the Court rendered nugatory the trust for preserving contingent remainders.

Lands being charged with debts and legacies will not vest the estate in the trustees.

The mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contains some other indication of an intention to create a trust for the purpose.

Thus, where (*a*) the testator, as to his real and personal estate, subject to his debts, legacies and funeral expenses, devised the same as follows, that is to say: unto M. and W. and their heirs, upon trust and to and for the several uses, &c., following, that is to say: to the intent that they the said M. & W. or the survivor of them, or the heirs, executors and administrators of such survivor, should in the first place apply the testator's personal estate in discharge of debts, funeral expenses, and such legacies as he might direct; and as to his real estates, subject to his debts and such charges as he might then or thereafter think proper to make, he gave and devised the same unto P. for his life, with remainders over. The Court held, that the estate was executed in P. for his life. Lord *Alvanley*, C. J., said, "Unless it appeared manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate would not vest in them. The question was, whether there were such apparent intention on the face of this will. It would, indeed, be much more convenient that the legal estate should be vested in trustees for the payment of the debts, than that the trust should be executed by the devisee under the direction of a Court of Equity; for a Court of Equity could not enable the devisee to make a complete title to the estate (*b*). But this," his Lordship added, "was only an argument ab inconvenienti, from which we cannot construe the testator to have said, what, in fact, he has not said."

(*a*) *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 178; [and see *Doe* d. *Müller* v. *Claridge*, 6 C. B. 641; *Poad* v. *Watson*, 6 Ell. & Bl. 606.]

(*b*) This deficiency is now supplied by enactment, 1 Will. 4, c. 47, s. 12, [and 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55.

[But if the testator has devised the land to the trustees in fee-simple and has appointed them executors, and directed them to pay the debts which he has charged on the land, the legal estate will vest in the trustees (*c*).]

To pay debts in aid of personalty.

Here, it may be observed, that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate instanter, independently of the fact of the personalty proving deficient (*d*).

Where devise is in terms contingent on personalty being insufficient.

[However,] where the devise is in terms made contingent on this event (the language of the will being, "*in case* my personal estate shall not be sufficient to pay debts, &c., then I devise, &c.") [the trustees will not take the fee unless the contingency happens. Thus,] in the case of *Hawker* v. *Hawker* (*e*), where an estate was made saleable by trustees, in the event of the proceeds of another estate proving deficient [*which they did not*] to pay the testator's debts, it appears to have been considered, that having regard to the terms in which the estate was given to the beneficial devisees, in the event of its not being wanted (such devises being framed in the manner of regular and formal limitations of the legal estate, including one to trustees for preserving contingent remainders), the trustees did not take the fee. As, however, the estate was in the first instance actually given to the trustees and their heirs, the point seems to have been one of great nicety and difficulty, and the propriety of the decision has been questioned by an eminent writer (*f*).

[On the other hand, if the contingency of the personal estate proving insufficient does happen,] the trustees take an absolute fee-simple in the whole, which continues in them as to the residue of the property, after they have by sale of part of the estate raised sufficient money to answer the charge (*g*). [Thus,] in the recent case of *Doe* d. *Cadogan* v. *Ewart* (*h*), where a testator devised to A., B. and C., and the survivors or survivor of them

Trustees held to take the fee, notwithstanding expressions

[(*c*) *Creaton* v. *Creaton*, 3 Sm. & G. 386.]

(*d*) *Murthwaite* v. *Jenkinson*, 2 B. & Cr. 357, 3 D. & Ry. 765. See also *Doe* v. *Field*, 2 B. & Ad. 564.

(*e*) 3 B. & Ald. 537.

(*f*) 1 Sugd. Pow. 7th Ed. 129. [See also per Jervis, C. J., *Poad* v. *Watson*, 6 Ell. & Bl. 619.

(*g*) Unless there is an express gift over, *Ward* v. *Burbury*, 18 Beav. 190.]

(*h*) 7 Ad. & Ell. 636, 3 Nev. & P. 197. But see *Doe* v. *Shotter*, 8 Ad. & Ell. 905.

and the heirs of such survivor (*i*), all his real estate charged with the payment of a life annuity and so much of his debts, legacies, funeral expenses, and the costs of proving his will, as his personal estate should not extend to, upon the trusts following: upon trust to pay the rents to his wife during widowhood, and after her decease, or marriage again, upon trust, to apply the rents for the maintenance of his daughter J., until she should attain twenty-five, and after her attaining that age, upon trust, charged as aforesaid, for her and her heirs and assigns; but in case she should die without leaving issue lawfully begotten, then the testator gave the said real estate to D. and E., their heirs and assigns for ever. And the testator ordained that the trustees, for the performance of his will, in order to raise money for the payment of his debts, funeral expenses and legacies, should, with all convenient speed after his decease, in case the residue of his personal estate should be insufficient for that purpose, *bargain and sell, and alien in fee-simple, any part of his freehold lands before mentioned;* for the doing whereof, he gave to his trustees and the survivors, &c., and the heirs, &c., full power and authority to grant, alien, bargain and sell, convey and assure the same premises, or any part thereof, to any person or persons and their heirs for ever in fee-simple, by all such lawful ways and means in the law as to them should seem fit. And the testator authorized the trustees and the survivors, &c., and the heirs, &c., to give receipts for the purchase-money; and did commit the management of the estates and fortunes of his daughter to his trustees and executors until she should attain twenty-five. The testator's widow died in his lifetime. *The personal estate proved insufficient to pay the debts,* and it was held, that in this event the trustees took an absolute fee in the real estate, and not (as had been contended) a mere estate of freehold until the testator's daughter attained twenty-five, with a power to sell for the payment of debts and legacies (*j*).

apparently conferring a power only.

An authority to grant leases of an indefinite duration has been in some cases considered to supply an argument for hold-

Authority to grant leases when it confers the fee.

(*i*) These words make the trustees joint-tenants for life, with a contingent remainder in fee to the survivor. See ante, p. 231, n. (*b*).

(*j*) Sometimes a trust or a power of sale is to be exercised during the continuance of the trusts, and the question arises as to what is to be deemed a "continuance" thereof? It is clear that the mere fact of the estate being outstanding in the trustees by reason of their neglect to convey at the proper period does not prolong their power. *Wood* v. *White*, 2 Kee. 664; but as to this case, see 4 M. & Cr. 460.

Sale to be made during continuance of trusts.

ing trustees to take the inheritance, scarcely less cogent than a direction to sell.

Thus in the case of *Doe* d. *Tomkyns* v. *Willan* (*k*), where a testator devised to trustees, their heirs, executors, administrators and assigns, all his real and personal estates, in trust to let the freehold estates *for any term they should think proper*, at the best improved yearly rent, and to pay one-third of the rents of the freehold estates to the testator's wife for life, and to pay the rents of the other two-thirds, and, after the death of the wife, the remaining third to his daughter E. Longman, for her separate use, and after her death the testator devised his freehold and two-thirds of his personal estate to his daughter's children, to be equally divided amongst them, and to be paid them at their respective ages of twenty-one years; and if his daughter died without leaving issue, then the testator devised his freehold estates to his wife for life, and after her death to his heir-at-law, as if he had died intestate. It was contended that the trustees took an estate determinable at the decease of the daughter, when the purposes of the trusts were satisfied; and that the authority to make leases for any term conferred a power and was not a measure of their estate. It was held, however, that the trustees took the fee. Mr. Justice *Bayley* observed, "There are no words here which distinctly create a power in the trustees; and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper (although at the best improved rent), the true construction is, that they are to create a term out of their interest; and if so, they must have a reversion after that term entirely ceased." The learned Judge next adverted to the trusts respecting the application of the rents during the lives of the testator's wife and daughter, and proceeded to remark, "Then comes a limitation to her (the daughter's) children, and it is said that that limitation gives to them the legal estate, and that in that part of the will there is a change of language, which shews that at that period of time all the former purposes of the trust were to cease. The language there used is not so clear as to satisfy my mind that that was necessarily the intention of the testator. That the interest, if defeasible, would continue until the death of E. Longman, and would not end when her first husband died, seems to me to receive some

(*k*) 2 B. & Ald. 84.

confirmation from this, that if E. Longman had no child by her first husband, the limitation to her children, as far as it regarded children by a future marriage, would have been a contingent remainder, and if the trustees did not take an interest co-extensive with her life, but one which might determine on the death of her first husband, that contingent remainder might have been defeated by the acts of E. Longman in her lifetime (*l*). The estate, therefore, to the trustees, seems necessary for the purpose of protecting the interests of the children (*m*); and, inasmuch as the words 'to them and their heirs,' are calculated to give them the fee, I am not prepared to say that they took less than the whole legal estate."

Indefinite power of leasing.

So, in the case of *Doe* d. *Keen* v. *Walbank* (*n*), where a testator devised lands to trustees and their heirs, upon trust, to permit his daughter to enjoy the same, and take the rents during her life, exclusively of her husband; and after her decease upon trust to the use of such child or children and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body: and for default of such issue, to his own right heirs for ever. Then, after several other devises to the trustees in the like terms, the testator concluded thus:—"And I hereby will, &c., that the said trustees, and each of them, shall, may and do, in every respect, give receipts, pay money and *demise the aforesaid premises*, or any part thereof, as shall be consistent with their duty and trust, or otherwise." It was held, that the trustees took the fee-simple in the lands devised to them. Lord *Tenterden*, C. J., observed, in answer to the argument that the words might be held to confer a *power* of leasing, that the language of the clause was unlike that of any clause by which a leasing power had been given, and that it specified no limit or qualification as to duration, rent, or other matter, but seemed intended to authorize any lease that would not be considered in a Court of Equity as a violation of the duty of a trustee.

Power to lease, with direction to pay taxes.

And where the authority to lease is accompanied by a direction to discharge taxes or other outgoings out of the rents and profits, the ground for giving to the trustees the legal estate is still more conclusive.

(*l*) As to this vide post.

[(*m*) But there was no express trust to preserve, as to which, see per *Parke*, B., 4 M. & Wels. 431.]

(*n*) 2 B. & Ad. 554. [See also *Riley* v. *Garnett*, 3 De G. & S. 629.]

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Thus, in the case of *White* v. *Parker* (*o*), where a testator devised property to two trustees, in trust, as to three fourth parts, to pay *or permit and suffer* his wife and two daughters respectively *to receive* each one-fourth of the *clear* yearly rents and profits, to their respective sole and separate uses; and as to the other fourth, in trust, to pay to *or permit and suffer* his son *to receive* the *clear* yearly rents and profits, with a contingent remainder; *and the trustees were empowered to demise the premises reserving the best rent,* and were directed out of the rents and profits to pay and discharge all outgoings for taxes or otherwise in respect of the premises, and to keep the premises in repair. It was held, that the legal estate in the whole vested in the trustees.

But in the recent case of *Ackland* v. *Lutley* (*p*), where a testator devised lands to A. and B., upon trust, that they and their heirs should set and let the premises, and out of the rents and profits in the first place pay a debt owing by the testator to M.; and, in the next place, pay certain legacies, which were to be paid as soon as the clear rents and profits would admit thereof; and from and after the debt and legacies were paid and discharged, the testator gave the same to C., his heirs and assigns for ever. It was contended that, according to the recent authorities, the indefinite power of leasing constituted a ground for the trustees taking the fee; but the Court of Queen's Bench decided, that the estate of the trustees terminated on the discharge of the debt and legacies, [and the Court of Common Pleas subsequently came to the same decision on the same will (*q*). The latter Court considered their decision consistent with the preceding cases, which they distinguished on the ground that no one could suppose at the death of the testator that the trustees could require more than a chattel interest, and that of a very limited extent, to make the specific ascertained payments which they were directed to make out of the rents of the estate (*r*). It is also to be observed that] in *Doe* v. *Willan* (*s*), there were other purposes besides the power of leasing, requiring the trustees to take some estate (and it would

Remarks on *Ackland* v. *Lutley.*

(*o*) 1 Scott, 542, 1 Bing. N. C. 573.

(*p*) 9 Ad. & Ell. 879, 1 Per. & D. 636. [The devise in this case seems only another form of a gift to trustees until debts and legacies paid, and may thus be reconciled with the other cases.

(*q*) *Ackland* v. *Priry*, 2 M. & Gr. 937, 3 Scott, N. R. 297.

(*r*) See also *Doe* d. *White* v. *Simpson*, 5 East, 162; *Heardson* v. *Williamson*, 1 Keen, 33, both stated post.]

(*s*) Ante, p. 278.

seem an estate pur autre vie, the trust being for the separate use of a woman) which did not exist in the case just stated. The same remark applies to *Doe* v. *Walbank*. In this state of the authorities it seems too much to affirm that the giving to trustees an indefinite power to grant leases constitutes, of itself an adequate ground for holding them to take the fee (*t*).

As to a power to accept surrenders of leases.

[A power given to trustees to accept surrenders of leases seems a more conclusive argument in favour of their taking the fee than is afforded by the gift of any other power, since a surrender in the proper sense of the word implies an acceptance of the particular estate by a person having *an estate* in reversion (*u*).]

Effect of appointing persons "trustees of inheritance."

The case of *Trent* v. *Hanning* (*v*) is remarkable for the difference of opinion which prevailed in regard to the effect of some very ambiguous words. The will was in the following terms: "I do hereby give unto my wife 200*l.* per annum during her natural life in addition to her jointure," (which was an annuity secured to her before marriage, out of his real estate,) "my just debts being previously paid, and I do give unto my younger children 6,000*l.* each, to be paid when they severally come to the age of twenty-one; and I do appoint B., C., and D. as *trustees of inheritance* for the execution thereof." The Court of C. P., on a case from Chancery, held, that the trustees took no estate, and had no power to create any; but Lord *Eldon* being dissatisfied with this opinion, and considering that upon this point turned the question, whether the annuity, debts, and portions, were a charge upon the real estate, sent a case to the King's Bench, three of the Judges of which (*Ellenborough*, *Grose*, and *Le Blanc*, dissentiente *Lawrence*) certified that the trustees took an estate in fee; they being of opinion that the words ["trustees of inheritance" were equivalent to the words] "trustees of my inheritance," [or] "trustees to inherit my estates for the execution of this my will." [Lord *Eldon* decided in conformity with this certificate, and his decision was finally affirmed by the House of Lords (*x*).

Again, in the case of *Plenty* v. *West* (*y*), the words "I appoint

[(*t*) See accordingly, per *Pollock*, C. B., *Doe* d. *Kimber* v. *Cafe*, 7 Exch. 684. Still less will a power to lease for a limited term, as for twenty-one years, give the trustees a fee, ib.

(*u*) *Blagrave* v. *Blagrave*, 4 Exch. 550. But *Parke*, B., said "surrender" might be differently explained, if necessary.]

(*v*) 1 B. & P. N. R. 116, 10 Ves. 495, 7 East, 97.

[(*x*) 1 Dow, 102.

(*y*) 6 C. B. 201.

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Appointment of person to perform trusts of will.

[W. executor of this my will so far as is necessary to the performance of the trusts relating to my real estate" occurring in a testamentary paper purporting to dispose only of real estate, and containing no direct devise (*z*), but only a direction as to the division of such real estate, were held to give W. an estate in fee-simple (*a*).

Direction to trustees to pay certain sums out of estate.

A direction that certain sums shall be paid out of an estate by persons who are appointed trustees or executors of the estate, or "to see justice done," is, it seems, an implied devise of the fee to those persons, and an appointment by codicil of a trustee in the place of a trustee named in the will, operates as an implied gift to the former of the trust estate (*b*).]

Principle which regulates the *quantity* of estate.

The reader will have perceived (though the position has not hitherto been distinctly advanced), that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, lately propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance: but whether the exigencies of the trust demand the fee-simple, or can be satisfied by any, and what less estate (*c*).

Estate of trustees commensurate with duties.

Thus, in the case of a devise to a trustee and his heirs, upon trust *to pay and apply the rents* for the benefit of a person for life, and after his decease to hold the lands *in trust* for other persons; the direction to apply the rents being limited to the cestui que trust for life, the estate of the trustee will terminate at his decease (*d*). And it seems that a limitation to trustees

[(*z*) *Sidebotham* v. *Watson*, 11 Hare, 170. In *Plenty* v. *West*, there was an actual devise vesting the fee in trustees, but this was omitted in the case sent from Chancery for the opinion of the Court of C. P. See 16 Beav. 175.

(*a*) *Anthony* v. *Rees*, 2 Cr. & J. 75; *Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785. See also *Oates* v. *Cooke*, 3 Burr. 1684, 1 W. Bl. 543.

(*b*) *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 30 L. J. Ch. 144, 7 Jur. N. S. 114.]

(*c*) 8 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113, 1 Eq. Ca. Ab. 383, pl. 4; 3 Taunt. 326, and Fea. C. R. 54, Butl. n.; Lucas' Rep. 523, 10 Mod. 518; 2 Str. 798; Willes, 650; Cas. t. Talb. 145; 1 Ves. 485; 3 Burr. 1684; 2 T. R. 444; 7 ib. 433, 652; 3 East, 533; 9 East, 1; 1 V. & B. 485; 2 Sw. 375; 3 Bing. 13, 10 J. B. Moo. 453; 5 J. B. Moo. 143, 1 B. & Cr. 721, and 3 D. & Ry. 58; 7 B. & Cr. 206.

(*d*) *Doe* d. *Hallen* v. *Ironmonger*, 3 East, 533; *Robinson* v. *Grey*, 9 East, 1; [*Cooke* v. *Blake*, 1 Exch. 220; *Playford* v. *Hoare*, 3 Y. & Jerv. 175.] The case of *Farmer* v. *Francis*, 2 Bing. 151, 9 J. B. Moo. 310, seems contra, but the attention of the Court was directed exclusively to another point.

and their heirs may be restrained by implication to an estate pur autre vie even in a deed (*e*); [though not so readily as in a will (*f*).

Again, in the case of *Adams* v. *Adams* (*g*) there was a devise to trustees upon trust to permit and suffer J. to take the rents during his life, "subject, with this proviso, to pay my wife, or her assigns, an annuity of four guineas during her life; if J. die before my wife, to permit my wife to enjoy the lands during her life," and after the decease of J. and the testator's wife, the lands were devised to the heirs male of the body of J. It was held, that (assuming that the annuity to the wife was not a legal rent-charge (*h*), and that the trustees took some estate in order to enable them to pay the annuity, yet that such estate was only commensurate with the duration of the annuity, namely, for the joint lives of J. and his wife; J. therefore had, at all events, a previous estate of freehold which, joined to the subsequent limitation to the heirs male of his body, gave him an estate tail.

As to commencement of estate of trustees.

And, as the estate of the trustees ceased when there was no longer any necessity for them to retain it, so it did not commence before there was a necessity that they should have it, as, under a devise to trustees upon trust to permit the testator's wife to receive the rents and profits till her son attained the age of twenty-one, and then upon trust to convey to the son in fee, it was held, that the wife took a chattel interest during the son's minority (*i*).]

Indefinite devises to the *use* of trustees susceptible of enlargement or restriction.

And though (as we have seen) where the devise is to the *use* of the trustees, they take the legal estate independently of the evidence of intention supplied by the nature of the trust; and though by a necessary consequence of this principle the extent of their estate must, if the will is clear and express on the point, in like manner be regulated by the terms of the will; yet, if the testator has affixed no express limit to its duration, such estate

(*e*) *Venables* v. *Morris*, 7 T. R. 342 and 438; *Blaker* v. *Anscombe*, 1 B. & P., N. R. 25; *Curtis* v. *Price*, 12 Ves. 89.

[(*f*) *Lewis* v. *Rees*, 3 Kay & J. 132.

(*g*) 6 Q. B. 860, 9 Jur. 300.

(*h*) Where lands are devised to trustees, "subject to" or "charged with" the payment of a yearly sum of money, a legal rent-charge is, it seems, created, *Buttery* v. *Robinson*, 3 Bing. 392. *Ramsay* v. *Thorngate*, 16 Sim. 575. Qu. whether this holds where goods and chattels as well as lands are charged, *Farewell* v. *Dickinson*, 6 B. & Cr. 251, 9 D. & Ry. 245; *Taylor* v. *Martindale*, 12 Sim. 158.

What words create a legal rent-charge.

(*i*) *Doe* d. *Noble* v. *Bolton*, 11 Ad. & Ell. 188.]

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will, as in other cases, be measured by the exigencies of the trust or duty (if any) which is imposed on the devisees (*j*).

Rule as to appointments under powers.

And here it is proper to observe, that where a will takes effect as an appointment under a power to appoint the use, any devise which it contains will vest the legal estate in the devisee, irrespectively of any purpose or duty requiring that he should have the estate, as such devise amounts to a mere declaration of the use of the instrument creating the power, in other words, a mere nomination of the cestui que use; consequently any limitation engrafted on the devise operates only on the equitable interest, though it be in terms *to the use* of the person or persons intended to take the estate beneficially.

As to devises of copyholds.

And the result is the same in the case of devises of copyhold land (*k*), as wills of such property take effect merely as instruments directory of the uses of the previous surrender to the use of the will, which was formerly essential to the validity of the devise, and the operation of which is now, by the statutes dispensing with the necessity of such surrender (*l*), transferred to the will itself. It is clear, therefore, that a devise of copyhold lands simply to A. and his heirs, in trust for B. and his heirs, would vest the legal inheritance in A. for the benefit of B., in fee (*m*). Still, however, it should seem, according to the principle just stated, in regard to devises of freehold lands *to the use* of trustees, that the extent and duration of an estate conferred by an *indefinite* devise of copyholds would, like that of a devisee cestui que use of freeholds (whose estate is undefined), depend upon, and be regulated by, the nature of the trust reposed in the devisee.

Indefinite devise of copyholds limited by nature of trust.

But in the case of *Houston* v. *Hughes*, it was argued at the bar, and assumed by the Court, that as the copyholds included in the devise were not within the Statute of Uses, the trustees necessarily took the entire fee; however, this point does not appear to have been much canvassed, and the doctrine is not only irreconcilable with the principles of the analogous cases just stated, but is in direct opposition to the case of *Doe* d. *Woodcock* v. *Barthrop* (*n*), which was not cited, and is as follows:—A. devised copyhold lands to B. and C., and their heirs, in trust to permit D. or her assigns to occupy the same, or to

(*j*) See *Curtis* v. *Price*, 12 Ves. 89, where the limitations were in a deed, which makes the case stronger.

(*k*) See *Houston* v. *Hughes*, 6 B. & Cr. 403, 9 D. & Ry. 464.

(*l*) 55 Geo. 3, c. 192, and 1 Vict. c. 26, s. 4; ante, Vol. I. pp. 51, 54.

(*m*) *Houston* v. *Hughes*, 6 B. & Cr. 403.

(*n*) 5 Taunt. 382.

pay to or permit her or her assigns to receive the rents, for her natural life, for her separate use, and, subject to such estate and interest of D., the testator devised the premises to such uses as D. should by her will appoint, and, in default of appointment, to her right heirs; it was held, that, under the limitation to B. and C., and their heirs, though not restricted in terms to the life of D., the estate was vested in B. and C., and their heirs, for the life of D. only, on whose decease the legal estate vested in the appointee of D. (who exercised her power), and such appointee accordingly recovered in ejectment against the persons claiming under the surrenderee of the trustees.

Bequests of leaseholds, how far influenced by nature of trusts.

The same question may arise, and the same principle, it is conceived, would apply, with respect to leaseholds held for a term of years, which, it is well known, are not within the Statute of Uses (*o*). Thus, a bequest of property of this description to A., simply in trust for B., would unquestionably vest the legal estate in A., although no duty or office were cast on him requiring that he should have the legal ownership; and, by necessary consequence, A. must, in such a case, take the entire term, there being nothing to restrict or qualify his estate. It does not follow, however, that where a definite duty or office is imposed on the trustee, he would take the entire legal estate in the term; for, as the law allows chattel interests in lands to be made the subject of an executory bequest after a prior limitation, not exhausting the whole term, even though the prior interest were an estate for life, it seems to be a necessary result of this doctrine, that such an executory bequest may be made ulterior to the partial or limited estate of a trustee; and it cannot be material whether the restriction of the trustee's estate was in express terms, or resulted from the nature of the duty imposed on him. For instance, if a term of years were bequeathed to A., until B. should attain the age of twenty-one years, in trust for the maintenance of B., and when he attained

(*o*) Not a little practical inconvenience has arisen from the exclusion of chattel interests in land from the operation of the Statute of Uses, whatever may have been the real ground of that exclusion; which is a point on which an entire coincidence of opinion appears not to exist. [Formerly] where leaseholds for years were to be transferred from A. to A. and B. jointly (on the occasion of the appointment of a new trustee, or otherwise), this purpose could only be accomplished by the circuity of two deeds; one transferring the property from A. to a third person, and another transferring it from such person to A. and B. jointly; whereas, in the case of freeholds, such result might be attained by means of a single conveyance by A. to B., *to the use* of himself and A. See 6 Jarm. Conv. 524, 3rd Ed., by Sweet. [But see now 22 & 23 Vict. c. 35, s. 21.]

Inconvenience of leaseholds for years not being within Statute of Uses.

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the age of twenty-one, then to B., there can be no doubt that the estate of the trustee would terminate at the majority of B., from which time the property would vest in possession in B. And it is conceived, that the effect would be the same if the bequest were in the following terms:—"I give my leasehold estate, called A., to B., his executors or administrators (without any specification of estate), upon trust to pay the rents to C. during his minority, and when he shall attain twenty-one, then I give the same to C." The estate of B. would cease at the majority of C., when the purposes of the trust would be at an end, although the bequest of B. leaves undefined the nature and extent of his estate.

Effect where testator, who apparently creates a trust, has an equitable interest only.

And here, it may be observed, that where a testator has an equitable interest only, in the land which is the subject of a devise in trust, and such devise would, if the testator had the legal ownership, carry the dry legal estate only, unaccompanied by any duty or office, the trustee takes nothing under the devise; the effect being the same as if the land had been devised directly to the cestui que trust. If, however, the trusteeship created by the will is of a nature to involve the performance of any office or duty (as a trust to sell or grant leases), the devise, though failing so far as it purports to vest the legal estate in the trustee, has the effect of onerating him with the prescribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under it. For instance, supposing the testator to devise lands in which he has only an equity of redemption to A. in fee-simple, in trust for B., the devise would not confer any estate, or impose any duty on A., but the entire beneficial interest would pass directly to B. If, on the other hand, the testator had devised such equity of redemption to trustees, upon trust for sale, though the trustees would not have acquired any actual estate at law (the testator himself having none), yet the property would be saleable by the trustees in the same manner as if the legal ownership had become vested in them.

Devises to pay debts, legacies, &c.

It is sometimes a question of difficulty (but which, as we shall presently see, cannot arise under wills that are regulated by the new law), to determine, whether a devise to persons, without words of limitation, to pay debts and legacies, raise a sum of money, secure a jointure, or the like, gives them the inheritance or a chattel interest only. In *Cordall's*

*case* (*p*), where the devise was to two persons, to hold for payment of legacies and debts, and afterwards to A. for life, with remainders over; it was resolved, that this was no freehold in them, but only a term of years, "though it could not be said for any certain number of years."

Indefinite term of years held to be created.

So, in *Carter* v. *Barnadiston* (*q*), where a testator devised, that, in case certain property should not be sufficient to pay his debts and legacies, then his executors should receive the profits (*r*) of his real estate for payment of his debts and legacies, and, after those should be paid, then he devised certain lands to P. for life, with remainders over; it was considered, that the executors took a chattel interest only, until the debts and egacies were paid (*s*).

But, in *Gibson* v. *Lord Montfort* (*t*), where A. gave all his real and personal estate to trustees, their executors, administrators and assigns, in trust to pay several annuities, sums, and legacies, out of the produce of the personal estate; if that should be deficient, then to pay the same out of the rents and profits arising by the real estate; and as to the residue of his real and personal estate, after provision being made for payment of the legacies, &c., he gave the same to the children of his daughter; Lord *Hardwicke* held that the trustees took a fee; for that, if these pecuniary legacies were not paid, the real estate must be sold to satisfy them; that this was a purpose which it was impossible to serve, unless the trustees had the inheritance. He said, that the objection, that the words of limitation were descriptive of a chattel interest, might have had weight, if there had not been a personal estate included in the devise.

It will be observed, that here the word "estate" was adequate to pass the fee independently of the trust; but this was not adverted to by Lord *Hardwicke*.

Trust to raise sum of money

In the next case, however, a limitation to trustees and their personal representatives, to raise a sum of money, was held, under the circumstances, to confer a chattel interest only, in addition to an estate of freehold which they took for other purposes.

(*p*) Cro. El. 316.

(*q*) 1 P. W. 505, 2 Eq. Ca. Ab. 224, pl. 5, 6, 3 B. P. C. Toml. 64.

(*r*) As to the question whether the monies in these cases are raisable out of the annual profits, or authorize a sale, see infra, Chap. XLV. Sect. 2.

(*s*) See also *Hitchens* v. *Hitchens*, 2 Vern. 403, Pre. Ch. 133.

(*t*) 1 Ves. 485.

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Trustees held to take a chattel interest.

The case referred to is *Doe* d. *White* v. *Simpson* (*u*), where a testator devised to A. and B., and the survivor of them, and the executors and administrators of such survivor, certain lands, and the arrears of rents, and a bond and judgment given by C., a tenant, for rent due, in trust, that they, out of the rents and profits and arrears due, should pay two life annuities; and, after payment thereof, then, in trust, out of the residue of the rents and profits, to pay to certain persons 800*l.* for the children of W.; and, after payment of the said annuities and the 800*l.*, he devised the said estates to W. for life, with remainders over. And the testator authorized A. and B., and the survivor, his executors, &c., to grant building leases, as often as there should be occasion, for any number of years. It was held, that the trustees took the legal estate for the lives of the annuitants, together with a term of years sufficient for the purpose of raising the 800*l.*, and not the fee. Lord *Ellenborough* relied much on the bond and judgment being coupled with the lands in the devise.

So, in the more recent case of *Heardson* v. *Williamson* (*x*), where a testator devised to A. and B., and the survivor of them, and the executors or administrators of such survivor, an estate at P., and a tenement at S., and the fixtures of his shop, in trust for sale, and with the money arising from such sale, to pay off all such sums as should be owing upon mortgage of all or any of the estates thereinafter devised, and if any surplus should remain, upon trust to pay such surplus to his wife; and the testator devised his other estates to his wife during widowhood, subject to an annuity, and to the annual payment of 100*l.* until the mortgage debts thereinbefore directed to be paid by the sale aforesaid were discharged; and, after the decease of his said wife, in case the said debts should not have been paid off, the testator gave such estates *to A. and B. and the survivor of them, and the executors or administrators of such survivor, in trust to let the same, and apply the rents in payment of the mortgage debts, if any should remain, until the whole should be paid by the gradual receipt of the rents;* and, after the decease or marriage of his wife, or the liquidation of the mortgage debts (as the case might be), the testator devised the last-mentioned estates to his son for life, with remainder to such children as he should

(*u*) 5 East, 162. (*x*) 1 Keen, 33.

have in fee. The son [who was heir-at-law (*y*)] executed a conveyance, which, if the estate limited to his children, was a contingent remainder (he then having had no child), had destroyed such remainder; and hence arose the question, whether the trustees took the fee; if they did, the interests of the children, being equitable, of course, were indestructible. Lord *Langdale*, M. R., admitted, that the circumstance of the estate being limited to the trustees, and their executors or administrators, would not prevent the fee from vesting in them, if the purposes of the trust required it; but his Lordship observed, that they were to take only an estate until the debts were paid, and he did not see the least necessity for their having the reversion for that limited purpose.

Legislative abolition of doctrine of cases just stated.

The construction which gives to trustees an undefined chattel interest, either with or without a prior freehold, has been considered so inconvenient in its consequences, and so difficult of application, that its exclusion has (as we shall presently see) been made one of the objects of the recent legislative change in the rules of testamentary construction.

Trustees held to take a fee, though the exigencies of the trust were not strictly commensurate.

Even under the old law it was held that if the purposes of the trust could not be satisfied by an estate pur autre vie, or by such an estate with a chattel interest superadded, the trustees took the fee, though the prescribed purposes did not require and could not exhaust the entire fee-simple.

Thus, in the case of *Harton* v. *Harton* (*z*), where the devise was to A. and B., and their heirs, in trust to permit C. (a feme covert) to receive the rents during her life, for her separate use, and so as not to be subject to the debts, &c., of her husband, with remainder to the use of her sons successively in tail, remainder to her daughters in tail; and, in default of such issue (without fresh words of gift), upon trust to permit D. (another feme covert) to receive the rents for her separate use, with remainder to the use of her sons and daughters in tail in like manner, and so on to another feme covert and her children, and then to the use of E. in tail, with reversion to the use of the testator's own right heirs. It was held, that the trustees took the fee; "that construction," it was said, "being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the femes covert."

[(*y*) 5 L. J. N. S. Ch. 166.]
(*z*) 7 T. R. 652. See also *Hawkins* v. *Luscombe*, 2 Sw. 391.

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Lord *Eldon's* strictures on *Harton* v. *Harton.*

Of this case, Lord *Eldon* has observed, that "there being trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate, there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate after every trust for a married woman, they would have held the whole legal estate to be in the trustees" (*a*).

Remark thereon.

Perhaps it is not strictly accurate to say, that in this case a fee in the trustees was *necessary* to secure the beneficial interest to the femes covert; for though the trusts in favour of the second and third women could not arise until the failure of the objects of the intervening limitations in tail, yet still they must inevitably take effect, if at all, in their lifetime, and the fact that in reaching them the estate necessarily comprehended the objects of the intervening limitations, with regard to whom no purpose was to be answered requiring that the trustees should take an estate, might seem to be no reason for extending that estate to the limitations *subsequent* to the gifts to the several femes covert. But probably the Court thought it better to vest the whole fee in the trustees, than to create a particular estate which might extend to *some* of the beneficial devisees not within the scope of it, and would affect their relative situation, by preventing the devisees in tail, to whom it extended, from suffering a recovery.

[In the case of *Brown* v. *Whiteway* (*b*), which was somewhat similar in circumstances to *Harton* v. *Harton*, Sir *J. Wigram*, V. C., felt bound by its authority, and decided accordingly; yet said he could not see why it was necessary to hold that the intermediate estates should not be good legal estates. However, the doctrine of *Harton* v. *Harton* has been recognized and acted on in recent cases, and must, therefore, be considered established (*c*).]

Power to limit an estate as a jointure.

The case of *Wykham* v. *Wykham* (*d*) presents a remarkable instance of contrariety of judicial opinion as to the estate

(*a*) See *Hawkins* v. *Luscombe*, 2 Sw. 391.

[(*b*) 8 Hare, 145.

(*c*) See *Toller* v. *Attwood*, 15 Q. B. 929; *Doe* d. *Müller* v. *Claridge*, 6 C. B. 641.]

(*d*) 11 East, 458, 3 Taunt. 316, 18 Ves. 395; [*Blagrave* v. *Blagrave*, 4 Exch. 550.] As to a direction to settle, see *Knocker* v. *Bunbury*, 8 Scott, 414, 6 Bing. N. C. 306.

authorized to be created by a power to jointure. A. devised lands to his eldest son for life, remainder to that son's first and other sons in tail male, with remainder to the testator's other sons and their sons in like manner. The will contained a power to the devisor's sons, as they should become entitled in possession, "from time to time to grant, convey, limit, and appoint all or any parts, &c., *to trustees*, upon trust, by the rents and profits thereof, to raise and pay any yearly rent-charge, not exceeding 1,000*l.*, as a jointure for any wife or wives that he or they should thereafter marry, for and during the term of such wife's natural life only." The devisor's eldest son, B., in exercise of his power, conveyed and appointed the lands so devised to him, to trustees and their heirs, upon trust to raise and pay certain yearly rent-charges (amounting to 1,000*l.*), to his intended wife as a jointure. After the death of B., but during the life of the jointress his widow, the next tenant in tail, who was let into possession, suffered a recovery, the validity of which depended upon this, whether the appointment did or did not vest in trustees an estate of freehold for the life of the jointress. If it did, the recovery was void for want of the immediate freehold, which was, in that case, outstanding; but in every other event, *i. e.*, if the appointment passed no estate, or a chattel interest only, or the fee, it was good, in the former case as a legal, and in the latter as an equitable recovery. The case coming on before Lord *Eldon*, he directed a case to be sent to the Court of King's Bench, who certified that the trustees took a fee. The same question was then sent to the Common Pleas, and that Court was of opinion that the trustees took *no* estate. On the case being again brought before Lord *Eldon*, on the conflicting certificates, he held, that the recovery was good, and that the estate which the trustees should have taken was a term of years, with a proviso for cesser of it on payment of the rent-charge during the life of the jointress, and all arrears thereon at the time of her death, *as that would not have gone to disturb any of the subsequent uses* (*e*).

Remarkable diversity of judicial opinion.

It is observable that, greatly as the several opinions varied in the construction of the devise, they all conducted to the same conclusion as to the recovery, which, quâcunque viâ, was good.

With regard to estates limited to trustees for preserving contingent remainders, it may be observed, that although they may

As to devises to trustees for

(*e*) See 1 Sugd. Pow. 478; 2 ib. 559, 7th Ed.

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preserving contingent remainders.

not be (as such estates usually are) in terms confined to the life of the person taking the immediately preceding estate of freehold, yet they will be so restricted in construction, if the will disclose no other purpose, which requires that the trustees should take a larger estate.

Thus, in the case of *Doe* d. *Compere* v. *Hicks* (*f*), where a testator devised lands, after the decease of his wife, to his father, A., for life, with remainder to B. for life, and after the determination of that estate, *unto trustees and their heirs, in trust to preserve contingent remainders from being defeated, and to make entries, and nevertheless to permit B. to receive* the rents and profits during his life, and after his decease, unto the first and other sons of the body of B. in tail male successively, and in default of such issue, unto his (testator's) brother, C., for life, and after that estate determined, *unto the trustees and their heirs to preserve the contingent remainders in manner aforesaid* (with various remainders limited in a similar manner). On an ejectment brought by one of the beneficial devisees, it was contended that the fee was in the trustees, under the unrestricted limitation to them and their heirs. But the Court was of opinion that, taking the whole instrument together, it appeared that the testator intended the trustees to take only an estate for the lives of the several tenants for life, in order to protect the contingent remainders. If the trustees had taken the whole interest in the estate, it was not necessary for the testator again to give them the same estate after all the subsequent estates for life.

Remarks on *Doe* d. *Compere* v. *Hicks*.

This decision has been noticed with approbation by Sir *W. Grant* (*g*), and seems to be abundantly sustained by the principles of analogous cases. Lord *Kenyon*, in the course of his judgment, however, in allusion to the case of *Venables* v. *Morris* (*h*), (which had been urged as an authority for holding the trustees to take the fee,) suggested that the result would be different where, under the limitations in question, any person had a power of appointment, which, his Lordship considered, would render it necessary that the fee should be in the trustees, *with a view to the possibility of the donee creating under the power contingent remainders which might require protection.* In the case of *Venables* v. *Morris*, the limitations (in a deed) were

(*f*) 7 T. R. 433, [and see *Haddelsey* v. *Adams*, 22 Beav. 266.]

(*g*) See 12 Ves. 100.

(*h*) 7 T. R. 342 and 437.

to the use of A. for life, with remainder to the use of trustees and their heirs for the life of A., to preserve contingent remainders, remainder to the use of B. (wife of A.) for life, remainder to the use of the same trustees *and their heirs, in trust to support the contingent uses, and permit B. and her assigns to receive the rents;* and after the decease of A. and B., to the use of the first and other sons of the marriage successively in tail, with remainder to the use of the first and other daughters successively in tail, remainder to the use of such persons as B. should by deed or will appoint, and, in default of appointment, to the use of the right heirs of B. B., by a deed-poll, appointed the estate to the right heirs of A. The contest was between the heirs of A. and the heirs of B., the former claiming under the limitation in the appointment, and the latter under the settlement. One of the points contended for by the heir of B. was, that the remainder in fee being in the trustees, an equitable interest only passed to the heirs of A. under the appointment, and which could not unite with the estate for life of A. under the settlement; but the Court was of opinion that the heir of A. was entitled quâcunque viâ; for if the limitation to the heir of A., under the appointment, was a legal limitation, it united with A.'s estate for life, under the settlement, and conferred the fee; but if it did not, then it was a contingent remainder, in equity, to the heir, and he took by purchase. Lord *Kenyon* subsequently expressed a more decided opinion that the legal estate in fee was in the trustees, and the certificate of the Court (it being a case from Chancery) was in conformity to this opinion.

Reservation of power of appointment held a ground for giving trustees the fee.

The ground on which Lord *Kenyon* rested the certificate of the Court, involves a very extensive and no less novel doctrine, and one which, in the absence of any confirmatory decision, cannot be relied on. To hold that the mere circumstance of there being included in the limitations a power of appointment, by virtue of which contingent remainders *might* be thereafter created, constitutes of itself a ground for vesting the fee-simple in the trustees, is evidently going much farther than making trustees take the fee, because contingent remainders are actually created by the instrument containing the limitation to them; though even the latter more moderate doctrine has not been invariably countenanced by the authorities.

Remarks on doctrine of *Venables* v. *Morris.*

Whether the creation of contingent remainders is a ground for giving trustees the fee.

Thus, in the recent case of *Heardson* v. *Williamson* (*i*), Lord

(*i*) 1 Kee. 33, ante, 283. [Qu. whether *Cursham* v. *Newland*, 2 Scott, 113,

*Langdale*, M. R., does not appear to have regarded the fact, that the will contained a contingent remainder of the devised estate, as a sufficient ground for holding the inheritance in fee to be in the trustees; while, on the other hand, in *Doe* v. *Willan* (*j*), and *Houston* v. *Hughes* (*k*), Mr. Justice *Bayley* considered that the circumstance of contingent remainders being created by the will, favoured the conclusion that the trustees took the legal inheritance.

In the case of *Barker* v. *Greenwood* (*l*) too, it seems to have been regarded by Mr. Baron *Parke* in the same point of view, though this able Judge disclaimed any reliance on the point; because the question in that case was not whether the trustees took the fee, but whether they took an estate pur autre vie, and the learned Judge considered it to be doubtful whether the trustees of such an estate would be bound, in the absence of an express trust, to preserve contingent remainders, a point upon which the writer is not aware of any decision. There certainly seems to be much difficulty in attaching any such obligation to the trustees, seeing that their estate is apparently created diverso intuitu: at all events, it is clear that such express direction to trustees to preserve contingent remainders will not have any influence on the construction, if the will contains no such remainder (*m*); nor where the subject of devise is a copyhold estate, as contingent remainders created of such property are not destructible, and therefore do not require any limitation of this nature for their preservation (*n*).

Where devise includes other property as to which trustees take the legal estate.

It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for giving to the will the same construction as to the estate in question (*o*).

Where trust fails ab initio.

[If all the active trusts, together with all the ulterior limitations fail ab initio, as, by lapse, the devise to the trustees, if sufficient to carry the fee, will operate to the full extent,

[2 Bing. N. C. 64, rests on this ground or on that stated in the next paragraph but one.]

(*j*) 2 B. & Ald. 84, ante, 278.

(*k*) 6 B. & Cr. 420.

(*l*) 4 M. & Wels. 431.

(*m*) *Nash* v. *Coates*, 3 B. & Ad. 839.

(*n*) See *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382.

(*o*) *Houston* v. *Hughes*, 6 B. & Cr. 403; [*Cursham* v. *Newland*, 2 Scott, 113, 2 Bing. N. C. 64.

[and they will hold in trust for the heir, if there be one; or if not, for their own benefit (*p*).]

General remark upon the cases.

Here closes the long catalogue of decisions respecting the quality and extent of the estate conferred by devises in trust, from which the reader will have collected the principles that govern cases of this description, and the considerations which have been admitted to influence the construction, though, as the question is constantly presenting itself under new aspects and combinations of circumstances, difficulty will sometimes occur in the application of the established doctrine. Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is the doctrine of those decisions (*q*) which, in certain cases, gave to trustees, whose estate was undefined, a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute of 1 Vict. c. 26. The 30th section provides, "That when any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Stat. 1 Vict., c. 26, sects. 30, 31.

Estate of trustees, if not expressly limited, to be either freehold or an estate in fee.

Section 31 provides, "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

These clauses have been the subject of much criticism (*r*). It is not easy to perceive why the provision regulating the estates

[(*p*) *Cox* v. *Parker*, 22 Beav. 168, 25 L. J. Ch. 873.]

(*q*) Ante, p. 287.

(*r*) See H. Sugd. Wills, 127; Sweet on Wills Act, 154; Sugd. R. P. Stat. 380.

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Remarks upon stat. 1 Vict., c. 26, sects. 30, 31.

of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases (*s*), gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, an estate for years, or, as in *Doe* v. *Simpson*, an estate for life, with a superadded term for years, but) an estate in fee-simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the "surplus rents and profits being given to a person for life," making no provision, therefore, for the case (a possible though not a frequently occurring one) of a trust of any other kind being created for a purpose co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section, but decision alone can settle the point.

[(*s*) Ante, p. 287.

Points not excluded by the Act.

The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate or only a power; also whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee-simple; and consequently there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of the 31st section, under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

The new doctrine would not, it is conceived, preclude the construction that trustees take an estate pur autre vie, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction, for where an estate is devised to trustees indefinitely, the authorities conduct to the conclusion, that whatever duty is subsequently imposed on them must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will.

# CHAPTER XXXV.

## WHAT WORDS CREATE AN ESTATE TAIL.

Proper terms of limiting an estate tail.

A LIMITATION to a person and the heirs of his body creates an estate tail general. If it be to him and the heirs *male* or the heirs *female* of his body, he takes an estate tail special, descendible in the male or female line, as the case may be. In the one case the land devolves upon the male issue and (unless the tenure be gavelkind or Borough-English (*a*),) according to the law of primogeniture, in the other upon the females as coparceners. If the estate tail be general, it will run in this manner through both lines, in their established order of succession.

What informal expressions create an estate tail.

But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed by any expressions denoting an intention to give the devisee an estate of inheritance, descendible to his or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an estate tail as distinguished from a fee-simple. The former is transmissible to *lineal* descendants only; the latter in default of lineal devolves to *collateral* and now to ascendant heirs.

Limitation to "heirs male," or "right heirs male, for ever,"

A devise to A. and his heirs male for ever (*b*), or to A. and his heirs male living to attain the age of twenty-one (*c*), or to A. for life, and after his death to his heirs male, or his right heirs male, for ever (*d*), has been held to confer an estate tail male; the addition of the word "male," as a qualification of "heirs," shewing that a class of heirs less extensive than heirs general was intended. [For the same reason (*e*), under a devise to the

(*a*) See *Trash* v. *Wood*, 4 My. & Cr. 324; [*Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228; *Anon.*, Dy. 179 b, pl. 45.]

(*b*) *Baker* v. *Wall*, 1 Ld. Raym. 185, 1 Eq. Ca. Ab. 214, pl. 12, stated ante, p. 70.

(*c*) *Doe* d. *Tremewen* v. *Permewen*, 3 Per. & D. 303, 11 Ad. & Ell. 431.

(*d*) *Lord Ossulston's case*, 3 Salk. 336. *Doe* d. *Earl of Lindsey* v. *Colyear*, 11 East, 548.

[(*e*) The line of descent of lands cannot be qualified, except through the medium of an entail, Co. Lit. 27 b.

[heirs of A. by a particular wife for ever, or to A. for life with remainder to his right heirs by a particular wife for ever, A. would take an estate tail special because of the restriction on the generality of the word "heirs" (*f*).]

—— or to heirs by a particular wife.

It has even been decided that a devise to one, et hæredibus suis legitimè procreatis, creates an estate tail (*g*), though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus. Such was the doctrine of the early authorities, and it was recognized and followed in the more recent case of *Nanfan* v. *Legh* (*h*), where a devise to H. when he should attain twenty-one, "and to his heirs *lawfully begotten* for ever," was held to make the devisee tenant in tail only. In the same will other property was devised to H. and his heirs simply, which it was contended afforded an argument in favour of construing the devise in question to give an estate tail; inasmuch as the testator, in varying the phrase, must have had a different intention. Being a case out of Chancery, we are not in possession of the reasons upon which the opinion of the Court was founded; but probably it was considered that the testator, by adding the expression "lawfully begotten," intended to engraft *some* qualification on the description of heir, and consequently must have meant an estate tail. [And in *Good* v. *Good* (*i*), Lord *Campbell*, C. J., said it was a rule of construction, long established and universally recognized, that such words created an estate tail. But the expression "lawful heirs" standing alone, will not be construed as meaning heirs of the body (*j*).

To A. and "his heirs *lawfully begotten*."

To A. and his "lawful heirs."

A devise to A., with a direction that neither he nor his heirs *to the third generation* should mortgage or sell the devised property, will, it seems, create an estate tail (*k*).]

"Heirs to the third generation."

It is clear that the words "*heir* of the body" (in the singular) operate as words of limitation, and consequently confer an estate tail. Thus, it has been held, that under a devise to A. for life, and, after his decease, to the heir of his body for ever, A. is tenant in tail (*l*); and a devise to A. and such heir of her body

To heir of the body in the singular.

[(*f*) *Wright* v. *Vernon*, 2 Drew. 439, 7 H. of L. Ca. 35, 4 Jur. N. S. 1113.]

(*g*) *Church* v. *Wyatt*, Moore, 637, Co. Lit. 20 b, Harg. n. 2.

(*h*) 2 Marsh. 107, 7 Taunt. 85.

(*i*) 7 Ell. & Bl. 295.

(*j*) *Matthews* v. *Gardner*, 17 Beav. 254; *Simpson* v. *Ashworth*, 6 Beav. 412; and see *Stratford* v. *Powell*, 1 Ba. & Be. 1; but see per *Bushe*, C. J., in *Moffet* v. *Catherwood*, Alc. & Nap. 472.

(*k*) *Mortimer* v. *Hartley*, 6 Exch. 47, 3 De G. & S. 316. But see *S. C.* 6 C. B. 819, contra.]

(*l*) *Pawsey* v. *Lowdall*, Sty. 249, 273. See also *Wilkins* v. *Whiting*, 1 Bulst.

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as shall be living at her decease (*m*), [or to A. and his heir male living to attain the age of twenty-one years (*n*),] has received the same construction.

Limitation to next or first heir male.

Nor is the effect varied by the word *next* or *first* being prefixed to "heir." Thus, in *Burley's case* (*o*), a devise to A. for life, remainder to the *next* heir male; for default of such male heir, then to remain, was adjudged to give an estate tail male to A. So, where (*p*) the devise was to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held, that M. and his wife were tenants in tail male. Again, a devise to A. for life, and after his death to the *first* heir male of his body, remainder over, has been adjudged to create an estate tail male (*q*).

To "next heir male," with superadded words of limitation.

But though a devise to the *next* heir male simply, following a devise to the ancestor for life, does not confer on the heir an estate by purchase (the words being construed as words of limitation), yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term "heir" as a mere descriptio personæ; in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the expression "next heir male" into words of purchase, an effect, however, which (as will be shewn at large in the sequel) does not, in general, belong to such superadded expression of this nature. This rule of construction is founded on the authority of *Archer's case* (*r*), where lands were devised to A. for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the Court, that this was a contingent remainder to the heir, and that A. was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

To next heir male and the heirs male of his body.

But it should seem that this construction is not peculiar to such a case as *Archer's*; namely, where the word "next" is

219, 1 Roll. Ab. 836; [*Clerk* alias *Cheek* v. *Day*, Cro. Eliz. 314;] *White* v. *Collins*, 1 Com. Rep. 289.

(*m*) *Richards* v. *Bergavenny*, 2 Vern. 324.

[(*n*) *Doe* d. *Tremewen* v. *Permewen*, 3 Per. & D. 303, 11 Ad. & Ell. 431.]

(*o*) Cited 1 Vent. 230.

(*p*) *Miller* v. *Seagrove*, Rob. Gavelk. 122, 16 Vin. Ab. Parols (H), pl. 4, n.; and see 1 Ves. 337.

(*q*) *Dubber* d. *Trollope* v. *Trollope*, Amb. 453, Lee t. Hardw. 160; and see *Goodright* v. *Pullyn*, 2 Ld. Ray. 1437, 2 Stra. 729; [*O'Keefe* v. *Jones*, 13 Ves. 412.]

(*r*) 1 Rep. 66.

prefixed, and words of limitation are superadded to "heir male;" for a similar construction was adopted in the case of *Willis* v. *Hiscox* (*s*), where the former circumstance was wanting. The devise was upon trust for the testator's son, W., for life, and after his decease for the heir male of his body begotten on an European woman, and the heirs of such heir male, and in case the son should die without leaving such heir male of his body, the trustees were to pay the rents equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the *heir male of the body of A. and the heirs of such heir male.* W. and M. both died without issue; after which. A., conceiving herself to be tenant in tail, suffered a recovery. A bill was filed by the heir male of the body of A. to compel a conveyance from the trustee; and Lord *Cottenham* considered his title so clear that he not only decided in his favour, but compelled the defendant trustee to pay the costs (*t*) of the suit, which was occasioned by his refusal to convey without the direction of the Court. His Lordship said, "The mother has an estate expressly for life; and after her death, the devise is to the heir male of her body, in the singular number, with words of limitation to the heir general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as was decided in *Archer's case* (*u*), and assumed by *Hale* in *King* v. *Melling* (*v*), and subsequent cases. If, indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testator's son; and the particular description of the heir of that son proves that he must have taken by purchase."

"To heir male of the body," and his heirs.

(*s*) 4 My. & Cr. 197.

(*t*) This seems rather hard upon the trustee, as there was no authority directly in point, and the cases which had decided that a devise to the heir of the body (in the singular) of the devisee for life, without words of limitation engrafted thereon, operated to confer an estate tail (ante, p. 299); and also that superadded words of limitation had no effect in turning heirs male, in the plural, into words of purchase, afforded an argument in favour of the construction which the Court rejected, sufficiently plausible, one should have thought, to justify the trustee's refusal to convey without judicial sanction. The tendency of such decisions is to increase the reluctance which is now very commonly felt by cautious and well-informed persons to take trusteeships.

Remark on *Willis* v. *Hiscox.*

(*u*) 1 Rep. 66.

(*v*) 1 Vent. 214; and see Fearne, C. R. p. 148.

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"To heir male of the body for life."

[In like manner a devise to A. for life, and after his death "to the heir male of his body lawfully begotten *during his life*," gives A. an estate for life, with remainder for life to the person who at his death happens to be his heir male (*x*).

Nor is it necessary that the first estate should be expressly an estate for life: a devise "to A. and the heir male of his body, and the heirs and assigns of such heir male," gives A. an estate for life merely, with a contingent remainder in fee to his heir male (*y*).]

To A. "et semini suo," or to A. "and his issue."

To "the male issue of A."

A devise to A. et semini suo (*z*), or to A. and his issue, clearly creates an estate tail, as is shewn more at large in a subsequent chapter (*a*), [and in one case it was held, that a devise to the male issue of A. created an estate tail male in the first son of A. (*b*), but from the cases noticed in a future chapter (*c*), the reader may, perhaps, find reason to doubt this decision.]

To A. and his heirs, and if he shall die without heirs of his body.

So, where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which shew that he used the word "heirs," in the prior devise, in the restricted sense of heirs of the body; such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had been originally employed. Thus, if lands are devised to A., or to A. and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or an heir male of his body, then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be (*d*).

(*x*) [*White* v. *Collins*, 1 Com. Rep. 289.

(*y*) *Chamberlayne* v. *Chamberlayne*, 6 Ell. & Bl. 625.]

(*z*) Co. Lit. 9 b.

(*a*) Chap. XXXIX.

(*b*) *Whitelock* v. *Heddon*, 1 B. & P. 243, stated ante, p. 58.

(*c*) Chap. XXXIX. sect. 2, pt. 3, where it will be shewn that a gift to A. for life, with remainder between his issue, gives A. an estate tail in order to carry the inheritance to the issue, it being assumed that the issue taking by purchase would only take for life.

(*d*) *Tracy* v. *Glover*, cit. 3 Leon. 130, pl. 183, Godb. 16; and see *Blaxton* v. *Stone*, 3 Mod. 123; *Denn* v. *Slater*, 5 T. R. 335. [The rule is also applicable to deeds, Co. Lit. 21 a. And in wills it holds where the devise over is if the prior devisee "die without issue," *Browne* v. *Jerves*, Cro. Jac. 290; *Chadock* v. *Cowley*, ib. 695; *Doe* d. *Neville* v. *Rivers*, 7 T. R. 276; *Doe* d. *Ellis* v. *Ellis*, 9 East, 382; *Biddulph* v. *Lees*, 8 Ell. & Bl. 289; and see ante, Chap. XVII. sect. 6. In *Cane* v. *James*, cit. Skinn. 19, where the devise was to A. and his heirs, and if A. die without heirs of his body that his sister should have 600*l.*, it was held that A took the fee. It will be observed that there was no devise over of the land itself. But if the dying without heirs male or without issue be coupled with any other contingency, as "dying without heirs male in the lifetime of A.," the first devisee takes not an estate tail, but an estate in fee, with an executory devise over. *Pells* v. *Brown*, Cro. Jac.

Except where coupled with another contingency.

Devise over on death without issue also gives estate tail.

Direction to grant a fee farm rent not conclusive against an estate tail.

Indeed so well has this been settled from an early period, that to found an argument in favour of a contrary construction, recourse is always had to special circumstances. Thus, where (*e*) a testator devised lands to his wife for life, and after her death to J., his eldest son, and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S., testator's second son, and his heirs, an annual rent of 4*l.*, and that *if J. should die without heirs of his body*, the land should remain to S. and the heirs of his body; it was contended that the intent was shewn that J. should have a fee, otherwise he could not legally grant such a rent, to have continuance after his death; but it was resolved to be an estate tail; for being limited that if he died without issue then it should be to S. and his heirs of his body, *shewed what heirs of J. were intended*, viz. *heirs of his body;* and though he was to make a grant of the rent, yet this, being by appointment of the donor, was not contra formam donationis, but stood with the gift, and it should bind the issue in tail. The Court evidently considered the direction to grant the fee farm rent as conferring *a power*, or rather, perhaps, a trust coupled with a power, in which view it was consistent with an estate tail.

Devise over on failure of heirs to a person in line of descent creates estate tail.

And here it should be observed that where real estate is devised over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs, while the devisee over exists, the word "heirs" is construed to mean heirs *of the body*, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate (*f*). This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

Otherwise where to a stranger in blood.

But the Courts will not so construe the word heirs, where the devise over is to a stranger, however plausible may be the con-

[590 ; *Eastman* v. *Baker*, 1 Taunt. 179 ; *Denn* v. *Kemeys*, 9 East, 366 ; *Doe* v. *Chaffey*, 16 M. & Wels. 656, ante, p. 69 ; and see post, Chap. XLI. sect. 2.] As to the effect of the recent statute (1 Vict. c. 26) on devises of the above kind, see ante, Chap. XVII. sect. 6, and post, Chap. XLI. sect. 4.

(*e*) *Dutton* v. *Engram*, Cro. Jac. 427.

(*f*) 1 Roll. Ab. 836 ; 2 Lev. 162 ;

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jecture that it was so intended, and consequently the devise over is void for remoteness (*g*); and formerly a relation of the half blood or a parent or grandparent was, for this purpose, considered as a stranger, such persons being then excluded from taking [directly] by descent (*h*); as to persons dying since the 31st of December, 1833, [no relation can be considered as a stranger,] the statute of 3 & 4 W. 4, c. 106, having admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship (*i*).

To several, one of whom is a stranger in blood.

[In the case of *Harris* v. *Davis* (*k*), the gift over in default of heirs of the first devisee was to several other persons, *one of whom* was not related to the first devisee, but as all the others were related to him, he was held to take an estate tail. It would seem, therefore, sufficient to give the first devisee an estate tail that *any one* of a number of devisees over was related to him.]

As to limitation over to the right heirs of the devisee.

Of course the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not vary the construction, further than to give the devisee the remainder in fee expectant on the estate tail. Thus, where (*l*) a testator devised certain lands unto his son P. and his heirs for ever, on condition that he paid W. 30*l.* within one year after the death of the testator's wife, and he gave other tenements to other sons, adding the following clause:—"Item. My will and mind is, that in case any of my said children unto whom I have bequeathed any of my real or copyhold estates *shall die without issue*, then I give the estate of him or her so dying unto his or their *right heirs* for ever;" and it was held that the children took estates tail, with remainder in fee to themselves.

Estate tail general cut down to an

Sometimes an estate tail general is cut down to an estate tail special by implication. As where (*m*) the devise was to the use

Cro. Jac. 416; 1 Freem. 74; 2 Eq. Cas. Ab. 306, pl. 2; 3 Lev. 70; 2 Stra. 849; Amb. 363; 2 Ed. 297; Cas. t. Talb. 1; Willes, 164, 369; 1 P. W. 23; Doug. 266; Cowp. 234; 3 T. R. 491, 488, n.; 2 Marsh. 170, 6 Taunt. 485; 6 Beav. 412. A few early decisions to the contrary, such as *Hearn* v. *Allen*, Cro. Car. 57, are overruled by the current of authorities.

(*g*) *Grumble* v. *Jones*, 2 Eq. Ca. Ab. 300, pl. 15, 11 Mod. 207, Willes, 166, n.; *S. C.* nom. *Aumble* v. *Jones*, 1 Salk. 238; *Att.-Gen.* v. *Gill*, 2 P. W. 369; *Griffiths* v. *Grieve*, 1 J. & W. 31.

(*h*) [*Tilburgh* v. *Barbut*, 1 Ves. 88, 3 Atk. 617; and] see *Preston* d. *Eagle* v. *Funnell*, Willes, 164; *Moffet* v. *Catherwood*, Alc. & Nap. 472.

(*i*) See 1 Hayes's Introd. 5th Ed. p. 319.

[(*k*) 1 Coll. 416.]

(*l*) *Brice* v. *Smith*, Willes, 1.

(*m*) *Fitzgerald* v. *Leslie*, 3 B. P. C. Toml. 154. This seems to be the converse of the cases of *Tuck* v. *Frencham*, Moore, 13, pl. 50, 1 And. 8; and *Doe* d. *Hanson* v. *Fyldes*, Cowp. 833, stated ante, Chap. XV. ad fin.

estate tail special by implication.

of the testator's eldest son John and his heirs for ever, and failing issue of John, to the use of James the second son and his heirs for ever, and failing issue of that son, to the use of the third son George and his heirs for ever, and failing his issue, to the use of every other son the testator should or might have, according to priority of birth; *and failing his (testator's) issue male,* then to his issue female and their heirs for ever, and for want of issue female, then to the use of his (the testator's) heirs for ever: it was argued that the testator evidently intended to postpone the female to the male line of issue, and that the latter part of the will was explanatory of the devise to the sons, shewing that they were to take estates tail male only; for that the intent of postponing the issue female could not be answered without postponing his granddaughters as well as daughters, who were both comprehended under the general expression of his issue female; and of this opinion appears to have been the House of Lords, confirming a decree of the Irish Court of Exchequer (*m*).

(*n*) This chapter, it is obvious, does not exhaust the general subject of which it professes to treat. The numerous instances in which the words *heirs of the body,* accompanied by explanatory expressions, and the words *children, son* and *issue* have operated to confer an estate tail, are fully discussed in subsequent chapters, to which, therefore, the reader is referred.

# CHAPTER XXXVI.

## RULE IN SHELLEY'S CASE.

I. *Nature of the Rule.—Requisites to its Operation; considered in regard to the Estate of Freehold,—in regard to the Limitation to the Heirs.—Questions where one or both of the Limitations relate to* several *Persons.*
II. *Executory Trusts.*
III. *Practical Effect of the Rule considered.*

Nature of the rule in *Shelley's case.*

I. THE rule in *Shelley's case* is a rule of law, and not of construction (*a*). The rule simply is, that, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word *heirs* is a word of limitation, *i.e.* the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple (*b*).

Only applies to limitations by way of remainder.

[The rule is usually stated in the above general terms, but by the word "limitation," we must understand a limitation by way of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though it be to the heirs of a person taking a previous estate of freehold, vests in the heir as a purchaser (*c*).]

Case of *Perrin* v. *Blake.*

This rule is well illustrated in the celebrated case of *Perrin* v. *Blake* (*d*). There A., by his will, declared, that if his wife should be enceinte with a child at any time thereafter (but which never

(*a*) The comprehensive nature of the present work renders it impossible to present more than a brief outline of the chief practical points connected with the rule in *Shelley's case*, which require the attention of the student or the practitioner; and this plan is the more willingly submitted to, since the subject has received an elaborate investigation from several writers, who have brought great learning and abilities to the task.

(*b*) *Shelley's case*, 1 Rep. 93; see p. 104 a. The question was not directly raised in this case, but was incidentally much discussed. See some observations on the nature and origin of the rule, Fea. C. R., and Hayes's Supplem.; Prest. Est., Vol. 1. c. 3. See also *Earl of Bedford's case*, Moore, 718; *Whiting* v. *Wilkins*, 1 Bulstr. 219; *Rundale* v. *Eeley*, Cart. 170; *Broughton* v. *Langley*, 2 Ld. Ray. 873, 2 Salk. 679, and cases passim in the next chapter.

[(*c*) *Lloyd* v. *Carew*, Pre. Ch. 72, Show. P. C. 137; per Lord *Cranworth*, C., *Coape* v. *Arnold*, 4 D. M. & G. 589; Fea. C. R. 276.]

(*d*) 4 Burr. 2579, 1 W. Bl. 672, 1 Coll. Jur. 283, Harg. Law Tracts, 489, n., Hayes's Inquiry, 227, n.

happened), and it were a male, he devised his real and personal estate equally to be divided between the said infant and his son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate for longer than his life; and to that intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives;* remainder to G. and his heirs for the lives of the said W. and the infant; remainder *to the heirs of the bodies of the said W. and the said infant* lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters, equally to be divided. The question was, what estate W. took. Lord *Mansfield*, Mr. Justice *Aston* and Mr. Justice *Willes*, (Mr. Justice *Yates* dissentiente,) held, that he was tenant for life only; but their judgment was reversed by a majority of the Judges in the Exchequer Chamber, who held, that W. took an estate tail. An appeal was brought in the House of Lords, but was compromised.

Rule never infringed.

Since this solemn determination (*e*), the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a person for life, and, after his death, to the heirs of his body, has been held, by force of the context, to give an estate for life only to the ancestor (*f*); but this has been the result, not of holding the heirs of the body, as such, to take by purchase, but of construing those words to designate *some other class of persons* generally less extensive. The rule, therefore, was excluded, not violated, by this interpretation.

Preliminary question of construction.

Whether the testator, by this or any other expression, mean to describe heirs of the body, is a totally distinct inquiry, and has therefore in the present Treatise been separately discussed (*g*).

(*e*) Indeed, for a long period antecedently the point had been considered as settled beyond dispute; but in the interval between the judgment in B. R. and its reversal in the Exchequer Chamber all was uncertainty. The profession beheld with no small degree of consternation a doctrine which had been regarded as an established principle of law completely subverted. An interesting statement of the circumstances and progress of this case may be found in Mr. *Hargrave's* Law Tracts, and more particularly in Mr. *Holliday's* Life of Lord *Mansfield*—a book which, though not in high estimation as a biographical work, the writer remembers to have perused in his early days with much pleasure.

(*f*) See next chapter.

(*g*) As to where heirs of the body,

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The blending of the two questions tends to involve both in unnecessary perplexity.

The rule applies to copyholds and estates *pur autre vie.*

And also as between a man and his personal representatives.

[The principle of the rule in *Shelley's case* applies to limitations of copyholds (*h*) and of estates *pur autre vie* (*i*). It applies also as between a man and his personal representatives; thus Lord *Coke* says (*k*), "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him, for even as ancestor and heir are correlativa as to inheritance, (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs,) even so are testators and executors correlativa as to any chattel (*l*)."]

Limitations must be created by same instrument.

It is to be observed, that to let in the application of the rule in *Shelley's case,* the limitations to the ancestor, and to his heirs, must be created by the same instrument. Therefore, where (*m*) A. had, on the marriage of B. his son, settled lands on the son for life, remainder to the sons of that marriage successively in tail male, reversion to himself in fee, and by will devised the same to the issue of B. by any other wife in tail male; it was held, that this devise did not make B. tenant in tail, but gave his heir of the body an estate tail by purchase.

Will and schedule.

But a will, and a schedule to it, are considered as one instrument for the purposes of this rule (*n*); and the same principle undoubtedly applies to a will and codicil, or several codicils.

Deeds creating and exercising powers.

It was contended by Mr. *Fearne* (*o*), that, where one limitation is contained in an instrument creating a power, and the other in an appointment under such power, the rule would apply (*p*); but the position has been, with much reason, questioned by other learned writers (*q*).

Legal and equitable interests.

The rule in *Shelley's case* applies to equitable as well as legal interests (*r*); but the estate of the ancestor, and the limitation to

children, sons and issue are used as words of limitation, see post.

[(*h*) *Busby* v. *Greenslate,* 1 Str. 445.

(*i*) *Low* v. *Burron,* 3 P. W. 262; *Forster* v. *Forster,* 2 Atk. 259.

(*k*) Co. Lit. 54 b.

(*l*) See accordingly *Kirkpatrick* v. *Capel,* 1 Sugd. Pow. p. 80, 7th Ed.; *Holloway* v. *Clarkson,* 2 Hare, 521; *Devall* v. *Dickins,* 9 Jur. 550; *Page* v. *Soper,* 11 Ha. 321.]

(*m*) *Moore* v. *Parker,* Ld. Raym. 37, Skinn. 558.

(*n*) *Hayes* d. *Foorde* v. *Foorde,* 2 W. Bl. 698.

(*o*) C. R. 75.

(*p*) *Venables* v. *Morris,* 7 T. R. 342. [Sugd. Pow. 7th Ed. vol. 2, p. 24, treats this case as settling the point.]

(*q*) Co. Lit. 299 b, Butl. n.; 1 Prest. Est. 324.

[(*r*) *Reynell* v. *Reynell,* 10 Beav. 21; Fearne, C. R. 124 et seq.]

the heirs, must be of the same quality, *i.e.* both legal or both equitable. It frequently happens that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life, that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule just stated, they take as purchasers (*s*). The converse case of course may, but it rarely does, occur (*t*).

Legal estate, clothed with a trust.

Where the limitations to the devisee for life, and to the heirs of his body, both carry the legal estate, the fact that one of them is subject to a trust does not prevent the application of the rule. Mr. *Fearne*, indeed, seems to have been of a contrary opinion (*u*); but the affirmative has been successfully maintained by his learned editor and Mr. *Preston* (*x*), on the well-known principle, that trust estates are not objects of the jurisdiction of Courts of Law.

In the case of *Douglas* v. *Congreve* (*y*), real and personal estate were given to a feme covert for life *for her separate use*, and, after her decease, to her husband for life, with remainder to the heirs of her body in tail, accompanied by a declaration that the aforesaid limitations were intended by the testator to be in strict settlement; and it was contended, that as the testator had created a trust for the separate use of the devisee, she had merely an equitable interest (the husband being a trustee for her), with which the legal limitation to the heirs would not unite; but Lord *Langdale* conclusively answered this reasoning by observing, that the legal estate was vested in the wife, and that the power which the law gave to the husband over the real estate of his wife did not alter the nature or quality of that estate.

Rule con-

The estate of freehold may be an estate for the life of the

(*s*) Ante, p. 271.

(*t*) An unsuccessful attempt to support such a construction was made in the case of *Nash* v. *Coates*, 3 B. & Ad. 839, ante, 294, where it is observable that the trustees had not any office to perform other than the preservation of the contingent remainder, and there was no such remainder unless the words "heirs of the body" were construed *children*; and the Court, by rejecting this construction, destroyed the force of the argument. This case serves to shew that the Courts are not disposed to strain the rules of construction for the purpose of preventing the application of the rule in *Shelley's case*.

(*u*) C. R. 35.

(*x*) Treat. on Estates, Vol. I. p. 311.

(*y*) 1 Beav. 59. [See *Verulam* v. *Bathurst*, 13 Sim. 386.]

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sidered in relation to *estate for life.*

devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate durante viduitate (*z*), and may arise either by express devise, or by implication of law (*a*), which must be, we have seen, a *necessary* implication (*b*).

Freehold resulting for life, *Coape* v. *Arnold.*

[In the recent case of *Coape* v. *Arnold* (*c*), there was a devise to G. H., the testator's eldest son, for ninety-nine years, if he should so long live, and subject to the said term, to trustees and their heirs during the life of G. H., upon trust only to support the contingent remainders thereinafter limited (but not expressly upon trust for G. H.), and after the determination of the said estates unto the heirs of the body of G. H., and for want of such issue, the testator devised to his second son, and to the same trustees, and to the heirs of the body of the second son in like manner, with remainders over. By a codicil the testator confirmed his will, and devised all his freehold and copyhold estates to four trustees, upon trust to convey to the trustees of his marriage settlement, such part as with the provision in the settlement would make up 1,200*l.* jointure for his wife, and he empowered his trustees to sell, convey, and exchange or mortgage his said estates, and he charged them with payment of his debts. It was admitted, that under the will standing alone the heirs of the body of the eldest son would have taken by purchase since the legal estate was devised to them; but it was contended, that as by the codicil the legal estate was vested in the trustees, the limitation to the heirs of the body of the eldest son became an equitable limitation and united with the equitable freehold which descended or resulted to the eldest son under the trust for preserving contingent remainders, and that he thus became equitable tenant in tail. Sir *J. Stuart*, V. C., however, decided that the eldest son did not take an estate tail. He said, "As there is an express devise of the beneficial interest to G. H. for ninety-nine years, if he should so long live, if an equitable freehold resulted to him by operation of law, the codicil having made all the devises in the will equitable estates, *either the term for ninety-nine years must be merged* in the resulting freehold, or G. H.

(*z*) *Merrill* v. *Rumsey*, 1 Keb. 888, T. Raym. 126; Fea. C. R. 31; *Curtis* v. *Price*, 12 Ves. 89; [*Griffiths* v. *Evan*, 5 Beav. 241.]

(*a*) *Pybus* v. *Mitford*, 1 Ventr. 372, Freem. K. B. 351, 369, T. Ray. 228; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; [and see Fearne, C. R. 40, et seq.]

(*b*) Ante, Vol. I. Chap. XVII.

[(*c*) 2 Sm. & Gif. 311. This decision was affirmed on appeal, but on a different ground, see post, 313.

[must have had two equitable estates co-existing in him, one for the term of ninety-nine years if he so long live, the other the freehold, said to result by operation of law. There are difficulties in holding, consistently with decided cases, that the freehold can result by implication to the *heir*, to whom an express estate is given for a term of years." The learned Judge then went on to shew from several authorities (*d*), that under a *conveyance* no estate could by implication of law result to the *settlor* which would be inconsistent with or annihilate an estate expressly limited to him. It is conceived that the authorities, as to an estate resulting to a settlor under a conveyance, did not apply to the case before his Honor; a deed is construed most strongly against the grantor, whereas a will is construed most strongly in favour of the heir who will take everything that is not either expressly or by necessary implication given away from him (*e*). His Honor, indeed, treated the whole beneficial interest during the life of G. H. as being effectually disposed of; but, though he is reported to have adverted to the possibility of the term determining in the lifetime of G. H., he is not made to say where the beneficial interest during the life of G. H. would, in that event, have been. It clearly could not have been in the trustees, for the estate was limited to them upon trust; it must, therefore, have descended to G. H. as the heir, who was consequently (there being no merger of estates in equity except to promote the intention (*f*)) entitled to the equitable freehold in reversion expectant on the term; and if so, then, according to the rule in *Shelley's case*, he was equitable tenant in tail.]

Observation on *Coape* v. *Arnold*.

It is to be observed, too, that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule (*g*); for this intention is as clearly indicated by the mere limitation of a life estate, as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention.

As to expressions negativing a larger estate.

[(*d*) Particularly *Adams* v. *Savage*, and *Rawley* v. *Holland*, stated Fea. C. R. p. 42; Preston on Merger, pp. 212 and 514.

(*e*) Ante, Vol. I. Chap. XVIII.

(*f*) Preston Merg. 557. This supplies another reason why *Adams* v. *Savage* and *Rawley* v. *Holland* would not govern the case in the text, since in them the limitations were of legal estates.]

(*g*) *Robinson* v. *Robinson*, 1 Burr. 38, 2 Ves. 225; *S. C.* nom. *Robinson* v. *Hicks*, 3 B. P. C. Toml. 180, stated infra; *Perrin* v. *Blake*, 4 Burr. 2579, ante, 306; *Hayes* d. *Foorde* v. *Foorde*,

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Interposition of trustees to preserve contingent remainders, &c.

Upon the same principle, neither the interposition of a trust estate to preserve contingent remainders, between the estate for life and the limitation to the heirs of the body (*h*), nor a declaration that the first taker shall have a power of jointuring (*i*), or that his estate shall be without impeachment of waste (*k*), or, if a woman, for her separate use (*l*), or that the devisee shall have no power to defeat the testator's intent, will prevent the remainder to the heirs attaching in the ancestor (*m*).

Rule in regard to limitation to the heirs.

With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that *or any other denomination*, since it is clear that in every case in which the word "issue" or "son" is construed to be a word of limitation, and follows a devise to the parent for life, or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in *Shelley's case* (*n*). The words in question are read as synonymous with *heirs of the body*, and consequently, the effect is the same as if those words had been actually used. Upon the same principle, in the converse case, *i. e.* where the words *heirs of the body* are explained to mean some other class of persons, the rule does not apply (*o*).

Immaterial under what denomination heirs are described.

Limitation to the heirs by implication.

It is clear, too, that the limitation to the heirs of the body may arise by implication; as (if the will is subject to the old law) in the case of a devise to A. for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail (*p*)) is an exemplification of the rule in *Shelley's case*. A gift to the issue or to the heirs of the body is implied; and the effect is, that the devise is read as a gift to A. for life, and after

2 W. Bl. 698; *Thong* v. *Bedford*, 1 B. C. C. 313; [*Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362.]

(*h*) *Coulson* v. *Coulson*, 2 Stra. 1125; *Hodgson* v. *Ambrose*, Doug. 337, 3 B. P. C. Toml. 416; *Sayer* v. *Masterman*, Amb. 344; *Measure* v. *Gee*, 5 B. & Ald. 910.

(*i*) *King* v. *Melling*, 2 Lev. 58, 1 Ventr. 225, 3 Keb. 42.

(*k*) *Papillon* v. *Voice*, 2 P. W. 471; *Denn* d. *Webb* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 548; *Jones* v. *Morgan*, 1 B. C. C. 206; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170.

(*l*) *Lady Jones* v. *Lord Say and Sele*, 8 Vin. Ab. 262, pl. 19, 3 B. P. C. Toml. 113; though in this case it was held that the estate for life was equitable, and the gift to the heirs carried the legal estate. See also *Roberts* v. *Dixwell*, 1 Atk. 607.

(*m*) *Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362, 1 B. C. C. 313.

[(*n*) *Robinson* v. *Robinson*, 1 Burr. 38, 2 Ves. 225; *Mellish* v. *Mellish*, 3 B. & Cr. 533, 3 D. and Ry. 804; *Griffiths* v. *Evan*, 5 Beav. 241; *Harvey* v. *Towell*, 7 Hare, 231, see *S. C.* 12 Jur. 242; *Tate* v. *Clarke*, 1 Beav. 100; *Doe* v. *Rucastle*, 8 C. B. 876; *Lewis* v. *Puxley*, 16 M. & Wels. 733; and see Chap. XXXVIII.

(*o*) See post, Chap. XXXVII. sect. 3.]

(*p*) See ante, p. 302, and Chap. XVII. sect. 6.

[his death, to his issue or heirs of the body (*q*), which brings it to the common case illustrative of the rule. These positions are indisputable, but the first and third appear to be frequently lost sight of.

As to declaration that heirs shall take by purchase.

As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life estate, will exclude the rule, so a declaration, that the heirs shall take as purchasers, is equally inoperative to have such effect (*r*).

Remarks of Lord Cranworth, in *Coape* v. *Arnold*.

[The authorities on the rule in *Shelley's case* being thus so positive and inflexible, it may be material to consider how far the decision on the appeal in the recent case of *Coape* v. *Arnold* (*s*), (the terms of the devise in which have been already stated (*t*)) is reconcilable with the previous authorities; it was there in effect laid down that the rule is one, not, as before stated, of law, but of construction, and, therefore, inapplicable where it can be collected that the testator did not intend that it should operate. In giving judgment on the appeal from the decision of Sir *J. Stuart*, V. C., in the case alluded to, Lord *Cranworth*, C., is made to say, "Suppose that the testator had had the legal fee as to some of the land, and the equitable fee as to the rest, surely it would have been a perversion of language and principle to say that G. H. would have been tenant in tail of the latter and not of the former; or suppose the testator had mortgaged part of his land in fee and the other for years; *the argument must go the length of saying that a testator, if he has only an equitable interest, can by no means make such a disposition as the plaintiff* (*u*) contends for." But is it so clear that the cases do not go the whole length of saying that a testator can by no means make such a disposition? that having an equitable estate only, and being, therefore, unable to give the ancestor a legal estate, and "the heir or heirs of the body" an equitable estate, or *vice versâ*, the law absolutely prevents him from giving the ancestor an estate of freehold, and his "heirs" or "heirs of the body" the inheritance by purchase (*x*)? If they

(*q*) See Lord *Hardwicke's* judgment in *Lethieullier* v. *Tracy*, as reported 1 Ken. 56.

(*r*) See Harg. Law Tracts, 562.

[(*s*) 4 D. M. & G. 574.

(*t*) Ante, p. 310.

(*u*) Who claimed under the limitation to the heirs of the body, by purchase, of G. H.

(*x*) Those cases are excluded where the testator shews that by "heirs" or "heirs of the body" he meant something different. This is, of course, a question of construction. Once admit that "heirs"

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[do not go this length, the rule in *Shelley's case* does not seem to exist as a rule otherwise than any rule of construction exists which Courts have established for their guidance in the interpretation of wills, where they cannot collect any definite intention on the part of the testator.]

Effect of contingent limitation to the heirs.

The rule in *Shelley's case* applies where the limitation to the heirs of the body is *contingent*. Thus, under a devise to A. and B. for their joint lives, with remainder to the heirs of the body of him who shall die first, the heir takes by descent (*y*).

Such limitation contingent, when.

It seems, however, that the mere possibility of the estate of freehold determining before the ancestor has heirs of his body (*i.e.* before his decease, since nemo est hæres viventis) does not render the limitation contingent. Thus, where (*z*) lands were limited to A. *during widowhood*, and, after her death, *to the heirs of her body* (in which case it is evident that, by the marriage of A., her estate would be determined before she could have any heirs of her body), Sir *W. Grant*, M. R., held, that an absolute estate tail was executed in her; and this accords with the resolution of the Judges in the early case of *Merrill* v. *Rumsey* (*a*).

Possibility of freehold determining in lifetime of ancestor.

The difference between these and the former cases is, that there the limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; but in the latter cases, the limitation is merely contingent by the application of a principle of law governing remainders; and when the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable, in the case of a devise to A. for the life of B., remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the circumstance of B., the cestui que vie, dying in the lifetime of A., and, consequently, before he has any heir of his body (*b*).

Limitation to heirs of tenant

It is essential to the operation of the rule in *Shelley's case*, that the heirs of the body should proceed from the person

[or "heirs of the body" were the objects of the limitation, and the authorities shew that the law pronounces upon the result of the limitation quite independently of, and even contrary to, an express direction. See Harg. Law Tracts, p. 551; ante, 311.

(*y*) Co. Lit. 378 b, and] see 1 Prest. Est. 316.

(*z*) *Curtis* v. *Price*, 12 Ves. 99.

(*a*) T. Ray. 126, 1 Keb. 888. But see 1 Sid. 247.

(*b*) See Perkins, s. 337; *Merrill* v. *Rumsey*, 1 Keb. 888, T. Ray. 126, Fea. C. R. 31.

taking the estate of freehold, and from that person only; for, if the devise be to A. for life, and after his decease, to the heirs of the body of A., *and of another person*, who might have a common heir of their bodies, it is a contingent remainder in tail to the heirs.

of freehold *and of another person.*

Thus, in *Gossage* v. *Taylor* (*c*), where the limitations were to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the heirs were held to take by purchase.

To wife for life, remainder to heirs of the bodies of husband and wife.

And the same construction prevailed in *Frogmorton* d. *Robinson* v. *Wharrey* (*d*), where S. surrendered copyholds to the use of M., his then intended wife, and the heirs of their two bodies lawfully to be begotten. [It will be observed that in the last case the limitation to the heirs was not expressed to be by way of remainder, nor was the estate of the wife limited expressly to a life estate.]

To wife and heirs of body of husband and wife.

It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails (*e*); for, as there could be no heir of their bodies until the death of both (nemo est hæres viventis), the failure of the particular estate before that period defeats the remainder (*f*).

But if, in such a case, the tenant for life and the other person to whose heirs the limitation is made are of the same sex, or being of different sexes, are not actually married, and are so related by consanguinity or affinity, that they cannot have, or be presumed to have, common heirs of their bodies, the effect is obviously different; for, as the testator cannot mean heirs issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A., the tenant for life, and to the heirs of the body of the other person respectively. The consequence is, that the former becomes, by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Distinction where there could not be joint-heirs of the bodies.

Pari ratione, if A. and B. were tenants in common for life,

Where

(*c*) Sty. 325.

(*d*) 3 Wils. 125, 144; 2 W. Bl. 728. See also *Lane* v. *Pannell*, 1 Roll. Rep. 238, 317, 438.

(*e*) *Lane* v. *Pannell*, 1 Roll. Rep. 238, 317, 438; *Anon.*, Dy. 99 b. [And the failure of a contingent remainder in this way is not prevented by the operation of the stat. 8 & 9 Vict. c. 106, s. 8, which only saves contingent remainders from failing by the *forfeiture*, *surrender* or *merger* of the previous estate, and does not apply where such previous estate determines by *efluxion of time*.

(*f*) See this rule adverted to, ante, Chap. XXVI.

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with remainder, as to the entirety, to the heirs of the body of A., A. would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.

ancestor is tenant in common of freehold.

Where the freehold is limited to husband and wife concurrently (and the same principle seems to apply in regard to persons capable, de jure, of becoming such), with remainder to the heirs of their bodies, the heirs, by the operation of the rule in question, take by descent (*g*). And the effect, it should seem, would be the same, if *successive* estates for life were limited to the husband and wife, or to persons capable of becoming such, with remainder to the heirs of their bodies (*h*).

Limitation to heirs of one joint-tenant of freehold;

Here it may be observed, that where there is a limitation to two persons jointly, with remainder to the heirs of the body of *one* of them, the disentailing assurance (now substituted for a common recovery) of the latter will acquire the fee-simple in a moiety (*i*). [Where these persons are husband and wife they are tenants by entireties; but the husband alone, without the concurrence of his wife, could formerly have conveyed the whole freehold and made a good tenant to the præcipe, and therefore could have barred the entail where the remainder was limited to the heirs of his body only. If the remainder was limited to the heirs of the body of both, both must have been vouched (*k*). But now by 3 & 4 Will. 4, c. 74 (*l*), where the husband is seised in right of his wife, the husband and wife together are the protectors of the settlement. But the case where husband and wife are tenants by entireties does not seem expressly provided for, though perhaps by a liberal interpretation it might be considered as included under the 23rd & 24th sections taken together.]

——where husband and wife are tenants by entireties.

Further observations on limitations of this nature.

Questions of this kind have most frequently occurred under limitations in marriage settlements, but they may of course

(*g*) See *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

(*h*) *Stephens* v. *Britridge*, 1 Lev. 36, T. Ray. 36. [And see 1 Preston Est. 336.]

(*i*) *Marquess of Winchester's case*, 3 Rep. 1.

[(*k*) *Cuppledike's case*, 3 Rep. 6; *Fitzwilliam's case*, 6 Rep. 32; Prest. Conv. vol. i. p. 55; but though the husband could make a good tenant to the præcipe, a recovery had against himself as tenant to the præcipe was bad, on the ground that the benefit of the recompense would not then enure to the proper parties; and it could not be good for a moiety, for the remainder depends on a joint and indivisible estate, which the husband could not sever. *Owen's case*, or *Owen* v. *Morgan*, And. 162, Moore, 210, 3 Rep. 5 a. See also *Green* d. *Crew* v. *King*, 2 W. Bl. 1211; *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 654; *Clithero* v. *Franklin*, 2 Salk. 568; 1 Prest. Conv. 58, 124.

(*l*) Sect. 24.]

arise under wills. In deciding on the application of the rule to such cases, the first object should be to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another, it seems the former will take an estate tail sub modo only (*m*). If from a person who takes an undivided estate in common, he will then, we have seen, take an estate tail to the extent of that undivided interest; but if the heirs of the body are to proceed from two persons as husband and wife, and *one* of them only takes an estate for life, the heirs will be purchasers.

Distinction between heirs *of* the body and heirs *on* the body to be begotten.

If the limitation is to husband and wife and the heirs to be begotten *on* the body of the wife by the husband, this will be an estate tail in both (*n*); for, as the heirs are not in terms required to be of the body of either in particular, the construction is the same as if they were to issue from *both*; and, accordingly, we have seen that where such a limitation occurred after an estate for life to the wife only, it was held, that she did not take an estate tail (*o*).

On the other hand, if the devise be to the wife for life, and then to the heirs *of* her body to be begotten by the husband, she takes an estate tail special, by force of the rule under consideration (*p*). The distinction, it will be perceived, is between heirs *on* the body and heirs *of* the body.

So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special (*q*). But if, in the former case, the estate for life had been limited to the *husband*, and, in the latter, to the *wife*, the heirs of the body would have taken by purchase.

Tenant in tail after possibility of issue extinct.

Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known, tenant in tail after possibility of issue extinct. In the case of *Platt* v. *Powles* (*r*), it was decided that such was the

(*m*) See Fea. C. R. 36.
(*n*) *Stephens* v. *Britridge*, 1 Lev. 36, T. Ray. 36;] *Denn* d. *Trickett* v. *Gillot*, 2 T. R. 431.
(*o*) *Gossage* v. *Taylor*, Sty. 325.
(*p*) *Alpass* v. *Watkins*, 8 T. R. 516.
[(*q*) *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.]
(*r*) 2 M. & Sel. 65.

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situation of the testator's widow, to whom lands were devised *for life, and after her decease to the heirs of her body by him,* at the expiration of the period during which she might have had issue by the testator, namely, nine or ten months after his death. During that time, issue being, in contemplation of law, possible (irrespective of age), and the devisee, therefore, being tenant in tail, she might have acquired the fee by means of a common recovery.

Rule considered in regard to executory trusts.

II. It has been already observed, that the rule in *Shelley's case* applies as well to equitable limitations as to legal estates. Mr. *Fearne* has laboured to establish this conclusion, in opposition to the case of *Bagshaw* v. *Spencer* (*s*), which was decided by Lord *Hardwicke,* on the ground of the difference of construction applicable to legal and equitable interests; a doctrine which has been overruled in a long series of cases (*t*), including a subsequent decision of this eminent Judge himself (*u*).

The preceding remarks, it should be observed, apply only to *executed* trusts; for between trusts *executed* and *executory* there is a very material difference, which requires particular examination.

Executory trust, what.

A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. As where a testator (*x*) devises real estate to trustees in trust *to convey* it to certain uses, or directs money to be laid out in land, *to be settled* to certain uses [which are indicated in imperfect or informal terms.] In these cases, the direction to convey or settle is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view.

Uses in strict

Thus, where a testator devises lands to trustees with a

(*s*) *Bagshaw* v. *Spencer,* 1 Ves. 142, 2 Atk. 246, 570, 577; see Fea. C. R. 124 et seq.

(*t*) *Bale* v. *Colman,* 2 Vern. 670, 1 P. W. 142; [*Papillon* v. *Voice,* 2 P. W. 471, 477;] *Wright* v. *Pearson,* 1 Ed. 119; *Austen* v. *Taylor,* ib. 361, Amb. 376; *Jones* v. *Morgan,* 1 B. C. C. 206. See also *Jervoise* v. *Duke of Northumberland,* 1 J. & W. 559, inf.; [*Reynell* v. *Reynell,* 10 Beav. 21.]

(*u*) *Garth* v. *Baldwin,* 2 Ves. 646.

(*x*) See Hayes's Inquiry, 248, 249 and 270.

settlement, when directed.

direction to settle them, or bequeaths a money fund to be laid out in the purchase of lands to be settled to the use of A. for life; *remainder to trustees during his life to preserve contingent remainders;* remainder to the heirs of the body of A. (limitations under which, if literally followed, A. would be tenant in tail, by force of the rule in *Shelley's case*), Courts of Equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made, vesting in the first taker an estate, which would enable him immediately to acquire the fee-simple by means of a disentailing assurance, execute the trust by directing a strict settlement, *i. e.* limitations to the use of A. for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail (*y*).

Settlement to be made on A. and the heirs of his body.

So, in *Leonard* v. *Earl of Sussex* (*z*), where lands were devised to trustees and their heirs for payment of debts and legacies, with a direction afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainders over; taking special care in *such settlement* that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties* (*a*):—it was held, that, in executing the settlement, the sons must be made only tenants for life, and should not have estates tail *conveyed* to them; but their estates for life should be without impeachment of waste, because here the estate was *not executed,* but only *executory,* and therefore the intent and meaning of the testatrix was to be pursued: she had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have if an estate tail were to be conveyed to them. And the Court took it to be as strong in the case of an *executory* (trust in a) devise, for the benefit of the issue, as if the like provision had been contained in marriage articles; but had the testatrix by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any

Direction that it should not be in his power to dock the entail.

(*y*) *Papillon* v. *Voice*, 2 P. W. 471. See also *Leonard* v. *Earl of Sussex*, 2 Vern. 526, post; *Earl Stamford* v. *Hobart*, 3 B. P. C. Toml. 31; *Lord Glenorchy* v. *Bosville*, Cas. t. Talbot, 3; *Ashton* v. *Ashton*, 1 Coll. Jur. 402; *White* v. *Carter*, 2 Ed. 366, Amb. 670; *Horne* v. *Barton*, Coop. 257.

(*z*) 2 Vern. 526.

(*a*) See observation infra.

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subsequent clause or declaration in the will, that they should not have power to dock the entail (*b*).

To convey to A. for life, without impeachment, &c., remainder to issue of her body.

So, in *Lord Glenorchy* v. *Bosville* (*c*) where the devise was to trustees and their heirs, in trust, till the marriage or death of A., to receive the rents and pay her an annuity for her maintenance, and as to the residue, to pay testator's debts and legacies, and after payment thereof in trust for A.; and if she married a Protestant, after her age, or with consent, &c., then *to convey* the estate after such marriage to the use of her *for life*, without impeachment of waste, remainder to her husband for life, remainder to the *issue of her body*, with remainders over: Lord *Talbot* held, that though A. would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust, being *executory*, was to be *executed in a more careful and more accurate manner;* and that a conveyance to A. for life, remainder to the husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

To be settled to A. and his issue in tail male.

Again in *White* v. *Carter* (*d*), where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise, unto and upon the trustees and their heirs upon trust, and to go for the use *of A. and his issue in tail male, to take in succession and priority of birth;* and there was a direction to the trustees to pay the dividends of the moneys until the purchase, to A. *and his sons* and issue male, Lord *Northington* decreed a strict settlement. [This decree was affirmed by Lord *Camden* upon a rehearing (*e*), who observed that the latter clause put it out of doubt; the testator had there explained his meaning by making use of the words, "sons and issue."

To be conveyed to A. for her separate use for life, and after her decease to the heirs of her body.

And in *Roberts* v. *Dixwell* (*f*), where a testator directed his trustees to convey lands in trust for the separate use of his daughter for her life, and so as her husband should not intermeddle therewith, and, after her decease, in trust for the heirs of her body, Lord *Hardwicke* held this to be an executory trust; and therefore, to prevent the husband becoming tenant by the curtesy (which he could not be consistently with the testator's intention that he should have no manner of benefit from the

(*b*) As to this, see ante, p. 17.
(*c*) Cas. t. Talb. 3. See also *Ashton* v. *Ashton*, 1 Coll. Jur. 525.
(*d*) 2 Ed. 366.
[(*e*) Amb. 670.
(*f*) 1 Atk. 607.

[estate), he decreed that the daughter should be made tenant for life only and not tenant in tail.

To be settled upon A. and his issue.

Again, in the case of *Parker* v. *Bolton* (*g*), where the testator devised lands to A. and directed him to settle them upon himself and his issue male by his lawful wife, and for want of such issue upon B. and his lawful issue, it was held by *Pepys*, M. R., that A. was tenant for life only.

To be settled on A., his heir and successors in the direct male line.

And in the recent case of *Shelton* v. *Watson* (*h*), the testator directed an estate "to be purchased and made *hereditary and settled upon* my here constituted heir, and *to descend to his heirs*, or dying without issue as I shall now provide, and I hereby constitute W. S. my heir and successor, and the said estate when purchased to be settled on him, his heirs and *successors in the direct male* line lawfully begotten. In case W. S. die without issue," a similar settlement was directed with respect to the two brothers of W. S. successively, the testator expressing his intent *that the estate should never pass out of his name and family.* Sir *L. Shadwell*, V. C., held, that W. S. and his brothers were to be made tenants for life only."]

Alleged distinction where testator himself declares uses of lands to be purchased.

But a distinction has been sometimes taken between the effect of a clause directing the trustees to purchase land, *and settle it*, as in *Papillon* v. *Voice*, and *White* v. *Carter*, and a direction to them simply to purchase, the testator himself declaring the uses of the land so to be purchased. Thus, in *Austen* v. *Taylor* (*i*), where the testator devised lands to A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A.; and bequeathed personal estate to be laid out in land, *which should remain, continue and be* to the same uses as the land before devised; Lord *Northington*, after observing, in reference to *Papillon* v. *Voice*, and *Leonard* v. *Earl of Sussex*, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held, that the case before him was distinguishable, inasmuch as the testator had referred to no settle-

[(*g*) 5 L. J. N. S. Ch. 98. Compare this case with *Seale* v. *Seale*, stated post. In *Sweetapple* v. *Bindon*, 2 Vern. 536, it does not appear to have been argued that the daughter ought to have taken only a life estate under the settlement. The two cases last stated in the text seem opposed to the subsequent decision of *Samuel* v. *Samuel*, 14 L. J. Ch. 222, 9 Jur. 222, where a testator directed that personalty should be settled on A. for the *sole* use of A. and her lawful issue, and Sir *L. Shadwell* held that A. was absolutely entitled. It is evident that if the subject of gift had been real estate, he would have held A. to be tenant in tail.

To be settled for the *sole* us of A. and her issue.

(*h*) 16 Sim. 542.]

(*i*) 1 Ed. 361, Amb. 376.

ment by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; accordingly, A. was to be tenant in tail in the lands to be purchased.

Disapproved by Lord *Eldon.*

This case is stated by Mr. *Ambler* to have been dissatisfactory to the profession, which is denied by Lord *Henley* (*k*); but Lord *Eldon* has spoken of the decision in terms which imply doubt of its soundness (*l*). His Lordship also observed, that the Judges who decided *Papillon* v. *Voice,* and *Austen* v. *Taylor,* agreed in the principle, but differed in the application of it. The distinction upon which the latter case is founded (or at least is usually supposed to be founded), certainly has not been invariably adopted; for in *Meure* v. *Meure* (*m*), where lands were devised to trustees in trust to sell, who with the money arising from the sale were to purchase other freehold lands, or some stock in the public funds, and then to permit A. and his assigns to receive the interest and profits for his life, and after his decease to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land if unsold, or such other lands as should be purchased, *during his natural life,* and after his decease, then in trust *for the use of the issue of the body of the plaintiff, lawfully begotten,* and, in default of such issue, over; Sir *J. Jekyll,* M. R., held, that in executing the trust, lands should be purchased, *and the plaintiff made tenant for life only.*

Disregarded in certain cases.

Devise of lands to be purchased to A. for life, remainder to his issue.

Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly have made A. tenant in tail (*n*), and yet he was held to be tenant for life only.

Devise of lands to be purchased to A. and the heirs male of his body.

So, in *Harrison* v. *Naylor* (*o*), where the testator directed his executors to purchase a freehold estate, and *gave and devised* such estate, when purchased, to A., to him and the heirs male of his body for ever; and if A. should die without issue male, then *he gave and devised* the said estate to the heir male of his (testator's) daughter E., but if E. had no issue, then he gave and

(*k*) See note, 1 Ed. 369.

(*l*) See *Green* v. *Stephens,* 17 Ves. 76; *Jervoise* v. *Duke of Northumberland,* 1 J. & W. 574.

(*m*) 2 Atk. 265. [See *Hadwen* v. *Hadwen,* 23 Beav. 551, sed qu. the issue ought to have taken an estate in fee, *Strutt* v. *Braithwaite,* 5 De G. & S. 369.]

(*n*) See post, Chap. XXXIX.

(*o*) 2 Cox, 247.

devised the said estate, on a certain condition, to his (testator's) next heir-at-law: and reciting that he was not certain whether it was possible to entail an estate not yet purchased, he directed his executors to consult some eminent lawyers; and if they held, that such entail as was expressed in the will was repugnant to law, then his personal estate should be equally divided between T. and E.: Lord *Thurlow* said it was impossible to argue against A.'s having an estate tail, and that the money must be invested (in lands to be settled) to the use of A. and the heirs of his body, with a contingent remainder in tail to the person who should answer the description of heir male of E. at the time of her death, with remainder to the right heir of the testator; but counsel suggesting that, as this was an *executory trust*, the Court would interpose, after the estate tail to A., a limitation to trustees to preserve the contingent remainder to the heir male of E., the daughter, his Lordship was of opinion that such a limitation should be inserted; and declared that the uses were to be to A. and his heirs in tail male, *with remainder to trustees to support contingent remainders*, remainder to the heirs male of E., the daughter, in fee; and if she should have no heirs male, then to the heir at law of the testator in fee.

Trust executed by simply interposing trustees to preserve contingent remainders.

By interposing the estate in the trustees, Lord *Thurlow* evidently treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, therefore, the case is another authority against *Austen* v. *Taylor*, of which, however, it may be observed, that to have made A. tenant for life only of the lands to be purchased, would have created a diversity between them and the lands devised, which the testator evidently intended should be held together. This distinguishes the case from and reconciles it with those just stated.

But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires, that to warrant the introduction of limitations in strict settlement, it should be indicated by the context that the testator did not intend an estate tail to be created, according to the technical effect of the expressions used.

Indication that testator did not intend an estate tail, required.

Thus, in the case of *Seale* v. *Seale* (*p*), where a testator bequeathed money to be laid out in the purchase of lands, to be

Direction to settle on A. and the heirs of his body.

(*p*) Pre. Ch. 421, 1 P. W. 290.

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settled *on A. and the heirs male of his body,* Lord *Cowper* held that A. was absolutely entitled to the money not laid out; and, though it was suggested that the Court would order a strict settlement, his Lordship observed, that in marriage articles the children are considered as purchasers, but in the case of a will (as this was) where the testator expresses his intent to give an estate tail, a Court of Equity ought not to abridge the bounty given by the testator.

Trust for A. and to convey to her heirs.

[Again, in the case of *Jackson* v. *Noble* (*q*), the trust was for the separate use of a feme covert for life, and after her decease *to convey* to her heirs, executors, and assigns, and it was held that she took absolutely.]

This principle was carried to a great length in the case of *Blackburn* v. *Stables* (*r*), where the testator devised the remainder of his real and personal estate in trust to his nephew J., and to M., his executor, for the sole use of a son of the said J., at the age of twenty-four; if he had no son, to a son of testator's great-nephew J.; but if neither of those had a son, then to a son of testator's great niece's daughter E., with a direction to take his (testator's) name: but on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust *till a proper entail were made to the male heir by him* (the person so being entitled). J., the nephew, had no son born at the testator's death, but his wife was then enceinte with a son, who was afterwards born, and attained twenty-four: Sir *W. Grant,* M. R., observed, that "it is settled that the words 'heir,' or 'heir male of the body,' in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to shew that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected; there is an absence of every circumstance that has commonly been relied on as shewing such an intention. The word is 'heir,' not '*issue.*' There is *no express estate for life* given to the ancestor; no clause that the estate shall be *without impeachment of waste; no limitation to trustees to preserve contingent remainders;* no direction so to frame the limitation that the first

That a "proper entail be made to the male heir."

[(*q*) 2 Kee. 590.] (*r*) 2 V. & B. 367.

taker shall not have the power of barring the entail. Everything is wanting that has furnished matter for argument in other cases: the words are therefore to be taken in their legal acceptation, and the son of J. is entitled to have the conveyance made to him *in tail male.*

Estate tail directed.

So, in the subsequent case of *Marshall* v. *Bousfield* (*s*), where a testator devised to his wife and her heirs, upon trust, that she should enjoy the estates during her life, and, after her decease, that the same *should be settled by able counsel,* and go to and amongst the grandchildren of the male kind, *and their issue in tail male,* and for want of such issue, upon his female grandchildren who should be living at his decease; but the testator declared that the shares and proportions of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs for ever. The wife appointed in favour of the testator's grandson W., and the heirs male of his body. It was objected that this was an executory trust, under which W. would be made tenant for life, with remainder to his issue in strict settlement: but Sir *T. Plumer,* V. C., held, that the words "in tail male" applied to the grandchildren, and that no language was used which had been held in other cases to give only an estate for life. He observed, that unless the grandchildren took an estate tail, the limitation, so far as regarded a grandson who was born after the testator's death, would be void, as being too remote (*t*).

To be settled upon grandchildren and their issue in tail male.

The latter circumstance constitutes a peculiarity in this case, which otherwise afforded strong arguments in favour of a strict settlement. The estate was to be settled *by able counsel* (*u*), and the word was *issue,* not heirs of the body (*x*). Confidence in the case, too, is weakened by the fact, that another determination of the same Judge on a question of this nature has been impeached (*y*).

Remark on *Marshall* v. *Bousfield.*

The reader should suspend any conclusion he may be disposed to draw from the two preceding cases of *Blackburn* v. *Stables,*

(*s*) 2 Mad. 166.

(*t*) But there was ground to contend that, as the limitation to the female grandchildren was confined to those living at his death, the same construction might be given to the gift to the *male* grandchildren.

(*u*) See *White* v. *Carter,* 2 Ed. 366, Amb. 670; *Bastard* v. *Proby,* 2 Cox, 6.

(*x*) See judgment in *Meure* v. *Meure,* 2 Atk. 265. And *Blackburn* v. *Stables,* 2 V. & B. 367, ante, p. 324.

(*y*) See *Jervoise* v. *Duke of Northumberland,* 1 J. & W. 559.

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and *Marshall* v. *Bousfield,* until he has carefully weighed them with Lord *Eldon's* decision in the subsequent case of *Jervoise* v. *Duke of Northumberland* (*z*), where the words were, "To my son R. I leave all my estates at" B., &c., "*to be entailed upon his male heirs;* and, failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* each to be raised upon the estates for female children. The above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estates at M. to be sold, in order to raise money for the above-named legacies, and what falls short to be raised or charged on the other property at" B., &c. The legal estate was not in the testator. In a suit for declaring the right of all parties, Sir *T. Plumer,* V. C., decreed, that R. was entitled to an *estate tail.* The estate was afterwards settled on the marriage of R., and was purchased by the Duke of *Northumberland,* under a power of sale in the settlement; but his grace objecting to the title, a bill was filed to enforce specific performance. It was contended for him that the trust was merely directory, and that the Court, in executing it, would mould the limitations in the nature of a strict settlement; and Lord *Eldon* thought the contrary so doubtful, that he could not compel a purchaser to take the title. His Lordship, indeed, expressed a strong opinion that the trust was directory; and his observations leave us not much room to doubt that, if called upon to execute it, he would have decreed a strict settlement, and not have given R. an estate tail.

Devise to R. *to be entailed* upon his male heirs.

Not a clear estate tail in R.

As to giving tenants in tail power to charge.

Lord *Eldon* in this case intimated that he did not think that the circumstances of the power being given to the devisee to charge a sum of money on the estate was a conclusive argument that he was to be only tenant for life, since, in many cases, powers are usefully given to a tenant in tail, enabling him to do certain acts more conveniently than by destroying the entail.

Distinction between marriage articles and wills.

Most of the cases of this kind have arisen on marriage articles (*a*), to which the same principles are applicable as to executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a

(*z*) 1 J. & W. 559.
(*a*) See Fea. C. R. 90; 1 Prest. Est. 354.

presumption of intention in favour of the issue, which does not belong to wills; and Lord *Eldon*, in the last case (*b*), intimated, that the observations imputed to him in *Countess of Lincoln* v. *Duke of Newcastle* (*c*), were to be received with this qualification (*d*).

General observations upon the cases.

The preceding cases do not clearly demonstrate the precise ground, on which Courts of Equity will execute a trust of the nature of those under consideration, by the insertion of limitations in strict settlement. It has sometimes been thought that the principle extends to every case in which the testator has left *anything to be done;* and that the Court only requires it to be shewn that the trust is executory, in order to mould the limitations in this manner. Some of Lord *Eldon's* observations in *Jervoise* v. *Duke of Northumberland*, have been supposed to go to this length (*e*); and perhaps it is difficult to place the doctrine, consistently with the liberty which has been taken with the testator's expressions, upon a narrower basis (*f*); but, in the actual state of the decisions, it is too much to hazard a general position of this nature. No case has yet determined that a trust, *in a will*, to settle lands simply on A. and the heirs of his body, authorizes the Court to limit estates in strict settlement. [On the contrary, it has been repeatedly laid down, that a direction to *convey* lands to certain uses does not create an executory trust. On this point it has been observed by Lord *St. Leonards* (*g*), that "all trusts are in a sense executory, because a trust cannot be executed, except by conveyance, and therefore there is something always to be done. But that is not the sense which a Court of Equity puts upon the term 'executory trusts.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner;—Has the testator been what is called his own conveyancer? Has he left it to the Court to

Mere direction to convey does not make a trust executory.

(*b*) 1 J. & W. 571, 574.

(*c*) 12 Ves. 227, 230.

(*d*) See *Rochford* v. *Fitzmaurice*, 1 Conn. & L. 158, 2 D. & War. 1.

(*e*) See Hayes's Inq. 262, n.

(*f*) If the Courts are bound to require an indication that the testator intended only an estate for life, would it not seem that by parity of reason they are obliged to adhere to the testator's language, *ultra* this object, provided the will contain no further evidence that he does not mean an estate tail, *i. e.* by giving the ancestor an *equitable* freehold, and the heirs a *legal* remainder, thus making the heirs purchasers? Their not having done this certainly affords an argument in favour of the hypothesis suggested.

[(*g*) *Egerton* v. *Brownlow*, 4 H. of L. Ca. 210, 23 L. J. Ch. 406, 18 Jur. 104; and see *East* v. *Twyford*, 9 Hare, 733; *Herbert* v. *Blunden*, 1 D. & Wal. 90; *Randall* v. *Daniell*, 24 Beav. 193; *Doncaster* v. *Doncaster*, 3 Kay & J. 35.]

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[make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates?"] The case of *Leonard* v. *Earl of Sussex*, it is true, had only the additional circumstance of a direction that it should not be in the power of A. to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend (*h*), "that this rather weakened than strengthened the presumption, that the testator intended A. to be merely tenant for life;" the direction seeming rather to import that A. was to take an estate tail, without the power of docking it. The case, however, was decided, and has been since generally referred to, as standing upon this ground; and, it is to be observed also, that the case of *Seale* v. *Seale* (*i*) is a direct authority against applying the doctrine to the simple case suggested.

Whether a direction to settle on A. for life, remainder to the heirs of his body, authorizes a strict settlement.

Indeed some Judges have denied its application even to the case of a direction to settle lands upon A. *for life*, and, after his death, to the heirs of his body. Such was the opinion expressed by Sir *J. Jekyll*, in *Meure* v. *Meure* (*k*), though he decided that a different construction was to be given to the word "issue;" [but, as we have seen, Sir *W. Grant*, in *Blackburn* v. *Stables*, in denying the applicability of the doctrine to that case, relied on the absence of all the clauses which had generally furnished matter for argument, as a declaration that the estate should be for life, that it] should be without impeachment of waste, and that there should be a limitation to trustees to preserve contingent remainders. A distinction [however, founded on declarations, such as either or both of the two last-mentioned,] is certainly very refined. How can a testator intimate that he intends the object of the trust to be tenant for life more strongly than by expressly so limiting the estate? If the rule in *Shelley's case* be objected as destroying that inference of intention, the answer is, that neither of the other circumstances, to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more

(*h*) Hayes's Inq. 262, n.

(*i*) 1 P. W. 132, ante, 323. See also *Sweetapple* v. *Bindon*, 2 Vern. 536; [*Harrison* v. *Naylor*, 2 Cox, 247; *Maryat* v. *Townly*, 1 Ves. 102; *Randall* v. *Daniel*, 24 Beav. 193.]

(*k*) 2 Atk. 265, ante, 322.

reasonable) doctrine, that a direction to settle authorizes the Court to adopt its own mode of settlement, without regard to the particular force of the terms used by the testator, and requires *distinct indication of intention* that the testator did not mean that the legal effect of those terms should be followed, yet even upon this principle the case under consideration would warrant the Court in moulding the limitations.

Affirmative established by *Bastard* v. *Proby*.

In fact, the case of *Bastard* v. *Proby* (*l*), is a direct authority in favour of the affirmative. A testator devised lands to trustees, in trust to lay out the rents for the benefit of his daughter J. until twenty-one or marriage; and, on her attaining that age, directed that the trustees should, *as counsel should advise, convey, settle and assure* the lands unto or to the use of, or in trust for, the said J. *for her life*, and, after her death, then *on the heirs of her body* lawfully issuing; and Sir *Lloyd Kenyon*, M. R., directed that conveyances should be executed limiting uses in strict settlement.

Observations upon *Blackburn* v. *Stables*.

Where the testator, instead of employing technical terms, as in the cases just noticed, expresses himself in very brief informal language, by directing *an entail to be made*, as in *Blackburn* v. *Stables*, and *Jervoise* v. *Duke of Northumberland*, it is useless to look for a specification of particulars, as that the devisee shall be tenant for life, &c.; the general indefinite nature of the testator's language forbids it: he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer receiving instructions for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which Courts of Equity proceed in the execution of directory trusts is not very widely different. Considering Lord *Eldon's* determination, in *Jervoise* v. *Duke of Northumberland*, and more especially the doctrines advanced by him in his elaborate judgment in that case, it seems unsafe to rely on *Blackburn* v. *Stables*, to which it is extraordinary that his Lordship, in his comment upon the cases, makes no allusion (*m*).

(*l*) 2 Cox, 6; [and see *Hodgeson* v. *Bussey*, 2 Atk. 89; *Sands* v. *Dixwell*, cit. 2 Ves. 652.]

(*m*) See further, as to executory trusts, Fea. C. R. 113; Prest. Est. 387; 1 Sand. Uses, 310; 1 Fonbl. Eq. 407, n.; Hayes's Inq. 264, where see strictures upon the observations of the other writers referred to. Lord *Eldon*, in *Jervoise* v. *Duke of Northumberland*, intimated his

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Effect of direction to make "strict entail."

[Where lands are directed to be settled on A. and his heirs *in strict entail*, there seems little doubt that A. ought to be made tenant for life only (*n*). But though the Court of Chancery will, of course, carry out any specific directions for a settlement which can be legally made, yet, however strongly the testator may express his wishes in general terms, the Court will not, in order to tie up the estate for a longer period, deviate from the usual plan of making the first taker tenant for life with remainder to his sons successively in tail male, nor will it appoint any person protectors of the settlement (*o*). And the Court has no power under an executory trust to insert limitations giving an interest to persons not pointed at by the will, nor to add powers not authorized by the testator, however usual such limitations or powers may be in settlements of a like nature (*p*).]

Usual limitations not deviated from.

Nor protectors appointed.

Trust in terms partly direct and partly executory.

It is clear, that where a testator devises real estate to trustees upon trusts, and then directs, that, in certain events, they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying to the former that liberality of construction which is peculiar to trusts of this nature (*q*).

Practical bearings of the rule in *Shelley's case*.

III. It may be useful, as supplementary to the preceding discussion of the rule in *Shelley's case*, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shewn by suggesting a case of each kind. Suppose, then, a

assent to the conclusions of Mr. *Fearne* on the subject of executory trusts, which is one of the many tributes of respect paid to the labours of this very eminent writer by those whose profound knowledge of the laws of real property enabled them to appreciate those labours. [See also *Stonor* v. *Curwen*, 5 Sim. 264; *Boswell* v. *Dillon*, 1 Dru. 291. The case of *Coape* v. *Arnold*, 4 D. M. & G. 574, stated ante, p. 310, may be here referred to, where, though there was no direction to convey, Lord *Cranworth*, C., considered that the trustees were bound, after executing the trusts of the codicil, to convey the estates to the same uses exactly (i. e. verbatim) as those contained in the will; but he said he did not come to this conclusion on any distinction between trusts executory and executed. It is not easy to reconcile the grounds of his decision with the latter statement, unless he considered that there being two degrees (as they have been styled) of equitable estates made a difference; as to which, see, however, *Nouaille* v. *Greenwood*, T. & R. 26.

(*n*) *Graves* v. *Hicks*, 11 Sim. 536; *Woolmore* v. *Burrows*, 1 Sim. 526.

(*o*) *Bankes* v. *Le Despencer*, 11 Sim. 508; but see *Woolmore* v. *Burrows*, 1 Sim. 527.

(*p*) *Fullerton* v. *Martin*, 1 Drew. & Sm. 31.]

(*q*) *Franks* v. *Price*, 3 Beav. 182.

As to lapse.

devise *to A.* for life, remainder to the heirs of his body; and suppose another devise to the use of *trustees for the life of B.*, in trust for B., remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the heirs of his body can claim only derivatively through him by descent per formam doni, and, therefore, if A. die in the lifetime of the testator, the heir (unless the will were made or republished subsequently to 1837) takes nothing, the devise to his ancestor having lapsed (*r*).

On the other hand, in the latter supposed case, if B. should die in the testator's lifetime, it would not affect his heir, who claims, not derivatively through his ancestor, but originally in his own right by purchase; and who would, therefore, be entitled under the devise, notwithstanding his ancestor's death in the lifetime of the testator. The estate tail would go by a sort of quasi descent (*s*) through *all* the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker (and which issue would claim by descent), and then devolving upon the collateral lines; the head of each stock or line of issue claiming as heir of the body of the ancestor by purchase, but taking in the same manner as such heir would have done under an estate tail vested in the ancestor.

As to dower and curtesy.

Another difference to be observed is, that where the heir takes *by descent*, the property, if in possession, devolves upon him, subject to the dower of the widow of his ancestor, if he were married at his death (provided, in regard to the dower of a widow, whose marriage was prior to or on the 1st of Jan. 1834 (*t*), his estate were *legal*, and not equitable only), or subject to curtesy, if the ancestor were a married woman, who left a husband by whom she had had issue born alive, *capable of inheriting*, and which attaches whether the estate be legal *or* equitable. On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

Alienation by an enrolled conveyance.

And, lastly, if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor by means of a

(*r*) *Brett* v. *Rigden*, Plow. 340; *Hartop's case*, Cro. El. 243; *Hutton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Dougl. 337, 3 B. P. C. Toml. 416; *Wynn* v. *Wynn*, ib. 95; *Warner* v. *White*, ib. 435; [*Goodright* v. *Wright*, 1 P. W. 397; *Fuller* v. *Fuller*, Cro. El. 422.] The abstract prefixed to *Warner* v. *White* is singularly inaccurate.

(*s*) *Mandeville's case*, Co. Lit. 26 b. See Fea. C. R. 80.

(*t*) Stat. 3 & 4 Will. 4, c. 105.

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conveyance enrolled, now substituted for a common recovery, the right to make which is, we have seen, an inseparable incident to an estate tail (*u*). On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts [might, previously to the statute 8 & 9 Vict. c. 106 (*v*),] have happened to destroy the contingent remainder of such heir, if not supported (as it always should [have been]) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in *Shelley's case*, under a limitation to the heirs of his body, not *immediately* expectant on his estate for life, had no effect upon the mesne estates, unless they happened to be legal remainders, contingent and unsupported. Thus, in the case of a limitation to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A., with remainders over; A., being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening estate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons, in which case, such remainders being contingent, would, [previously to the passing of the statute before referred to, have] clearly [been] destroyed. [That statute puts it out of the power of the owner of the preceding estate of freehold to destroy the contingent remainders depending thereon.]

Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs.

Further points suggested.

It may be useful to illustrate the practical consequences of a limitation of another description. Suppose a devise to A. and B. *jointly* for their lives, remainder to the heirs of their bodies; if they were *not* husband and wife (or, it would seem, persons who may lawfully marry), they would be *joint*-tenants for life, with *several* inheritances in tail (*x*). An enrolled conveyance by either would acquire the fee-simple in an undivided moiety, and they would thenceforward be tenants in common: by parity of reason, a similar conveyance by both would comprise the entirety.

If the limitations were to them *successively* for life, A. would be tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B.'s estate for life, and B.

(*u*) Ante, p. 17.
[(*v*) See sect. 8.
(*x*) See Lit. sect. 283; *Ex parte Tanner*, 20 Beav. 374.

would be tenant for life in remainder of one moiety, and tenant in tail in remainder of the other moiety. A. being tenant in tail in possession, might make a disentailing assurance, which would give him the fee-simple in a moiety of the inheritance, but would not, as before shewn, affect B.'s estate for life in remainder in that moiety. B., on the other hand, having no immediate estate of freehold, could not during the life of A., and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A. and B. might conjointly convey the absolute fee-simple in the entirety.

Under a devise to A. and B. jointly for their lives, with remainder to the heirs of their bodies, A. and B., being persons who might lawfully marry, would be joint-tenants in tail; if actually husband and wife, they would be tenants in tail by entireties (*y*). In the former case, each might acquire the fee-simple in his or her own moiety, by making a disentailing assurance thereof; but, in the latter case, the concurrence of both would be essential, on the ground of the unity of person of husband and wife (*z*), and the deed of course must be acknowledged by the wife. In each of the suggested cases, if the estate remained unchanged at the decease of either of the two tenants in tail, it would devolve to the survivor, according to the well-known rule applicable as well to joint-tenancies as tenancies by entireties.

[(*y*) Co. Lit. 187 b.
(*z*) See *Green* d. *Crew* v. *King*, 2 W. Bl. 1211.]

# CHAPTER XXXVII.

## WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

I. *Superadded Words of Limitation.*
II. *Words of Modification inconsistent with the Devolution of an Estate Tail, [with or without Words of Limitation superadded.]*
III. *Clear Words of Explanation.*

Effect of context in controlling "heirs of the body."

I. It has been already shewn, that a devise to A. and to the heirs of his body (*a*), or to A. *for life*, and, after his death, to the heirs of his body (*b*), vests in A. an estate tail. On a devise couched in these simple terms, indeed, no question can arise; for wherever the contrary hypothesis has been contended for, the argument for changing the construction of the words has been founded on some expressions *in the context;* as where words of limitation are superadded to the devise to the heirs of the body; the effect of which has been often agitated, and will here properly form the first point for inquiry.

Similar limitation superadded.

Where the superadded words amount to a mere repetition of *the preceding words of limitation*, they are, of course, inoperative to vary the construction. Expressio eorum quæ tacite insunt nihil operatur.

Thus, in *Burnet* v. *Coby* (*c*), where a testator devised lands to A. for life, and, after his decease, to the heirs male of the body of A., *and the heirs male of such issue male*, it was held, that A. had an estate tail, [and the settled distinction was said to be that where, after a limitation to the ancestor, the word "heir" is in the *singular* number, and a limitation made to the issue of such heir, the word heir is considered as a word of purchase (*d*), and a descriptio personæ; but wherever the word "heirs" is in the *plural* number, and a limitation made to the issue of such

(*a*) Ante, p. 298.
(*b*) Ante, p. 306.
(*c*) 1 Barn. B. R. 367. See also *Shelley's case*, 1 Rep. 93; [*Minshull* v. *Minshull*, 1 Atk. 411;] *Legatt* v. *Sewell*, 2 Vern. 551, 4 Eq. Ca. 394, pl. 7, 1 P. W. 87, cit. 2 Ves. 657, where the trust was *executory*, and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See ante, p. 318.
[(*d*) See ante, p. 299.]

[heirs, the word heirs is considered as a word of descent and not of purchase.]

Construction not varied by superadded limitation to *heirs general* of heirs of the body.

It is also well established that a limitation to the *heirs general* of the heirs of the body, is equally ineffectual to turn the latter into words of purchase.

Thus, in the case of *Goodright* d. *Lisle* v. *Pullyn* (*e*), where a testator devised lands to N. for life, and, after his decease, then he devised the same unto *the heirs male of the body* of N., lawfully to be begotten, *and his heirs for ever;* but if N. should happen to die without such heir male, then over; the Court was of opinion that the devise vested an estate tail in N. A similar decision was made by the Privy Council on a similar devise (*f*).

So, in *Wright* v. *Pearson* (*g*), where the devise was to R. and his assigns for his life, remainder to trustees to support contingent remainders, remainder to the use of *the heirs male of the body* of R., lawfully to be begotten, *and their heirs;* provided that in case R. should die without leaving any issue male of his body living *at his death*, then the testator subjected the premises to certain charges, and, in default of such issue male of R., he devised the premises to certain grandchildren, or such of them as should be living at the time of the failure of issue of R.; Lord Keeper *Henley* held it to be an estate tail in R.

Again, in *Denn* d. *Geering* v. *Shenton* (*h*), where the testator devised lands to S. to hold to him and *the heirs of his body* lawfully to be begotten, *and their heirs for ever*, chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of 100*l.* to A. *within one year after W. or his heirs should become possessed of the premises.* It was contended, on the authority of *Doe* v. *Laming* (*i*), that the words *heirs of the body* might be words of purchase, with these superadded words of limitation, and that this construction was much strengthened by the circumstance of the legacy of 100*l.*,

(*e*) 2 Ld. Raym. 1437, 2 Stra. 729.

(*f*) *Morris* d. *Andrews* v. *Le Gay*, noticed 2 Burr. 1102, and 2 Atk. 249, and more fully and somewhat differently stated under the name of *Morris* v. *Ward*, by Lord *Kenyon*, 8 T. R. 518.

(*g*) 1 Ed. 119, Amb. 358, Fea. C. R. 126, where the case is very fully commented on. See also *Alpass* v. *Watkins*, 8 T. R. 516; [*Marshall* v. *Grime*, 29 L. J. Ch. 592.]

(*h*) Cowp. 410. See also *Alpass* v. *Watkins*, 8 T. R. 516.

(*i*) 2 Burr. 1100, as to which, see post.

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which must have referred to a dying without issue at the death, and not to an indefinite failure of issue, which might happen a hundred years thence. But Lord *Mansfield*, and the rest of the Court of King's Bench, held it to be a clear estate tail in S.

Even if the devise over had been made in express terms to depend on the prior devisee leaving no issue *at the time of his death*, this would not, according to the case of *Wright* v. *Pearson* (*k*), have prevented the *prior* devisee taking an estate tail.

So, in *Measure* v. *Gee* (*l*), where the devise was to J. for his life, remainder to trustees to preserve contingent remainders, and, after the decease of J., the testator devised the premises to *the heirs of the body* of J. lawfully to be begotten, *his, her, and their heirs and assigns for ever*; but in case there should be a failure of issue of J. lawfully to be begotten, then over. It was contended, that the early cases on this subject had been shaken by modern decisions; but the Court of King's Bench considered them to be irrelevant (*m*), and held, that the devise vested an estate tail in J.

Nor by interposition of estate to preserve contingent remainders.

This case, as well as *Wright* v. *Pearson*, shows that the interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

The next case in order is *Kinch* v. *Ward* (*n*), where a testator devised freehold and leasehold lands to trustees, in trust to permit his son T. to receive the rents for his life, and, after his decease, the testator devised the same to *the heirs of the body* of his said son lawfully begotten, *their heirs, executors, administrators and assigns for ever*; but in case he should die without issue, then over. It was assumed, in the discussion of another question, that the devise of the freehold lands vested in T. an estate tail.

As to heirs of the body being directed to assume testator's name.

And it is clear, that the circumstance of the heirs of the body being directed to assume the testator's name does not constitute a ground for varying the construction, although the effect is, by enabling the ancestor to acquire the fee-simple, to place within his power the means of rendering the injunction

(*k*) Ante, p. 335.

(*l*) 5 B. & Ald. 910. See also *King* v. *Burchell*, 1 Ed. 424; *Denn* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 548, where the word was *issue*, as to which see post.

(*m*) The only case cited in *Measure* v. *Gee*, which afforded a shadow of opposition to the principle of the cases in the text was *Doe* v. *Goff*, 11 East, 668, which had other circumstances, and has been, as we shall presently see, itself overruled by the highest authority, post.

(*n*) 2 S. & St. 411.

nugatory (*o*); this being, in fact, merely one of the consequences which a testator does not usually intend or foresee, when he employs words that, in legal construction, make the first taker tenant in tail, and which consequences, whether apprehended or not, do not authorize the testator's judicial expositor to divert his bounty into another channel, by giving to his language a strained construction, which would make it apply to a different class of objects.

Thus, in the case of *Nash* v. *Coates* (*p*), where a testator devised lands to trustees, and the survivor of them, and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age and taking that name, habendum to him for life; and *from and after his decease,* to hold to the trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the *heirs male of F. W.,* taking the testator's name, *and the heirs and assigns of such male issue for ever;* but in default of such male issue, then over. It was held, that the trustees did not take the legal estate in the lands devised (*q*), but that F. W. had a legal estate tail in them on his coming of age and adopting the testator's surname.

Result of the cases.

Down to the very latest period then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee, annexed to *heirs of the body,* to control their operation. The only remark suggested by the recent decisions is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions; and our surprise is greatly increased, when, in such a state of the authorities, we find [two] distinguished Judges attempting to found a distinction between the two cases, on the mere existence in one, and the absence in the other, of superadded words of limitation (*r*).

(*o*) Such a condition, too, if imposed on a person taking an estate tail by purchase, would (unless made a condition precedent) be liable to be defeated by an enrolled conveyance, which, like a common recovery, destroys all estates limited in defeazance of, as well as those which are made to take effect after the determination of the estate tail.

(*p*) 3 B. & Ad. 839. [See also *Toller* v. *Attwood,* 15 Q. B. 929, stated post.]

(*q*) On this subject, see ante, p. 294.

(*r*) See judgment in *Doe* d. *Bosnall* v. *Harvey,* 4 B. & Cr. 623, [and *Montgomery* v. *Montgomery,* 3 Jo. & Lat. 52; and see observations on the last case, post.

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Distinction where the words of limitation change the course of descent.

But it seems, that if the superadded words of limitation *operate to change the course of descent,* they will convert the words on which they are engrafted into words of purchase; as in the case of a devise to a man for life, remainder to his *heirs* and the *heirs female* of their bodies (*s*). And the same principle of course would apply where a limitation to the heirs *male* of the body is annexed to a limitation to the heirs *female,* and vice versâ; but the books contain no such case, and the doctrine rests entirely on the position arguendo of *Anderson,* in *Shelley's case,* which, however, has been since much cited and recognized.

Position of Mr. Preston examined.

An eminent writer has laid it down (*t*) "that as often as the superadded words are included in, and do *not* in their extent *exceed* the preceding words; but the words *heirs, &c.*, in the several parts of the gift are in terms, or at least in construction of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be words of limitation."

The position, that the preceding words are words of limitation where the superadded words do *not* exceed them, seems to be the reverse of the established rule (*u*); the very case put by *Anderson,* as an instance of their being words of purchase, is one in which the superadded words *narrowed* the preceding words; and, on the other hand, we have seen that, in all the cases in which the superadded words have been held to be inoperative, they have been either equal to, or more extensive than, the words of limitation upon which they were engrafted (*x*).

Effect of superadded words of modification inconsistent with an estate tail.

II. We next proceed to inquire as to the effect of coupling a limitation to *heirs of the body* with words of modification importing that they are to take concurrently or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words "*share and share alike,*" or "*as tenants in common,*" or "*whether sons or daughters,*" or "*without regard to seniority of age or priority of birth.*" In such cases, the great struggle has been to determine, whether the superadded words are to be treated as explanatory

(*s*) Per *Anderson,* in *Shelley's case,* 1 Rep. 95 b.

(*t*) 1 Preston on Estates, 353.

[(*u*) And see Fea. C. R. 183. But see *Hamilton* v. *West,* 10 Ir. Eq. Rep. 75, stated post.]

(*x*) See ante, pp. 334, 335.

of the testator's intention to use the term *heirs of the body* in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, [even where words of limitation are superadded to words of modification,] and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in permitting words of a clear and ascertained signification to be cut down by expressions, from which an intention equally definite could not be collected. The inconsistent clause shews only that the testator intended the heirs of the body to take in a manner, in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation is to sacrifice the main scope of the devise to its details. The Courts have, therefore, wisely rejected the construction which reads heirs of the body with such a context as meaning *children*, and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in heirs of the body, yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach (as grandchildren and more remote descendants); to say nothing of the difference in the *order* of its devolution.

Expressions superadded to the limitation "to heirs of the body."

This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decision and dicta which can be adduced.

Thus, in the case of *Doe* d. *Candler* v. *Smith* (*y*), where a testator devised his freehold lands to his daughter A., and *the heirs of her body* lawfully to be begotten, for ever, *as tenants in common, and not as joint-tenants;* and in case his said daughter

"For ever as tenants in common, and not as joint-tenants."

(*y*) 7 T. R. 532. It should be stated that the reader will not find in this and some of the other cases of the same class any distinct recognition of the principle stated in the text; but as that principle is sanctioned by the later cases, and affords a more intelligible and definite guide than the doctrine of general and particular intention on which some of these decisions proceed, the writer has felt himself authorized to rest them on the former ground. An able and extended examination of most of the cases stated in this chapter may be found in Mr. Hayes's "Inquiry."

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should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord *Kenyon* and the other Judges of the Court of King's Bench held, that the daughter took an estate tail.

"Whether sons or daughters, as tenants in common," &c.

So, in *Pierson* v. *Vickers* (*z*), where a testator devised his estates at B. unto his daughter A., and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and not as joint-tenants;* and in default of such issue, over; Lord *Ellenborough* and the other Judges of the Court of King's Bench held, on the authority of the last case, and *Doe* v. *Cooper* (*a*), that the daughter took an estate tail.

Again, in the case of *Bennett* v. *Earl of Tankerville* (*b*), where the devise was to the use of A. and his assigns for his life, without impeachment of waste, and after his decease, to *the heirs of his body, to take as tenants in common, and not as joint-tenants;* and in case of his decease without issue of his body, then over: Sir *W. Grant*, M. R., held that the devisee took an estate tail.

In such shares, &c., as F. should appoint.

So, in *Doe* d. *Cole* v. *Goldsmith* (*c*), where a testator devised his lands to his son F. to hold to him and his assigns for his natural life, and immediately after his decease the testator devised the same unto the heirs of his body lawfully to be begotten, in such *parts, shares and proportions, manner and form, as F. should by will or deed devise or appoint,* and in default of such heirs of his body lawfully to be begotten, then *immediately after his decease* the testator devised the premises over to another son, J., in fee. It was held, by the Court of Common Pleas, that F. took an estate tail. *Gibbs*, C. J., observed that it was the testator's evident intent that the estate should not go over to J. until all the "heirs of the body" of F. were extinct.

Observations.

In this and several of the preceding cases, much stress was laid on the words "in default of issue," or "in default of heirs of the body," occurring in the devise over, or rather in the clause introducing such devise, as demonstrating a "general intent" that the estate was not to go over until a general failure of issue of the first taker; but it is difficult to understand how this intention could be rendered more distinctly and

(*z*) 5 East, 548. [See *Grimson* v. *Downing*, 4 Drew. 125, where the estate to A. was expressly for life.]

(*a*) 1 East, 227, stated post.

(*b*) 19 Ves. 170.

(*c*) 7 Taunt. 209, 2 Marsh. 517.

unequivocally apparent by such referential language than by an *express* devise to these very objects.

In such shares as W. should appoint, *and if but one child*, &c.

We now proceed to the important case of *Jesson* v. *Wright* (*d*), which was as follows. A testator devised to W. certain real estate for the term of his natural life, he keeping the buildings in tenantable repair; and after W.'s decease devised the same to the *heirs of the body of W.* lawfully issuing, *in such shares* and proportions *as W.* by deed or will *should appoint*, and for want of such appointment, then to *the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common*, and if but one *child*, the whole to such only *child*; and for want of *such* issue, then over. It was held by the Court of King's Bench that W. took an estate for life only, with remainder to his children for life as tenants in common. A writ of error was brought in the House of Lords, which Court, after a very full argument, *reversed* the decision. Lord *Eldon* observed: "It is definitively settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent (*e*). The decision of the Court below has proceeded upon the notion that no such paramount intent was to be found in the will." His Lordship then read the devise, observing, that if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, "lawfully issuing," he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his Lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator, *but that must be clearly intelligible and unequivocal*. The will then proceeds, 'in such shares and proportions as he the said W. shall by deed, &c., appoint.' Heirs of the body mean one person at any given time, but they com-

Case of *Doe* v. *Jesson* in K.B.

Judgment of reversal in Dom. Proc.

Lord *Eldon's* observations.

(*d*) 2 Bligh, 1; from which the statement of the will is here taken.

(*e*) By "general intent" his Lordship must be understood to mean an intent to include heirs of the body in the gift. It is submitted that those parts of the judgment in which Lord *Eldon* refers to the uncontrolled force of the words *heirs of the body* contain a more satisfactory explanation of the principle than these passages. Lord *Redesdale*, it will be seen, strenuously insists upon this being the true ground of the decision.

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prehend all the posterity of the donee in succession. W. therefore could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power,—'and for want of such gift, &c., then to the heirs of the body, &c., share and share alike, as tenants in common.' It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that 'heirs of the body,' in this part of the will, must mean the same class of persons as the 'heirs of the body' among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side; as, for instance, how the children should take in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words 'heirs of the body' mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because in the concluding clause of the limitation in default of appointment the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but *because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children*, where you can find upon the will a more general intent comprehending more objects. Then the words '*for want of such issue*' which follow, it is said, mean for want of children; because the word *such* is referential, and

the word *child* occurs in the limitation immediately preceding. On the other hand it is argued, that heirs of the body, being the general description of those who are to take, and the words 'share and share alike as tenants in common,' being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation, 'if but one child, then to such only child,' being, as they say, the description of an individual who would be comprehended in the terms 'heirs of the body,' 'for want of such issue,' they conclude, *must mean for want of heirs of the body.* If the words 'children' and 'child' are so to be considered as merely within the meaning of the words *heirs of the body,* which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word *issue* (*f*),) there is an end of the question."

Lord *Redesdale* said: "There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson* v. *Colson* (*g*), it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case, it is argued that the testator did not mean to use the words 'heirs of the body' in their ordinary legal sense, because there



(*f*) But these words, it is submitted, derive all their force from the terms of the preceding devise, having in themselves no independent operation whatever; for it is settled that the words "in default of such issue," preceded by a gift to children, refer to those objects. See *Rex* v. *Marquess of Stafford,* 7 East, 521; *Doe* d. *Tooley* v. *Gunniss,* 4 Taunt. 313; and other cases stated post.

(*g*) 2 Stra. 1125.

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are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff* (*h*) decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise.* In many cases,—in all, I believe, except *Doe* v. *Goff* (*i*)—it has been held, that the words *'tenants in common'* do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; *but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed.* This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and *the words of modification are to be rejected.* Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties; but look to the words used in the will. The words 'for want of *such* issue' are far from being sufficient to overrule the words 'heirs of the body' (*j*). They have almost constantly been construed to mean an indefinite failure of issue, and of themselves have frequently been held to give an estate tail. In this case the words 'issue' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they shew another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will."

Lord *Redesdale's* statement of the principle of the decision.

So in *Doe* d. *Bosnall* v. *Harvey* (*k*), where a testator devised his real *estate*, subject to his debts and legacies, to T. for the

Effect of limitation to preserve contin-

(*h*) Infra, 351.

(*i*) But see cases infra.

(*j*) It could not for a moment be contended that these words *overruled heirs* of the body. The argument was, that if those words, as used in the preceding devise, meant *children* (but which his Lordship shows incontrovertibly they did not), then the words "for want of such issue" meant for want of such *children*. See note, p. 343.

(*k*) 4 B. & Cr. 610.

term of his natural life, and after the determination of that estate, to A. and B. and their heirs, during the life of T. to preserve contingent remainders; and after the decease of T. the testator devised the same to and among all and every *the heirs of the body of T., as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants;* and for default of such issue, over. The lands were gavelkind. It was held that T. took an estate tail; *Abbott*, C. J., observing,—"that though the heirs could not take by descent *as tenants in common*, but would be coparceners, yet it was not to be inferred because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all."

gent remainders.

"As well female as male to take as tenants in common," &c.

Again, in the case of *Doe* d. *Atkinson* v. *Featherstone* (*l*), where a testator devised to J., and E. his wife, for the term of their natural lives, and for the life of the longer liver of them, and after the decease of the survivor he devised to *the heirs of the body of E.* by J., already begotten or to be begotten, to *be equally divided amongst them, share and share alike.* It was held, on the authority of *Jesson* v. *Wright*, that E. took [an] estate tail, and not (as had been contended) [an] estate for life, with remainder to the children [of E. and J.

"Equally to be divided amongst them, share and share alike."

And in *Grimson* v. *Downing* (*m*), where the testator devised "the said *estate*" to A. for life with remainder to the heirs of his body lawfully begotten for ever equally, share and share alike, sons and daughters, but if A. should die without heirs or heir" then over, Sir *R. Kindersley*, V.C., held that A. took an estate tail.

Devise of "estate" to heirs of the body, "share and share alike."

As neither words of limitation to the heirs general of the heirs of the body, nor words of modification added to the limitation to the heirs of the body will, when occurring singly, make the heirs take by purchase, so neither will the two expressions when found together in the same will have any such effect.

Words of limitation joined to words of modification ineffectual.

Thus, in the recent case of *Toller* v. *Attwood* (*n*), there was a devise to the use of E., a married woman, for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the heirs male of the body of E. to be begotten, *who shall live to attain the age of twenty-one years, and to his heirs and assigns for ever;* but in

"Heirs male who shall live to attain twenty-one and his heirs."

(*l*) 1 B. & Ad. 944.

[(*m*) 4 Drew. 125.

(*n*) 15 Q. B. 929. The trustees were held to take the fee, ante, p. 273.

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[default of such heirs male, or there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue, then over. It was held by the Court of Queen's Bench that the words "who shall live, &c." could not restrict the force of the previous limitation, and that E. took an estate tail, citing the rule as distinctly and emphatically laid down in *Jesson* v. *Doe*, that technical words should have their legal effect unless from subsequent inconsistent words it was very clear that the testator meant otherwise; and in this case the form of the gift over rather favouring the conclusion of an estate tail in E., than of a limitation by purchase to her sons. The Court did not advert to the form of the limitation being "to *his* heirs and assigns," as shewing that one person only was intended to take at one time as heir of the body, and as strengthening the conclusion that "heirs of the body" must be held to be words of limitation in order to let in all the issue (*o*).

Lord *St. Leonards'* remarks on *Doe* v. *Jesson*.

It is true that Lord *St. Leonards* has gone so far as to say (*p*) that *Doe* v. *Jesson* only decided that the words "heirs of the body" should operate as words of limitation where otherwise the issue could not take estates of inheritance, and that it did not follow that the same rule was to be applied where the children taking as purchasers were entitled to estates tail (*i. e.* estates of inheritance). But in *Grimson* v. *Downing* (*q*), Sir *R. T. Kindersley*, V.C., said he did not think the Chancellor intended to imply that wherever there were words which would carry the fee, there "heirs of the body" should not be construed as words of limitation, and that, but for the absence of those words, *Jesson* v. *Wright* would have been otherwise decided (*r*).

Lord *Brougham's* distinction between words of modification and explanation.

Again, in the case of *Fetherston* v. *Fetherston* (*s*), Lord *Brougham* said that such was the force of the words "heirs of the body," that it might be almost laid down as a general rule that no other provision of a will is sufficiently strong to over-

[(*o*) See post, Chap. XXXIX. sect. 2.
(*p*) 3 Jo. & Lat. 55.
(*q*) 4 Drew. 133.
(*r*) In the case of *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 881, 882, Lord *Wensleydale* doubted whether the word "issue" was not as strictly technical as "heirs of the body," and whether it did not require as explicit a context to divert it from its primary meaning as the latter expression (sed. qu.—see cases cited post). At the same time he agreed that this effect was produced where "issue" was used with words of limitation and words of distribution too: his Lordship would, therefore, hold the like effect to be produced when the expression ussd was "heirs of the body."
(*s*) 3 Cl. & Fin. 67, 77.

[rule this tendency and make them words of purchase which does not fall within the exception (*t*), where the testator has in his will *explained* the sense in which he meant to use those words, so as to shew that his meaning was other than what at first sight it appears to be. There is thus, supposing we adopt Lord *Brougham's* phraseology, an important distinction between words *modifying* and words *explaining* a limitation to heirs of the body.]

Observations.

The preceding cases present many shades of difference, but they *all* concur in establishing the principle, that words of inconsistent modification engrafted on a limitation to heirs of the body are to be rejected. It follows, then, that every decision not strictly reconcilable with this principle may be regarded as overruled by them. How far the line of cases about to be stated falls under the remark, the reader will form his own opinion, keeping in view the general scope of the reasoning of Lord *Eldon* and Lord *Redesdale*, in *Jesson* v. *Wright*, and their pointed reprobation of "petty distinctions."

Cases in which expressions were held to control "heirs of the body."

To "heirs male or female" for ever.

In *Doe* d. *Browne* v. *Holmes* (*u*), the devise was to L. for life, with impeachment of waste, remainder unto the *heirs male or female* lawfully to be begotten of the body of L. for ever, they paying certain sums thereout. The Court *inclined* to the opinion that this was not an estate tail in L., but a contingent remainder in fee to the issue; but it was unnecessary to decide the question, as a recovery had been suffered, which had either barred the entail, or destroyed the contingent remainder. This case seems to be destitute of even the slender grounds upon which the construction of an estate tail is commonly resisted in cases of this nature, nor did the Court, it will be perceived, assume to decide the point.

"As well females as males, and to their heirs."

Another case which must be classed with this series, is *Doe* d. *Long* v. *Laming* (*x*), where a testator devised gavelkind lands to his niece *A. and the heirs of her body* lawfully begotten or to be begotten, *as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common.* A. died in the testator's lifetime. Lord *Mansfield* said the devise could not take effect at all, but must be absolutely void unless the heirs took as purchasers; that the term *heirs* in the plural, in the case of gavelkind lands, answered to

(*t*) See this exception treated of in the next section of this chapter.]

(*u*) 3 Wils. 237, 241, 2 W. Bl. 777.

(*x*) 2 Burr. 1100.

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the term *heir* in the singular in the common case of lands not being gavelkind; that the testator mentioned females not only expressly and particularly, but even prior to males; and that it was clear that he did not mean that the lands should go in a course of descent in gavelkind. Influenced by these and other such considerations, the Court held the true construction of the devise to be, that the *children* of A. took estates in fee.

Remark on *Doe* v. *Laming*.

Few cases have been more cited than this. There being both words of limitation and words of distribution annexed to "*heirs of the body*," it has been commonly relied upon as an authority for giving to both those circumstances occurring conjunctively the operation of changing heirs of the body into *children*. It is observable that the Court had to encounter, not only the difficulty of doing this violence to the words, but also that of reading the limitation to the heirs as a *remainder*; for the devise was to A. and the heirs of her body in one entire unbroken clause, and not to A. for life, *remainder* to the heirs; and, therefore, even if the devise had been *expressly* to children, they must have taken jointly with their parent, or not at all; indeed so strongly is the impossibility of reading the devise to the children as a remainder felt in such cases, that where they cannot take jointly with their parent, on account of their non-existence when the devise takes effect, the word *children* is, we shall see in the next chapter, actually construed as a word of limitation, in order to give the parent an estate tail which *may* devolve upon the children, this being, it is considered, the *only* means of preventing the total failure of the testator's intention in their favour. Such cases form a singular contrast to the construction adopted in *Doe* v. *Laming*.

*Doe* v. *Laming* virtually overruled by *Doe* v. *Harvey*.

As to the circumstances of the land being *gavelkind*, this extraordinary ground of distinction is now overturned by the case of *Doe* d. *Bosnall* v. *Harvey* (*y*), which, it is observable, has *all* the ingredients that have been relied upon by the Judges who decided, or who have since cited *Doe* v. *Laming*, viz. the land being gavelkind; there being words to carry the fee to the children, if the devise had been construed as designating them (*z*); and, lastly, there being a direction that *females* should

(*y*) 4 B. & Cr. 616, stated ante, 344; [see accord. per Lord *Brougham*, 3 Cl. & Fin. 77.]

(*z*) In *Doe* v. *Harvey*, the word *estate*, used in the description of the subject-matter of the preceding devise, would clearly have extended to the devise in question. This makes Mr. Justice

take as well as *males*, and the whole as tenants in common. We might then reasonably have hoped never to hear the case of *Doe* v. *Laming* again cited as an authority in a court of law. The circumstance that the devise would have lapsed if the devisee had taken an estate tail, seems to have had an undue influence on Lord *Mansfield's* mind, and the case may be regarded as one of those in which this distinguished Judge suffered the established rules of construction to be violated, in order to avoid hardship in the particular instance.

Remarks of Sir *E. Sugden* on *Doe* v. *Laming*.

[However, in the case of *Montgomery* v. *Montgomery* (*a*), Sir *Edward Sugden*, C., said, that though *Doe* v. *Laming* had been sometimes questioned, he thought it properly fell within the fourth exception mentioned by Mr. Justice *Blackstone* in his judgment in *Perrin* v. *Blake* (*b*); namely, where the testator has superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he has given the estate. Mr. Justice *Blackstone* does indeed himself (*c*) class *Doe* v. *Laming* within his fourth exception, but he also classes it under his third exception, namely, where words of explanation are added to the words "heirs of the body;" and, at the time he wrote, this certainly (if any) was the only exception under which to class it, though that exception, so far as it applies to such words as those in *Doe* v. *Laming*, namely, "female as well as male, and to take as tenants in common," has, as we have seen, been expressly overruled by *Jesson* v. *Wright;* moreover, we have Lord *Northington's* authority, that in his time there was *no case in the books* where "heirs," used in the plural number with words of limitation added, had been held words of purchase (*d*). It is impossible, therefore, to come to any other conclusion than that the cases did not, in Mr. Justice *Blackstone's* time, nor have they since, recognized his fourth exception as applying to cases where the word "heirs" in the plural number is used; that exception must be taken to apply solely to cases in which the word "heir" in the singular is used, as in *Archer's case* (*e*), or where the line of descent is altered as in the case put by *Anderson*, C. J., in *Shelley's case;* and this

*Bayley's* observation, in regard to *Doe* v. *Laming* before adverted to (ante), the more extraordinary; for the alleged distinction with respect to the words of limitation occurring in that case was not only altogether untenable according to the doctrine of the authorities, but was not presented by the actual circumstances of the case.

[(*a*) 3 J. & Lat. 52.
(*b*) Harg. Law Tracts, 506.
(*c*) See ibid.
(*d*) 1 Ed. 432.
(*e*) Ante, p. 300

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[conclusion is abundantly confirmed (if confirmation is wanted) by the recent case of *Toller* v. *Attwood* (*f*) decided since that of *Montgomery* v. *Montgomery*, and in which the modification, though differing in kind, was not less forcible than in *Doe* v. *Laming*.]

The case next in chronological order to *Doe* v. *Laming* is *Doe* d. *Hallen* v. *Ironmonger* (*g*), which arose on a devise to A. and his heirs, upon trust to receive the rents, *and apply the same* for the support of S., and the issue of her body lawfully begotten or to be begotten, *during the life of S.*; and after the decease of S., upon trust *for the use of the heirs of the body* of S. lawfully begotten or to be begotten, their heirs and assigns for ever, *without any respect to be had or made in regard to seniority of age or priority of birth*, and in default of such issue over. S. had three children, one son and two daughters. The son died in her lifetime, leaving several children, and his eldest son, on the death of S., claimed the property as the heir of her body at her death; but it was held that he was not entitled.

"Without any respect to seniority of age, &c."

By the few observations which fell from the Court in the course of the argument, it appears that the Judges relied upon the words, "without respect, &c., to seniority of age and priority of birth," as plainly shewing that the heirs should take "as *purchasers*," meaning, it should seem, as *children*, for even as heirs of the body they were clearly *purchasers*, inasmuch as the limitation to the heirs, and the limitation to the ancestor were of a different quality (*h*). Perhaps it will be said that this circumstance distinguishes the case from those under consideration; but it would be difficult to support such a distinction. The words "heirs of the body" are as clear and well ascertained in the one case as in the other, and therefore require a demonstration of intention equally clear and decisive to control them. The class of objects embraced by the two gifts is the same. Indeed the question whether the rule in *Shelley's case* will or will not operate upon the two limitations, seems to be quite irrespective of the construction; though it cannot be denied that a regard to the effect of the application of that rule, in making the ancestor tenant in tail, and thereby enabling him to exclude all the ulterior objects by means of a disentailing assurance, has

Observations upon *Doe* v. *Ironmonger*.

[(*f*) 15 Q. B. 929.] (*g*) 3 East, 533.
(*h*) Ante, 308.

not unfrequently biassed the minds of Judges in determining the construction.

"As tenants in common, with devise over if the issue died under twenty-one."

The next case is *Doe* d. *Strong* v. *Goff* (*i*), where the devise was to the testator's daughter M. and *to the heirs of her body* (*k*), lawfully begotten or to be begotten, *as tenants in common, and not as joint-tenants;* but if such issue should depart this life *before he, she, or they should respectively attain their age or ages of twenty-one years,* then over to the testator's son. It was held by the Court of K. B. that the daughter took an estate for life only, with remainder to her children as tenants in common. Lord *Ellenborough* considered that the heirs of the body, being to take as *tenants in common,* clearly demonstrated that children were meant by that description, as heirs of the body would take by succession, which he considered was rendered still more plain by the following words, "that if such issue should depart this life *before twenty-one;*" and he held that this was too plain to be defeated by a mere conjecture that the devisor might have a paramount intention inconsistent therewith; and, even admitting such intention, he thought it might afford a reason for implying cross remainders between the children (*l*) (which his Lordship observed it was not necessary to decide), but not for making so important a difference as converting into an estate in the mother what would otherwise be separate and distinct interests in the children. His Lordship ridiculed the idea that the eldest son and his issue should take, to the exclusion of the rest, lest the share of a child dying under twenty-one should go over to the testator's son (*m*) before all the issue of the daughter were extinct. He observed that the Court had looked through all the cases, and did not think they should break in upon any of them by this decision.

Lord *Ellenborough's* judgment in *Doe* v. *Goff.*

Of this case it is enough to say, that it has been distinctly overruled by the highest authority (*n*).

(*i*) 11 East, 668.

(*k*) This case is open to the same observations as *Doe* v. *Laming*, in regard to the circumstance of the limitation to the heirs not being by way of remainder.

(*l*) By cross remainders his Lordship must have meant cross executory limitations; for it is clear that the children, if they took at all, had *a fee* by implication from the gift over in the event of their dying under twenty-one (ante, 251), on which fee of course no remainder could be limited; but it seems to be the better opinion, that in such cases no cross executory limitation in fee would be implied. See post.

(*m*) But upon the terms of the devise, as settled by decision, it is clear that no share could go over to the son unless *all* the issue of the daughter died under twenty-one.

[(*n*) But see 3 J. & Lat. 54, where Sir *E. Sugden* seems to say *Doe* v. *Goff* is not overruled.]

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Authority of *Doe* v. *Goff* denied in *Jesson* v. *Wright*.

Thus in *Jesson* v. *Wright* (*o*), Lord *Redesdale* said, "*Doe* v. *Goff* seems to be at variance with preceding cases. In several cases it had been clearly established that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate tail, and that subsequent words such as those contained in this will," (his Lordship alluded, no doubt, to the words "share and share alike, as tenants in common," occurring in that case,) "had no operation to prevent the devisee from taking an estate tail. In *Doe* v. *Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to be so far from amounting to a declaration that he did *not* mean heirs of the body in the technical sense of the words, that, I think, they peculiarly shew that he *did* so mean. They would otherwise be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that at twenty-one the children (*i. e.* the issue) should have the power of alienation. *It is impossible to decide this case without holding that Doe* v. *Goff is not law.*"

Lord *Eldon* expressed the same opinion (*p*), tempered, however, with his characteristic caution. "*Doe* v. *Goff*," said his Lordship, "is difficult to reconcile with this case, I do not say impossible; but that case is as difficult to be reconciled with other cases."

Observations.

The deliberate denial by these eminent Judges of the case of *Doe* v. *Goff*, may be considered as equivalent to an affirmative decision, that under such a devise an estate tail is created; in other words, that a devise to A. and the heirs of his body as tenants in common, with a limitation over in case the issue or the heirs of the body should die under twenty-one, gives A. an estate tail. Indeed such a devise over is not absolutely *inconsistent* with an estate tail, as the testator *may* intend (though the intention is rather improbable) that the remainder shall be contingent on the event of the *issue* of the tenant in tail (not the tenant in tail himself) dying under age. But Lord *Redesdale* went a great length in asserting that these words *assisted* the construction which gave the ancestor an estate tail, for the absurdity which his Lordship seemed to think attached to the

(*o*) 2 Bligh, 58, stated ante, p. 341; [and see *Dunk* v. *Fenner*, 2 R. & My. 557.]
(*p*) 2 Bligh, 55.

supposition that they were applied to children is quite removed by giving them, as the established rule does, the fee-simple. Admitting, however, that the inference, so far as it goes, is the other way, it does not approach to that necessary irresistible kind of evidence, which alone should be allowed to vary the construction of words of an established signification.

"As tenants in common," with devise over if the issue died under twenty-one.

Another case, which perhaps it may be difficult to rescue from a similar condemnation, is *Crump* d. *Woolley* v. *Norwood* (*q*), where a testator devised to his three nephews W., J. and R., equally between them, during their respective lives, as tenants in common; and after their respective decease he devised the share of him or them so dying *unto the heirs lawfully issuing of his and their body and bodies* respectively, and, if more than one, *equally to be divided*, and to take *as tenants in common*; and, if but one, to such only one, and to his, her, or their heirs and assigns for ever, and if any of the testator's said nephews should die without such issue, or, *leaving any such, they should all die without attaining twenty-one*, then he devised the part of him and them so dying unto the survivor and survivors, and the heirs of the body of such surviving and other nephew equally, as tenants in common, and to hold the same as he had thereinbefore directed as to the original share, and with the like contingency of survivorship on failure of issue; and in default of such issue of his said nephews, then over to the testator's own right heirs. It seems to have been rather taken for granted in this case (for the contrary was scarcely contended for), that the nephews took an estate for life only, with remainder in fee to their *children*. *Gibbs*, C. J., observed, that he would state the interest which W. and his *children* took in the premises. "The devise," he said, "is to W. for life, and if he has children (*for heirs here mean children*), then to them in fee; if he has no children, then the estate goes to the testator's nephews J. and R. *It is admitted on all hands that this is the true construction.*"

"*Heirs of the body*" assumed to mean *children*.

(*q*) 7 Taunt. 362, 2 Marsh. 161. In the case of *Lees* v. *Mosley*, 1 Y. & C. 595, however, one of the counsel who argued that case with great zeal and ability (Mr. *Duckworth*) contended that there was no sufficient reason for saying that the case of *Crump* v. *Norwood* was overruled by *Jesson* v. *Wright*; but upon what particular grounds he considered the two cases to be distinguishable does not appear. Indeed, the same learned counsel treated even *Doe* v. *Goff* with a degree of respect quite inconsistent with Lords *Redesdale* and *Eldon's* pointed condemnation, but the Court of Exchequer lent no countenance to the attempt to uphold these cases; and as the Barons decided the case before them (*Lees* v. *Mosley*) mainly on the difference between the terms "heirs of the body" and "issue" in regard to the force of explanatory words, the case cannot be considered as bearing upon the subject of the present chapter.

Treatment of *Crump* v. *Norwood* in *Lees* v. *Mosley*.

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And the Court held that the contingent remainder in W.'s share was destroyed by the descent of the reversion in fee on him at the decease of his father, to whom it devolved immediately from the testator (*r*).

Remark on *Crump* v. *Norwood.*

This case was not cited in *Jesson* v. *Wright*, which accounts for its not having fallen under the censure there applied to *Doe* v. *Goff*, which it closely resembles, and on the authority of which, probably, the translation of heirs into children was considered as almost too clear for argument.

Devise over in default of issue *by the testator* following a devise to his wife in tail.

The case of *Gretton* v. *Haward* (*s*) is another of the decisions which occurred during the time that *Doe* v. *Goff* was regarded as an authority. The devise was in these words:—"I give, devise, and bequeath, unto my loving wife A. all my real and personal estate, she paying debts, &c.;" and after her decease to *the heirs of her body, share and share alike,* if more than one, "and, in default of issue to be lawfully begotten *by me,* to be at her own disposal." The case of *Doe* v. *Goff* was cited in argument, and the now exploded doctrine of that case, that the testator, having given the estate to the heirs of the body, share and share alike, could not have intended an estate tail, under which the eldest son would take the whole, was much relied on. The Court certified (it being a case from Chancery), that the wife took an estate for life, with remainder to the *children,* as tenants in common, in fee; and this certificate was confirmed by Sir *William Grant,* M. R. (*t*).

Observations upon *Gretton* v. *Haward.*

No remark fell from the Court during the argument, so that the precise grounds of the decision are not known; but it has been sometimes considered as distinguished from the other cases by the circumstance, that the limitation over was in default of issue begotten *by the testator*, which must, it is said, have referred exclusively *to children.* This, however, is a *non sequitur;* for, allowing to these words their utmost operation, they are only explanatory of the species of heirs of the body intended by the testator in the preceding devise, namely, heirs by himself (*u*); and the effect would then be to make the wife tenant in special tail, if she had issue by the testator, or while the possibility of her having issue continued; and in case she had no issue by

(*r*) See *Hartpoole* v. *Kent*, T. Jones, 76, 1 Vent. 306; *Hooker* v. *Hooker*, Lee's Cas. t. Hardw. 13.

(*s*) 6 Taunt. 94, 2 Marsh. 9.

(*t*) 1 Mer. 448.

[(*u*) See accordingly cases cited supra, p. 93, n. (*b*).]

him, she would, from the time that such possibility ceased, be tenant in tail after possibility of issue extinct (*x*).

General remarks upon the class of cases overruled by *Jesson* v. *Wright*.

Such is the long line of cases which appear to have been overturned by *Jesson* v. *Wright;* a decision, which will be appreciated when the state in which the subject had been left by the prior adjudications is contemplated. The frequent demand upon the Courts to pronounce on the construction of the words "heirs of the body," when associated with words of modification which did not exactly quadrate with an estate tail, evinces the uncertainty that prevailed in the profession in regard to the actual effect of such a devise. The slightest variation of phrase was thought to render a case proper for judicial investigation, in order to try the experiment whether these words, or the inconsistent modifying expressions, would be held to preponderate. The mischief, however, did not altogether *originate* in the class of cases just stated, but may be traced to an earlier source. It seems to have been a consequence of the line of argument adopted by Lord *Kenyon* in *Doe* d. *Candler* v. *Smith* (*y*), and other cases, where, though a devise of the nature of those under consideration was held, and properly held, to confer an estate tail, this construction was founded, not on the uncontrolled effect of the words of limitation, but upon the *general intention* manifested by the words disposing of the property to the next taker, if the devisee in question died *without issue;* which, it was said, demonstrated that the estate was not to go over until a general failure of issue of such prior devisee. Having therefore first reasoned upon the devise to the heirs of the body or issue as a gift to *children* or to issue *of a particular class*, the Court sacrificed the intention in favour of these objects, which was denominated the *particular* intent, in order to give effect to the "*general* intent," which was discerned in the subsequent words. Lord *Ellenborough*, the successor of Lord *Kenyon*, acceded to the reasoning, or, at all events, to the authorities, which read the devise to the heirs of the body and issue as a gift to *children;* but, probably seeing no reason why the devise so construed should be affected by the use of the same or nearly similar words in the clause introducing the devise over (which clearly referred to the objects of the preceding devise, whatever those objects were), held that the

(*x*) See *Platt* v. *Powles*, 2 M. & Sel. 65.

(*y*) 7 T. R. 531, ante, 339. See also *Robinson* v. *Robinson*, 1 Burr. 38, post.

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*children* were entitled, notwithstanding the subsequent words referring to the failure of issue. This appears to be the short history of the rise and progress of the doctrine which the case of *Jesson* v. *Wright* overturned.

But the uncertainty induced by a series of erroneous decisions is not easily removed; and we shall see that the effect of inconsistent words of modification, engrafted on a devise to the heirs of the body, has been since repeatedly agitated.

Limitation to *heirs of the body*, with power of appointment to *children*, &c.

Thus, in the case of *Wilcox* v. *Bellaers* (*z*), where the testator devised his lands to his son H. during his natural life, and after his decease to *such* of his said son's *children*, and in such shares and proportions as his said son should, by his last will and testament duly executed, limit, direct and appoint, *and to their heirs*, and for want of such direction and appointment, and as to such part of the estate of which no such appointment should be made, to *the heirs of the body* of the said H., *their heirs and assigns for ever*; and in case his said son should happen to die without issue, then *from and immediately after his decease* the testator devised the said estate unto his daughter E. for life, remainder to such of her children and in such shares as she should by deed or writing appoint, and to their heirs; and in default to the heirs of the body of the said E., their heirs and assigns for ever; and in case his son should live, *and have children as aforesaid*, then he bequeathed unto his daughter E. a legacy of 500*l*. H., before issue born, suffered a common recovery. To a title derived under this recovery, it was objected that H. was not tenant in tail, but that his children took by purchase. The vendor instituted a suit in equity to enforce the performance of the contract, and the Master reported in favour of the title. The purchaser excepted to the report, and the exception was argued at the Rolls (*a*), before Mr. Baron *Graham* and Master (afterwards Lord Chief Baron) *Alexander*, and Master *Stratford*, sitting for the then Master of the Rolls, who, after taking time to examine the authorities, differed in opinion; the two former thinking it very doubtful at least whether H. took more than an estate for life, and Master *Stratford* being of a contrary opinion, so that no judgment was given. The exception was afterwards (*b*) argued before Sir *T. Plumer*, M. R., who, upon looking into the cases,

(*z*) Hayes's Inquiry, p. 2.
(*a*) June, 1823.
(*b*) 17 Dec. 1823.

thought there was so much doubt whether H. took an estate tail, that the purchaser ought not to be compelled to take the title, and accordingly dismissed the bill; and the Lord Chancellor (*Lyndhurst*), on appeal, affirmed the order (*c*).

Examination of the circumstances in which *Wilcox* v. *Bellaers* differs from *Jesson* v. *Wright*.

The only circumstances affording the slightest pretext for distinguishing this case from *Jesson* v. *Wright* are,—first, the power to appoint to the *children*, secondly, the legacy to the devisee in remainder, in case H. "should live and have children as aforesaid," [and thirdly, the words of limitation superadded to the gift to the heirs of the body.]

As to the first point, we learn from the case of *Smith* v. *Death* (*d*), that there is no *necessary* implication, that the term "heirs of the body" in the limitation is used to describe the same objects as "children" in the power. 2ndly. In reference to the other circumstance, perhaps, it will be said that the testator evidently intended the devisee in remainder to have the legacy if the objects of the prior devise came into existence, and which, therefore, is explanatory of those objects being children. But this is merely conjectural; the testator might intend the legacy to be a charge only as against the objects of the power, as distinguished from the objects of the limitation, because the donee might have appointed to those objects in fee to the total exclusion of even a chance of succession by the devisee in remainder. However this may be, the circumstance is far too equivocal to be made a ground for departing from the construction of words of an established meaning. [As to the third point, since the words "heirs of the body" in themselves include words of limitation, and will carry the inheritance to the issue by purchase, it is conceived that superadded words of limitation, unless operating to alter the line of descent (*e*), cannot produce any effect.]

Nor is the case of *Wilcox* v. *Bellaers* the only instance in which reluctance has been manifested to follow up the principle of *Jesson* v. *Wright*; for in other cases the term *heirs of the body* has since been cut down to *children*, in subservience to expressions in the context which that case had appeared for ever to have stripped of all controlling operation.

"Share and

Thus, in *Right* d. *Shortridge* v. *Creber* (*f*), where a testator

(*c*) T. & R. 495.
(*d*) 5 Mad. 371; stated ante, Chap. XVII. sect. 5.
[(*e*) Ante, p. 338.]
(*f*) 5 B. & Cr. 866.

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"share alike," their heirs and assigns for ever.

devised a messuage to trustees and their heirs, in trust to permit his daughter J., and her assigns, to receive the rents for her life free from her husband, and after her death then the testator devised the same to *the heirs of the body* of J., share and share alike, their heirs and assigns for ever, it was held, that the words, "share and share alike," denoted that the testator meant, by "heirs of the body," to designate children.

Remarks on *Right* v. *Creber*.

It is proper to observe that the case of *Jesson* v. *Wright*, although decided several years before *Right* v. *Creber*, was not cited in the latter case, and the subsequent determination of the Court of Q. B. in *Doe* v. *Featherstone* (*g*), already stated, shews that a similar decision would not now be made. It is surprising, however, that, in *Doe* v. *Featherstone*, the case of *Right* v. *Creber* was referred to by Mr. Justice *Patteson* as not inconsistent with what the Court was then about to decide; for the only distinction is, that in one case there were, and in the other there were not, superadded words of limitation, which were, we have seen, wholly immaterial, and on which indeed no stress was laid by the Judges who decided *Right* v. *Creber*.

No distinction made where there is a direction to convey.

[It may be observed, in conclusion of this section, that a different construction will not necessarily be put upon limitations by way of trust expressed in words such as those now under consideration, merely because the trust is a trust to convey and not a direct trust (*h*).]

Effect of clear words of explanation annexed to heirs of the body.

III. But it is not to be inferred from the preceding cases that he words *heirs of the body* are incapable of *explanation* by the effect of superadded expressions clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect. Where the words in question are accompanied by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually inserted in the will.

*Lowe* v. *Davies*. Heirs, "that is to say," &c.

Accordingly, in the case of *Lowe* or *Lawe* v. *Davies* (*i*), where a testator devised to B. and his heirs lawfully to be begotten, "that is to say, to his first, second, third, and every other son

(*g*) 1 B. & Ad. 944; ante, 345.
[(*h*) *Marryat* v. *Townly*, 1 Ves. 102.]
(*i*) 2 Ld. Ray. 1561, 2 Stra. 849, 1 Barn. B. R. 238.

and sons successively, lawfully to be begotten of the body of the said B., and the heirs of the body of such first, second," &c., it was held that B. took but an estate for life; for the subsequent clause was explanatory of what "heirs" meant.

*Lisle* v. *Gray*. *Heirs male of the body* explained to mean *sons*.

So, in the case of *Lisle* v. *Gray* (*k*), where real estate was limited by deed to the use of the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E. and the heirs male of the body of such second son (similar limitations were carried on to the fourth son), "and *so* to all and every other the *heirs male of the body* of E. respectively and successively, and to the heirs male of their body, according to seniority of age." There was a power to raise portions out of the land if E. died without issue male. It was held that E. took only an estate for life; the words "and so," &c. shewing that the words "heirs male" in the latter clause meant *sons*, by relation to the preceding limitation.

*Goodtitle* v. *Herring*. Same construction.

Again, in the case of *Goodtitle* d. *Sweet* v. *Herring* (*l*), where the devise was to A. for life, remainder to trustees to preserve contingent remainders, remainder to the *heirs male* of the body of A. to be begotten severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons*, and the heirs male of his body lawfully issuing, being always to be preferred to *the younger of such sons*, and the heirs male of his and their body and bodies; and for default of such issue, to the *daughters*, as tenants in common, and the heirs of their bodies. The Court held that the testatrix had, by the words "the elder of *such sons*," &c., explained herself by "heirs of the body" to mean *sons*, so that A. took only an estate for life.

*North* v. *Martin*. "Heirs of body" held to mean children.

So, in the case of *North* v. *Martin* (*m*), where by a marriage settlement lands were conveyed to the use of A., the intended husband for life, with remainder to trustees to preserve contingent remainders, with remainder to B. the intended wife for

(*k*) 2 Lev. 223, T. Jo. 114, T. Ray. 278, 315. [The judgment in B. R. is stated in the two last-named reports to have been reversed in the Exchequer Chamber, but this seems not to have been the case, see 1 P. W. 90, 2 Burr. 1109;] see also Hayes's Inq. 81.

(*l*) 1 East, 264, [affirmed in D. P., see 3 B. & P. 628;] see also *Mandeville* v. *Lackey*, 3 Ridg. P. C. 352, post. As to the expression heirs male *now living*, see *Burchett* v. *Durdant*, 2 Vent. 311, Carth. 154, ante, Vol. I. p. 289. For some other instances of the same kind, ante, p. 66.

(*m*) 6 Sim. 266. [In *Dunk* v. *Fenner*, 2 R. & My. 557, similar words of explanation were not allowed to prevail.

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life, and after the decease of the survivor, to the use of the heirs of the body of A. on the body of B. to be begotten, and their heirs, and if more children than one, equally to be divided among them, to take as tenants in common, and in default of such issue, then over. It was contended that, according to the authorities, particularly *Wright* v. *Jesson*, A. was tenant in tail by force of the limitation to the heirs of his body, but Sir *L. Shadwell*, V. C., held, that the words "and if more children than one," were interpretative of those words, observing that no case had been cited, nor did he recollect any in which the words "heirs of the body" had been held to create an estate tail, where those words of interpretation had been used; and his Honor added (and the remark is deserving of attention), that this did away with the effect of the argument founded on the limitation over for default of such issue, which must be construed for default of such children.

*Doe* v. *Woodall.* Heirs of body "in manner aforesaid," explained by preceding limitations.

[Again, in the recent case of *Doe* d. *Woodall* v. *Woodall* (*n*), there was a devise to the testator's four grandchildren for their lives as tenants in common, with remainder as to the share of which each was tenant for life to his or her first and other sons successively in tail, with remainder to his or her daughters as tenants in common in tail, with cross remainders in tail between the daughters; and then the testator proceeded, "in case either of my said grandchildren shall happen to die, leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised shall go and remain to the survivor of them and the heirs of his or her body lawfully to be begotten *in manner aforesaid.*" It was contended that, under the last clause, a surviving grandchild took an estate tail in the share of a grandchild who left no issue; but the Court of C. B. held, that the limitation to the "heirs of his or her body" was explained by the words "in manner aforesaid" to mean a limitation to the first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, as in the preceding limitations, and that the surviving grandchild therefore took only an estate for life.

*Gummoe* v. *Howes.* Heirs of the body explained to mean children.

In *Gummoe* v. *Howes* (*o*) the devise was upon trust for A. and B. equally for life, and in case of the death of either of them without issue, the part or share of her so dying to go to the

[(*n*) 3 C. B. 349; and see *Green* v. *Green*, 3 De G. & S. 480.
(*o*) 23 Beav. 184.

[survivor of them, but if either of them should depart this life leaving issue, then the part or share of her so dying to go to her children in equal proportions if more than one, and if but one, then to such only *child;* and after the death of both A. and B., the testator directed his trustees to convey, assign, and transfer the property to the heirs of the body of A. and B. lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one, then to such only *child* when and as often as he, she, or they should attain his, her, or their respective age or ages of twenty-one years; and the will contained a devise over on the death of A. and B. without issue. Sir *John Romilly*, M. R., held that the words "heirs of the body" were interpreted to mean "children," and that A. and B. took estates for life only.

*Jordan* v. *Adams.* Heirs male of the body held to mean sons, by mention of "their father."

And lastly, in the case of *Jordan* v. *Adams* (*p*), where a testator devised lands to W. T. for life, and after his decease "to the heirs male of his body for their several lives in succession according to their respective seniorities, or in such parts, shares and proportions, manner and form, and amongst them as the said W. T., *their father*, should appoint. And in default of such issue male of W. T.," over. It was held by the Court of C. B. that the testator had here shewn that by heirs male of the body he meant sons, for in case of an appointment the appointor must stand in the relation of "father" to the appointees. In delivering the judgment of the Court, *Erle*, C. J., laid great stress, more perhaps than was warranted by *Jesson* v. *Wright*, on the words of modification contained in the devise: but *Williams*, J., declared his concurrence with the rest of the Court solely on the ground of the use of the words "their father" in the power of appointment.]

Remark on preceding cases.

In all the preceding cases it will be seen that the testator had annexed to the term "heirs of the body" words of explanation, which left no doubt of his having used the expression as synonymous with *sons*. These cases, therefore, may be supported, without impugning the general principle, as stated by Lord *Alvanley* in the case of *Poole* v. *Poole* (*q*), that the Courts will not deviate from the rule which gives an estate tail to the first taker if the will contains a limitation to the heirs of his

[(*p*) 29 L. J. C. P. 180, 6 Jur. N. S. 536.]

(*q*) 3 B. & P. 627. There is a striking similarity between the general scope of Lord *Alvanley's* reasoning here and that of Lords *Eldon* and *Redesdale* in *Jesson* v. *Wright*, ante, p. 342, 343.

body, except where the intent of the testator *appears so plainly to the contrary that nobody can misunderstand it;* for the will in these cases seemed to supply the clear incontrovertible evidence of intention required by such a statement of the doctrine.

On the other hand, in the case of *Jones* v. *Morgan* (*r*), it was decided, and that in perfect consistency with the principle of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten, *severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth,* gave W. an estate tail. Lord *Thurlow* said, "Where the estate is so given that it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of limitation. All heirs taking *as heirs* must take by descent."

Heirs male of the body "severally, respectively, and in remainder, the one after the other."

So, in *Poole* v. *Poole* (*s*), where a testator devised all his real estate to the use of trustees, in trust for his first son during his life, and also upon trust to preserve contingent remainders, and after his decease in trust for the several *heirs male of such son lawfully issuing,* so that the elder of *such sons* and the heirs male of his body should always take before the younger and the heirs male of his body, remainder to the second, third, fourth, and other son and sons of the testator for their respective lives, and also upon trust to preserve, remainder in trust for the several heirs male of their bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should take before the younger of such sons and the heirs male of his body, remainder to his first and every other daughter for their lives, and upon trust to preserve, remainder to the several heirs male of their respective bodies, so that the elder of such daughters and the heirs male of her body should always be preferred to the younger of such daughters and the heirs male of her and their body and bodies. The testator then charged the estates with certain portions, and devised them, in failure of such issue by him as aforesaid, but not otherwise, upon trust for his nephew A. for life, and upon trust to preserve, remainder in trust for the first and other son and sons of A., as they should be in seniority of age and priority of birth, and the several heirs of their respective bodies lawfully issuing, so that

"Such sons" construed such *heirs male,* upon the effect of the whole will.

(*r*) 1 B. C. C. 206. (*s*) 3 B. & P. 620.

the eldest of such sons and the heirs of his body should be preferred to the younger of the same sons and the heirs of his and their body and bodies. The question was, whether the eldest son of the testator took an estate for life or in tail; in other words, whether the testator had not explained himself by the words "heirs male of the body" in that devise to mean *sons*, by declaring that the elder of "*such sons*" should be preferred to the younger. Lord *Alvanley*, and the rest of the Court of Common Pleas, expressly avoiding an intimation of what their opinion would have been if that clause had stood alone in the will, held, that in connection with the devise to the other sons, the daughters, and the nephew, the son took an estate tail.

Remarks upon *Poole* v. *Poole*.

In this case the context certainly much assisted the construction adopted by the Court, for as the other sons of the testator, as well as his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The clause which gave rise to the question, although applied properly enough in a subsequent part of the will to the devise to the other sons of the testator, was redundant in the position which it here occupied, where its insertion was evidently an error.

To W. and to his heirs male, the elder son surviving, and the heirs male of his body always to be preferred, &c.

Again, in the case of *Jack* v. *Fetherstone* (*t*), where the words of devise were:—"I give, &c. to W., and to his heirs male, according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses and tenements, not hereinbefore disposed of, *the elder son surviving of the said W., and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son;* and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to T., (brother of the said W.), and his heirs male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever." The House of Lords held, that W. took an estate tail

(*t*) 9 Bligh, 237, [*S. C.* 3 Cl. & Fin. 67, nom. *Fetherston* v. *Fetherston*.]

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male. Lord C. J. *Tindal* declared the unanimous opinion of the Judges to be, that the present case was governed by the rule laid down by Lord *Alvanley* in *Poole* v. *Poole*, "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Here the subsequent words were not wholly incompatible with an estate tail. If W. took an estate tail, the elder son surviving, and the heirs male of his body would be preferred to the second or the younger son, and any difficulty created by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

By contrasting *Lowe* v. *Davies* and *Lisle* v. *Gray* with *Jones* v. *Morgan*, and *Goodtitle* v. *Herring* with *Poole* v. *Poole* and *Jack* v. *Fetherstone*, the limits of the doctrine of the respective cases will be perceived.

Declaration that devise to heirs of the body was intended to be *in strict settlement.*

In further confirmation of the doctrine that the words "heirs of the body" are not controlled by expressions of an equivocal import, may be cited the case of *Douglas* v. *Congreve* (*u*), where a testator devised real estate to A. for life, and after his decease to the *heirs of his body*, and so on to several other persons by way of remainder in like manner, and then declared that all the aforesaid limitations were intended by him to be *in strict settlement*, with remainder to his own right heirs for ever; and the Court of C. P. certified an opinion that these ambiguous words did not prevent the devisees from taking estates tail under the prior words of devise; which certificate was afterwards confirmed by Lord *Langdale*, M. R., who observed, "In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rules of law, give an estate tail to the plaintiff; and it does not appear to me, that the words, 'in strict settlement,' can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different."

(*u*) 5 Scott, 223, 4 Bing. N. C. 1, 1 Beav. 59.

# CHAPTER XXXVIII.

## "CHILDREN," "CHILD," "SON," "DAUGHTER," WHERE WORDS OF LIMITATION.

I. *Rule in Wild's Case.*
II. *"Child," "Son," "Daughter," &c., where used as nomina collectiva.*

*Children,* where a word of limitation.

I. THE rule of construction commonly referred to as the doctrine of *Wild's case* (*a*) is this, that where lands are devised to a person *and his children, and he has no child at the time of the devise,* the parent takes an estate tail; for it is said, "the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not *in rerum naturâ,* and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation." In support of this position, a case is referred to, as reported by Serjeant *Bendloes* (*b*), in which the devise was to husband and wife, "and to the men children of their bodies begotten," and it did not appear that they had any issue male at the time of the devise, and therefore it was adjudged that they had an *estate tail* to them and the heirs male of their bodies. The principle has been followed in several subsequent cases.

Rule in *Wild's case.*

Thus, in *Davie* v. *Stevens* (*c*), where a testator devised to his son S., when he should accomplish the full age of twenty-one years, the fee-simple and inheritance of Lower Shelstone, *to him and his child or children* for ever, but if he should happen to die

To A. *and his child or children* for ever.

(*a*) 6 Rep. 17; *S. C., Anon.,* Gouldsb. 139, pl. 47; *S. C.* nom. *Richardson* v. *Yardley,* Moore, 397, pl. 519. [This rule is distinct from the point *decided* in *Wild's case,* which arose on a devise to A. and his wife, and after their decease to their children. And see *Doe* d. *Tooley* v. *Gunniss,* 4 Taunt. 313; *Doe* d. *Liversage* v. *Vaughan,* 5 B. & Ald. 464.]

(*b*) 1 Bulstr. 219, Bendl. 30.

(*c*) Dougl. 321. The case of *Wharton* v. *Gresham,* 2 W. Bl. 1083, is generally classed with these cases; but as the devise was to J. W. and his sons *in tail male,* it is clear that he took an estate tail without construing "sons" as a word of limitation; and the only consequence of the non-existence of a son was his exclusion from taking immediately under the devise.

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before twenty-one, then over to testator's wife for ever. S. was unmarried at the death of the testator, and it was held that he took an estate tail, *there being no children to take an immediate estate by purchase.* The meaning, Lord *Mansfield* said, was the same as if the expression had been "to S. and his heirs, that is to say, his children or his issue." The words "for ever" made no difference, for the heirs (of the body) of S. might last for ever (*d*).

To J. *and his children* lawfully to be begotten.

So, in the case of *Seale* v. *Barter* (*e*), where the devise was in these words, "It is my will that all my lands and estates shall after my decease come to my son J., *and his children* lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them or any of them, as he shall think proper, and for default of such issue, then," over in like manner to a daughter. J. had no child at the date of the will, [but had a daughter living at the testator's death (*f*).] The Court of Common Pleas, on the authority of *Wild's case*, *Wharton* v. *Gresham*, and several other cases (which the writer has referred to other grounds, as they did not involve the inquiry whether the devisee had children or not at the time), held, that J. took an estate tail, the Chief Justice (Lord *Alvanley*) expressly intimating that the Court gave no opinion as to what

Observations upon *Hodges* v. *Middleton*.

(*d*) In *Hodges* v. *Middleton*, Dougl. 431, Lord *Mansfield* and the Court of King's Bench inclined to think that where a testator devised to A. for life, and after her death to *her children*, upon condition that she or they constantly paid 30*l*. a year for a clergyman to officiate in her chapel, and on failure thereof to testator's own next heirs, and in case of failure of children of A., then to her brother G., &c., A. had an estate tail; or that if she took an estate for life, the children took an estate tail; and as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to the children in this case was by way of remainder, there seems to have been no ground, whether a child existed at the date of the will or not, for holding the parent to be tenant in tail. It is as difficult to perceive any satisfactory reason for giving the children estates tail. The direction to pay the 30*l*. a year would have enlarged their devise to a fee-simple. See sup. 250.

(*e*) 2 B. & P. 485; but see *Doe* d. *Davy* v. *Burnsall*, 6 T. R. 30; *S. C.* nom. *Burnsall* v. *Davy*, 1 B. & P. 215; *Doe* d. *Gillman* v. *Elvey*, 4 East, 313, post, where it seems to have been taken for granted that under a devise to A. and his issue, the issue took by way of remainder; and it is observable that in the case of *Heron* v. *Stokes*, 2 D. & War. 107, Sir *Edward Sugden* suggested that the more natural construction of a gift to one and his children, *there being no children in esse at the time*, and that which he should have adopted in the absence of authority the other way, would be to hold it to be a gift to the parent for life, with remainder to the children. These remarks do not shew that this eminent Judge considered that the authorities would have left him free to adopt such a construction if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often recognized rule in *Wild's case*, either with or without the modification suggested. With respect to personalty, perhaps, the authorities would not be found to present so formidable an obstacle to the adoption of the doctrine of the Irish Chancellor.

(*f*) See 2 B. & P. 487.

would have been the construction if there had been children born at the time of the devise.

Devise in remainder to B. and to his children lawfully begotten for ever.

Again, in the case of *Broadhurst* v. *Morris* (*g*), where the testator devised all his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law F. he directed that the whole legacy to him should go to his (testator's) grandson, B., *and to his children lawfully begotten for ever;* but, in default of such issue, *at his decease*, then over. B. was unmarried at the death of the testator. It was contended, that the words "at his decease," distinguished the present case from the previous authorities; and it was also suggested, that, by the effect of the words "for ever," the children might take the fee; but the Court of K. B. certified (the case being from Chancery), that the devise conferred an estate tail on B.

Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail.

Suggested modification of the terms of the rule.

*The time of the devise* appears to denote rather the period of the *making* of the will, than the time of its *taking effect*, and yet it is impossible not to see that the material period in regard to the evident design of the rule, is the death of the testator, when the will takes effect.

The object of the rule manifestly is, that the testator's intention in favour of children shall not *in any event* be frustrated; but if it be applied only in case of there being no child living at the time of the making of the will, the accident intended to be so carefully guarded against may occur. For suppose there should happen to be a child or children at that time, who should subsequently die in the testator's lifetime, so that no child was living at his death; in this case, though there was no child to take jointly with the parent, yet the rule would not be applied in favour of after-born children. On the other hand, in the converse case, namely, that of there being a child at the death, but not at the date of the will, an estate tail would be created, though there was a child competent to take by purchase, so that the ground upon which that construction has been resorted to did not exist. Indeed a still more absurd consequence may follow from an adherence to the literal terms of this rule of

(*g*) 2 B. & Ad. 1.

construction in the latter case; for suppose there is no child at the making of the will, but a child subsequently comes into existence, who survives the testator, and the parent does not, the devise would fail altogether, notwithstanding the existence of a child at the death of the testator, if it were held that the parent would have been tenant in tail (*h*). These circumstances actually occurred in *Buffar* v. *Bradford* (*i*), where a testator in a certain event gave real and personal estate to *A. and the children born of her body* (*k*). A. having died in the testator's lifetime, leaving a child who was born after the making of the will *when A. had no child*, it was contended on the authority of *Wild's case*, that the devise had lapsed; but Lord *Hardwicke* held the child to be entitled. His Lordship said, "It must be allowed that children in their natural import are words of purchase and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way.*"

Application of the rule to future devises.

If the literal terms of the rule in *Wild's case* can be departed from in the manner suggested, in order to give effect to *its spirit*, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming in *esse* before the period of vesting in possession would be entitled (*l*), the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any *such objects*. In the case of *Broadhurst* v. *Morris* (*m*), the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention, and it must be confessed that, in reference to cases of every class, the modification of the doctrine suggested in the preceding remarks has to encounter the objection, that it makes the construction of the devise depend upon subsequent events, and therefore its adoption is not too hastily to be assumed. [Probably Lord *Hardwicke* did not intend to countenance such a doctrine, but only to explain the real meaning of the rule to be that the

(*h*) But now see 1 Vict. c. 26, s. 32, ante, Chap. XI.

(*i*) 2 Atk. 220.

(*k*) In some of the early cases an absurd distinction is taken between a gift to children and a gift to children *of the body*, as if the latter more strongly pointed to an estate tail. Even Lord *Hale* seriously advanced it in *King* v. *Melling*, 1 Vent. 230. This is indeed "spelling a will out by little hints." See same judgment, 230.

(*l*) Ante, p. 143.

(*m*) Ante, p. 367.

[word "children" may be construed as a word of limitation, where the general scope and object of the will necessitates such a construction (*n*). In this sense his observations are not at variance with the case of *Seale* v. *Barter* (*o*), where, though there were no children living at the time of making the will, yet in the interval before the testator's death a daughter was born, whose existence at that time did not prevent the application of the rule.]

It has been hitherto treated as an undeniable position, that in the devises under consideration, children, if there be any, will take jointly with their parent by purchase; and such certainly is the resolution in *Wild's case*, as reported in *Coke* (*p*), who lays it down—"If a man devise land to *A. and to his children or issue*, and *they* then have issue of *their* bodies, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary: and therefore, in such case, they shall have but a joint estate for life."

Rule in *Wild's case* as to the children taking jointly.

And in conformity to this doctrine seems to be the case of *Oates* d. *Hatterley* v. *Jackson* (*q*), where a testator devised to his wife J. for her life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband, *and their heirs* for ever. B. had one child at the date of the will, and afterwards others; and it was held that she took jointly with them an estate in fee, and consequently that on their deaths (which had happened) she became entitled to the entirety in fee. This, it will be observed, was the case of a devise *in fee*.

But in the more recent case of *Jeffery* v. *Honywood* (*r*), where a testator gave certain estates, subject to charges, to A., and to all and every the *child and children*, whether male or female, of her body lawfully issuing, and *unto his, her, and their heirs or assigns for ever, as tenants in common*. A. died in the lifetime of the testator, leaving ten children. (It is not expressly stated whether any of the children were living at the date of the will, but it seems probable that this was the case.) The question

To A. and her children, and their heirs.

[(*n*) See per Sir *W. P. Wood*, *Webb* v. *Byng*, 2 Kay & J. 674. Stated post, p. 371.

(*o*) 2 B. & P. 485; see also *Scott* v. *Scott*, 15 Sim. 47.]

(*p*) 6 Rep. 17. The plural "they" and "their" appears to be used by mistake.

(*q*) 2 Stra. 1172. See also *Buffar* v. *Bradford*, 2 Atk. 220; [*Caffary* v. *Caffary*, 8 Jur. 329.]

(*r*) 4 Madd. 398. See also *Newman* v. *Nightingale*, 1 Cox, 341, elsewhere stated.

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was, whether A. took an estate in fee in an eleventh share, the consequence of which would be that it lapsed by her death in the testator's lifetime. The affirmative was contended for on the authority of *Oates* v. *Jackson;* but Sir *John Leach,* V. C., held that A. had a life estate only; he said, "There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In *Oates* v. *Jackson* the mother was, by the plain force of the expression, comprehended in the limitation in fee."

Children held to take by way of remainder.

The difference of expression, however, in the two cases is extremely slight. In *Jeffery* v. *Honywood,* the gift is "to A. and *to* all and every the child and children." In *Oates* v. *Jackson,* "to A. and her children." The only difference consists in the word "to," and, according to the report of the latter case in Modern Reports (*s*), even this slight difference is extinguished, the expression there being "to B. and *to* the children of her body" (*t*).

Observations upon *Jeffery* v. *Honywood.*

Even supposing the words of the limitation not to apply to the mother, (in which case, however, it might have been contended that she took the fee by force of the word "estates,") it is difficult to see upon what ground the devise to the children could be held to be *a remainder* expectant on the mother's estate, and not to be immediate or in possession as to all the objects. His Honor's objection to the latter construction is, that "after-born children would be included in this devise, and it is a singular intention to impute to a father, that he means his daughter's personal interest in an estate should continually diminish upon the birth of a new child." But, according to all the authorities (*u*), including a decision of the Vice-Chancellor himself (*x*), an *immediate* gift *to children vests exclusively in the objects living at the death of the testator.*

(*s*) 7 Mod. 459.

(*t*) It has been justly remarked, however, that the substitution of the word "his, her and their" for the simple "their" of *Oates* v. *Jackson* shewed the testator's idea that it was probable [qu. possible] that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Construction of Issue, &c., pl. 54. [A similar line of argument was taken by Lord *Northington* in *Garden* v. *Pulteney,* 2 Ed. 323, Amb. 499, post, 374.]

(*u*) *Heath* v. *Heath,* 2 Atk. 121; *Singleton* v. *Singleton,* 1 B. C. C. 542, n., and other cases cited ante, p. 142.

(*x*) *Scott* v. *Harwood,* 5 Madd. 332.

The case of *Jeffery* v. *Honywood* seems to be inconsistent with, and must, therefore, be considered as overruled by the case of *Broadhurst* v. *Morris* (*y*) already stated. It is true that the former case was cited with seeming approbation in the case of *Bowen* v. *Scowcroft* (*z*) by Mr. Baron *Alderson*, who founded the latter decision mainly on its authority; but the cases are, it is submitted, distinguishable, as will be seen by referring to the statement of *Bowen* v. *Scowcroft* in a subsequent chapter.

*Children* held to be a word of limitation, notwithstanding the existence of children.

In some instances the Courts seem to have inclined to construe "*children*" a word of limitation, notwithstanding the existence of children. Thus, in *Wood* v. *Baron* (*a*), where a testator devised to his daughter his whole *estate* and effects, real and personal, *who should hold and enjoy the same as a place of inheritance to her and her children, or her issue, for ever;* and if his daughter should die leaving no child or children, or if her children should die without issue, then over. It was held, that the daughter took an estate tail, though she had issue at the time of the making of the will, and of the death of the testator.

Devise to A. as a "place of inheritance to her and her children, or her issue."

Devise to A. and her children of mansion house with articles as heir-looms.

[And in the somewhat similar case of *Webb* v. *Byng* (*b*), where the testatrix, *Anne Cranmer*, devised as follows:—"I give in trust to my executors for my niece, *Mary Anne Byng*, and her children, all my Q. estates, provided she takes the name of *Cranmer* and arms, and her children, with my mansion house, plate, books, linen, &c., Archbishop *Cranmer's* portrait, by Holbein," and other articles "as heir-looms with my estate:" there were children of Mary Anne Byng in esse at the date of the will and at the death of the testatrix; but it was held by Sir *W. P. Wood*, V. C., that Mary Anne Byng took an estate tail. She and her children could not take concurrently; since that would involve this manifest absurdity, viz., that they must all live together in the same house and enjoy the various articles given as heir-looms with the estate. And the object of the testatrix being to perpetuate the name of Cranmer, she could not have intended that Mary Anne Byng should take for life, with remainder to her eight children as joint tenants in fee; because then, independently of the fact that *Jeffery* v. *Honywood* had been overruled by *Broadhurst* v. *Morris*, the estate would by that construction be divisible into eight separate estates,

(*y*) 2 B & Ad. 1. [See acc. per Sir *W. P. Wood*, 2 Kay & J. 673.]
(*z*) 2 Y. & C. 640.
(*a*) 1 East, 259.
[(*b*) 2 Kay & J. 669; affirmed on appeal 26 L. J. Ch. 107.]

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[and as the parties to take the property were also to take the name and arms, the result would be to found as many small families all bearing the name and arms of *Cranmer*, whereas the testatrix spoke of her estate as one and indivisible and to be enjoyed in its entirety.]

In *Seale* v. *Barter* (*c*), Lord *Alvanley* observed that, according to the report of *Wild's case* in *Moore* (*d*), two of the Judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his Lordship that the devise in that case was to A. and his wife, and *after their death* to their children, which it is now admitted on all hands gives an estate for life to the parents, with remainder to their children; so that the notion as to its being an estate tail was clearly untenable (*e*). Had the observation been applied to a devise to A. and his children simply, it might have had more weight.

The word "children" seems to have been construed as a word of limitation (in a very obscure will) in the case of *Doe* d. *Gigg* v. *Bradley* (*f*), where a testator bequeathed a leasehold property to A. and B., for life, share and share alike, with survivorship for life to A., and after their decease to the children of A., "to be equally divided between them, share and share alike, and to the survivor of them *and their children*;" it was held that these words were words of limitation, applicable to the gift to the children, (though there were children of such children living at the death of the testator (*g*),) and accordingly it was to be construed as a gift to the children absolutely (*h*), with survivorship between them for *life*.

Rule whether applicable to *bequests* of personalty.

This case has too much of peculiarity to authorize any general conclusion. Lord *Hardwicke*, in *Buffar* v. *Bradford* (*i*), seems to have been averse to the application of the rule in *Wild's case* to personal estate, where, he said, the effect of construing *children* to be a word of limitation must be, that the first taker would have all (*k*); and the same reluctance is perceptible in

(*c*) 2 B. & P. 485, ante, 366.

(*d*) Pl. 519, 397, nom. *Richardson* v. *Yardley*.

(*e*) See also his Lordship's observations upon *Hodges* v. *Middleton*, stated ante, in *Seale* v. *Barter*, 2 B. & P. 494, which are susceptible of the same answer.

(*f*) 16 East, 399.

[(*g*) It does not appear whether any were living at the date of the will; possibly there were, as one of the children of A. was then married.]

(*h*) See rule discussed post.

(*i*) Ante, p. 368.

[(*k*) But every case where the words "issue" and the like, which give an estate tail in realty, are held to give an

the more recent cases of *Stone* v. *Maule* (*l*), elsewhere stated, *Heron* v. *Stokes* (*m*), and *Audsley* v. *Horn* (*n*).

In such cases, however, the point seems to be immaterial; for as the rule only applies where there is no child to take jointly with the parent, and as the absolute interest in personalty passes without words of limitation, the result is, that the parent, as the only existing object at the time of distribution, would be solely entitled quâcunque viâ (*o*).

To bequests of personal annuities.

[There is one class of cases, however, where the point would call for a decision; that is, where there is a gift of an annuity to a person and his children. For though a simple gift of personalty, or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation (*p*); yet where an annuity is so given, the annuitant takes only for life (*q*).

In a case of *Snowball* v. *Procter* (*r*), where a testator bequeathed the annual proceeds of his share in a leasehold colliery to be equally divided amongst his wife and children and their children after them respectively, it appeared that none of the testator's children were married at the time of his death, and it was contended that these words gave a personal benefit to each successive legatee and confined the children to a limited interest for the sake of the grandchildren; but Sir *J. K. Bruce*, V. C., thought it clear that they were words of limitation and not of purchase. This conclusion, however, was materially assisted by other parts of the will, and the case is by no means an authority, that the rule in *Wild's case* is generally applicable to personal bequests (*s*).]

Parent entitled for life, and children taking ulterior interest.

Indeed, with respect to personal estate, an attempt has often been made, and [of late with increasing] success, to cut down the parent (according to Sir *J. Leach's* construction in *Jeffery*

[absolute interest in personalty, is open to the same objection.]

(*l*) 2 Sim. 490.

(*m*) 2 Dr. & War. 89, 1 Con. & Law. 270; [Sugd. Law of Prop. 236 sq.; but see *S. C.* 12 Cl. & Fin. 161, *Gawler* v. *Cadby*, Jac. 346.

(*n*) 26 Beav. 195, and on app. 6 Jur. N. S. 205, 29 L. J. Ch. 201.]

(*o*) See *Cape* v. *Cape*, 2 Y. & C. 543. And the result would be the same in reference even to real estate under wills made or republished since 1837, as the fee would pass by such wills without words of limitation.

[(*p*) *Heron* v. *Stokes*, 2 Dr. & War. 89, 12 Cl. & Fin. 161; *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576.

(*q*) *Savery* v. *Dyer*, Amb. 139; *Yates* v. *Maddan*, 3 Mac. & G. 532; and the rule is not altered by the stat. 1 Vict. c. 26, *Nichols* v. *Hawkes*, 10 Hare, 342. As a personal annuity cannot be entailed, the limitation to children, if it attracted the rule in *Wild's case*, would create a conditional fee, *Stafford* v. *Buckley*, 2 Ves. 170.

(*r*) 2 Y. & C. C. C. 478.

(*s*) See, however, *Scott* v. *Scott*, 15 Sim. 47.]

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v. *Honywood*) to a life interest, the children taking the ulterior interest by way of remainder. Thus, in *Crawford* v. *Trotter* (*t*) (a decision of the same learned Judge), a bequest of 1,000*l.* Three per Cent. Reduced Annuities to A. and her heirs (say children), was held to give a life interest to A., and the capital to her children, [the word "heirs," which was used as synonymous with "children," importing that they were to take after her death.]

So, in the case of *Morse* v. *Morse* (*u*), where a testator gave to his daughter *A. and her children* 5,000*l.* for their sole use and benefit, 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A. B. *trustee of those sums for his daughter and her children;* Sir *L. Shadwell*, V. C., held the 5,000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime, or after his decease.

[So, in *Garden* v. *Pulteney* (*x*), where stock was bequeathed in trust for A. (then an infant), and for such younger son and sons as A. should have, to be equally divided between them, share and share alike, and in case there should be but one younger son, then the whole to that younger son, Lord *Northington* thought it clear that A. was intended to take for life, with remainder to his younger sons: the latter words which gave the whole to a younger son in case there should be but one, could not have effect by any other construction.

Again, in *Vaughan* v. *Marquis of Headfort* (*y*), a testator bequeathed a legacy to A. and his children, *to be secured for their use*, and Sir *L. Shadwell*, V. C., held that, as the latter words were inapplicable to A., since he might have taken his share and secured it for himself, they could only mean that the fund was to be secured for A. for life, and for his children after his decease.

Effect of limitation to mother for separate use.

And in *Ogle* v. *Corthorn* (*z*), where a testator gave "to his great-niece E. 7,000*l.*, and to her heirs free from the power of her husband," and proceeded to direct that sum to be invested in trust "for E. and her children, and to be applied most conducive to their interest;" it was held by Sir *J. Wigram*, V. C., that E. took for life, and her children after her death, there

(*t*) 4 Mad. 361.
(*u*) 2 Sim. 485.
[(*x*) 2 Ed. 323, Amb. 499. See also *Audsley* v. *Horn*, 26 Beav. 195, on app. 6 Jur. N. S. 205, 29 L. J. Ch. 201.
(*y*) 10 Sim. 639.
(*z*) 9 Jur. 325.

[being a continuing trust, besides a gift to the separate use of a married woman, which of itself was considered by Sir *L. Shadwell* to be conclusive (*a*).

Upon this last point, however, that learned Judge did not seem to entertain a fixed opinion, since, in *De Witte* v. *De Witte* (*b*), he came to an opposite conclusion under similar circumstances; and Lord *Langdale*, M. R., followed that decision in *Bustard* v. *Saunders* (*c*); neglecting, therefore, the conflicting decisions of Sir *L. Shadwell*, we have on the one side Sir *J. Wigram's* submission (in a case not resting solely on that ground) to the authority of *French* v. *French*, and on the other Lord *Langdale's* approval of the case of *De Witte* v. *De Witte*, which, it is submitted, is consistent with sound principles of construction (*d*).

In *Dawson* v. *Bourne* (*e*), where a testator gave his residuary estate to be equally divided between his nieces A. and B., "and he confined his said legacies to be given to his nieces A. and B. and their children, without comprehending their husbands, unless they, his said nieces, or either of them, should die without issue:" Sir *J. Romilly*, M. R., thought that the only way to give effect to these words was, to give the residue between the nieces equally for their separate use for life, and after their deaths to their children, and if they had no children, then to the nieces absolutely.

And in *Jeffery* v. *De Vitre* (*f*), where a testator bequeathed a legacy to "A. the wife of B., for the benefit of herself and such children as she then had *or might thereafter have* by her then husband, free from the control of her husband, the same learned Judge observed that all A.'s children were intended to take, and that this could only be effected by giving a life interest to the widow and the fund afterwards to the children: otherwise it would be distributable at the testator's death amongst the children then in esse (together with A.). The trust for A.'s separate use was relied upon in argument, but not noticed by the Court.

[(*a*) *French* v. *French*, 11 Sim. 257; *Bain* v. *Lescher*, ib. 397.

(*b*) 11 Sim. 41.

(*c*) 7 Beav. 92, 7 Jur. 986, where, however, the opposite decisions were not cited.

(*d*) *Froggatt* v. *Wardell*, 3 De G. & S. 685; and *Cator* v. *Cator*, 14 Beav. 463, are too special to be relied on in favour of a general rule. See *Chambers* v. *Atkins*, 1 S. & St. 382.

(*e*) 16 Beav. 29.

(*f*) 24 Beav. 296. See also *Parsons* v. *Coke*, 4 Drew. 296, where the issue were directed to take the share of their parents.

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[So strong indeed has been the tendency in modern cases to hold upon very slight indication of intention that the parent shall take a life interest with remainder to the children, that, although, in the two cases last stated, the M. R. relied on the special terms of each will as leading to such a conclusion, yet on a subsequent occasion he thus stated the result of the authorities:—"It is to be observed," said his Honor, "in all these cases, that under a gift to a wife and her children, if there be nothing to denote the proportions in which the wife and children are respectively to take, then the Court is called upon to determine the proportions; and it follows, according to the rule laid down in *Crockett* v. *Crockett* (*g*), that the most natural disposition is to give the property to the wife for her life, and afterwards to her children" (*h*).

Parent and children will take concurrently where no evidence of contrary intention.

In that case, however, Lord *Cottenham* expressly distinguishes a simple gift to the mother and her children from one where there is an indication, however slight, of an intention that the children should not take jointly with the mother (*i*), and throughout his Lordship's judgment it appears to be assumed that in the absence of all indication of such an intention concurrent interests will be created.

As] in the case of *Pyne* v. *Franklin* (*k*), where a testator gave 200*l.* to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces *and their children*, as his wife should, by will, appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to the nieces, who afterwards died without having had any child. It was held that the payment was properly made.

[In the case of *Salmon* v. *Tidmarsh* (*l*), where a testator directed his trustees to hold the produce of his real and personal property "for the use and benefit of his wife and nine children in such manner as his trustees should from time to time think proper, during the widowhood of his said wife; nevertheless it

[(*g*) 2 Phill. 553, stated Chap. XII., sect. 5.

(*h*) Per Sir *J. Romilly*, M. R., *Salmon* v. *Tidmarsh*, 5 Jur. N. S., 1380. See also *Ward* v. *Grey*, 26 Beav. 485; and Lord *St. Leonards*' remarks cited ante, p. 366, n.

(*i*) See 2 Phill. 555, 556.]

(*k*) 5 Sim. 458. See also *De Witte* v. *De Witte*, 11 Sim. 41; *Sutton* v. *Torre*, 6 Jur. 234; [*Lenden* v. *Blackmore*, 10 Sim. 626; *Paine* v. *Wagner*, 12 ib. 184; *Read* v. *Willis*, 1 Coll. 86; *Cunningham* v. *Murray*, 1 De G. & S. 366; *Gordon* v. *Whieldon*, 11 Beav. 170; *Beales* v. *Crisford*, 13 Sim. 592; *Mason* v. *Clarke*, 17 Beav. 126; *Cormack* v. *Copous*, ib. 397.

(*l*) 5 Jur. N. S. 1380.

[was his desire that a certain sum should be set apart for his daughter S., and all the rest to be equally divided between his said wife and children on their severally attaining twenty-one, and his said wife continuing a widow." Sir *J. Romilly*, M. R., held that the first part of the will would have given an estate to the wife during widowhood, and that upon her death the property would go to the children. But then followed the direction to divide between the wife and children on attaining twenty-one; under which he thought the wife and nine children were entitled to one-tenth each, immediately on their attaining their respective ages of twenty-one, and that the words "my said wife continuing a widow" related back to the former part of the will, meaning that the widow was to receive the income during the minority of the children for their benefit.

A devise of all the testator's "property to A. and to his children in succession," gives A. an estate tail (*m*).

So a devise in remainder to children, "and so on to their children for ever," after an estate expressly limited to the life of the parent, will give the latter an estate tail as the only means of effecting the testator's object (*n*).]

Devise "to A. *for life*, remainder to his children and so on to his children for ever," an entail in A.

The same principle which regulates devises to children applies to devises to *sons*, the only difference being that the estate tail, which the latter term, where used as nomen collectivum, creates, will be an estate tail *male* (*o*). A devise to A. for life, and after his decease to his sons, of course gives to A. an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life or in fee, according as the will is regulated by the old or the new law.

Devises to *sons* not distinguishable from devises to *children*.

II. We now proceed to consider a point which has often occupied the attention of the Courts, and still more frequently that of the conveyancing practitioner,—namely, whether the word "son" or "child" in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, *i. e.*, as synonymous with issue male or issue general.

"Son," "child," "daughter," &c., where used as nomina collectiva.

One of the earliest cases of this kind is *Byfield's case* (*p*), where, after a devise "to A., and if he dies *not having a son*,

To A., and if he die *not having a son*.

[(*m*) *Earl of Tyrone* v. *Marquis of Waterford*, 29 L. J. Ch. 486.

(*n*) *Wollen* v. *Andrewes*, 2 Bing. 126; *Trash* v. *Wood*, 4 My. & Cr. 328. See also *Cormack* v. *Copous*, 17 Beav. 397.

(*o*) 1 Bulst. 219, Bendl. 30.]

(*p*) Cited by *Hale*, C. J., in *King* v. *Melling*, 1 Vent. 231.

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then" over to the heirs of the testator, it was held that the word "son" was used as *nomen collectivum*, and that the devise created an entail.

To J., and if he die having no son.

So, in *Milliner* v. *Robinson* (*q*), where a testator devised to his brother J., and if he should die *having no son*, that the land should remain over; it was held that J. had an estate tail.

Again, in the case of *Robinson* v. *Robinson* (*r*), where the testator devised his real *estate* to L. for the term of his natural life and no longer, provided he altered his name and took that of R., and lived at the testator's house at B., and after his decease *to such son as he should have lawfully to be begotten* taking the name of R., and for default of *such* issue, then over to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favour of L.'s children, who were designed for holy orders; and, after the same should be disposed of as aforesaid, gave the *perpetuity* of the presentations to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir *Joseph Jekyll*, M. R., held that L. was entitled for life, remainder to his eldest, and but one, son for life, remainder in fee to W.; and Lord *Talbot*, on appeal, affirmed the decree. But afterwards, a bill having been filed by the second son of L. (the first having died an infant), the Judges of the Court of King's Bench, on a case sent to them by Lord *Hardwicke*, certified their opinion "that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male." The Lords Commissioners, who succeeded Lord *Hardwicke* in the custody of the great seal, confirmed this certificate; and their decree was affirmed after great consideration, and with the concurrence of all the Judges, by the House of Lords.

To A. for life, and after his death "to such son as he shall have."

Remark on *Robinson* v. *Robinson*.

The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest tribunal, but in consequence of its frequent recognition. Lord *Kenyon* founded a great number of decisions (*s*) upon it,

(*q*) 1 Moore, 682, pl. 939.

(*r*) 1 Burr. 38, 2 Ves. 225, 1 Kenyon, 298, *S. C.* in D. P. nom. *Robinson* v. *Hicks*, 3 B. P. C. Toml. 180.

(*s*) See *Hay* v. *Coventry*, 3 T. R. 86; *Doe* v. *Applin*, 4 ib. 82; *Denn* d. *Webb* v. *Puckey*, 5 ib. 303; *Doe* d. *Candler* v. *Smith*, 7 ib. 533; *Doe* d. *Bean* v. *Halley*, 8 ib. 5; *Doe* d. *Cock* v. *Cooper*, 1 East, 235.

and though his Lordship did not invariably advert to the true principle (sometimes laying an undue stress on the words, "in default of *such* issue," which a long line of cases has established to be merely referential (*t*),) yet, in *Doe* v. *Mulgrave* (*u*), he distinctly treated the case as standing on the ground to which it has been here referred.

Again, in the case of *Mellish* v. *Mellish* (*x*), where the devise was in these words: "Hamels to go to my daughter C. M. as follows: *in case she marries and has a son, to go to that son;* in case she has more than one daughter at her death, or her husband's death, *and no son,* to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother W. M." In a subsequent part of his will the testator added, "Mrs. P. to receive 200*l.* a year from C. M., during the life of Mrs. P." The question was what estate C. M. took in Hamels. It was contended for her, on the authority of *Wight* v. *Leigh* (*y*), *Wharton* v. *Gresham* (*z*), *Chorlton* v. *Craven* (*a*), *Sonday's case* (*b*), and *Wyld* v. *Lewis* (*c*). that she took an estate tail. On the other side it was insisted that C. M. took the fee by the effect of the annuity made payable by her (*d*), and which fee was defeasible on either of three events: first, if she married, and had a son, it was to go to that son; secondly, if she had more than one daughter, and no son, it was then to go to the eldest daughter; and, thirdly, if she had no child at all (or, it seems, if she had only one daughter), it was to go to W. M. The Court, however, held that C. M. took an estate tail male. *Bayley*, J., said, "It may be collected from the authorities, that if the word *son* be used, not as *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear that words are not to operate as an executory devise, which are capable of operating in any other way. In this case the words are, 'Hamels to go to my daughter

To A., and if she marries and has a son, then to that son.

"Son," held to be a word of limitation.

(*t*) See post, Chap. XL. sect. 3. In this observation, which the writer has found it necessary often to make, he leaves out of view the well-known operation of the words "in default of such issue" to create cross remainders among several tenants in tail, which turns on a different principle.

(*u*) 5 T. R. 323.

(*x*) 2 B. & Cr. 520. Examine the case of *Seaward* v. *Willock*, 5 East, 198, in reference to this doctrine.

(*y*) 15 Ves. 564, post.

(*z*) 2 W. Bl. 1083: ante, 365, n.

(*a*) Cit. 2 B. & Cr. 524.

(*b*) 9 Rep. 127.

(*c*) 1 Atk. 432, post.

(*d*) And other grounds which were clearly inadequate.

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C. M. as follows, viz. in case she marry, and has a son, then it is to go to that son.' Now, if the word 'son' be used as nomen collectivum, it would give to C. M. an estate, to continue as long as there should be any male descendants of her, and that would be an estate in tail male. I cannot find in the subsequent part of this will anything inconsistent with the construction that ought to be put upon it, if he had stopped here." *Holroyd*, J., said the word "son" should be read *any son*. The Court afterwards certified, "that C. M. took an estate in tail male, with a reversion in fee (*e*), subject to other estates created by this will."

Remark on *Mellish* v. *Mellish*.

It is evident, from the concluding words of the certificate, that the Court considered the eldest daughter would take an estate in the event described. The intention expressed in favour of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail, which would descend to daughters.

"Son" held to be a word of limitation.

Again, in the case of *Doe* d. *Garrod* v. *Garrod* (*f*), where a testator, by his will, devised thus:—"As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not,* to the eldest son of my nephew, J. G. and to his son after him, if he has one, if not, to the regular male heir of the G. family." By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son, after his father's decease; and to his "*eldest son, if he has one;* but if he has no son, then to the next eldest regular male heir of the G. family." It was held, that, by the will and codicil, the son of T. G. took an estate tail. Lord *Tenterden*, C. J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great nephew should remain, and that the giving an estate tail to the devisee was warranted by *Sonday's case*.

So, in the case of *Doe* d. *Jones* v. *Davies* (*g*), where a testator, after premising, that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, but that it should be entailed, devised all his real estate to trustees, to permit his daughter, Susanna Maria Jones, not only to receive the rents and profits thereof for her own use, or to sell or mortgage any part, if occasion required; but also to

(*e*) She was heir-at-law. (*f*) 2 B. & Ad. 87.
(*g*) 4 B. & Ad. 43.

settle on any husband she might take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting repairs. He then added, that should "*my daughter have a child I devise it to the use of* SUCH CHILD from and after my daughter's decease, with a reasonable maintenance for the education, &c., of such child in the meantime. Should *none of these cases happen,*" the testator devised the estate to a nephew, subject to a condition to reside, &c., and to his first and every other son, and in default he gave the estate to another person on a like condition, and his first and every other son. The will then proceeded as follows:—"My will and meaning for having the house and farm occupied is for the sake of improving the neighbourhood as far as my poor abilities extend, which would be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remaindermen should ill-treat her, or should be likely to turn out an immoral man, or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament, that my intention of doing good in the neighbourhood might not be defeated. I recommend it to my daughter, for *want of issue to herself,* not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern," (a distinct property of the testator), "which I have also articled for, and entail the rest for the further support of this house." At the time of the making of the will, and at the death of the testator, the daughter had no child. It was held, that the word "child," as here used, was nomen collectivum; it being evident from the whole tenor of the will, that the testator intended that the estate should not go over to the devisees in remainder until the failure of issue of his daughter. The Court considered that the case came within the principle of those in which the word *son* had been held to be nomen collectivum, particularly *Byfield's case.*

Word "child" held to be used as nomen collectivum, and to confer an estate tail.

To this class of cases it is conceived also belongs the case of *Raggett* v. *Beaty* (*h*), where a testator devised a messuage to the use of G. (the second son of his nephew J.) to enter upon and

(*h*) 2 M. & Pay. 512, 5 Bing. 243.

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possess the same after the decease of his father, and he directed the said J. and G. to pay the sum of 100*l.* within one year after his decease to A. and B. upon certain trusts; but in case they did not pay the said sum, he ordered A. and B. to let the premises and receive the rents until the 100*l.* should be paid, they keeping possession of the deeds and not allowing the said J. and G. either to sell or mortgage any part of the premises until the legacies were all paid and G. was twenty-one years of age; *or, if in case the said G. should die and leave no child lawfully begotten of his own body*, it was his will that the said A. and B., their heirs and assigns, should sell the premises and distribute the money arising therefrom amongst his (the testator's) brothers and sisters and C. and D., or their heirs, in such shares as the trustees should think proper. The question sent for the opinion of the Court of Common Pleas was, what estate G. had upon the death of his father. It was contended, that G. took an estate tail as the result of the apparent intention that the estate should not go over, unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued, that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the 100*l.*; and no attempt seems to have been made to distinguish the word "child," as used in this devise, from the word "issue," which occurred in the cited cases. The Court, however, certified that G. took an estate tail.

"In case A. should leave no child," with context:—Held, to create an estate tail.

Remark on *Raggett* v. *Beaty*.

This is the most signal instance in which an estate tail has been created by a devise over in case of the prior devisee leaving no child, though the tenor of the authorities discussed in the present chapter and some others, especially *Doe* v. *Webber* (*i*), (in which Lord *Ellenborough* made very little difficulty of construing the word "children" in such a position as synonymous with *issue*,) had certainly paved the way to such a result. An example of this species of construction has since occurred (though with an assisting context), in the case of *Doe* d. *Simpson*

(*i*) 1 B. & Ald. 713. See also *Hughes* v. *Sayer*, 1 P. W. 534, ante, p. 185; *Wyld* v. *Lewis*, 1 Atk. 432, post; [*Voller* v. *Carter*, 4 Ell. & Bl. 173; *Coles* v. *Witt*, 2 Jur. N. S. 1226.]

Words referring to leaving no *children* held to mean, leaving no *issue*.

v. *Simpson* (*k*), where a testator gave certain lands to his son A., his heirs and assigns, for ever; but if it should happen that A. should die *without leaving any child or children*, he devised the estate to B., C., D., E. and F., their heirs and assigns for ever as tenants in common, with a limitation over to the survivors in case of any of them dying under age and without issue. And the testator in a certain event devised other property, subject to the same mode of distribution among the five devisees over as the before-mentioned property given to A. "in case he died *without issue*." It was considered by the Court that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be, if the first taker should die *without issue* (*l*). [They thought, however, that even without this special reason there would have been strong grounds for coming to the same conclusion. And, accordingly, in the case of *Bacon* v. *Cosby* (*m*), where a testator left "his entire *fortune* equally divided between his two daughters, and directed that the portion of his youngest daughter should devolve, in case of her dying without children, to his eldest daughter and her children;" a similar construction prevailed, though there was no explanatory context, and the consequence was that the gift over was void as to the personal estate. The younger daughter never had a child (*n*), but the elder had two children living at the date of the will, and, in giving judgment, Sir *J. K. Bruce*, V. C., said

(*k*) 5 Scott, 770, 4 Bing. N. C. 333, 3 M. & Gr. 929.

(*l*) A strong instance of refusal to construe the word "issue" as synonymous with *children* occurs in the case of *Malcolm* v. *Taylor*, 2 R. & My. 416, as the testator had, in reference to another subject-matter, clearly used the word issue in that sense.

A. bequeathed the residue of her funded property and her plate to B. and C. for their lives, and after the decease of the survivor to such of the children of C. as she should by deed or will appoint,* and in default of appointment, the residue of the money in the funds to be equally divided among the said children; *and, in case C. should die without issue as aforesaid*, the testatrix bequeathed her funded property and plate to certain persons. It was held, that the words "without issue as aforesaid," in reference to the funded property, meant without such issue as were objects of the prior gift, *i.e.*, children, but that as to the plate, of which there was no gift to the children of C., the words were to be construed as importing a general failure of issue, and consequently that C. was absolutely entitled.

Question whether words referring to failure of *issue* meant *children*, as in another gift in same will.

[(*m*) 4 De G. & S. 261. See *Egan* v. *Morris*, 2 Ll. & Goo. 297, where there was a devise to A. for life, with a gift over if he should die unmarried or without children.

(*n*) So that if the devise had been to her and her children, she would have taken an estate tail on the authority of *Wild's case*, see 3 M. & Gr. 954. But this reasoning is not applicable in case of personal estate, semb. *Stone* v. *Maule*, 2 Sim. 490.]

* This power, it is observable, was not considered to raise an implied trust for the children as to the plate.

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[that, according to the whole course of the decisions and the plainest rules of construction, the younger daughter would have been held to take an estate tail in the realty, and an absolute interest in the personalty, but for the words "and her children" occurring at the end of the will and applied to the elder daughter, coupled with the fact that the elder daughter had children at the date of the will. This, however, he thought was much too slight and conjectural a ground for departing from a settled rule of construction.]

An instance of the word "child" being construed as qualifying the word "heirs" in the preceding devise, is afforded by the case of *Doe* d. *Jearrad* v. *Banister* (*o*), where a testator devised a certain property to A. and her heirs, *if she has any child;* if not, after the decease of herself and her husband, then to B. and her heirs. It was contended that it was a devise in fee upon the condition of A. having a child; but the Court of Exchequer held that she was tenant in tail.

"If she has any child."

But it is not to be inferred from the preceding cases that a devise, definitely pointing out the eldest, or any other individual son, will (unaided by the context) have the effect of conferring an *estate tail* on the parent; and this remark is advanced without losing sight of the case of *Chorlton* v. *Craven* (*p*), where the devise was, to Thomas Chorlton during his natural life, with remainder to the first son of the body of the said Thomas in tail male, lawfully begotten, severally and successively; and for want of such lawful issue, either of his son Thomas Chorlton and his son James Chorlton, then the testator devised the estate to his daughters and their children, share and share alike. The Court of King's Bench, on a case from Chancery, certified Thomas to be tenant *in tail male* (*q*); which was confirmed by the Chancellor, and in 1823 the Court of Exchequer came to the same decision upon the same devise.

Whether term "eldest son" used as nomen collectivum.

In this case, probably, the words "severally and successively" may have assisted the conclusion at which the Court arrived, but these words would have more force if the devise were in

Remark on *Chorlton* v. *Craven.*

(*o*) 7 M. & Wels. 292. See *Goodtitle* d. *Cross* v. *Woodhull*, Willes, 592; *Jenkins* v. *Lord Clinton*, 26 Beav. 108, affirmed in D. P. 6 Jur. N. S. 1043, nom. *Jenkins* v. *Hughes.*

(*p*) 2 B. & Cr. 524, cited; *S. C.* 3 D. & Ryl. 808.

(*q*) The fact of the devise being held to confer an estate tail *male* (which appears by the statement in one of the reports, Dowling and Ryland's, only) is important as shewing that the devise to the son had some influence on the decision; as the subsequent words, if they had led to this result, would seem to have pointed to an estate tail general.

the exact terms of the brief statement which has been handed down to us than if the estate tail were created in more formal language—*i. e.* by a devise to the eldest son, and to the heirs male of his body, in which case the words in question would seem to refer to the mode of taking by the heirs; otherwise they give rise to a strong suspicion that a devise to the second and other sons successively in tail was inadvertently omitted. The absence of all information as to the precise grounds of the decision greatly detracts from its value as a general authority.

Devise to "eldest son" held not to confer an estate tail male.

A question of this kind was much discussed in the case of *Doe* d. *Burrin* v. *Chorlton* (*r*), where a testator devised a messuage to his kinsman S. C. for his life, and after his decease to the *eldest son* of S. C., but for want of such issue, then to his (S. C.'s) daughters or daughter, share and share alike, for ever; but in case his said kinsman had no issue, then to hold to S. C., his heirs and assigns, for ever. It was contended, on the authority of the last case, that the word "son" was to be construed as *nomen collectivum;* and consequently that S. C. took an estate tail male, precedent to the general estate tail, which was assumed to arise by implication from the words referring to a failure of issue in the devise over (*s*). But the Court decisively negatived this construction, being of opinion that neither the devise to the eldest son alone, nor the words "for want of such issue" following such devise, created an estate tail. In none of the cases had there been that strict reference to a single individual which occurred in the case before the Court, except in *Chorlton* v. *Craven*, where considerable weight was probably attached to the expressions "severally and successively."

"To A. for life, and to his eldest son after his death," held an estate tail in A. by force of subsequent devise in tail "in like manner."

[In the case of *Lewis* v. *Puxley* (*t*), a testator devised his real estate in the county of P. to his eldest son John, for life, and to *his eldest legitimate son* after his death; and in default of such issue, he gave it *in like manner* to his son Richard; *and in case Richard had no legitimate issue male, then in like manner* to the offspring about to be born of his (testator's) wife, and in default of such issue, to his own right heirs. And he declared that he made no provision for his son Richard if John lived, because he knew he was otherwise well provided for. It

(*r*) 1 Scott, N. R. 290, 1 M. & Gr. 429. And see *Foord* v. *Foord*, 3 B. P. C. Toml. 124.

(*s*) Ante, Chap. XVII. s. 6.

[(*t*) 16 M. & Wel. 733.

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[was contended, on the authority of *Doe* v. *Chorlton*, that the devise to John and his eldest son after him, gave John no more than an estate for life, and, on the authority of *Goodtitle* v. *Woodhull* (*u*), that this could not be affected by the subsequent expressions in the devise to Richard: but the Court of Exchequer, while allowing the first branch of the argument, rejected the second, and held that the expression "eldest legitimate son" was explained by the subsequent part of the will to be nomen collectivum, and gave John an estate tail.

But the case may be reversed, and the words "eldest son," or the like, which might otherwise have conferred an estate tail on the parent, may, by a similar argument, be confined to their literal meaning. By such referential expressions the testator is supposed to shew the sense in which he understands the preceding devise (*x*).]

[(*u*) Willes, 592.

(*x*) *East* v. *Twyford*, 9 Hare, 713, 4 H. of L. Cas. 517, overruling the decision of the Court of Exchequer on the same will, 9 Hare, 730, n.]

# CHAPTER XXXIX.

## "ISSUE," WHERE CONSTRUED AS A WORD OF LIMITATION.

I. *Devises to a Person and his Issue.—Effect of Words creating a Tenancy in Common,—of Words of Limitation in Fee-simple, and other modifying Expressions.*

II. 1. *Devises to A. for* Life, with Remainder *to his Issue.—Effect in* these *Cases of* — 2. *Superadded Words of Limitation.* 3. *Words of Distribution and Modification with or without Words of Limitation superadded.* 4. *Clear Words of Explanation.* — *Issue synonymous with Sons and Children.* 5. *Devise over in case of failure of Issue* at the Death.

"Issue" a word of limitation, when.

I. "ISSUE" is nomen collectivum, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term, is by construing it as a word of limitation synonymous with *heirs of the body*, by which means the ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word "issue" in its largest sense.

Opinions certainly have differed as to the signification of the word *issue*. It has been denominated by some Judges (*a*) and writers a word of limitation; and a devise to A. and his issue has even been stated by an eminent Judge as "the aptest way of describing an estate tail according to the statute (*b*);" by others, "issue" has been called a word of purchase, or an ambiguous word (*c*). However, it is not from such dicta that the true legal acceptation of the word is to be collected, but from the adjudications *fixing its operation*. Unhappily, some discordancy prevails even here, and an ex-

[(*a*) See per *Parke*, B., 15 M. & Wels. 272; *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 823.]

(*b*) Per Lord *Thurlow*, in *Hockley* v. *Mawbey*, 1 Ves. jun. 149.

(*c*) See judgment in *Ginger* d. *White* v. *White*, Willes, 348; *Roe* d. *Dodson* v. *Grew*, 2 Wils. 324; *Doe* d. *Cooper* v. *Collis*, 4 T. R. 299; *Earl of Orford* v. *Churchill*, 3 V. & B. 67; *Lyon* v. *Mitchell*, 1 Mad. 473; *Tate* v. *Clarke*, 1 Beav. 105; *Doe* d. *Gallini* v. *Gallini*, 3 Ad. & Ell. 340.

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amination of the cases will serve to evince that, in the enunciation of any general proposition on the subject, the utmost caution is requisite.

Devise "to A. and his issue," whether an estate tail.

[A devise simply "to A. and his issue" is included in *Wild's case* (*d*), under the same head as a devise "to A. and his children," and would, therefore, as we have seen in the last chapter, give A. an estate in joint-tenancy with his issue, or an estate in tail, according as A. had or had not issue at the time of the devise (*e*). That A., if he had no issue at the time of the devise, would take an estate tail, is free from all doubt (*f*); and it is also clear that under a devise to a class, as, "to the children of A. and their issue," the children of A. having no issue at the time of the devise, would take an estate tail (*g*). And if some members of the class had no issue at the time of the devise, it would seem that the fact of other members having issue at that time would not vary the construction: for those who had none must take an estate tail as the only way of giving anything to the issue; and those who had, must of course take the same estate (*h*). But if A., (in the one case put above) or all the children of A. (in the other case) had issue at the time of the devise, the authorities do not conclusively decide whether the issue would take concurrently with the ancestor or whether the ancestor would have an estate tail. It was, indeed, said by Lord *Hale* in *King* v. *Melling* (*i*), that though the word *children may be made nomen collectivum,* the word issue is *nomen collectivum* of itself; but this remark appears to have been made with reference only to issue when taking expressly by way of remainder, and is not inconsistent with the issue taking concurrently with the ancestor under a limitation to them not expressly by way of remainder, and Lord *Hale* himself was of that opinion, as is clear from the same case, where he says, "It must be admitted that if the devise were to B. and the issue of his body, having no issue at that time, it would be an estate tail; for the law will carry over the word issue not only to his immediate issue but to all that shall descend from him. *I agree that it would be otherwise if*

Opinion of Lord *Hale*.

[(*d*) 6 Rep. 17.

(*e*) As to the meaning of the expression "time of the devise," see ante, p. 367.

(*f*) *King* v. *Melling*, 1 Vent. 225, 2 Lev. 58, 3 Keb. 95; *Howston* v. *Ives*, 2 Ed. 216; and see cases stated post in this chapter.

(*g*) *Beaver* v. *Nowell*, 25 Beav. 551.

(*h*) *Campbell* v. *Bouskell*, 27 Beav. 325. See also *Parkin* v. *Knight*, 15 Sim. 83.

(*i*) 1 Vent. 231.

[*there were issue at the time*" (*k*). Lord *Hale's* authority is therefore opposed to the proposition that a devise to A. and his issue gives A. an estate tail in every case.

*Martin* v. *Swannell.*

In the case of *Martin* v. *Swannell* (*l*), the testator devised and bequeathed all his real and personal estate to his wife for life, and after her decease unto and among his three children *and their lawful issue,* in such proportions, manner and form as his wife should appoint. There was no gift in default of appointment. Lord *Langdale,* M. R., held, that in default of appointment there was an implied devise "unto and among the three children and their lawful issue," which would make them tenants in tail. It is not stated in the report whether there were any issue of the children living at the date of the will, though it appears probable that some at least had issue at that time (*m*); but the absence of any statement relating to the point shews that it was not thought material to the determination: and probably the better opinion now is that a gift to A. and his issue will give A. an estate tail whether he has issue living at the time of the devise or not; *Wild's case,* to quote Lord *Hardwicke's* words in *Lampley* v. *Blower* (*n*), having been decided before it was fully settled that issue was as proper a word of limitation as heirs of the body.

No assistance derived from the corresponding cases on bequests of personalty.

The cases on the effect of a bequest of personal estate to A. and his issue give us no assistance on this point, for, as we shall see in a subsequent chapter (*o*), the word "issue," when used in regard to personal estate, is frequently considered to be a word of purchase, when, if it had been used with a similar context relating to real estate, it would have been a word of limitation, and accordingly under a gift of personalty to A. and his issue, the issues have been held to take as purchasers, sometimes concurrently with A. (*p*), sometimes in remainder after his death (*q*), and sometimes again by substitution for him in case of his death before the period referred to (*r*), according as the terms of the will point to one construction or another.]

Devise to A. and his *next* or *eldest* issue male.

It seems extremely probable that a devise to A. and his *next* or *eldest* issue male, he having no issue at the time, would

[(*k*) In 3 Keb. Lord *Hale* is made to say expressly it would be a joint estate for life.

(*l*) 2 Beav. 249.

(*m*) For one daughter died only *two* years after the testator, and had *three* children living at her death.

(*n*) 3 Atk. 396.

(*o*) Chap. XLIV.

(*p*) *Clay* v. *Pennington,* 7 Sim. 370; *Law* v. *Thorp,* 27 L. J. Ch. 649.

(*q*) *Parsons* v. *Coke,* 4 Drew. 296.

(*r*) *Butter* v. *Ommaney,* 4 Russ. 70; *Stanhope's Trusts,* 27 Beav. 201.]

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be held to give A. an estate in tail male, though the contrary was decided in the case of *Lovelace* v. *Lovelace* (*s*).

To A. and his issue *living at his death*, held an estate tail.

It has been held, that a devise to A. and his issue *living at his death* creates an estate tail in A. (*t*). In such a case, it is clear, the issue cannot take as joint-tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in *Wild's case*, namely, that the parent must take an estate tail in order to let in the other objects. Had the devise been to A. for life, *with remainder* to the issue living at his death, the case might have been different (*u*). All the objects might then have taken by purchase (*x*); [but even so, as the issue taking by purchase would, under a will made before 1838, take only estates for life, the better construction seems to be to hold that the ancestor takes an estate tail, and thereby to give the issue the chance of acquiring the inheritance by descent (*y*)].

Effects of words of modification inconsistent with an estate tail.

Difficulty frequently arises from the introduction into the devise of expressions inconsistent with the course of devolution or enjoyment under an estate tail, as, that the issue shall take in equal shares, or *as tenants in common*, or that the estate shall go *over in case they die under twenty-one*, which has been regarded as inapplicable to issue indefinitely. If the Courts had uniformly

(*s*) Cro. El. 40. But see *Doe* v. *Garrod*, 2 B. & Ad. 87, stated post. That a devise to A. and his *next* or *eldest heir* male gives A. an estate in tail male, see ante, p. 300. [Though it appears in the next section that "issue" is a more flexible term than "heirs" in the plural, we must not, it is conceived, too readily assume that it is more flexible than "heir" in the singular.]

(*t*) *University of Oxford* v. *Clifton*, 1 Ed. 473.

(*u*) See *Lethieullier* v. *Tracy*, 3 Atk. 774, 784, 796, Amb. 204, 220, 1 Ken. 56.

*Lampley* v. *Blower*.

(*x*) Considering the inclination manifested in some of the recent cases to construe a devise to a person and his children as amounting to a devise to A. for life, with remainder to his children (ante, 374), perhaps the reader will not be disposed to place implicit confidence in the adjudication that a devise to A. and his issue living at his decease gives to A. an estate tail. There would seem to be less difficulty in such a case in reading the gift to the issue as a remainder than in that of a devise to A. and his children, which remainder, however, being contingent, would be destructible during the life of A. At all events, there can scarcely be a doubt that the words in question applied to *personal* estate, would be construed in the manner suggested, namely, as giving a life interest to A., with a contingent disposition of the ulterior interest to the issue living at his death; [and this seems to have been the decision of Lord *Hardwicke*, in *Lampley* v. *Blower*, 3 Atk. 396, where he held that the gift over on death without *leaving* issue explained the word issue in the gift "to Francis and Ann each one-half, and to their issue," to mean such issue as was left at the time of death. He denied that the issue took jointly with the parent, while at the same time he decided that there was no lapse, which there would have been if "issue" had been taken as a word of limitation. The above explanation seems therefore the only one of which the case admits.

(*y*) See *Shaw* v. *Weigh*, *Crozier* v. *Crozier*, and *Kavanagh* v. *Morland*, stated post.]

rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shewn to be now the established rule in regard to limitations to *heirs of the body* (*z*); and there might seem, upon principle, to be strong ground to contend for the application of the same doctrine to the cases under consideration. The word *issue* is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the Statute *De Donis* (*a*), in some instances at least synonymously with heirs of the body, and the cases are very numerous in which it has been held to create an estate tail. It will be seen, however, that, in some instances, the word *issue* has been diverted from its general legal acceptation by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and which have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate tail.

Some confusion arises in the cases from the neglect to distinguish between a devise to A. and his issue in one unbroken limitation, and a devise to A. *for life* and *after his death* to his issue. It is true they both converge to the same point, when *issue* is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former *jointly with the parent*, in the latter *by way of remainder* after him; though certainly, in some of the cases, this distinction has been overlooked, and the Courts have shewn a readiness, even where the devise is to a person and his issue, not only to read "issue" as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

To A. and his issue, *as tenants in common*, but in default of such issue, *or in case they should die under twenty-one*, over.

Thus, in the case of *Doe* d. *Davy* v. *Burnsall* (*b*), where a testator devised freehold and leasehold *estates to M. and the issue of her body* lawfully to be begotten *as tenants in common* (if more than one), but in default of such issue, or, living such, if they *should all die under the age of twenty-one years*, and without leaving lawful issue of any of their bodies, then over to

(*z*) Ante, p. 338. (*a*) 13 Edw. 1, c. 1.
(*b*) 6 T. R. 30.

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A.; M., before the birth of a child, suffered a recovery. It was held by the Court of King's Bench, that M. took for life, with remainder in fee to her children, if she had any; but if she had none, and they died under twenty-one, and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of Common Pleas (*c*), on a case from Chancery; and that Court certified that M. took only an estate for life (*d*), with contingent remainders over. *Eyre*, C. J., said, "If it were not for the words, 'if they shall all die under the age of twenty-one years,' I should be of opinion that this must be construed to be an estate for life in M., remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over; but I am at a loss to know what to do with these words. If I were perfectly satisfied with the rejection of the word 'amongst' in *Doe* v. *Applin* (*e*), I would reject them, and consider this as a devise over in case the issue of M. should die without leaving lawful issue of their bodies" (*f*).

To H. and his issue, his, her, or their heirs, *equally to be divided.*

So, in *Doe* d. *Gilman* v. *Elvey* (*g*), where a testator devised his real estate to his wife for life, and, after her decease, to his son H., *and to the issue of his body* lawfully begotten or to be begotten, *his, her, or their heirs, equally to be divided, if more than one;* and if H. should have no issue of his body lawfully begotten living at his decease, then to A. in fee. H. survived the testator's widow, and, before he had any issue, suffered a recovery. The Court considered the case as falling exactly within *Doe* v. *Burnsall,* the devise being in effect to the issue as tenants in common. It was held, however, that quâcunque viâ datâ, *i. e.* whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

Remarks on

Of these two cases, it may be observed, that they *decided*

(*c*) *Burnsall* v. *Davy*, 1 B. & P. 215.

(*d*) The certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

(*e*) 4 T. R. 82, post.

(*f*) It is evident that the word *issue* in this passage of the judgment is used in two senses, differing in comprehensiveness; for if used as nomen generalissimum, in regard to the issue of M., it is clear that such issue could never fail without involving the failure of the issue of such issue. To render the sentence intelligible, we must suppose the learned Judge to mean, in the first instance, either issue of a given class or issue existent within a given period, *i. e.* either children or all issue born in the lifetime of the tenant for life, probably the latter.

(*g*) 4 East, 313.

*Doe* v. *Burnsall*, and *Doe* v. *Elvey*.

nothing more than that A.'s estate was *either* a contingent remainder after an estate for life, *or* a vested remainder after an estate tail, either of which was defeated by the recovery. The opinion of the Court upon the alternative of these propositions can hardly be considered as an *adjudication* on the point here discussed.

As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase), under the joint devise to them and their parent, by giving him an estate tail, unless the gift to the issue were construed as a remainder, which the Court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to* A. *and his children* must, under such circumstances, be construed an estate tail in order to let in the children (*h*). If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the Court is authorized to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. At present, however, the authorities do not warrant any such conclusion, as the two preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are unsupported by any subsequent cases. Indeed, in the only case that has since occurred, in which the devise to the issue was concurrent with that to the ancestor, and not by way of remainder, the devisee was held to take an estate tail, although words of limitation in fee were superadded. The case here referred to is *Franklin* v. *Lay* (*i*), where a testator devised to his grandson J., and to the issue of his body lawfully to be begotten, *and to the heirs of such issue for ever*, chargeable with a mortgage; but, if his said grandson J. should die without leaving any issue of his body lawfully begotten, then over; Sir *J. Leach*, V. C., held it to be an estate tail in J.; observing, that the words "dying without leaving issue" might of course be restrained by other expressions in the will to issue living at the death; as the

To A. and to his issue, and to the *heirs* of such issue.

(*h*) *Wild's case*, 6 Co. 17; *Davie* v. *Stevens*, Doug. 321; *Seale* v. *Barter*, 2 B. & P. 486, ante, p. 366.

(*i*) 6 Mad. 258, 2 Bli. 59, n.

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general words "in default of issue" might also be, *but not by words of limitation superadded to the issue.*

Although there seems to be considerable difficulty in reading a devise to A. and his issue, as a devise to A. for life, with remainder to his issue, even when accompanied with expressions pointing at a mode of enjoyment inconsistent with an estate tail; yet it is not denied that a slight indication of intention in the context would be sufficient to induce such a construction, and the devise would then be brought within the scope of the authorities discussed under the next division.

II. 1. We come now to the consideration of those cases in which a devise to A. *for life,* and after his death to his issue, becomes, by the operation of the well-known rule in *Shelley's case* (*k*), an estate tail.

To A. for life, *remainder* to the issue of his body, held an estate tail.

One of the earliest cases of this kind is *King* v. *Melling* (*l*), where a testator devised lands to A. *for life,* and after his decease he gave the same *to the issue of his body* lawfully begotten on a second wife; and for want of such issue to B. and his heirs for ever, provided that A. might make a jointure of the premises to such second wife, which she might enjoy for her life. *Twisden* and *Rainsford,* JJ., held it to be an estate for life in A., in opposition to *Hale,* C. J., who delivered an elaborate and argumentative opinion in favour of an estate tail, which construction was afterwards adopted by all the Judges in the Exchequer Chamber, reversing the judgment of the King's Bench.

To A. and D. for their lives; if either die leaving issue, then to such issue; held an estate tail.

So, in *Shaw* v. *Weigh* (*m*), where the testator devised lands to his wife for life, and after her decease in trust for his sisters A. and D., equally betwixt them *during their natural lives,* without committing any manner of waste, and if either of his sisters happened to die, *leaving issue or issues of her or their bodies* lawfully begotten, then in trust *for such issue or issues* of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both his said sisters died without issue as aforesaid, *and their issue or issues to die without issue lawfully to be begotten* (*n*), then over. The chief question was whether this

(*k*) Ante, p. 306.

(*l*) 1 Vent. 225, 232, 2 Lev. 58, 61. See also *Taylor* v. *Sayer,* Cro. El. 742; [*Jordan* v. *Lowe,* 6 Beav. 350.]

(*m*) 2 Stra. 798, 1 Barn. B. R. 54, 1 Eq. Ca. Ab. 184, pl. 28, 3 B. P. C. Toml. 120.

(*n*) As these words would raise an

was an estate for life, or an estate tail in the sisters. It was adjudged in the House of Lords (affirming a judgment of the Court of Great Sessions for Flintshire, which had been reversed in B. R.), that the devise created an estate tail (*o*).

In *Ginger* v. *White* (*p*), C. J. *Willes* questioned this decision; but subsequent cases have placed its authority beyond all doubt (*q*).

[In *Haddelsey* v. *Adams* (*r*), the devise was to the testator's four granddaughters as tenants in common for life, with benefit of survivorship, the remainder to trustees and their heirs upon trust, to support the contingent remainders thereinafter limited concerning the said estate and premises, the remainder to the issue male of my said granddaughters successively, lawfully to be begotten, and in default of such issue, the remainder to my own right heirs for ever. Sir *John Romilly*, M. R., held, that the granddaughters took estates tail.

In the cases *A.-G.* v. *Bright* (*s*) and *Jordan* v. *Lowe* (*t*), a bequest of personalty to A. for life, and after his decease, to his issue, and in default of issue, over, was held to give A. the absolute interest, on the ground that such words would have given an estate tail in realty.]

Effect of words of limitation superadded.

2ndly. It is clear, too, that *issue* is not converted into a word of purchase by the addition of words of limitation, descriptive of heirs of the same species as the issue described (*u*). Thus, in *Roe* d. *Dodson* v. *Grew* (*x*), where a testator devised unto his nephew G. for his natural life, and after his decease to the use of the *male issue of his body* lawfully to be begotten, and the *heirs male of the body of such issue male*, and for want of such male issue, then over; the Court of Common Pleas held that G. took an estate tail: *Wilmot*, C. J., said, that the intention certainly was to give G. an estate for life only; but the intention also was, that as long as he had any issue male the estate

To the *heirs male* of the body of such issue male.

implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise to the issue. See also *Franks* v. *Price*, 3 Beav. 182, post.

[(*o*) This seems to have been one of those cases where lay Lords voted on a question of law and decided it against the opinions of a majority of the Judges, only three of whom held it an estate tail, and *nine* an estate for life.]

(*p*) Willes, 359, post.

(*q*) See cases passim in the sequel of this chapter.

[(*r*) 22 Beav. 266.

(*s*) 2 Keen, 57.

(*t*) 6 Beav. 350.]

(*u*) See same rule as to heirs of the body, ante, 334.

(*x*) 2 Wils. 322; better reported Wilm. 272. See also *Shaw* v. *Weigh*, in the text.

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should not go over (*y*); and if we balance the two intentions, the weightier is, that all the sons of G. should take in succession. *Clive*, J., said, too great a regard had been paid to the superadded words "heirs male of the body of such heirs male." *Bathurst*, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. *Gould*, J., observed, that the word is used in the Statute *De Donis* promiscuously with the word "heirs;" *that the term "issue" comprehends the whole generation as well as the word "heirs"* (of the body), and, in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

This case (which has always been regarded as a leading authority) [is sometimes considered] to have overruled *Backhouse* v. *Wells* (*z*), where the devise being to J. *for his life only*, without impeachment of waste, and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless him with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over; it was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

To the *heirs male of the body* of the issue male.

Observations upon *Roe* v. *Grew* and *Backhouse* v. *Wells*.

It would be idle to attempt to distinguish *Backhouse* v. *Wells* from *Roe* v. *Grew*, on the ground of the words "only," and "without impeachment of waste," and "if God shall bless him with any." The two first expressions merely shew that the testator intended to confer an estate for life, and nothing more, which sufficiently appeared by the express limitation for life, and the last words are obviously implied in every gift of this nature.

[It has, however, been suggested by Sir *E. Sugden* (*a*), that from the report of this case in another book (*b*), it is not improbable that the Court considered the word "issue" as used in the singular number, for the remainder is stated to have been "to the heirs males of the *body* of *that* issue;" and we shall hereafter see that there is a difference whether "issue" is used in the singular or plural number (*c*).]

(*y*) Or rather that the issue should take it.

(*z*) 1 Eq. Ca. Ab. 184, pl. 27, Fort. 133.

[(*a*) 3 Jo. & Lat. 57.

(*b*) 10 Mod. 181.

(*c*) Post, p. 397.]

The authority of *Roe* v. *Grew* has been confirmed by the case of *Hodgson* v. *Merest* (*d*), where the devise was to A. for the term of his natural life, and, after his decease, then to the issue of his body, and to the heirs of the body of such issue, with remainders over; and it was held that A. took an estate tail.

Superadded limitation to the heirs *general* of the issue.

It is also established, that the addition of a limitation to the heirs *general* of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation (*e*). This position, indeed, may appear to be encountered by the well-known case of *Loddington* v. *Kime* (*f*), where under a devise to A. *for life,* without impeachment of waste, and in case he should have any issue male, then *to such issue male and his heirs for ever,* [and if *he* die without issue male, then to B. and his heirs,] it was held that A. took an estate *for life only*, with a contingent fee to his issue male.

A. for life, remainder to issue male and *his* heirs, and if *he* die, over.

To A. for life, remainder to his issue male and *their heirs*, held estate tail in A.

But in *King* v. *Burchell* (*g*), the testator devised [his houses at Maidstone] to J., *for his life,* and after the determination of that estate unto *the issue male of the body of* J. lawfully to be begotten, *and to their heirs,* and, for want of such issue, over; and if J. or his issue should alien the premises, they were charged with 2,000*l.*; Lord Keeper *Henley* held that J. was tenant in tail, and that the proviso was repugnant and void: his Lordship distinguished *Loddington* v. *Kime* [on the ground that the word "his" was used instead of the word "their" in the limitation to the heirs of the issue, whereby it appeared that one particular person was pointed at, and that all the issue were not intended to take. This force of the word "his" is noticed by Lord *Raymond* in *Goodright* v. *Pullyn* (*h*), (where he got over the difficulty by referring it to the ancestor,) and would, it seems, be admitted by Sir *E. Sugden,* who, as we have before noticed, seemed to think that the similar force to be ascribed to the word "*that*" would prevent *Backhouse* v. *Wells* from being overruled by *Roe* v. *Grew* (*i*). If *Loddington* v. *Kime* may be

*Loddington* v. *Kime* distinguished.

(*d*) 9 Price, 556. [See also *Irwin* v. *Cuff*, Hayes, 30; with which compare *Hockley* v. *Mawbey*, 1 Ves. jun. 143, post.]

(*e*) See same rule as to heirs of the body, ante, 335.

(*f*) 1 Salk. 224, Ld. Raym. 203; [*S. C.* nom. *Barnardiston* v. *Carter*, 3 B. P. C. Toml. 64.]

(*g*) 1 Ed. 424, Amb. 379. [The devise here referred to is the second one in the will, namely, of the Maidstone estate. The case, so far as it relates to the first devise, properly belongs to the next division of this section. No distinction was taken between the two, though, as we shall hereafter see, they would now be considered to have different effects.

(*h*) 2 Stra. 731.

(*i*) 2 Jo. & Lat. 57.]

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[referred to these special grounds, it cannot be taken as an authority against the position above laid down. The other distinction taken by the Lord Keeper, namely, that the remainder was expressly contingent, is not entitled to any weight; for]

Remark on *Loddington* v. *Kime.*

every remainder to a class is contingent in this sense, namely, as respects the event of there being objects to claim under it Upon this principle, Sir *W. Grant,* in *Elton* v. *Eason* (*k*), held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction.

Another decision, which may seem to militate against the rule before laid down, is *Doe* d. *Cooper* v. *Collis* (*l*), where a testator devised to his daughter E., and to S. the wife of W., to be equally divided between them, not as joint-tenants, but as

To S. for life, remainder to her issue and *their heirs,* held estate for life in S.

tenants in common, viz. the one moiety to E. and her heirs for ever, and the other moiety to S., for the term of *her natural life,* and after her decease *to the issue of her body* lawfully begotten *and their heirs* for ever. (There was no devise over.) The question was whether S. took an *estate tail* or an estate for *her life,* with remainder in fee to her children (*m*); and the Court decided in favour of the latter construction, Lord *Kenyon* observing that issue was either a word of purchase or of limitation, as would best answer the intent of the devisor; and his Lordship remarked, that the property was *to be equally divided,* which it would not be if S. were held to take an estate tail; for, in that case, the reversion in fee of that moiety would be again subdivided between the heirs of the two daughters.

Remark on *Doe* v. *Collis.*

It is difficult to accede to the reasoning which ascribed to the words of division this influence on the construction, since they were merely applied to the *corpus* of the land, not to the inheritance. At all events, it is enough for our present purpose to shew that the case was decided upon special grounds, and not in opposition to the doctrine that a limitation to the heirs of the issue superadded to the devise to the "issue" is inoperative to vary the construction. As such, indeed, it would have been clearly overruled by subsequent cases.

To A. for life,

Thus, in *Denn* d. *Webb* v. *Puckey* (*n*), the testator devised to

(*k*) 19 Ves. 73. [See also *Marshall* v. *Grime,* 29 L. J. Ch. 592.]

(*l*) 4 T. R. 294.

[(*m*) This case is not an authority that "issue" in such a limitation is to be read "children," for it does not appear that there were any other issue who could have taken; it is most probable there were not, as the eldest child was only sixteen when S. levied a fine *sur conuzance,* &c.]

(*n*) 5 T. R. 299.

his grandson N. *for life*, without impeachment of waste, and after his decease *to the issue male of his body* lawfully begotten, and *to the heirs and assigns of such issue male for ever;* and in default of *such* issue male, then over. N. suffered a recovery, and the question raised was whether, under the devise, he was tenant in tail or tenant for life only. The Court held that the general intention of the testator was that the male descendants of his grandson N. should take the estate, and that none of those to whom the subsequent limitations were given should take until all such male descendants were extinct; and, to effectuate this, it was necessary to give him an estate tail; for if his issue took by purchase, Lord *Kenyon* thought it would be difficult to extend it to more than one (*o*), and that even if the words comprehended all the male issue as tenants in common in tail, yet that would not have answered the devisor's intention, because there were no words to create cross remainders between them (*p*). But it was held, even if the issue would have taken by purchase, yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of issue, so that the defendant, who claimed under the recovery, was entitled quâcunque viâ datâ (*q*).

remainder to his issue and to the *heirs and assigns* of such issue, held an estate tail in A.

So, in *Frank* v. *Stovin* (*r*), where a testator devised to B. *for life*, without impeachment of waste, with power to make a jointure to any future wife, and after his decease then *to the use of the issue male of the body of B.* lawfully begotten and to be begotten, *and their heirs;* and in default of such issue, then over. B. had issue, and afterwards suffered a recovery. Lord *Ellenborough* was of opinion that the case was governed by *Roe* v. *Grew*, and accordingly that B. took an estate tail.

To B. for life, remainder to his issue male *and their heirs*, held an estate tail.

[Again, in the case of *Manning* v. *Moore* (*s*), the testator

To A. for life,

(*o*) His Lordship is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words, 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? It would be difficult to extend it to more than one, and I conceive that the eldest must have taken the *absolute interest in the estate*. But that would have defeated the devisor's intention, because if it had *descended* (*Qu.* devolved?) to that one son, and he had died without making any disposition of it, it would have gone over to the other sons of the devisor," *i. e.* by descent, for if it were a devise in fee to the son, of course no remainder could be limited on that estate.

(*p*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.

[(*q*) It will be observed that, under the 8 & 9 Vict. c. 106, s. 8, no act of the tenant for life before issue born can now destroy subsequent contingent remainders. See remarks ante, Chap. XXVI.]

(*r*) 3 East, 548. [See also *Sturge* v. *Sturge*, 12 Beav. 230.

(*s*) Alc. & Nap. 96. Though there

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remainder of all the testator's term and interest to the issue of A., in default of such issue, over, held an estate tail in A.

To A. for life, with remainder to her issue *for ever*, held an estate tail in A.

To A. for life, remainder to her issue, and in default of issue, or in case none attain twenty-one, over, held estate for life in A.

Remarks on *Merest* v. *James*.

[devised lands held on lease for lives renewable for ever to his daughter Catherine during her life, and from and after her decease he gave and devised the same and *all his term and interest therein unto the issue of her* body lawfully begotten; and in case she should happen to die without such issue, then over. The Court of K. B. in Ireland held that Catherine took an estate in the nature of an estate tail.

So, in the case of *Griffiths* v. *Evan* (*t*), the testator devised to his daughter to hold for her life and the life of her husband, and after her decease to the lawful issue of her body *for ever*; and for want of such issue, over. Lord *Langdale*, M. R., held that the daughter took an estate tail (*u*).]

On the other hand, in the case of *Merest* v. *James* (*x*), where the devise was to the use of the testator's daughter for her natural life, and after her decease, then to the issue of her body lawfully begotten; and in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then over. The Court of C. B., on a case from Chancery, certified that the daughter took an estate for life only. [As the gift over, in case no issue lived to attain twenty-one, was sufficient to give the fee to the issue, this case clearly comes within the line of cases now under consideration, where words of limitation are superadded to the gift to the issue; and yet] this gift over seems to have been the only ground for diverting the word "issue" from its more extensive signification, and is precisely the circumstance which both Lord *Eldon* and Lord *Redesdale*, in the case of *Jesson* v. *Wright*, considered was improperly allowed to control the effect of the words "heirs of the body," in *Doe* v. *Goff* (*y*), and which Lord *Redesdale* denied to be inconsistent with giving an estate tail to the prior devisee (*z*). The case of *Merest* v. *James* was decided between the period of the determination of *Doe* v. *Goff* (*a*), in the Court of King's Bench, and that of its being overruled in the House of Lords; and this might be sufficient to cast a shade of doubt upon the decision; but we shall find that the case of *Lees* v. *Mosley*, and other

[were no actual words of limitation, the words in italics were of equal force, see ante, p. 264.

(*t*) 5 Beav. 241.

(*u*) As the daughter died without having had issue, and without attempting to bar the estate tail, the decision of the M. R. on this point was unnecessary.]

(*x*) 4 J. B. Moo. 327, 1 Br. & B. 484.

(*y*) Ante, p. 351.

(*z*) See *Grimshawe* v. *Pickup*, 9 Sim. 591. [But see *Minter* v. *Wraith*, 13 Sim. 61.]

(*a*) Ante, p. 351.

subsequent cases, noticed in the next section, have tended to place devises to issue and devises to heirs of the body on a different footing in regard to the effect of superadded words of modification inconsistent with an estate tail. [The difference, however, has obtained only where words of distribution and words of limitation have been *both* superadded; and it is clear, from the remarks of *Parke*, B., in *Slater* v. *Dangerfield* (*b*), that he did not consider the decision in *Merest* v. *James* satisfactory; moreover, it appears, according to the view above taken of it, to be opposed to the other cases noticed in this section.]

Effect of limitation over "in default of such issue."

It should be observed, that in *Frank* v. *Stovin* (*c*), a learned Judge made a distinction between that case and *Denn* v. *Puckey* (*d*) and the case of *Doe* v. *Collis* (*e*), by reason of the limitation over "in default of such issue," which occurred in those cases, [and not without a foundation in reason (*f*). It is true, indeed, that] the cases discussed in the next chapter establish that this expression following a devise to [issue of a particular generation] refers to those objects: so that in the case of a devise to sons or children, and in default of such issue, over, the clause introducing the devise over is inoperative to vary the construction of the prior devise. [But where there is no such precision in the description of the devisees in the first instance (as, where the devise is to "issue" generally,) and the word "issue" cannot be deprived of its most comprehensive meaning and its fullest operation without resorting to the context for expressions to control it, why is not the clause introducing the gift over to be taken into consideration as well as any other portion of the context? Nearly every Judge who has found such a limitation over in the will under his consideration has expressly put it forward as one ground for construing the ancestor to take an estate tail; and in a recent case (*g*) Sir *W. P. Wood*, V. C., distinctly asserted that it was an important ground. The difference between the effect of the words "in default of such issue," following a limitation to issue of a particular generation, and following a limitation to issue generally, may be explained by the fact that the expressions

[(*b*) 15 M. & Wels. 274.]
(*c*) 3 East, 551.
(*d*) Ante, 398.
(*e*) Ib.

[(*f*) But see observations in 1st edition of this work, pp. 342, 343.
(*g*) *Woodhouse* v. *Herrick*, 1 Kay & J. 352, stated post.]

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["issue," "issue male," "issue female," mean in themselves emphatically "*all* issue" of the particular class; that is, issue of every generation; consequently, a gift "in default of such issue" following a limitation to A. for life, with remainder to his issue (that is to say, issue of every generation), means "in default of issue of A. of every generation;" and viewed in this light evidently forms a strong ground for giving A. an estate tail. But, however this may be, the foregoing cases will, it is conceived, be found to establish] that a devise to A. for life, with remainder to his issue [with or without superadded words of limitation], and *with or without a limitation over,* confers an estate tail on A. (*h*).

Rule deducible from the foregoing cases.

To A. for life, with remainder to her issue female and the heirs of their bodies.

[We may here refer to the case of *Hamilton* v. *West* (*i*), where there was a devise to A. for life, with remainder to her first and other sons in tail male, with remainder "to the issue female of the said A. and the *heirs of their bodies,* with remainder over: and it was held, by *Smith,* M. R., in Ireland, that A. did not take an estate in tail female expectant on the estates tail of her first and other sons, but that the daughters of A. took estates in tail general by purchase, the limitation to the heirs general of the bodies of the issue being inconsistent with an estate in tail female in the ancestor. Now we have already seen that the cases in which superadded words of limitation are allowed to make preceding words (such as heirs of the body) operate as words of purchase are those where "it is absolutely impossible by any implied qualification to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation (*k*);" as in the instance of a devise to a man for life, with remainder to his heirs and the heirs female of their bodies: but that this does not apply to cases where the devise in remainder is to the issue or heirs of the body of the tenant for life and their heirs general, for in this case "the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used in the same qualified sense as the preceding; and then both may be satisfied by taking the first as words of limitation (*l*)." These reasons include in terms cases

Superadded words of limitation which change the course of descent.

(*h*) See Hayes's Inq. 302.

[(*i*) 10 Ir. Eq. Rep. 75.

(*k*) Fearne, C. R., 183, 184; ante, p. 338.

(*l*) Fearne, C. R., 184.]

[where, as in *Hamilton* v. *West*, the remainder is limited to special issue or heirs of the body, and to the heirs general of the body; for here, too, the latter words include the preceding, and might be satisfied in a qualified sense by taking the preceding as words of limitation. However, it may be thought that this reasoning is not fairly applicable where the superadded words indicate any mode of descent less general than one in fee-simple; and considering the tendency of modern decisions to read words as words of purchase wherever such a construction is consistent with authority, and that there is no authority precisely meeting the case, it is not improbable that the doctrine of *Hamilton* v. *West* will be supported as well where the preceding words are "male" or "female heirs of the body" as where the more flexible term "issue" is used.]

Words of modification inconsistent with an estate tail.

3rdly. It might seem upon principle to follow that words of distribution annexed to the devise to the issue, or any other expressions prescribing a mode of enjoyment inconsistent with the course of descent under an estate tail, would be no less inoperative than superadded words of limitation, to turn "*issue*" into a word of designation; and such undoubtedly is the doctrine of *some* at least of the cases.

Devise of estate to W. for life, remainder to *and amongst* his issue, and in default of issue, over, held an estate tail.

Thus, in *Doe* d. *Blandford* v. *Applin* (*m*), where a testator devised an estate at A. to W. for life, and after his decease *to and amongst his issue*, and in default of issue, over; it was held that W. took an *estate tail:* Lord *Kenyon* and Mr. Justice *Buller* reasoned much on the words limiting over the property, and the latter admitted that in rejecting the words "and amongst," they went beyond any of the preceding cases. Mr. Justice *Grose* referred the decision to the broad (and, it is conceived, the true) ground, that the word *issue* was a word of limitation, and different from *children*, the learned Judge citing

(*m*) 4 T. R. 82; and see 8 T. R. 8, n. [See also *King* v. *Burchell*, 1 Ed. 424, 4 T. R. 296, n., 3 T. R. 145, n., Amb. 379, Serj. Hill's MSS. Vol. V. pp. 522, 633, and Fearne C. R. 164. But it is not easy to collect from these different reports whether Lord *Henley's* opinion in favour of an estate tail referred to the devise of the Hunton estate (in which both words of distribution and words of limitation were superadded to the gift to the issue of J. H.). If it did, it is in point on the question discussed in this section. It was so treated by Sir *W. P. Wood* in *Woodhouse* v. *Herrick*, 1 K. & J. 352, stated post, and by Sir *E. Sugden* in *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 58, 59, and questioned by both these learned Judges. But it may be observed that, whatever the weight due to an opinion of Lord *Henley*, the case did not require a decision of the question, the decree dismissing the bill being amply warranted by the illegality of the proviso upon which the plaintiff's claim was founded, see per Lord *Loughborough*, *Jacobs* v. *Amyatt*, 13 Ves. 481, n., and per Sir *E. Sugden*, ubi sup.]

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the declaration of *Rainsford*, J. (*n*), "that the word issue is ex vi termini nomen collectivum, and takes in all issues to the utmost extent of the family, *as far as the words heirs of the body would do.*"

Remark on *Doe* v. *Applin*.

The authority of *Doe* v. *Applin* was denied by *Eyre*, C. J., in *Burnsall* v. *Davy* (*o*), and by Lord *Thurlow*, in *Jacobs* v. *Amyatt* (*p*), but it is now indisputable (*q*). The fact that Lord *Thurlow*, in deciding *Jacobs* v. *Amyatt*, found it necessary to question *Doe* v. *Applin*, shews that his Lordship saw no distinction between devises to *heirs of the body* and *issue*, in regard to the effect of superadded expressions.

To R. for life, remainder to his issue *as tenants in common*, with devise over in default of issue, held an estate tail.

So, in *Doe* d. *Cock* v. *Cooper* (*r*), where a testator devised lands to his nephew R. for the term only of his natural life, and after his decease he devised the same to the *lawful issue* of R. *as tenants in common;* but in case R. should die without leaving lawful issue, then after his decease the testator devised the lands to G. in fee. It was held that R. took an estate tail, to accomplish the general intention, and by implication from the words devising over the property in case R. should die without issue (*s*). In this case, even if the issue took as purchasers, the contingent remainder to them had been destroyed by a recovery suffered by R.; but the Court decided the case unreservedly on the other point.

Issues jointly to inherit.

With the two preceding cases may, it is conceived, be classed the case of *Ward* v. *Bevil* (*t*), where a testator devised a messuage, &c., called B., to his son W. during his life, adding "in case he has issues then it is my will that they should jointly inherit the same after his decease." After other bequests the testator devised over the whole of his property upon W.'s dying without issue. It was held by Lord C. B. *Alexander* that W. took an estate tail in B.

Influence of words introducing devise over.

It must be observed that in *Doe* v. *Applin* and *Doe* v. *Cooper*, Lord *Kenyon* and most of the other learned Judges distinctly grounded their judgment on the intention appearing by the

(*n*) Finch, 282.
(*o*) 1 B. & P. 215, ante, 392.
(*p*) 4 B. C. C. 542, post.
[(*q*) Except when viewed with relation to the distinction introduced by later cases (see post), that as the devise was of "an estate," the issue taking by purchase might have taken the fee, and therefore the ancestor ought to have taken only for life.]
(*r*) 1 East, 50.
(*s*) Notwithstanding that Mr. Justice *Grose*, in *Doe* v. *Applin* (ante, 403), argued so clearly upon "issue" being a word of limitation, he here assumed it to mean *children*.
(*t*) 1 Y. & Jerv. 512.

words devising the property over, that the estate should not pass to the ulterior devisee until a failure of the descendants of the first taker (*u*).

To A. for life, with remainder to his issue as he should by will appoint, with devise over in default of issue, held estate tail in A.

[In the case of *Croly* v. *Croly* (*x*), the testator devised all his *estate and interest* in certain lands to his younger son Richard for his life, and after his decease to the use and behoof of *his issue, male or female, in such proportion or proportions as Richard should think proper by his will to devise the same,* and he empowered Richard to charge a jointure for any wife; and in case Richard should die leaving no issue, male or female, then the testator devised his aforesaid *lands* to his eldest son John for his life, and "after his decease to his issue in like manner, and with like power to devise the same to his issue at the time of his decease as in the case of Richard: but in case Richard and John should both die leaving no issue," then over. Richard died without issue, and John died leaving an eldest son and several younger children. The Court of B. R. in Ireland certified, on a case from Chancery, that the eldest son of John "took" an estate tail under the will and that the younger children took nothing. The certificate reads as if the Court thought that the eldest son of John took an estate tail by purchase, but it is conceived they merely meant that he was then tenant in tail (which was all that it was necessary to decide), and must have considered that he was tenant in tail by descent and not by purchase. If "issue" had been held a word of purchase, *all* the issue, and not the eldest son alone, would have taken.

To H. for life, with remainder to her issue equally, and if A. die without issue over, held estate tail in A.

Again, in the case of *Heather* v. *Winder* (*y*), in which there was a devise of lands to A. for life to the exclusion of her husband, and at her decease *to her lawful issue, share and share alike,* but if A. should die without lawful issue, then over. Sir *C. Pepys,* M. R., decided that A. took an estate tail. His Honor said, "It was clearly established that the words of the gift over, as applied to freehold property, were to be construed as referring to a general indefinite failure of issue of A., and

[(*u*) See observations at pp. 345, 346, in 1st edition of this work, which are here omitted as being inconsistent with the text as now altered.

(*x*) Batty, 1. It will be observed hat the words would have been sufficient to carry the fee to the issue of Richard, but not necessarily to the issue of John.

(*y*) 5 L. J. N. S. Ch. 41. It is remarkable that this case does not appear to have been cited in any of the subsequent cases on the same point noticed in the text. Several other decisions of that learned Judge, not reported elsewhere, will be found in the same volume.

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[therefore created an estate tail in her. That it was true the issue were to take share and share alike; but *Doe* v. *Cooper* and *Doe* v. *Applin* proved that this did not prevent the application of the rule, a doctrine fully confirmed by *Jesson* v. *Wright*." It is evident his Lordship considered that *Jesson* v. *Wright* applied as well where the word "issue" as where the words "heirs of the body" were used; such, too, is the clearly expressed opinion of Lord Wensleydale (*z*): but closely following *Heather* v. *Winder* comes the first of a series of cases before referred to, shewing that the word "issue" may be diverted from producing its primary effect where the words "heirs of the body" will not.

To A. and his issue lawfully begotten, to be divided among them as he shall think fit, and in default of issue, over, held issue take by purchase.

But before stating these cases reference should be made to the earlier case of *Hockley* v. *Mawbey* (*a*), which was a case where a testator devised houses, &c., to his wife for life, and after her decease to his son R. R. and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit, and in case he should die without issue, over. Lord *Thurlow* held that R. R. took an estate for life only. Assuming that the words were sufficient to carry the fee to the issue as purchasers, this decision is in entire conformity with later cases.]

The case referred to is *Lees* v. *Mosley* (*b*), where a testator devised certain lands unto his two sons, Henry James and Oswald Fielden, in moieties as tenants in common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he (H. J.) should by deed or will appoint; but in case his son Henry James should not marry and have issue who should attain the age of twenty-one years,* then he devised the said moiety to his son Oswald and his heirs for ever. And as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely for ever. At the date of the

To H. for life, with power of distribution in fee in favour of issue, and limitation over, in case of being no issue who should attain twenty-one, held estate for life in H.

[(*z*) *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 881, 882.

(*a*) 1 Ves. 143, 3 B. C. C. 82: in the latter book the will is stated at length. The gift to the issue was not expressly by way of remainder, but could not, it is conceived, be read otherwise. The case is generally treated as one in which the issue taking by purchase might have taken the fee by implication in default of appointment, see *Kavanagh* v. *Morland*, Kay, 25; Prior on Issue, p. 117: but except as to the property described as the testator's "reversion" this point does not seem free from doubt. See 1 Sugd. Pow. p. 480, 7th Ed., 2 ib. p. 165; and ante, ch. xvii. s. 6.]

(*b*) 1 Y. &. C. 589.

will, and at the death of the testator, Henry James Fielden was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James Fielden took an estate tail. The Court decided that he was tenant for life only. Mr. Baron *Alderson* (who delivered the judgment of the Court) drew a distinction between a devise to *heirs of the body*, which he considered were technical words admitting but of one meaning, and a devise to *issue*, which he characterized as a word in ordinary use not of a technical nature, and capable of more meanings than one; observing that it was used in the Statute De Donis, both as synonymous with children and as descriptive of descendants of every degree, and though the latter might be its primâ facie meaning, yet the authorities shewed that it would yield to the intention of the testator to be collected from the will, *and that it requires a less demonstrative context to shew such intention than the technical expression "heirs of the body" would do.* The learned Judge then proceeded as follows:—

Judgment of Mr. Baron Alderson in *Lees* v. *Mosley*.

"The Court in the present case have to look to the terms in this will in order to ascertain whether, by construing the word 'issue' here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there, it would be an estate tail. For the word 'issue' might include all descendants; and here all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's case* would apply, and would convert the estate for life previously given into an estate tail. But the testator then adds, 'and their respective heirs in such shares and proportions and subject to such charges as he the said Henry James should by will or deed appoint.' Now, according to the case of *Hockley* v. *Mawbey* (*c*), the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed.

(*c*) Ante, p. 406.

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The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit. Now, if issue be taken as a word of limitation, the word 'heirs' would be first restrained to 'heirs of the body,' and then altogether rejected as unnecessary. The word 'respective' could have no particular meaning annexed to it; and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If, then, the will stopped here, it would seem clear that the Court ought to read 'issue' as a word of purchase. Then comes the devise over. 'But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee.' Now, the effect of such a clause, if superadded to a remainder to children, would be to shew an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of *Doe* v. *Burnsall* (*d*) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail, and we think that we best effectuate that intention by construing the words 'lawful issue' in this will, accompanied by their context, as words of purchase; and, in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have ever been held to be words of limitation."

Remark on *Lees* v. *Mosley*.

The case of *Lees* v. *Mosley* may be considered as deciding that under a devise to A. for life, with remainder to his respective issue in fee, in such shares as he shall appoint, with a limitation over in case of his dying without issue who should attain

(*d*) 6 T. R. 30, ante, 391.

majority, the issue take estates in fee as tenants in common, and A. is not tenant in tail. It may be also collected from the judgment, that the Court (or at least the very learned Judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A. for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A. an estate for life, with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only (a circumstance which is less likely to occur under a will made or republished since 1837 than any other), it is conceded that the leaning to the construction which makes "issue" a word of purchase would be less strong, and the fate of the devise is still uncertain.

The recent case of *Tate* v. *Clarke* (*e*) shews the opinion of Lord *Langdale* on this much-controverted point; though, as his Lordship decided that, in the events which had happened, the devise to the issue did not extend to the issue claiming (because their parent was not one of the designated sisters of the testator), the case cannot be considered as an actual adjudication on the subject.

To be divided amongst several and to their issue; after their respective deaths equally to be divided. "Issue" held a word of limitation.

The devise was to the testator's widow for life, with remainder to trustees and their executors, to pay costs, &c., and to divide the residue of the rents amongst all the testator's brothers and sisters "who should be living at the time of the decease of his (the testator's) wife *and to their issue, male and female,* after the respective deceases of his said brothers and sisters, *for ever; to be equally divided between and among them.*" Lord *Langdale,* M. R., held that the words "issue male and female" were to be construed as words of limitation, and not of purchase; and that the children of a sister of the testator, who died in the lifetime of the widow, took no interest.

"The word 'issue,'" his Lordship observed, "is a word of limitation, if the context of the will does not afford sufficient reasons to construe it otherwise. In the present will, I think that it cannot be construed in a sense different from 'heirs of the body;' and if the words 'heirs of the body' had been

(*e*) 1 Beav. 100.

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employed, I think that neither the superadded words, primâ facie denoting distribution, nor the want of a gift over, in default of issue, would have afforded sufficient reasons for construing the words otherwise than as words of limitation. This case is not so strong as some others which have been decided; for the words of distribution may be applied to the brothers and sisters who were intended to be first takers, and the words 'their issue' must mean the issue of those who were to take, and they are expressly those who should be living at the death of the wife; at which time there was no brother or sister living" (*f*).

Remark on *Tate* v. *Clarke*.

It will be perceived that in this case the devise was to the issue *male and female*, which perhaps (where unaccompanied by expressions shewing that the objects were to take concurrently) does not present so decided an inconsistency with an estate tail, as words of distribution, since the course of descent under an estate tail general does, in point of fact, embrace persons of each sex, although not in general simultaneously.

To A. for life, with remainder to his issue in such manner as he shall by will appoint. Held issue take by purchase.

[Next in order, we have the case of *Crozier* v. *Crozier* (*g*), where the testator devised leaseholds for lives to her nephew J. C. for life, and from and after his decease to the issue, male and female, of J. C. begotten or to be begotten on his then wife, *to be divided between and amongst them* in such manner, shares and proportions as the said J. C. should by will appoint, subject to the payment by J. C., his heirs, executors, administrators and assigns, and the persons who should become entitled under the will, of the landlord's rent and an annuity of 40*l.* during the continuance of the lease. Sir *E. Sugden* laid some stress on the absence of a devise over in default of issue, and held that J. C. took an estate for life only, and that the power to appoint raised an implied estate to the issue in default of appointment, which, by force of the direction to pay the annuity, must be an absolute estate for the residue of the lease. If there had been nothing in the will to carry the whole interest in the lease to the issue, the learned Judge thought that J. C. would have taken an estate tail in order to carry the whole interest by descent to the issue.

To A. for life,

So, in the case of *Greenwood* v. *Rothwell* (*h*), the devise was

[(*f*) See however, as to this case, per Sir *E. Sugden*, 3 Jo. & Lat. 57, and per Sir *W. P. Wood*, V. C., *Woodhouse* v. *Herrick*, post.

(*g*) 3 D. & War. 373, 2 Con. & L. 309.

(*h*) 5 M. & Gr. 628, 6 Scott, N. R. 670.

with remainder to his issue as tenants in common in fee. Held issue take by purchase.

[to Jonas Greenwood for life, and after his decease unto *all and every the issue* of the body of the said Jonas, *share and share alike, as tenants in common,* and the heirs of such issue. On a case sent for the opinion of the Court of C. B., the Judges certified that Jonas Greenwood took only an estate for life; and Lord *Langdale*, relying on the direction that the issue should take share and share alike, and on the words of limitation superadded, and adverting also to the absence of a gift in default of issue, affirmed their decision (*i*).

To A. for life, with remainder to his issue by any future wife in fee; and if he should die without such issue, over. Held issue take by purchase.

Again, in the case of *Montgomery* v. *Montgomery* (*k*), the testator devised his *part* (*l*) of certain lands to his son during his life and no longer, unless it should so happen that his said son should survive his then wife and marry a second or other wife, by whom he should have lawful issue living at the time of his death, and then and in that case he devised his *part* of the said lands upon the death of his son, leaving issue male of such second or other marriage, *to such issue male, share and share alike,* and for want of issue male to the issue female of such second or other marriage, share and share alike; and in case his son should die without leaving any such issue of a second or other marriage, then over to two other persons in fee. Sir *E. Sugden* held that the son took only an estate for life, with concurrent contingent remainders in fee to the issue and the two devisees last named, of which remainders only one was to start according to the event (*m*).

To children as tenants in common for life, and afterwards to their issue as tenants in common in fee. Held estate tail in the children.

On the other hand, in the case of *Harrison* v. *Harrison* (*n*), the testator devised all the residue of his real *estates* unto and to the use of all his children as tenants in common, during their respective natural lives, and afterwards to their issue as tenants in common. There was no gift over in default of issue. On a case sent out of Chancery for the opinion of the Court of C. B., the Judges certified their opinion that the children of the testator took an estate tail as tenants in common in the residuary real estate, and that the children of the children took no estate. It may be conjectured that the Court avoided the effect of the words "as tenants in common" added to the gift to the issue, by

Remarks on *Harrison* v. *Harrison*.

[(*i*) 6 Beav. 492.

(*k*) 3 Jo. & Lat. 47.

(*l*) The force of this word was sufficient to pass the fee, see ante, p. 264.

(*m*) The cases of *Montgomery* v. *Montgomery*, and *Greenwood* v. *Rothwell*, and *Slater* v. *Dangerfield*, noticed in the text, post, must be considered to have overruled *Mogg* v. *Mogg*, 1 Mer. 654, if at least anything can be said to be decided by that case beyond the mere case itself.

(*n*) 7 M. &. Gr. 938, 8 Scott, N. R. 862.

[construing them as a direction that the inheritance as well as the life interest of the children should be held in common, in which view the words were not inconsistent with an estate tail in the children, but merely surplusage, and the will was read as if they had been omitted. It must be remarked, however, that one considerable inducement towards holding the ancestor to take an estate tail, namely, a gift over in default of issue, was wanting in this case. The decision, if not referable to the ground above noticed, is clearly opposed to the case of *Montgomery* v. *Montgomery* before stated (which, being almost contemporaneous, was not cited), and to the case next stated.

To A. for life, with remainder to his issue as tenants in common in fee. Held issue take by purchase.

The case next in order of time is that of *Slater* v. *Dangerfield* (*o*), where the devise was to George Dangerfield for his life, and from and immediately after his decease unto and to the use *of all and every the lawful issue* of the said George, *their heirs and assigns* for ever, as tenants in common, and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. There was no devise over in default of issue, but the will contained a general residuary devise which would have comprised the interest (if any) undisposed of under the first gift. The Court of Exchequer held that George Dangerfield took an estate for life only, and relied upon the cases of *Greenwood* v. *Rothwell* and *Merest* v. *James*, the case before them containing conjointly expressions similar to those which, occurring separately in those two cases, were considered sufficient to restrict the ancestor to an estate for life. The case of *Slater* v. *Dangerfield* is one of the few cases in which a doubt seems to have been thrown on the force which a devise over in default of issue is said to have in creating an estate tail in the ancestor; but it was not necessary to discuss the point, as the Court held that the same reasoning did not apply to a general residuary devise.

To A. for life, with remainder to his issue equally, and if he should not leave issue at his death, over. Held estate tail in A.

Next, we have the case of *Doe* d. *Cannon* v. *Rucastle* (*p*), where the testator devised a dwelling-house and field to A. for life, and after his decease he devised the same *to the issue of his body* lawfully begotten, *if more than one, equally amongst them*, and in case he should not leave any issue of his body lawfully begotten *at the time of his death* (*q*), then to the testator's heir

[(*o*) 15 M. & Wels. 263. See also *Golder* v. *Cropp*, 5 Jur. N. S. 562.

(*p*) 8 C. B. 876; and see *Rimington* v. *Cannon*, 12 C. B. 18, on same will.

(*q*) The Court seems not to have assented to the argument that these words

[or heirs at law; the Court of C. B. decided that A. took an estate tail.

To A. for life, and if she die leaving issue equally between them; but if A. leave no issue, over. Held estate tail in A.

Similarly in the case of *Kavanagh* v. *Morland* (*r*), where lands were devised to A. for life, and after her decease, in case A. should die leaving issue, the testator gave to her said issue all his freehold and copyhold lands to be distributed between them, share and share alike, as three gentlemen learned in the law shall affix the same, but in case A. should die leaving no issue, then over; Sir *W. P. Wood*, V. C., decided that A. took an estate tail, considering that if the issue took by purchase, there was not sufficient in the will to carry the fee to them, and the gift over not being to take place except upon an indefinite failure of issue of A.: A. must consequently take an estate tail. As to the gift over his Honor observed, that "if there be a gift to the issue, and a limitation in the will with reference to them, which has the effect of giving to them the fee-simple; then, if there be a gift over in case of dying without issue, the gift over affords no evidence of intention to justify the application of the rule in *Shelley's case*, because the fee was in the issue, and the words "dying without issue" are consequently held to mean only such issue as were before mentioned, as in the cases of *Hockley* v. *Mawbey* (*s*) and *Leeming* v. *Sherratt* (*t*). But it must first be made out that the fee is in the issue as purchasers. If that be not so, and words occur importing a gift over in fee after an indefinite failure of issue, then the words giving over the property in the event of an indefinite failure of issue have been held to be so strongly indicative of the intention of the testator that the estate should not pass over except upon failure of all the issue, that those words are made to reflect back upon the preceding limitations to the issue, and have this effect, namely, that if the limitations to the issue do not of themselves clearly effect the intention of the testator of not giving over the property until the issue fail,—that is, if for want of superadded words of limitation they would take life estates as purchasers only, and therefore the gift to them cannot effect the general intention, the Court is obliged to construe the word "issue" in the original gift as a word of limitation, for the purpose of carrying into effect the general intention implied from the gift over."

Remarks of Sir *W. P. Wood* on effect of gift over in default of issue generally.

[would have enlarged the estate of the issue taking by purchase to a fee-simple; see as to this, ante, p. 251.

(*r*) Kay, 16.
(*s*) 1 Ves. jun. 142, ante, p. 406.
(*t*) 2 Hare, 14.

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To children for their lives, with remainder to trustees to preserve, with remainder between the issue of the children, and for want of such issue, over. Held an estate tail in children.

[In the case of *Woodhouse* v. *Herrick* (*u*), the testator devised houses and lands (after a previous life estate to his wife) to F. and M. his wife for their joint lives, and the life of the survivor of them, with remainder to trustees to preserve contingent remainders; and from and after the several deceases of F. and M. his wife the testator devised his said messuages and lands unto all the children of the said F. and M. his wife, whether male or female, for their joint lives and the life of the survivor; and from and after their several deceases he gave and devised the same premises to the said trustees for the life of all the said children of the said F. and M. his wife, whether male or female, in trust to preserve contingent remainders, and to permit the said children to receive the rents and profits during their natural lives; and from and after their several deceases the said testator gave and devised the said premises unto and equally between all their issue male and female, and for want of such issue, over. Sir *W. P. Wood*, V. C., held, that the children of F. and M. took estates in tail as tenants in common with cross remainders in tail. His Honor doubted whether he could say, *reddendo singula singulis*, that there was meant to be a tenancy in common between the issues of the several children, and not as between the issue themselves *inter se;* if he could have come to that conclusion it would have relieved the case of much difficulty, because then it would have been a single gift to the party for life, with remainder to the issue, and for want of such issue, with remainder over. That, he observed, had been held over and over again to give an estate tail to the first taker. The difficulty was that the children took as joint tenants for their joint lives (*x*). His Honor then, after noticing some of the principal authorities, grounded his decision principally on the consideration that from the whole will the intent appeared to be that the issue in every degree of the children should take, but if the issue took by purchase they could only take for life, and the intent would be frustrated; the only way of giving effect to that intent was to hold the children to take as tenants in common in tail. With respect to the argument, that "such issue" in the gift over referred to those who were to be first takers, he remarked that it involved a little fallacy; the true

[(*u*) 1 Kay & J. 352.

(*x*) But the children might properly have been held to be joint tenants for life with several inheritances in tail; see ante, p. 232.

[mode of construing a will was not to stop short of any one point and say the issue are to take in equal shares during their lives; he must read the whole will and make up his mind as to the true construction and effect of the whole instrument; it was a fallacy to say a definite meaning should be fixed to the word "issue" in one part of the will, and then necessarily, and as of course, to say that "such issue" in itself is immaterial with reference to the construction of the will.

To children and the survivors and survivor for life, and then to their lawful issue, and the heirs of the body of such issue, with cross remainders between the issue. Held that the children took for life.

Again, in the case of *Parker* v. *Clarke* (*y*), lands were directed to be conveyed upon trust for the children of the testator's niece during their lives, and for the survivors or survivor of them during their, his, or her lives or life, and after the decease of the last survivor of the said children, then in trust for all and every the lawful issue male and female of such of the children of his niece then or thereafter to be born as should be living at the testator's decease, in equal shares and proportions as tenants in common, and not as joint-tenants, and the heirs of the body and respective bodies of all and every the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original share or shares of him, her, or them so dying, and of whom there should be such a failure of heirs of the body as aforesaid, as also such share or shares as should accrue to him, her, or them, or his, her, or their issue, should be in trust for the survivors and survivor, and others or other of them, if more than one, in equal shares as tenants in common, and not as joint-tenants, and for the heirs of the body, or respective bodies, of such surviving issue, and for default of issue, to inherit under the preceding limitations, then upon certain other trusts. It was held by Lord *Cranworth*, C., affirming the decision of Sir *J. Stuart*, V. C., that the children of the nieces took estates for life only.

To A. for life, and after his death to his issue, as he should appoint, and, in default, to his issue equally; if one child, to such child, and, in default of issue, over.

The last of this long line of cases is *Roddy* v. *Fitzgerald* (*z*), where the testator devised renewable freeholds for lives "to his son during his life, and after his death to his lawful issue in such manner, shares, and proportions as he by deed or will should appoint, and for want of such appointment, then to his issue equally if more than one, and if only one child to such only child; and in case of his said son dying without issue,"

[(*y*) 3 Sm. & G. 161, 6 D. M. & G. 104.
(*z*) 6 H. of L. Ca. 823.

[then over. The case was argued in the House of Lords, in the presence of Lords *Cranworth* and *Wensleydale*, and seven of the judges, four of whom delivered judgment in favour of an estate tail in the son, and with them agreed Lords *Cranworth* and *Wensleydale*, and judgment was given accordingly. The other three judges thought the son took for life only, with remainder by purchase to the issue; but their judgment was based chiefly on the opinion that the issue took an estate in fee-simple by implication from the power, which it was admitted authorized an appointment to them in fee. This opinion, however, was conclusively shewn to be wrong; there being in default of appointment an express gift to the issue, which carried only life estates, and which, according to the well-known rule, "expressum facit cessare tacitum," excluded all further extension of the devise by implication (*a*).

Propositions to be deduced as the result of the cases.

Though these decisions are not altogether in unison, yet having regard to the fact that the later cases clearly overrule some of those of earlier date, we may, perhaps, venture to lay down the following propositions as now recognized:—

1st. Where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally (*b*), or in default of "such" issue (*c*), or in default of issue living at the death of the ancestor (*d*), the ancestor takes an estate tail. As to the truth of this proposition, the cases seem to admit of no reasonable doubt, and it appears to be immaterial that between the gift to the ancestor and that to the issue, there is a limitation to trustees to preserve contingent remainders (*e*).

2ndly. Where the gift is as in the last proposition, but there is *no* gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate tail, which, if not barred, will descend to his

[(*a*) Upon the question whether an estate for life by purchase might be given to the issue, with *remainder* in tail to the son, *Crompton*, J., held that the authorities did not warrant such a construction. See *Parr* v. *Swindels*, and other cases stated post.

(*b*) *Doe* v. *Applin*, 4 T. R. 82; *Doe* v. *Cooper*, 1 East, 229; *Ward* v. *Bevil*, 1 Y. & Jerv. 512; *Croly* v. *Croly*, Batty, 1; *Heather* v. *Winder*, 5 L. J. N. S. Ch. 41; *Kavanagh* v. *Morland*, Kay, 16; *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 823.

(*c*) *Woodhouse* v. *Herrick*, ante, p. 414.

(*d*) *Doe* v. *Rucastle*, 8 C. B. 876.

(*e*) *Woodhouse* v. *Herrick*, ante, p. 414.

[issue, this being the only mode of carrying the inheritance to the issue (*f*).

3rdly. Where words of distribution, together with words which would carry an estate in fee are attached to the gift to the issue, the ancestor takes an estate for life only, and the result is the same whether the fee is given by the technical words "heirs and assigns" (*g*), or by such words as "estate," "part," "share," &c., occurring in the description of the subject of gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication from a power to appoint to them (*h*), and whether there is a gift over on general failure of the issue of the ancestor (*i*) or not (*k*); and the same rule applies where the issue would take an estate tail (*l*).

The result of the cases as applied to wills made since 1837.

The first and second of the above propositions are materially affected by the recent statute (1 Vict. c. 26) with respect to wills. For, since the third proposition applies not only to those cases where the issue would take the fee under an express limitation to their "heirs and assigns," but also apparently includes all other cases where the words are sufficient to give them the fee, and since under the recent statute a devise to issue indefinitely will give the fee to the issue and not an estate for life merely as under the old law, it follows that we must, in a will made since 1837, construe such devises as those falling within the first and second of the above propositions in the same manner as if words of limitation were superadded, and such devises will then coincide with those falling within the third proposition; the law on this point as to wills made since 1837 will thus be reduced to a very simple general rule,— namely, that *every* devise to a person for life and after his decease to his issue, in words which direct or imply distribution between the issue, gives the issue an estate in fee in remainder by purchase.]

General rule as to such wills.

It is observable that, in *Lees* v. *Mosley* (and the same remark

Whether "is-

[(*f*) Per Sir *E. Sugden*, C., *Crozier* v. *Crozier*, 3 D. & War. 373; and per Sir *W. P. Wood*, V. C., *Kavanagh* v. *Morland*, Kay, 16.

(*g*) *Lees* v. *Mosley*, 1 Y. & C. 589, ante, p. 406; *Greenwood* v. *Rothwell*, 5 M. & Gr. 628, 6 Scott, N. R. 670, 6 Beav. 492, ante, p. 410; *Slater* v. *Dangerfield*, 15 M. & Wels. 263, ante, p. 412; *Golder* v. *Cropp*, 5 Jur. N. S. 562.

(*h*) *Crozier* v. *Crozier*, 3 D. & War. 373, ante, p. 410; *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47, ante, p. 411.

(*i*) *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47, ante, p. 411.

(*k*) *Lees* v. *Mosley*, *Greenwood* v. *Rothwell*, *Slater* v. *Dangerfield*, ubi sup. note (*g*).

(*l*) *Parker* v. *Clarke*, 6 D. M. & G. 104, ante, p. 415.]

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sue," where a word of purchase, is confined to *children.*

applies to many other cases), it does not distinctly appear whether, in pronouncing "issue" to be a word of purchase, the Court intended to construe it as synonymous with *children*, or as admitting descendants of every degree (*m*). The latter, it is presumed, would be its construction in the absence of a restraining context (*n*). What amounts to such a context will be the subject of consideration in the next division of this section, which this remark will serve to introduce.

"Issue" explained to mean *sons.*

4thly. If the testator annex to the gift to the issue words of explanation, indicating that he uses the term "issue" in a special and limited sense, it is of course restricted to that sense.

As in the case of *Mandeville* v. *Lackey* (*o*), where a testator devised his real estate in certain counties to K. during his life only, subject to a certain condition, and after the determination of that estate to M.'s *lawful issue male,* and the lawful issue male of such heirs, the eldest always of *such sons* of M. to be preferred before the youngest, according to their seniority in age and priority in birth, and for want of such lawful issue in M., over: the Court of King's Bench in Ireland held that M. took only an estate for life, which was affirmed in the House of Lords, with the unanimous concurrence of the Judges, on the ground that the word "issue" was explained to mean "sons."

Issue not restricted to children.

(*m*) The case of *Dalzell* v. *Welch*, 2 Sim. 319, seems to bear upon this point, and favours the more enlarged construction of the term "issue."

A moiety of certain real estate was devised to D. for life, remainder to and among his issue as he should by will appoint, remainder to his issue living at his death, in fee. D. made an appointment in favour of his children only, though he left also grandchildren and great-grandchildren. Sir *L. Shadwell*, V. C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power, as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A. for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, &c., as A. should appoint; and, in default of appointment, among *such issue* in equal shares, and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A. living at her decease, or if they should all die before attaining twenty-one, then over. The Vice-Chancellor thought, that the word "children" meant *issue* in this instance, for that the testator could not intend that, if A. left a grandchild and no child, the property should go over.* *At all events, as a similar phraseology was not adopted in the latter part of the will, the word "issue" must be considered as used in the sense it generally bears.* [And see *Hall* v. *Nalder*, 17 Jur. 224.]

(*n*) As to the mode in which the several degrees of issue take in such cases, see ante, pp. 89, 90.

(*o*) 3 Ridg. P. C. 352. Hayes's Inq. 148, n. See same principle as to *heirs of the body, Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264, and other cases stated ante, p. 359 et seq.

* Compare this with *Ryan* v. *Cowley*, supra, and *Carter* v. *Bentall*, post, p. 419.

The Lord Chancellor said the subsequent words of explanation seemed to him to point out the *sons* of M. by name, as the persons whom the testator meant by issue male.

"Issue" explained to mean *children*.

So, in the case of *Ryan* v. *Cowley* (*p*), where a testator devised and bequeathed to trustees freehold and leasehold and other personal property, upon trust for his daughter for life; and after her decease the rents and profits, and interest of money, he gave, devised and bequeathed to and amongst the *issue* of his said daughter lawfully to be begotten, in such shares and proportions as she should by her last will and testament appoint, provided such *child or children* should arrive at the age of twenty-one years; and for want of such issue of his daughter, or in case of the death of such issue, and of the death of his wife, the testator devised all his property to other persons. It was contended on behalf of the daughter that the word "issue" was to be construed as a word of limitation, and consequently that she took an estate tail in the freehold, and an absolute interest in the chattel property. But the Lord Chancellor (*Sugden*) held that the daughter took a life interest only. "The term 'issue,'" he observed, "may be employed either as a word of purchase or of limitation; but when the testator adds, 'provided such child or children shall attain twenty-one, and for want of such issue, then' over, he translates his own language; and clearly shews that he uses the word 'issue' as synonymous with child or children."

Issue explained to mean *children*.

Again, in the case of *Carter* v. *Bentall* (*q*), where a testator, after creating certain life interests, gave the produce of his real and personal estate to trustees, upon trust to transfer one moiety thereof to the issue of his daughter S., to be paid to them at their respective ages of twenty-one; and if only one *child*, then to such one *child*, for his, her, or their benefit. And the testator ordered the trustees to lay out the dividends in the maintenance of such "issue;" and in default of such issue, over (*r*): Lord *Langdale*, M. R., held that the word "issue" was here explained to mean *children* (*s*).

(*p*) 1 Ll. & G. 7. See also *Machell* v. *Weeding*, 8 Sim. 4, ante, Chap. XVII. sect. 6; *Pruen* v. *Osborne*, 11 Sim. 132; [*Bradshaw* v. *Melling*, 19 Beav. 417.]

(*q*) 2 Beav. 551.

(*r*) The chief discussion was, whether, in respect of the *other* moiety, a gift over on failure of issue of the testator's mother and daughter (to whose children no gift was made), the word "issue" was to be read "children" and it was held not.

(*s*) See a similar construction applied to a deed, *Campbell* v. *Sandys*, 1 Sch. &

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Issue explained to mean sons and daughters.

[Similarly in the case of *Farrant* v. *Nichols* (*t*), the bequest was to the testator's daughters during their lives, and after their respective deceases to all and every the respective *issues* of his daughters, whether sons or daughters, in equal shares; but if any of his daughters should die without leaving any *such issue*, or having left *any issue*, all such issue should die under a certain age, then over. It was held that "issues" was explained by the subsequent words "sons or daughters" to mean children, and that the use of the word issue in the gift over did not again enlarge the meaning of the word "issues."]

Effect where "issue" and "children" have elsewhere been used indifferently.

And of course it is a circumstance favourable to the construction in question, that the testator has in other parts of his will used the words "children" and issue" indifferently (*u*).

Indeed, in a very recent case, it was considered to be a conclusive ground for construing the word "issue" to mean *children*, that the testator had elsewhere employed it in this limited sense (*x*).

But of course the word "issue" will not be cut down to *children* by the mere circumstance of the words "children" and "issue" being previously used synonymously, if in those prior instances there was fair ground to conclude that both terms were used in the sense of issue (*y*).

Specia construction of issue living at the death, in an executory trust.

Lef. 281; *Swift* v. *Swift*, 8 Sim. 168. In the case of *Stonor* v. *Curwen*, 5 Sim. 264, a testator directed personalty to be settled in trust for his niece A. for life, but to devolve *to her issue at her death*, and, failing issue, to his nephew B. It was held, that the trust embraced the children living at the death of A., and the issue then living of any deceased child or children. It will be observed that this was the case of an executory trust.

(*t*) 9 Beav. 327.]

(*u*) *Cursham* v. *Newland*, 2 Bing. N. C. 58, 2 Scott, 105, 2 Beav. 145, 4 M. & Wels. 101.

Uniformity of construction on recurrence of same word.

(*x*) *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84. In this case Lord Chancellor *Sugden* said, "It is a well-settled rule of construction, and one to which from its soundness I shall always strictly adhere, 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." To this proposition no objection can be advanced; but it seems not entirely to dispose of the difficulties attending these cases, for the question still is, what amounts to such "a clear intention to the contrary" as will take any given case out of the rule. Different minds may (as the reports abundantly testify) estimate variously the force of context requisite to outweigh the presumption of similarity of intention from the recurrence of the same expression. Where a term is in some instances accompanied by an explanatory context, and in other instances not, a Judge may see in the occasional omission of the explanatory phrase sufficient ground to infer a difference of intention in the respective instances, of which the case of *Dalzell* v. *Welch*, 2 Sim. 320, ante, p. 418, n., affords an example. In such cases, the general plan of the will must be regarded; and if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing.

(*y*) *Dalzell* v. *Welch*, 2 Sim. 319, ante,

A leading and often-cited example of the word "children" being used in the sense of *issue*, is *Gale* v. *Bennett* (*z*), where a testator gave real and personal estate to his daughter H. for life, and remainder to her children at twenty-one; and, in default of such issue, then to his other daughters that should be living at the time of the death and failure of issue of H., and the *child or children* of such of his other daughters as should be dead, as tenants in common in fee; but such children to take only their parent's share: but in case there should be none of his other daughters, nor any *issue* of his other daughters then living, the testator bequeathed over the property. H. died childless; and it was held, that the grandchild of another daughter, who died in the lifetime of the testator, was entitled, the word child and children being here used as synonymous with *issue* (*a*).

"Children held to mean *issue*."

The present division will be concluded by the statement of two recent cases of the converse kind, namely, in which the word "issue" has been used in the restricted sense of *children*. In one of these, *Ellis* v. *Selby* (*b*), a testator bequeathed his funded property upon trust for A. for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one, share and share alike, and, if only one, for the maintenance of such one during his, her, or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them, if more than one, and, if only one, then to such one; and, after the decease of B. (to whom the testator had given the dividends on his bank stock for life), he gave the dividends thereof to A. for the term of his life, and, after his decease, upon trust for the lawful *children or child*, if only one, of A. *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property*; and, if A. should happen to die without *issue male or female* of his body lawfully begotten, then over: Sir *L. Shadwell*, V. C., was of opinion, that the words "die without issue male or female" in the bequest over referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female.

Bequest to children made to govern prior gift to "issue."

p. 418, n.; and see further on this point, ante, p. 92.

(*z*) Amb. 681, [and stated from Reg. Lib. 3 De G. & J. 276.] See also *Wyth* v. *Blackman*, 1 Ves. 196, ante, p. 94; *S. C.* nom. *Wythe* v. *Thurlston*, Amb. 555.

(*a*) Much stress in the arguments at the bar was laid on the fact of there being no child; but the inadmissibility of such a principle of construction has been elsewhere shewn, ante, p. 137.

(*b*) 7 Sim. 352.

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"Issue" held to mean *children* by reference to another gift.

The other case referred to is *Peel* v. *Catlow* (*c*), where a testator bequeathed one-sixth part of his residuary estate amongst the *children* of his late sister Jane T., to be paid at twenty-one, and, in case any such *child* or *children* should die under age leaving *issue* living at his, her, or their decease, their shares to be paid to the issue of such child or children respectively, with a bequest over of the shares of any child or children dying in minority without leaving issue, to the survivors and the issue of any who should have died leaving issue as aforesaid (such issue to take no greater share than their respective parents would have been entitled to, if living). And, as to one other sixth part, upon trust to pay the interest to the testator's sister, Mary C.: and, after her decease, to pay and apply the said share unto and amongst her *issue*, and to be payable at the like times, and with the like benefit of survivorship and accruer, *and in like manner as is thereinbefore expressed concerning the sixth part given to the children of his* the testator's *late sister Jane T.*; and in case the testator's sister Mary should die without leaving issue at her decease, or leaving any, they should die under twenty-one, and should leave no issue living at his, her, or their decease, then over: Sir *L. Shadwell*, V. C., was of opinion, that the bequest to the "issue" of the testator's sister Mary must of necessity be taken to mean *children*, by force of the terms of reference to the prior bequest to the children of Jane.

Remark on *Peel* v. *Catlow*.

It may be observed, in support of the construction adopted by the Court, that the testator had used the word "issue" in the sense of *children*, in reference to both the share of the children of Jane and the share of Mary, namely, in the clauses which provided for the event of their respectively dying *under age* without issue living at their decease, where it is obvious the word "*issue*" necessarily meant *children*, as a minor could not leave issue of a remoter degree.

Limitation over if the devisee leave no issue at his death.

5thly. It remains to be observed, that where a devise to a person and his issue (or to him and the heirs of his body (*d*)) is followed by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the prescribed event. They are not considered as explanatory of the species

(*c*) 9 Sim. 372.

(*d*) *Wright* v. *Pearson*, 1 Ed. 119, ante, p. 335; but where it was not necessary to decide its effect upon the remainder. [Compare *Abram* v. *Ward*, 6 Hare, 165.]

of issue included in the prior devise (*e*), and, therefore, do not prevent the prior devisee taking an estate tail under it (*f*). The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a *subsequent* failure of issue.

In *Doe* d. *Gilman* v. *Elvey* (*g*), the circumstance of there being a limitation over on failure of issue at the death of the prior devisee does not appear to have given rise to an argument against an estate tail. The only doubt, it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail, contingent on the event of the devisee in tail leaving no issue *at his death* (*h*), The affirmative, however, seems to be the better opinion, as the Courts would hardly feel themselves authorized, without a context, to reject the clause "living at his decease." But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency (*i*).

(*e*) See *Hutchinson* v. *Stephens*, 1 Keen, 240, post.

(*f*) [*Doe* v. *Rucastle*, 8 C. B. 876; *Marshall* v. *Grime*, 29 L. J. Ch. 592.] Indeed, in one instance, we have seen (ante, p. 390) even an express devise to A. and the issue living at his death was held to confer an estate tail; but this is a construction which probably would not be universally acquiesced in.

(*g*) 4 East, 313, ante, p. 392.

(*h*) See an instance of such construction applied to personalty in *Lyon* v. *Mitchell*, 1 Mad. 467, where personal estate was bequeathed to A., B., C. and D., as tenants in common, and to the issue of their respective bodies; but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held, that the bequest passed absolute interests to A., B., C. and D., subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

Bequest over on failure of issue at the death, following bequest to A. and B. and their issue.

(*i*) See *Broadhurst* v. *Morris*, 2 B. & Ad. 1, ante, p. 367.

# CHAPTER XL.

## WORDS "IN DEFAULT OF ISSUE," ETC., WHEN REFERABLE TO THE OBJECTS OF A PRIOR DEVISE.

I. *Preliminary Remarks.*
II. *Construction in regard to Personalty.*
III. *In relation to Real Estate.* 1. *Where the Expression is "such Issue."* 2. *Where the reference is to "Issue" simply.* 3. *Conclusions from the Cases.* 4. *Doctrine of general and particular Intention.* 5. *Devises of Reversions.*
IV. *Effect of recent Enactment.*

Preliminary remarks.

I. THE expression which forms the subject of consideration in this chapter stands pre-eminent for the number and variety of the questions of construction to which it has given rise. The offices assigned to it are very numerous, and vary of course with the context. Following a devise to heirs *general*, a clause of this nature, we have seen, frequently explains the word "heirs" to mean heirs-*special*, i. e. heirs of the body, and cuts down the estate comprised in the prior devise to an estate tail (*a*), unless there is ground for restraining the term "issue" to issue living *at the death*. Preceded by a devise indefinitely or expressly for life to the person whose issue is referred to, the words in question (occurring in a will which is subject to the old law) have the effect of enlarging such prior devise to an estate tail (*b*), unless they are restrained, as before suggested, or *unless there is an intermediate devise to some class or denomination of issue to which they can be referred.* To determine in what cases the latter construction prevails, is the present object of inquiry. The distinctions which the authorities present require particular attention, and they will be found upon the whole to be more easily reducible to a few general propositions than is commonly supposed. It will be proper to separate gifts of real and personal estate; for as the construing of the words in question to import a general failure of issue in regard to *personalty*, necessarily renders void the gift over which is to take effect on such

(*a*) Ante, Chap. XVII. sect. 6. (*b*) Ibid.

contingency (*c*), the disinclination of the Courts to that construction is evidently stronger than where (as in reference to *real* estate) they have the effect of creating an estate tail, on which a remainder can be limited.

In regard to personal estate.

II. *In regard to personal estate,* it seems to be clear that words denoting a failure of issue, following a bequest to *children,* refer to the objects of that gift.

Preceded by a bequest to *children.*

As in *Doe* d. *Lyde* v. *Lyde* (*d*), where a term of years was bequeathed to G. for life, and after his decease to M. for life, and after the decease of the survivor to *the children of G.*, share and share alike, and *if G. died without issue* of his body, then over; it was held, that there being no child of G. the ulterior gift took effect.

Contingent and confined to children of a certain class.

So, in the case of *Salkeld* v. *Vernon* (*e*), where a testator bequeathed 1,000*l.* to his daughter R.'s child or children, to the number of *four;* and if she should have a greater number than four living at his decease, then he bequeathed 4,000*l.* to be divided among the said children *who should be so living at his decease,* to be paid at twenty-one; *but if his daughter should happen to die "without issue,"* then he bequeathed the said legacy over. It was contended, that the ulterior bequest was void, being after a general failure of issue; but Lord *Northington* held, that it was a legacy to the children, if there were any, living at his decease, and, if not, to the substituted legatees.

Die without issue held to mean die without children mentioned in previous limitation.

[Again, in the case of *Robinson* v. *Hunt* (*f*), the testator bequeathed an annuity to his sister-in-law and his nephew, equally between them during their joint lives, and to the survivor of them, and if his nephew should have any children lawfully begotten, then the said annuity to be equally divided between them, and if but one child, then to that child; but if his nephew should die without issue, then over. Lord *Langdale* decided that "issue" was to be read, "such issue" meaning children, and therefore the children and not the nephew took the absolute interest in the annuity.]

"Without

And a similar doctrine prevailed in the case of *Malcolm* v.

(*c*) Ante, Vol. I. p. 230.

(*d*) 1 T. R. 593. See also [*Att.-Gen.* v. *Bayley,* 3 B. C. C. 553;] *Vandergucht* v. *Blake,* 2 Ves. jun. 534, and *Farthing* v. *Allen,* 2 Mad. 310, but as to which see post.

(*e*) 1 Ed. 64; [*Cormack* v. *Copous,* 17 Beav. 397.

(*f*) 4 Beav. 450.]

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"issue as aforesaid," held to refer to objects of prior gift.

*Taylor* (*g*), though the trust for children was confined to those who attained a prescribed age; but the construction was considered to be aided by an expression in the context. The testator gave certain lands and all the residue of his money in the funds to his mother and his sister M., for their lives and the life of the survivor, and, after the decease of the survivor, to such of the children of M. as she by deed or will should appoint; and, in default of appointment, to be equally divided among the said children, their heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons, at twenty-one; or, being daughters, at twenty-one or marriage. And *in case M. should die without issue of her body lawfully begotten,* then the testator devised the estate to the children of A. in fee; and in case M. should *die without issue as aforesaid,* the testator gave the residue of his money in the funds to J., and after his decease to his (testator's) eldest son. M. died unmarried; whereupon a doubt arose as to the validity of the bequest over to J., which of course failed if the words referred to an extinction of issue at any time. It was held by Sir *J. Leach,* M. R., and afterwards by Lord *Brougham,* that the words "without issue as aforesaid" meant without such issue of M. as were objects of the preceding gift of the funded property, i. e. the children; his Honor observing, that it was a reasonable intendment that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This was the plain intention of the testator with respect to the real estate; and it was to be supposed, when real and personal estate were given together, that the testator had the same intention with respect to the funded property and the real estate. In Lord *Brougham's* judgment there is much criticism on the words "as aforesaid" (*h*), which his Lordship considered to refer, not to the objects of the immediately preceding devise, but to the more remote antecedent, the legatees of the stock, which seems to have been rather a nice question.

Dying without issue at death not interpreted "such issue."

[Sir *R. T. Kindersley,* V. C., has observed (*i*), that where there is a gift to one for life, with remainder to his children,

(*g*) 2 R. & My. 416; [and see *Bryan* v. *Mansion*, 5 De G. & S. 737.

(*h*) As to these words, see also *Walker* v. *Petchell*, 1 C. B. 65, stated post.

(*i*) *Westwood* v. *Southey*, 2 Sim. N. S. 202, 203.

[and a gift over on his dying without issue, which is either in terms or by the proper construction limited to dying without issue living at his death, there is no reason for interpreting the words as meaning "such issue as before mentioned." Such a construction might in fact wholly defeat the testator's intention; for the tenant for life might have an only child who might attain twenty-one, and marry and have children, and die before the tenant for life, and then the child and the issue of that child would be excluded. Accordingly in *Pride* v. *Fooks* (*j*), the gift was in trust for such child or children as the testator's nephew and niece should leave at the time of their respective deceases, one third to the children or child of each nephew and niece, and in case either of the nephews and niece should happen to die without leaving any children or child lawfully begotten, such third part should go and be paid to the children or child of the other or others leaving children or a child in equal proportions, if more than one, and in case all of them the nephews and niece should happen to die without leaving (*k*) any issue lawfully begotten, upon other trusts. Neither of the nephews nor the niece left any children living at their deaths; but two of them left grandchildren at their deaths. It was held by Sir *J. Knight Bruce* and Sir *G. Turner*, L. J., that the word "issue" in the gift was not to be restricted to mean "children," and that there was an intestacy. Sir *G. Turner* said, "If the primary limitation be in favour of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see reasons for construing "default of issue" to mean "default of children," for if there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over, but where the primary limitation is so expressed as that there may be issue who may not take under it, as in the case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed (*l*).]

Where the prior gift is expressly to "issue," though restricted by the context to issue of a particular class, or existing at a

[(*j*) 3 De G. & Jo. 252.

(*k*) This means leaving them surviving. See post, Chap. XLI. sect. 1.

(*l*) *Salkeld* v. *Vernon*, ante, p. 425, is the only instance of such a construction; *Malcolm* v. *Taylor* being an exceptional case.]

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prescribed period, it seems more obvious to apply to the objects of such prior gift, the words importing a failure of issue (the term being identical in both clauses), than where the prior gift is in favour of *children*.

Words held to be referential to prior gift to "issue."

Thus, in the case of *Leeming* v. *Sherratt* (*m*), where a testator bequeathed to each of his children 1,000*l.*, to be paid at twenty-one, but as to the girls, one-half to be placed out at interest, to be secured from the control of any husband, the interest in the meantime to be paid to them, and the principal to be disposed of in such manner as they might direct, to their *issue; but in case they should die without issue,* the testator gave the principal among the survivors of his children; Sir *J. Wigram,* V. C., was of opinion that the original bequest applied to issue living at the death of the children, and that the gift over, on the failure of "issue," referred to the same objects.

Words held in an executory trust not to refer to prior objects.

In two earlier cases, however, a different construction seems to have prevailed. Thus, in *Andree* v. *Ward* (*n*), where a sum of 5,000*l.* stock was bequeathed to A. for life, and in case he should marry any woman with 1,000*l.* fortune, then the testator's will was, that the 5,000*l.* should be settled on his wife, and the *issue of such marriage;* but in case A. died *leaving* no issue of his body lawfully begotten, then over: Sir *T. Plumer,* M. R., was of opinion that "issue" in the ulterior gift could not be confined to issue of such marriage as before mentioned, and that therefore A. having left issue not of such a marriage, the gift over failed.

The strong tendency of the recent cases towards the referential construction, suggests a doubt whether the doctrine of this case would now be followed.

Referential construction rejected.

So, in the case of *Campbell* v. *Harding* (*o*), where a testator bequeathed to his adopted daughter, Caroline Harding, 20,000*l.* Three per Cent. Consols, and his house and landed property at Culworth; *but in case of her death without lawful issue,* then the testator willed the money so left to her to be equally divided betwixt his nephews and nieces who might be living *at the time* (*p*), and the land, &c., at Culworth to his nephew J. H.; and the testator requested his friends C. and S. to be guardians for Caroline Harding, and if she married, it must be with their

(*m*) 2 Hare, 14.
(*n*) 1 Russ. 260.
(*o*) 2 R. & My. 390; *S. C.* in D. P. nom. *Candy* v. *Campbell,* 8 Bli. N. S. 469, 2 Cl. & Fin. 421.
(*p*) Vide ante, Vol. I. p. 263.

consent, and "the property to be solely settled *upon herself and her children,* and in no way charged or alienated." It was contended, that the words "death without lawful issue" in this case, meant death without having had any such issue as would have taken under the settlement subsequently directed by the testator, and not death without issue indefinitely; but it was held by Sir *L. Shadwell,* V. C., and afterwards by Lord *Brougham,* in affirmance of his decree, and ultimately by the House of Lords (where the case was very elaborately argued), that the words could not be restricted, and consequently that Caroline Harding (who had died unmarried) became absolutely entitled to the stock. Lord *Brougham* considered that the introduction of the direction to settle the stock on the marriage of the legatee did not vary or affect the construction which was to obtain in the alternative event of her not marrying at all (*q*).

Remark on *Campbell* v. *Harding.*

The frame and language of the will in this case were peculiar, and it must not be considered as intrenching on the general principle of construction exemplified in the preceding cases. That principle was recognized and forcibly stated by Lord *Cottenham,* in the case of *Ellicombe* v. *Gompertz* (*r*), where his Lordship held, that the words "from and immediately after the decease of all the sons and grandsons of my said son J. J." were confined to such sons and grandsons as were embraced by the preceding gifts, a construction which supported the validity of the ulterior gift (*s*). His Lordship thus stated the general doctrine: "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appear that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will

Lord *Cottenham's* statement of the general doctrine.

(*q*) This case was cited as a leading authority by Sir *Knight Bruce,* V. C., in the case of *Pye* v. *Linwood,* 6 Jur. 618; but as in the events which had happened it was unnecessary for his Honor to decide whether the words importing a failure of issue applied to the objects of the preceding bequest to "children" or extended to issue indefinitely, the case of *Pye* v. *Linwood* has really no connection with the present subject of discussion. The material question was, whether the words referred to issue living at the death (vide next chapter), which construction the Court (it is considered most properly) negatived.

(*r*) 3 M. & Cr. 127.

(*s*) The will was found too long and special for insertion.

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adopt such a construction as will extend the benefit, in the best way the law will admit to the whole class."

Words held to refer to objects of prior gifts.

So, in the case of *Trickey* v. *Trickey* (*t*), where a testator bequeathed the residue of his personal estate to his daughter A. for life, and after her decease to her children at twenty-one; and in case any of such children should die under twenty-one, and have one or more children *who should survive A.*, and live to attain the said age, the last-mentioned children should be entitled to their parents' share; provided that, in case any child of A. should die under twenty-one, his, her, or their share or shares should go to the survivors of the said children, and the issue of any deceased child or children, who should marry, and die under the said age; provided further, that *if there should be no child of A., or there being any such, no one child living to attain the age of twenty-one years, nor leave any issue who should attain thereto, then over:* Sir *J. Leach*, M. R., held, that the gift over must be intended to take effect on failure of the former gifts; and as such former gifts were confined to those grandchildren who should survive (and who should therefore necessarily have been born in the lifetime of) the daughter, the ulterior bequest was valid (*u*).

In default of *such* issue.

Where the words are not "in default of issue" simply, but "in default of *such* issue," it is clear that whatever be the class of issue included in the preceding gift, whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over *in default of such issue* is construed to mean in default of such *children, sons, or daughters* (*x*).

In regard to real estate.

III. With regard to *real estate* also, it is clear that the words "in default of *such* issue," following an express devise to any particular [generation] of issue, as *children, sons, or daughters*, will be construed to refer to the issue before described; that is, as meaning in default of "*such*" *children, sons*, &c. (*y*). And in

(*t*) 3 My. & K. 560.

(*u*) Although in the cases of *Ellicombe* v. *Gompertz*, and *Trickey* v. *Trickey*, above stated, the expression which connected the prior and ulterior gifts did not correspond with that which is the subject of the present chapter; yet, as the general principle was much discussed, and as these cases exemplify the application of the doctrine to bequests of personalty, they appeared to call for insertion in this place. *Ellicombe* v. *Gompertz* was cited as a leading authority by Sir *James Wigram*, in *Leeming* v. *Sherratt*, 2 Hare, 14, ante, p. 428; [see also *Hillersdon* v. *Lowe*, 2 Hare, 355.]

(*x*) *Maddox* v. *Staines*, 2 P. W. 421, 3 B. P. C. Toml. 108; *Stanley* v. *Leigh*, 2 P. W. 685; and see 3 M. & Cr. 153.

(*y*) *Lethieullier* v. *Tracey*, Amb. 204, 220; *Denn* d. *Briddon* v. *Page*, 11 East,

cases of *this* class (as distinguished from those which form the subject of the next section), this rule prevails, whether the objects of such preceding devise take estates of inheritance, or only estates for life (*z*).

The reported cases supply numerous examples of each kind.

Preceded by a devise to children in fee;

In *Doe* d. *Comberbach* v. *Perryn* (*a*), *Rex* v. *Marquess of Stafford* (*b*), [and *Foster* v. *Hayes* (*c*),] the words "in default of *such* issue" following a devise to *children in fee* were held to refer to such children.

—— to children for life;

In *Doe* d. *Tooley* v. *Gunniss* (*d*), and *Doe* d. *Liversage* v. *Vaughan* (*e*), the same construction was given to a devise to children (without words of limitation), with a devise over, "on *failure of such issue;*" and also in *Ashley* v. *Ashley* (*f*), where a similar devise was followed by the words, for "want of such issue."

—— to daughters for life;

In *Denn* d. *Briddon* v. *Page* (*g*), the limitations of the will were to the first and other sons in tail male in strict settlement, and in default of such issue, to all and every *the daughters*, (without words of limitation,) *and in default of such issue*, over; Lord *Mansfield* held, that the daughters took estates for life only; but his Lordship said, "If, after the limitation to the daughters, the words had been, 'and if they die *without issue*,' we would have implied an estate tail (*h*); but here the words are '*such* issue,' *which can only mean the issue before mentioned.*" The case of *Hay* v. *Earl of Coventry* (*i*) was precisely similar.

—— to sons in tail male;

So, in *Doe* d. *Phipps* v. *Lord Mulgrave* (*j*), where the devise being to the first and every other son in tail male, "*failure of*

603, n., 3 T. R. 87, n.; *Hay* v. *Lord Coventry*, 3 T. R. 83; *Doe* d. *Comberbach* v. *Perryn*, ib. 484; *Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264; and other cases, ante, p. 359.

[(*z*) It must be observed that a limitation over in default of issue following an estate in fee to children or any other particular branch of issue operates as an alternative contingent remainder which is defeated the moment that, by birth of a child or other issue taking under the previous limitation in fee, such limitation in fee becomes vested. On the other hand, a limitation over in default of issue, following an estate for life or in tail given to the issue, is construed as a vested remainder expectant on the estate for life or in tail, and is not defeated by the birth of issue, but takes effect upon the determination of the estates for life or in tail limited to them. It is clear, therefore, that, according as the issue take, (1) in fee, (2) in tail, or (3) for life, the words in default of issue mean,—(1) if there never are any issue; (2) if there never are any issue, or being such, upon their deaths and the failure of their issue inheritable under the estate tail; (3) if there never are any issue, or being such, upon their deaths.]

Meaning of words "in default of issue."

(*a*) 3 T. R. 484.
(*b*) 7 East, 521.
[(*c*) 2 Ell. & Bl. 27, affirmed 4 Ell. & Bl. 717.]
(*d*) 4 Taunt. 313.
(*e*) 1 D. & Ry. 52, 5 B. & Ald. 464.
(*f*) 6 Sim. 358.
(*g*) 3 T. R. 87, n., 11 East, 603, n.
(*h*) See post.
(*i*) 3 T. R. 83.
(*j*) 5 T. R. 320.

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*such issue*" over, the latter words were treated as merely referring to the preceding devise.

—— to sons for life.

Again, in *Foster* v. *Romney* (*k*), where the devise was to A. for life, and after his decease to *his sons* successively (without words of limitation), and *in default of such issue,* over; it was held, that A. and his sons took for life only, the words "*such* issue" meaning such *sons.*

These decisions must be considered as overruling *Lomax* v. *Holmden* (*l*), and *Evans* d. *Brook* v. *Astley* (*m*), unless the latter cases can be referred to their special circumstances. Lord *Kenyon* (*n*) certainly so treated the latter. The case of *Robinson* v. *Robinson* (*o*) would be in the same predicament, were it not that the word "*son,*" in the devise in that case, appears to have been regarded as a word of limitation (*p*), and consequently the first taker was properly held to be tenant in tail, without imposing on the subsequent words, "in default of *such* issue," the office of conferring that estate, to which, indeed, upon every sound principle of construction, they appear to be inadequate. The cases just stated, establishing that expression to be purely referential, are decisive authorities against the stress which in some parts of the discussion of *Robinson* v. *Robinson* was laid on these words.

Remarks on *Robinson* v. *Robinson, Roe* v. *Grew, Frank* v. *Stovin.*

Of course where the word "issue," occurring in an express devise to issue, is therein explained to mean *children,* the words *in default, or for want of such issue,* immediately following, are construed in default of such *children* (*q*).

"Such issue" preceded by a devise to first and other sons *and their heirs.*

But in one instance the word "such issue," preceded by a devise to first and other *sons* and *their heirs,* were held to refer to *the heirs* of the sons. Thus, in *Lewis* d. *Ormond* v. *Waters* (*r*), where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to *the first and other sons of the testator's eldest son and their heirs,* and *for want of such issue,* to his second son B. for life, with similar remainders; it was held, that the word "issue" in the limitation over referred to the *heirs of the sons,* and consequently that they took successive *estates tail,* which would effectuate

(*k*) 11 East, 594. See also *Goodright* d. *Lloyd* v. *Jones,* 4 M. & Sel. 88; *Purcell* v. *Purcell,* 2 D. & War. 219, n.; [*Bridger* v. *Ramsay,* 10 Hare, 320; *Bevan* v. *White,* 7 Ir. Eq. Rep. 473.]

(*l*) 1 Ves. 296.

(*m*) 3 Burr. 1570.

(*n*) 3 T. R. 87.

(*o*) 1 Burr. 38, 3 B. P. C. Toml. 180.

(*p*) See Lord *Kenyon's* judgment in *Doe* v. *Mulgrave,* 5 T. R. 323.

(*q*) *Ryan* v. *Cowley,* 1 Ll. & G. 7; [*Carter* v. *Bentall,* 2 Beav. 551.]

(*r*) 6 East, 337.

the apparent intention of the testator to continue the estates in his family.

Remark on *Lewis* v. *Waters*.

This is a strong case, inasmuch as there was an antecedent class of issue to which the clause might have been applied; but as the words "first and other" evidently imported that the sons were to take *successively* (*s*), there was no mode of giving effect to that intention except to cut down the fee-simple of the sons to an estate tail.

"Such issue" controlled by subsequent clause shewing an estate tail to be intended.

[Again in *Biddulph* v. *Lees* (*t*), a devise to A. for life, and to his sons in tail male successively, with remainder for default of such issue to B. and C., and their sons in like manner; and for default of such issue, to the daughters of A. and their heirs for ever as tenants in common, and for *default of such issue* to the daughters of B. and C. in like manner (which it was admitted by the Court would per se have given an estate in fee-simple to the daughters of A.) was held to create an estate tail in the daughters on the ground that the testator had expressly interpreted his meaning by a shifting clause which provided that if any daughter became a nun, the use declared in her favour should cease, and that "the person next in reversion to take, according to the aforesaid limitation should, immediately thereupon, enter upon and enjoy the premises as he would have been entitled to hold and enjoy the same in case the person so entering into religion had been then dead without issue of her body."]

Remarks on doctrine advanced in *Ginger* v. *White*.

In *Ginger* d. *White* v. *White* (*u*), C. J. *Willes* read a devise to children and their heirs *successively* as conferring an estate tail only, though he distinctly held, as we shall presently see, that the subsequent words, importing a failure of issue, referred to the children themselves (*v*). The learned Judge seems even to have thought that a gift over in default of *male* children to *female* children, and in default of female children to a person who was their cousin, explained heirs to mean heirs *of the body*, "because the male children could not die without heirs if any of their sisters were living, and the female children could not die without heirs if the cousin were living" (*w*): but he evidently confounded *a remainder* with an *alternative limitation*; in other words, he failed to distinguish between a devise over if the

[(*s*) See *Kershaw* v. *Kershaw*, 13 Ell. & Bl. 845; *Cradock* v. *Cradock*, 4 Jur. N. S. 656, ante, p. 262.

(*t*) 8 Ell. & Bl. 289. See also *Earl of Tyrone* v. *Marquis of Waterford*, 29 L. J. Ch. 486.]

(*u*) Willes, 352, stated post, 434, 435.

(*v*) See post, 435.

(*w*) See as to this doctrine, ante, p. 302.

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children should die without heirs, and a devise over if there should be *no* children. With the latter the doctrine to which he refers has no connection.

Effect where prior devise is in favour of a single child.

Even where the prior devise embraces a single child only, the words "for want of such issue" are construed for want of such *child*, and have not the effect of conferring an estate tail on the parent of that child (*x*).

Words "as aforesaid" equivalent to "such."

[The force of the words "as aforesaid," seems to be equivalent to that of the word "such." Thus, in *Walker* v. *Petchell* (*y*), the testator devised lands upon trust for his wife for her life, and, after her decease, in trust for all and every such one or more of the child or children, whether male or female, of his said wife lawfully begotten, for such estates, &c., as the wife should appoint, and in default of appointment, in trust for the children as tenants in common in fee, "but in case his wife should happen to die without leaving lawful issue as aforesaid," then over; it was held that the words "issue as aforesaid" meant children, and, therefore, that the gift over was not too remote.]

General position deducible from the cases.

In this state of the authorities, then, the proposition seems undeniable, that the phrase "in default of such issue," "for want of such issue," or "on failure of such issue," following a devise to any class of issue, or even to any individual child or other descendant, is simply and exclusively referential, and does not enlarge, or in any manner affect any of the prior estates.

*Doe* v. *Taylor*, opposed to other cases.

[But notwithstanding that this proposition is so abundantly clear, it was apparently altogether ignored by the late case of *Doe* d. *Harris* v. *Taylor* (*z*), where the Court of Queen's Bench held, that the words "for default of such *first* issue" did not mean for default of such "*first* son" as took under the previous limitation, but "for default of issue of such first son," and, therefore, the first son took an estate tail.]

In default of issue generally (without the word *such*).

2. It is well settled also, that words importing a failure of issue (without the word *such*), following a devise to *children* in fee-simple or fee-tail, refer to the objects of that prior devise, and not to issue at large.

Thus, in *Ginger* d. *White* v. *White* (*a*), where a testator

(*x*) *Doe* v. *Charlton*, 1 Scott, N. R. 290, 1 M. & Gr. 429, ante, p. 385; [*Boydell* v. *Golightly*, 14 Sim. 327; (in this case, the difficulty was evidently created by the error of the copier). *Ashburner* v. *Wilson*, 17 Sim. 204.

(*y*) 1 C. B. 652.

(*z*) 10 Q. B. 718; see Chap. XVI. s. 1.]

(*a*) Willes, 348; [*Cormack* v. *Copous*, 17 Beav. 397; *Peyton* v. *Lambert*, 8 Ir.

devised a house to his son J. (subject to an undivided interest given to a daughter during widowhood), and after the determination of that estate to the *male children of* J. successively, one after another, as they should be in priority of age, *and to their heirs;* and in default of such male children, to the *female children of J. and their heirs;* and *in case J. should die without issue,* then over to the testator's grandson W. and his heirs. One question was, whether the last words in italics did not give an estate tail by implication; and it was held, that they did not. *Willes,* C. J., said, that the word "issue" meant *such issue as the testator had mentioned before,* and he could mean no other, for he had devised the estate before to all J.'s sons and daughters. It seems that the learned Judge considered that the children took estates *tail,* on a ground which has been already alluded to (*b*).

Words held to refer to children objects of prior devise.

So, in the case of *Goodright* d. *Docking* v. *Dunham* (*c*), where a testator devised to his said son J. for life, and after his death to all and every his *children* equally, *and their heirs;* and in case his son died *without issue,* then unto his (the testator's) two daughters, and their heirs; Lord *Mansfield,* without hesitation, held, that the limitation over was the same as if it had been "in case the son had died without *children.*"

Again, in the case of *Malcolm* v. *Taylor* (*d*), where a testatrix devised (among other things) the moiety of an estate in Jamaica to her mother, and her sister Maria Taylor, for their lives, and the life of the survivor, and after the decease of the survivor, to such of the children of Maria Taylor as she by deed or will should appoint; and in default of appointment, then the said moiety to be divided equally between the said children, their heirs and assigns for ever; and if but one, then to such one child, his or her heirs and assigns for ever; *and in case the said Maria Taylor should die without issue of her body lawfully begotten,* then the testatrix devised the moiety in question over to other persons: and it was considered as clear, that these words referred to the children who were the objects of the prior devise (*e*).

[Com. Law. Rep. 485; *Towns* v. *Wentworth,* 11 Moo. P. C. C. 526.]

(*b*) Ante, 433.

(*c*) Doug. 264.

(*d*) 2 R. & My. 416. See also *Doe* v. *Selby,* 2 B. & Cr. 926, ante, Chap. XXVI.; *Tarbuck* v. *Tarbuck,* post, 437; [*Hale* v. *Pew,* 25 Beav. 335].

(*e*) In the unreported case of *Clonmert* v. *Whitaker* (8th August, 1807, MS. with a note of which the Author has been favoured), a testator devised unto his

Unreported case of *Clonmert* v. *Whitaker.*

"Default of issue" referred to issue taking previous estates tail.

[So, in the recent case of *Baker* v. *Tucker* (*f*), decided by the House of Lords, where the devise was to the testator's natural son John for life, with remainder to the first and other sons of John successively in *tail male*, and in default of such issue, to the daughters of John as tenants in common in fee, and *in default of issue of the said John*, to the testator's right heirs; it was strongly urged that, where any chasm of events occurs between the actual limitations to the children, and that upon which the gift over is made to depend, an estate tail in the parent, whose issue is referred to in the gift over, ought to be implied to fill up the chasm; but the House of Lords, in affirmance of a decree of the Court of Chancery in Ireland, decided that the referential construction must prevail, and that John took only for life.

"Die without issue" referred to issue taking previous estates in fee.

Again, in the case of *Goymour* v. *Pigge* (*g*), where the testator devised copyholds to his wife for life, and, after her decease, to his daughter for life, and, after her decease, to the first child of her body, whether male or female, and to his or her heirs and assigns for ever; but if such child should depart this life under the age of twenty-one years, without leaving issue of his or her body lawfully begotten, then the testator devised to the second and third child in similar words, and so on to the other children; but in case his daughter should die *without leaving issue of her body* lawfully begotten, or having issue, such issue should die

three sons, Thomas, George and John, share and share alike, all his freehold, leasehold and personal estate and effects. And he also further bequeathed, that, in case of the demise of either of his said sons, the said estate should be equally divided between his surviving sons; and if his sons had issue, *his* (the son's) *child or children should be entitled to the father's share. And in case they all died without issue*, then his freehold estate or estates situated in South Street, Peckham, should devolve to the heirs of his late brother Thomas, to be equally divided. The three sons suffered a common recovery, and the question, on a bill for specific performance filed by a person who claimed under the recovery and had contracted for the sale of the estate, was, whether the fee-simple was acquired by their recovery. The Judges of the Common Pleas (to whom a case had been sent from the Court of Chancery) certified, that Thomas, George and John who suffered the recovery, took such an estate [most probably a fee] as would have enabled them to make a good title, whereupon Lord *Eldon* decreed the specific performance of the contract.

[This case does not appear to be inconsistent with the authorities in the text. The devise was sufficient to carry the fee to the three sons by force of the word "estate;" and all the subsequent limitations may be read as to be substituted only in case the sons died in the testator's lifetime, leaving their estates absolute if they survived him. But supposing this not to be so, the sons acquired a good title by the recovery quacunque via: for if they were tenants in tail the entail was barred by it; if tenants for life with remainder (adopting the referential construction) to their children by purchase, still, as there do not appear to have been any children born when the recovery was suffered, the remainder was destroyed and a fee acquired by the sons.

(*f*) 3 H. of L. Ca. 106, 14 Jur. 771.

(*g*) 7 Beav. 475.

[under the age of twenty-one years without leaving issue lawfully begotten as aforesaid, then he devised the estate over. The M. R. considered that the words "issue of the body," when used with reference to the daughter, must be understood to mean the children to whom, subject to the daughter's life estate, the property was previously given.

Whether any different effect attributed to "die without *leaving* issue."

The daughter, in the last case, never having had any children, it was not necessary to consider the effect of the word "leaving," for whether that word meant "without having had children," or "without leaving a child at her decease," the result would have been the same, namely, that the gift over took effect. In any case, however,] the introduction of the word "leaving" would not vary the construction, inasmuch as the phrases "without issue," and "without leaving issue," have (we shall hereafter find) been held to be undistinguishable, in regard to their importing an indefinite failure of issue in reference to real estate.

*Tarbuck* v. *Tarbuck.*

[A contrary opinion was indeed] expressed by Lord *Cottenham* (when Master of the Rolls), in the case of *Tarbuck* v. *Tarbuck* (*h*), where James Tarbuck, by a will dated the 17th of June, 1805, devised his lands at Barnhill to his son James for his life, and after his decease to all the children of James, lawfully to be begotten, and to their heirs and assigns for ever, as tenants in common, and if but one child, then to such only child, his or her heirs and assigns for ever. And the testator charged the lands with the payment of an annuity. The testator then gave all his other lands to his son Jonathan and his children in similar terms, also charged with an annuity. *And in case the testator's son James should happen to die without leaving lawful issue,* then the testator gave the lands devised to him to his (testator's) son Jonathan, his heirs and assigns; *and in case the testator's son Jonathan should happen to die without leaving lawful issue,* then the testator gave the lands devised to him to his (testator's) son James, his heirs and assigns for ever. *But if both the testator's said sons should happen to die without leaving lawful issue,* then he gave the whole of the said hereditaments to his nephews and nieces in fee. The testator's sons, James and Jonathan, both died in the testator's lifetime, James leaving a son, who also died in the testator's lifetime. Jonathan died a bachelor. Sir *C. C. Pepys,* M. R., held, that in these

Devise to children in fee followed by devise over on death without *leaving* issue

[(*h*) 4 L. J. Ch. N. S. 129.]

"Issue" held to refer to children, objects of preceding devise.

events the devise over failed, on the ground that the son of James would, if he had survived the testator, have taken an estate in fee, and therefore the lapse of such devise, instead of letting in the ulterior devisee, occasioned intestacy (*i*). "The first question," said his Honor, "to be considered is, what estates would James and Jonathan have taken had they survived the testator? On the part of the nephews and nieces it was contended that they had estates tail, upon the ground that the gift over, being to take effect in case either died without leaving lawful issue, is postponed until an indefinite failure of issue, and therefore creates an estate tail. This rule has been adopted for the purpose of giving effect to the general intent of the testator, manifested in his devises over depending on a failure of issue generally, in order to give a chance at least of succession to persons who, though they cannot claim under a particular gift, are included in the general description of issue. That rule does not apply where this object is not to be attained, and amongst the exceptions is the very case which occurs here; namely, a gift to A. for life, with remainder to the children of A. in fee; that is, the children of A. in fee generally, and a gift over on the death of A. without issue, which means *such* issue, that is, children. This was the case of *Goodright* v. *Dunham* (*k*), which is precisely in point on this subject. In such cases the general term 'issue' is construed to mean that particular description of issue before specified, namely, children. It was indeed in this case, as it has been in former cases, contended, that such construction is a restricting of the meaning of the term issue, because thereby children's children would be excluded in the event of their parents' death before the testator's death (*l*); but this argument has not prevailed against the rational construction of making the gift over depend on the failure of the object before distinctly specified. Such were the cases of *Blackborn* v. *Edgley* (*m*), and *Morse* v. *Marquess of Ormonde* (*n*). I am therefore of opinion, that if James and Jonathan had

Lord *Cottenham's* construction of "die

(*i*) As to this doctrine, vide post.

(*k*) Ante, 435.

(*l*) But according to *Goodright* v. *Dunham*, and *Malcolm* v. *Taylor*, a child on its birth, or at the death of the testator, takes a vested fee, which of course, in the event of that child subsequently dying in the lifetime of the tenant for life, leaving issue, would descend to such issue, if not otherwise disposed of.

(*m*) 1 P. W. 600, ante, Chap. XVII. sect. 6.

(*n*) 5 Mad. 99, ante, Chap. XXV. The M. R. also, it seems, adverted to the fact of the children of James and Jonathan taking as tenants in common; and on this point cited the cases of *Doe* v. *Elvey*, 4 East, 313; *Gretton* v. *Haward*, 6 Taunt. 94.

survived the testator they would have taken estates for life, with remainder to their children in fee, *with gifts over, in the event of there being no children at the respective times of the death of the tenants for life.* If they had so survived the testator, it is clear the gift to the nephews and nieces could not have taken effect, for that gift is only to take effect in the event of James and Jonathan not having lawful issue, that is, children according to the above construction; and James, at the time of his death, had a son James who survived both his father and uncle Jonathan."

without *leaving* issue."

[The opinion of Lord *Cottenham* as to the validity of the gifts over in the event of there being no children at the respective deaths of the tenants for life has, however, been overruled, by an express decision in the subsequent case of *Doe* d. *Todd* v. *Duesbury* (*o*), where the testatrix devised to Thomas Duesbury for life, with remainder to his child and children, if only one child then to such child, his or their heirs or assigns, but if more such children, then equally to be divided amongst them, share and share alike, and to the heirs, executors, administrators, and assigns, of such children respectively as tenants in common; but in case the said Thomas should happen to die *without leaving lawful issue,* then over. Thomas Duesbury died without leaving any issue living at his death, but having had children who survived the testatrix, and it was contended on behalf of the devisees over that Thomas took only an estate for life with remainder either to his children as tenants in common in tail with remainder over, or with remainder to the children in fee with an executory devise over in the event of his not leaving issue at his death, which event happened. The latter construction would have been exactly in accordance with the opinion of Lord *Cottenham* in *Tarbuck* v. *Tarbuck,* but the Court of Exchequer negatived both constructions, holding, that if the gift over was to be construed as an executory devise limited on the estate to the children, it was too remote as being limited on a general failure of issue. *Rolfe,* B., in delivering judgment, said, "Whenever the words 'die without leaving issue' have been construed to mean 'die without leaving issue living at the death,' the Courts have always relied or professed to rely on some other expressions or circumstances apparent on the face of the will,

"Die without *leaving* issue" held to mean failure of previous estates in fee to issue.

[(*o*) 8 M. & Wels. 514.]

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[and have never assumed to act against that which we consider to be a long established settled rule of construction, namely, that in wills of real estates these words refer to a general failure of issue at any time, however remote."

Observations on *Doe* v. *Duesbury.*

As the Court negatived the only two constructions upon which the plaintiff could recover, it was not necessary for them to say what was the true construction; but the case clearly fell within the decision in *Goodright* v. *Dunham* (*p*), and the words die without leaving lawful issue were to be referred to such issue of Thomas as before mentioned. The gifts to the children of Thomas and to the devisees over were thus alternative contingent remainders, and the gift to the children having vested that to the devisees over failed. The case of *Doe* v. *Duesbury* is not opposed to the actual decision, but only to the dictum of Lord *Cottenham* in *Tarbuck* v. *Turbuck,* which was unnecessary to the decision.

Meaning of "leave no issue" when not referring to issue before mentioned.

Where it is clear that] the words in question cannot be held to be simply referable to the objects of the preceding devise (as in *Goodright* v. *Dunham,* and that class of cases), they will, it seems, be construed as denoting a failure of issue *of every degree* living at the decease. Thus, in the case of *Hutchinson* v. *Stephens* (*q*), where the devise was to trustees in fee upon trust for H. for his life, and after his decease upon trust for the child and children of H. lawfully to be begotten, at his, her or their respective ages of twenty-one years, if more than one, as tenants in common; and if there should be but one child living at his decease, then in trust for such only child at twenty-one: *but in case H. should die without leaving any issue of his body living at the time of his decease,* then over. H. had two children, both of whom died in his lifetime, one of them leaving children who survived H. Lord *Langdale,* M. R., held, that, in the event which had happened, the children took estates in fee-simple as tenants in common. In this case the words, "if there shall be but one child *living at his decease,*" appeared to supply a plausible argument for reading the word "issue," subsequently occurring in juxtaposition with the same words, in the sense of *children,* and its rejection serves to shew the strong disinclination of the Courts to adopt a construction which exposes the vested interest of a child to be divested on decease

Remark on *Hutchinson* v. *Stephens.*

(*p*) Ante, p. 435. (*q*) 1 Keen, 240.

within a given period, although leaving issue who survive that period.

"Die without leaving issue" held not to refer to issue before mentioned.

[So, in the case of *Ex parte Hooper* (*r*), there was a devise to A. for life, and after her decease to her children, "in case she shall *leave* more than one child, their heirs and assigns, as tenants in common, but in case she shall *have* only one child, then to such one child in fee;" but in case A. should "die without *leaving* any issue," then over: Sir *R. Kindersley*, V. C., said, that by the words "without leaving issue" the testator meant "without leaving issue at her death," and that as there was a grandchild living at the death the limitation over failed.]

Effect where words refer to failure of issue of children, objects of prior devise.

It seems, that where the testator not merely devises over the property in the event of the parent dying without issue, but goes on to provide for the contingency of the *issue* also dying without issue, the effect is to cut down the fee-simple of the children to an estate tail (*s*); although, it will be observed, by this construction two different meanings are given to the word "issue" in the same sentence (*t*). The case of *Ives* v. *Legge* (*u*), [is an instance of this] construction; the phrase "in default thereof," following a devise to the parent for life, with remainder to the children in fee, being held to refer to both the children and the heirs of the children; and, as the devisee over stood in the relation of uncle to the children (so that there could not be a failure of their heirs while he lived), the word "heirs" was read heirs *of the body* (*v*).

"In default thereof."

Argument for referential construction weak-

[It will be remembered that the statement of the general rule made by Lord *Cottenham* in *Ellicombe* v. *Gompertz*, and already

[(*r*) 1 Drew. 264, better reported 21 L. J. Ch. 402; and see observations of same Judge, 2 Sim. N. S. 202, 203, stated ante, pp. 426, 427.]

(*s*) *Doe* d. *Barnard* v. *Reason*, cit. 3 Wils. 244; but as the words were "in default of such issue," the case hardly seems to fall within the present section. The devise was to E. for life, and after her decease to such issue of the body of E. as should be then living, and to the heirs of such issue; and if there should be only such issue one child, then the whole to that one child and its heirs; and if two or more children, then to such two or more and their heirs, as tenants in common: and in case E. should die without issue then living, *or in case all such issue should die without issue*, so that the descendants of her body should be dead without issue, then to B. and F. in fee. It was held that E. took an estate for life only, with remainder to her issue (qu. children) in tail, with a vested remainder to B. and F. See also *Southby* v. *Stonehouse*, 2 Ves. 611; *Smith* v. *Horlock*, 7 Taunt. 129.

Case of *Doe* v *Reason*.

(*t*) But the force of this objection is somewhat weakened by the fact that the word "issue" in this position must be used, in the first instance, in a restricted sense, since the failure of such first-mentioned issue is treated as an event distinct from the failure of the issue subsequently mentioned, which of course would be involved therein if the word "issue" denoted issue indefinitely.

(*u*) 3 T. R. 488, n.

(*v*) Ante, pp. 302, 303.

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ened by whatever restricts the range of objects.

[referred to (*x*), makes the application of the rule dependent on the intention of the testator to be collected from the general context of the will. Primâ facie the referential construction will prevail; but such a construction will not be admissible if it appears from the context that other issue than those expressly provided for were intended to take: and it might be expected that the narrower] the range of objects comprised in the express devise to issue of a certain class or denomination [the readier would the Courts be to yield to any indication of an intention to include a more extensive class in] subsequent words importing a failure of issue. [Accordingly] the circumstance of the prior gift to children being restricted to such as should attain a particular age was considered to exert this kind of influence upon the con-

*Doe* v. *Lucraft.*

struction in the case of *Doe* d. *Rew* v. *Lucraft* (*y*), where a testator devised certain hereditaments to A. & B. and their heirs, in trust, nevertheless, as to one undivided moiety for N., his heirs and assigns for ever; and, as to the other moiety, in trust for such *son* of the testator by his then wife *as should first attain the age of twenty-one years,* as and when such son should attain such age, and for his heirs and assigns for ever; but in case the testator should depart this life without leaving a son, or, leaving such, none should live to attain the age of twenty-one years, then, as to the last-mentioned moiety, in trust for the testator's *daughter J., if she should live to attain the said age of twenty-one years,* and for her heirs and assigns for ever; but, in case J. should depart this life under that age, then unto A. and B. and their heirs, in trust for such *other his* (*testator's*) *daughter* by his then wife *as should first live to attain the age of twenty-one years,* and for her heirs and assigns for ever; *but should he* (*testator*) *depart this life without leaving issue,* then he gave the entirety of the said hereditaments unto A. and B. and their heirs, in trust for N. in fee. The testator died leaving issue his daughter J., who died at the age of four years. The point of

Words held not to be referable to issue before mentioned, being issue who should attain a certain age.

construction related to the words in italics, as affecting the devise over. Lord C. J. *Tindal* said, "The natural meaning of the words is, either a general failure of issue, in which case the devise over would be too remote, and, consequently, would be void; or they may be taken to contemplate the case of the

(*x*) 3 My. & C. 151, ante, 429; and see 6 Hare, 178.

(*y*) 1 M. & Sc. 573, 8 Bing. 386. [See also *Alexander* v. *Alexander,* 16 C. B. 59; *Strutt* v. *Braithwaite,* 5 De G. & S. 369; *Hope* v. *Potter,* 2 Kay. & J. 206.]

testator dying, leaving no child or children, in which case the event upon which the devise over was to depend never happened; for the testator left a daughter living at the time of his death. But it is contended, that these words will also admit of a third interpretation; thus, 'should I depart this life without leaving *such* issue *as before mentioned;*' that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will, viz. a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to shew that the word 'issue' may be construed to mean such issue as the testator had before referred to; but no case can be found wherein the principle has been carried further. It has never been held, that the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus—'without leaving a son or daughter,'—what authority have we to insert a restriction—'who shall live to attain the age of twenty-one years?' We clearly are not at liberty to insert any such restriction. It seems to me that if we were to import the latter words into this will, we should be doing violence to other parts of it, or in fact making a new will altogether. The earlier part of the will contains a different disposition from that in dispute. It is material to observe that when the testator is disposing of the moiety in question to his son, and afterwards to his daughter, he does insert the words of restriction, and that he has omitted them in the devise over to the defendant. When, therefore, we see that in one part of his will the testator has used expressions restraining the meaning of the word issue, and that in another part he has not used them, it seems to me that we should not be warranted in concluding that such omission was not intentional."

Observations of *Parker*, V. C., in *Bryan* v. *Mansion*.

[In the recent case of *Bryan* v. *Mansion* (*z*), Sir *James Parker*, V. C., said, "It is a rule of construction not now to be controverted, that where there is a gift to some only of a class and there is subsequently a gift over upon failure of all that class, it is to be construed upon failure not of the whole class, but of those only who are before mentioned. If it is necessary to support this proposition by authority, the cases of *Malcolm* v. *Taylor* and *Salkeld* v. *Vernon* seem to me to supply that authority (*a*).

[(*z*) 5 De G. & S. 737.

(*a*) This statement of the rule must be read with that of Lord *Cottenham*, ante, p. 429, and see per *Turner*, L. J., 4 D. M. & G. 88.

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[The case of *Doe* v. *Lucraft* has been cited, in which *Tindal*, C. J., was pressed by this rule, and it appears to me that he did not dissent from it; he only said that he would not apply it in that case so as to make the word issue include the issue mentioned before with the restrictions which had accompanied the mention of such issue in the preceding part of the will. His Honor then quoted the special reason above assigned by the Lord Chief Justice, and, as that did not occur in the case before him, he thought that the gift over was good as being on failure of such issue as would have taken under the previous limitations (*b*).

"Issue living at death" extended to mean all issue in order to meet the gift over.

On the other hand, in the case of *Doe* d. *Bills* v. *Hopkinson* (*c*), stated in a former part of this work, where, after a limitation in fee to such of the children of the tenant for life as he should leave *living at his death*, there was a gift over in case of death of the tenant for life *without issue*, such latter words were not only not held to refer merely to the restricted class of issue to whom estates were before given, but the class of issue was extended to meet the words of the gift over: that is, instead of the limitation being read as a contingent remainder to children living at the death, it was read as a vested remainder in the children as they came into existence. Such a construction we have already endeavoured to shew is opposed to all established rules as to the vesting of estates.]

Principle on which preceding are reconcilable with subsequent cases.

By keeping steadily in view the principle above suggested, namely, that the argument in favour of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases, (in which a clause of this nature, following a devise to the whole line of children or sons, has been held

Alternative contingent remainder fails if any object in existence who may possibly take under previous limitation.

[(*b*) It may be convenient here to remark that where the limitation to children who shall attain a certain age is a legal remainder in real estate, if the previous estate determines before the children (if any) in existence have attained the prescribed age, the contingent remainder to the children, and also the alternative contingent remainder to the devisee in default of issue, fails: the former because the children have not attained the age when the remainder is to vest, the latter because the contingency has not happened on which it is to vest in the devisee over; for it cannot be said that there is a default of issue who shall attain the prescribed age while children are in existence who may subsequently attain that age. (*Festing* v. *Allen*, 12 M. & Wels. 301.) If, however, the subject of gift is money or an equitable interest in real property, the vesting of the interest will await the period (provided it be not too remote) when a child attains the prescribed age, or all shall have died under that age, and the children or the devisee in default of issue will take accordingly. See ante, Vol. I. p. 237.

(*c*) 5 Q. B. 223, ante, Vol. I. p. 239.]

to refer to the objects of such prior devise,) with those that remain to be stated, in which similar words preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import a general failure of issue, and, therefore, in the case of real estate, to confer an estate tail on the parent; such implied estate tail being (as we shall presently see) either an estate in possession, or in remainder expectant on the determination of the estates comprised in the prior express devise.

Devise extending to *six* sons only.

Thus, in the case of *Langley* v. *Baldwin* (*d*), where a testator devised certain lands to A. for life, with power to jointure, and, after his death, to the first son of A. in tail, *and so on to the sixth son only;* and then devised that if A. *should die without issue male* the lands should remain to B. It was held, that A. took an estate tail in remainder expectant on the estates comprised in the prior devises, there being no limitation beyond the *sixth* son, and there might be a seventh, who was not intended to be excluded; therefore, to let in the seventh and subsequent sons, these words created an estate tail.

Devise to *first* and *second* sons.

So, in *Attorney-General* v. *Sutton* (*e*), where the testator devised to his nephew A. for life, and, after his decease, to the *first* son or issue male of his body lawfully begotten, and to the heirs male of the body of such first son, and for default of such issue, to the *second* son or issue male of the body of A. lawfully to be begotten, and to the heirs male of such second son lawfully to be begotten for ever; subject to a proviso that A. or his assigns, *and the heirs male of his body*, should not commit any waste, and should not impeach the payment of the annuities in the said will; and from and immediately after the death of A., *without issue male of his body*, or after the death of such issue male, then over. A. suffered a recovery, and died without issue. It was held, that he took an estate tail; for, as all the issue male which he might possibly have, viz. his third, fourth, and every other son, were not expressly provided for by the will, the limitation, after his death "without issue male," raised the same estate in him by implication, as if the devise had been in terms to him and his issue male.

(*d*) 1 Eq. Ca. Ab. 185, pl. 29, cit. 1 P. W. 759.

(*e*) 1 P. W. 754, 3 B. P. C. Toml. 75. See also *Stanley* v. *Lennard*, 1 Ed. 87; *Doe* d. *Bean* v. *Halley*, 8 T. R. 5, post. Also *Evans* d. *Brook* v. *Astley*, 3 Burr. 1570; [*Monypenny* v. *Dering*, 2 D. M. & G. 171, 172.]

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Remark on *Langley* v. *Baldwin* and *Attorney-General* v. *Sutton.*

In these two cases, though the express devise embraced only a certain number of his sons, yet it was considered to be evident that the testator did not intend to exclude the others, which, indeed, in *Attorney-General* v. *Sutton,* was clearly manifested by the reference in the proviso to *A. and the heirs male of his body;* and the only mode in which this could be effected was to give the parent an estate tail.

On the same principle, where there is a devise to the parent for life, with remainder to *an eldest son only* [for life or] in tail male, a limitation over, in case the parent die *without issue,* will raise in him an estate tail, and not merely refer to the single object of the preceding devise.

Devise to an eldest son only of A. in tail, and in default of issue of A., over.

Thus in *Stanley* v. *Lennard* (*f*), where lands were devised to trustees in fee, upon trust to permit A., the eldest of the testator's two natural children, to receive the rents for his life; and after his decease, to permit *the eldest son* of A., and the issue male of *such eldest son* to receive the same; and *for want of issue of the said* A., to permit testator's second son, &c.; and he directed that his son A. should have the use of his (testator's) pictures for his (A.'s) life, and after his decease to his issue, and the issue of his issue; *and for default of issue of* A. *then* to T., &c.; A. died, leaving one child (a daughter), who claimed an estate tail under the will. Lord *Northington* stated the general rule to be, that where the testator makes a man tenant for life, with remainder to one, two, three, &c. of the issue of the tenant for life, and then, for want of issue of the tenant for life, limits the estate over, this will be an estate tail in the first taker for life by necessary implication; and this, because of the word "then" before the limitation over, which, though sometimes an adverb of time, is sometimes a word of relation, and signifies as much as "in such case," and must have this effect, that upon the first, second, third, &c. limitations failing, the remainder-man could not take it, because of the words "for want of issue;" and therefore, unless the tenant for life was construed to have an estate tail, it would descend in the mean time to the heir-at-law, because the contingency on which the remainder-man was to take had not happened. Then, as to the will before the Court, how could he say that he must not give an estate to A.? The words said so: the clause relating to the pictures confirmed

(*f*) 1 Ed. 87.

it. It was argued that all the sons of A. should take an estate in tail male, and then the words would stop; but that he could not do.

Remark on *Stanley* v. *Lennard*.

In this case, it will be perceived the words on which the question arose referred to issue of either sex, and not, as in the two preceding cases, to issue of the same species as the individuals to whom express estates were devised, namely, issue male. The construction adopted by the Court seems to have been somewhat aided by the gift of the pictures.

Devise to an eldest surviving son only of A. for life, and in default of issue of A. over.

[Again, in the case of *Key* v. *Key* (*g*), the testator devised an "estate at A." (*h*), to S. K. for life, and after his decease to his eldest surviving son; but in default of issue male, then to his brother T. K. and his eldest surviving son on the same conditions; but in default of issue male, then to his heirs-at-law. It was held, first, that the words "default of issue male" referred to issue male of S. K., and not of his eldest surviving son (*i*); secondly, that those words were not to be read as meaning default of an eldest surviving son who would take under the prior limitation, but in default of issue male generally of S. K., and that S. K. therefore took an estate tail male (*k*).]

Remark on *Stanley* v. *Lennard* and *Key* v. *Key*.

It is observable, [with respect to both the cases last cited,] that in the events which had happened, it was not necessary to decide whether the parent took an estate tail in the first instance, or (which seems a better construction) an estate tail in remainder expectant on the estate tail or estate for life of the son. A point of this nature, however, arose in the next case *Doe* d. *Bean* v. *Halley* (*l*), which deserves particular attention. The testator devised to his nephew A., and his assigns, for his life, without impeachment of waste, and after his decease to the *eldest son* of his said nephew A. lawfully to be begotten, and the heirs of such eldest son, upon condition that such eldest son were christened and called by the name of F.; *and in default of issue male of* A., then over to his (the testator's) nephew B. and his son in like manner (*m*). It was held, that the evident

*Doe* v. *Halley*.

Remainder in tail implied in the parent, expectant on estate tail of eldest son.

[(*g*) 4 D. M. & G. 73.

(*h*) This was held not to pass the fee: see post.

(*i*) See accord. *Wight* v. *Leigh*, 15 Ves. 564, post.

(*k*) The eldest surviving son of S. K. left only a daughter.]

(*l*) 8 T. R. 5. See also *Parr* v. *Swindels*, post.

(*m*) A bequest much resembling this occurred in *Marsh* v. *Marsh*, 1 B. C. C. 294, where a testator bequeathed personalty in trust for W. for life, and after his decease to his eldest son and his heirs for ever; and in case of their death without issue, then over to A.; and it was held that the two gifts to the son and A. were alternative. The word "their"

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intention being that B. and his issue should not become entitled until the male issue of A. should have become extinct, A. took an estate tail by implication, and then the limitations were to be read to A. for life, remainder to the eldest son in tail male (not in fee-simple, as had been contended), with remainder to A. in tail male, with remainder over. *Lawrence*, J., referred to the cases of *Attorney-General* v. *Sutton* and *Langley* v. *Baldwin*, as warranting this construction (*n*).

Gift over of land in default of issue of A., a portion only being previously limited to A.'s issue, A. takes estate tail in the other portion.

[The principle of the foregoing authorities is applicable to the analogous case of an express limitation to issue extending only to a *part of the land* which forms the subject of the devise over "in default of issue:" in order to effectuate the intention of the testator (implied in the latter gift), that the *whole* of the land should be enjoyed by the issue, it is necessary to hold that the ancestor takes an estate tail under the words "in default of issue." Thus, in the case of *Franks* v. *Price* (*o*), lands were devised to A. and B., for their lives, as tenants in common, and if A. died before B., leaving no issue male, the whole was given to B. for life; but if A. should die in his lifetime leaving issue male, then A.'s moiety was given to his sons successively in tail male, remainder to B. for life, with remainder to B.'s sons successively in tail male; and a similar provision was made, mutatis mutandis, in case B. should die before A.: and "*in case A. and B. should both die without leaving issue male, or such issue male should die without leaving issue male*," the whole was given over. Under these limitations, it will be seen that in none of the events provided for could the issue of the survivor of A. and B. take the share of their ancestor by express limitation: for the only limitation applicable to that share was to operate solely in the event of the ancestor predeceasing the other. Therefore, whether A. or B. died first, one moiety of the land was undisposed of by direct devise. It was held, therefore, after much

was assumed to mean *his*, and the word "issue" to denote *son*.

(*n*) It is to be observed that in the case of *Langston* v. *Pole*, 2 M. & P. 490, where the devise was nearly the converse of that in the two cases in the text (the testator having passed by the first son of the devisee for life, and then proceeded to devise the property to his second and other sons in tail), the first son was held to take an estate tail by force of the intention collected from the subsequent part of the will, which reserved to the devisee for life a power of appointing portions to his daughters *in case of there being no son* (combined with another event), and also limited portions to the *testator's own* daughters in similar terms; but as the first son was considered upon the whole will to be tenant in tail by implication, the case has been stated in a former chapter as exemplifying this doctrine. (Vide ante, Vol. I. Chap. XVI. sect. 1).

[(*o*) 6 Scott, 710, 5 Bing. N. C. 37, 3 Beav. 182; and see *Allanson* v. *Clitherow*, 1 Ves. 24.

argument, that the words introducing the devise over had the effect of creating an implied estate tail in remainder expectant on the estates conferred by those devises (*p*).]

Rule where preceding gifts to sons or children are for life only.

Even where the prior devise runs through the whole class of sons or children in succession, yet, if they take life estates only, there seems less disposition to hold subsequent words importing a failure of issue to refer exclusively to the objects of such devise, than where (as in the preceding cases) the prior devise confers estates of inheritance; and accordingly we find in several instances of this nature the words in question have been held to create an estate tail in the prior devisee.

To A. for life, remainder to first and other sons for life, and in default of issue male over; immediate estate tail raised by implication.

Thus, in *Wight* v. *Leigh* (*q*), where A. devised all her real estates in Surrey to her husband B., in case he survived her, during his life; and after B.'s decease she gave the said Surrey estates to C., and after his death to his first and other sons; *and in default of male issue,* then she gave the said estates unto the eldest and other daughters of C., and to their heirs male for ever, on condition that they should take the name of W., and no other. C. (who had a son and three daughters) claimed an immediate estate tail; against which, however, it was contended, that by giving the father an estate tail, the Court would expunge the limitation to the first and other sons, which was a descriptio personæ as much as a limitation to an existing son by name, pointing also to that order in which estates are usually limited, with a view to succession according to priority of birth: and that the words "in default of issue male" might be applied, not to C., but to the immediate antecedent, the first and other sons; a construction more grammatical, more consistent with the general plan of the devise, and approaching as near as could be to the ordinary language and course of settlement; but Sir *W. Grant,* M. R., decided that C. took an immediate estate tail. He said that the evident intention of the testatrix was to prefer all the male issue of *somebody,* either of the plaintiff, or of his first and

[(*p*) It should seem that the M. R. (Lord *Langdale*) considered that the words in the text distinguished by italics had the effect of giving to A. & B. either successive estates tail male by implication in the entirety (as in *Tenny* v. *Agar* and *Romilly* v. *James,* ante, Vol. I. Chap. XVII. s. 6), or (as seems more probable) estates in tail male in respective moieties, with cross remainders in tail male. His Lordship did not advert to this point (which is one of considerable nicety), conceiving probably that B. was entitled in either case.]

(*q*) 15 Ves. 564. [See also per Lord *Kingsdown, Towns* v. *Wentworth,* 11 Moo. P. C. C. 546.

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other sons, to the daughters; but she had not given such an interest to any one as would enable male issue generally to take, for all that was given to the plaintiff was what amounted in law to an estate for life, and *so it was with regard to the estates given to his first and other sons.* It was necessary, therefore, in order to effectuate the general intention in favour of issue male, to consider some of the antecedent takers as having by implication such an estate as would enable all the issue male to take, which could only be by giving an estate tail either to the father or to his first and other sons. The male issue intended must, his Honor thought, be the male issue of the father, not of the sons. Nothing was before mentioned of any issue male of the sons, whereas there was a certain description of male issue of the father before spoken of, viz. his first and other sons (*r*).

Observations upon *Wight* v. *Leigh.*

In this case the word "estate" was sufficient per se to vest the fee in the sons; a circumstance which escaped attention; [but it appears to be a conclusive argument against its having that operation, that in the probable event of the limitation to the first son vesting in him all the subsequent limitations would be annihilated (*s*).]

But although the devise to the sons was (as assumed by Sir *W. Grant*) capable of conferring estates for life only, there was no apparent reason why such devise should be sacrificed, in order that the parent might take an estate tail. What prevented the following construction of the limitations? To the parent for life, with remainder to the first and other sons for life, *with remainder* to the parent in tail. For such a construction, the case of *Doe* v. *Halley* would even then have afforded ample authority; but the attention of the Master of the Rolls does not appear to have been called to this case, or indeed to the suggested mode of constructing the will, which, however, is now exemplified in two more recent cases. One of these is *Parr* v. *Swindels* (*t*), where a testator devised certain messuages to his daughter, Mary Parr, for life, and after her decease, unto and equally between the children of his said daughter, to take as tenants in common; *and in case she should die without leaving any lawful issue,* then the testator devised

To A. for life, remainder to her children; if A. die without leaving issue over, held estate tail in remainder in A.

[(*r*) See *Key* v. *Key*, 4 D. M. & G. 73, ante, p. 447.

(*s*) *Key* v. *Key*, 4 D. M. & G. 81, 82. See also *Martin* v. *McCausland*, 4 Ir. Law Rep. 340.]

(*t*) 4 Russ. 283.

the premises among the children of his daughters, Charlotte and Hannah. Sir *J. Leach*, M. R.: "The plain intention of the testator was, that this property should not go over until the failure of the issue of Mary Parr; and to effectuate this intention an estate tail in her must be implied. It is to be considered, whether that estate is to be immediate in her, or in remainder after estates for life to her children. If the intention, that the property should not go over to the children of Charlotte and Hannah until there was a failure of issue of Mary, could not be effectuated without giving an immediate estate tail to Mary, there is in the books sufficient authority to warrant that construction. But as that purpose will, in this case, be equally accomplished by an estate tail in remainder to Mary, after the life estates given to the children, I am of opinion that the better construction is, that Mary takes an interest for life, with remainder to her children as tenants in common for life, remainder to Mary in tail. This construction will give effect to all the words of the will" (*u*).

Referential construction adopted, though daughters in prior devise took life estate only.

But this construction, however strongly recommended by its convenience as letting in the whole line of issue, by giving an estate tail to the parent, without sacrificing the preceding express gift to sons, daughters, or children, did not prevail in the case of *Bennett* v. *Lowe* (*x*), where a testatrix devised certain freehold messuages to A. and his heirs, in trust to pay certain life annuities, and, after the decease of the annuitants, upon trust to pay the rents to four females, for their separate use; and, in case any of the said four persons should happen to depart this life, leaving a daughter or daughters, it was declared that the share or interest of her or them so dying should go to such daughters as they should be in seniority of age and priority of birth: Provided always, *that in case any of them should happen to depart this life without issue in the lifetime of the annuitants*, then the testator ordered that the share or interest of her or them so dying be paid, applied and disposed of to certain other persons in succession, as they the said devisees (naming them) should depart this life. On a case from Chancery, the questions for the opinion of the Court were, first, what estates the four female devisees took; and, secondly, what estates passed to their daughters. It was contended, that the word "issue," occurring in the devise over,

(*u*) 8 T. R. 10.

(*x*) 5 M. & Pay. 485, 7 Bing. 535.

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meant the issue before referred to, namely, the daughters, and might be read as if the word *such* had been introduced; and that, to hold the words to refer to an indefinite failure of issue, would defeat the testatrix's intention, which evidently was, that female issue should be preferred to male issue, and that they should take in succession,—objects which were quite incompatible with giving the first four takers an estate tail, as then the male issue would take in preference to the females, and the latter would take (if at all) concurrently. It was observed, that the limitation over was not to take effect on a dying without issue generally, but only in a particular event, *i. e.* on the death of any of the females without daughters in the lifetime of the annuitants. The Court certified an opinion, that the four devisees took estates for life only, and that their daughters took estates for life on the decease of their parents respectively. The four devisees survived the annuitants; and it was held, that, subject to the estates for life, the fee passed by the residuary clause.

Remarks on *Bennett* v. *Lowe.*

The precise grounds on which the Court arrived at this conclusion do not distinctly appear; but we may infer, from the tenor of the arguments at the bar, and the few remarks which fell from the Bench, that it was thought that the issue referred to in the clause in italics were the daughters, who were the objects of the preceding devise. The case of *Parr* v. *Swindels* was not cited, and probably was then not in print. Had any construction, supported by authority, been suggested, by which the words in question might have received their ordinary and established signification, without interfering with the intention to prefer the daughters, and give them estates in succession, the Court would, in all probability, gladly have adopted it. One peculiarity in this case deserves notice, namely, that the devise over was, on the failure of the issue within a definite time, namely, the death of the annuitants; but this was very faintly adverted to, and would, it should seem, have no other effect upon the construction than to render the devise over contingent on the failure of the issue of the prior devisee (*i. e.* the determination of the estate tail) within the prescribed period; it would not, it is conceived, prevent such prior devisee from taking an estate tail (*y*).

[(*y*) But see *Doe* v. *Chaffey*, 16 M. & Wels. 664, where, under a devise to A. and his heirs, and if he die without an heir lawfully begotten and without sur-

The other of the two cases before alluded to, is the much-discussed case of *Doe* d. *Gallini* v. *Gallini* (*z*), which was as follows:—A testator devised certain lands of which he was seised in fee, to trustees and their heirs, upon trust, as to part, to permit his son A. to receive the profits for life, and, as to other parts, to permit his two daughters and his son B. to receive the profits for life, and also upon trust, during the lives of his said children, to preserve contingent remainders; and, after the decease of any or either of his said children, he devised the estate to him or them limited for life as aforesaid, unto all and every his, her or their child or children living at the time of his, her or their decease, or born in due time afterwards, for their lives as tenants in common; but, nevertheless, with an equal benefit of survivorship among the rest of the said children, if more than one, and if any of them should die without leaving issue, the child or children of each of his said sons and daughters taking the rents and profits of his, her or their parent's estate only; and from and after the decease of all the children of each (*a*) of his said sons and daughters *without* (*b*) *issue*, the testator devised the estates to them respectively limited as aforesaid, *unto and among all and every the lawful issue of such child or children* (during their lives) as tenants in common, and to descend in like manner to the issue of his said sons and daughters respectively, so long as there should be any stock or offspring remaining; *and for default or in failure of issue of any of his said sons and daughters*, the testator devised the estates so limited to him, her or them dying without issue, unto the survivors of his said sons and daughters during their respective lives, in equal shares as tenants in common; and after their respective deaths, he devised the same to the children of the survivors of his said sons and daughters during their respective lives as tenants in common, with such benefit of survivorship as aforesaid, and, after the decease of all of them, to the issue of such children, in like manner as he had before devised the original estate of each of his said sons and daughters; *and for default or in failure of issue of all his said sons and daughters*, except one,

Remainder in tail implied in the parent expectant on estate expressly devised to the issue.

[viving his father and mother, then over, A. was assumed to take the fee with an executory devise over. And see ante, p. 302, n. (*d*).]

(*z*) 5 B. & Ad. 621, 3 Ad. & Ell. 340.

(*a*) "Each" was apparently inserted by mistake for "any" or "either."

(*b*) The word "without" was evidently written by mistake for "leaving."

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the testator devised all his said estates unto his only surviving son or daughter in fee. It was contended, that the testator's children took immediate estates tail by force of the words shewing that the property was not to go over to the surviving children until a total failure of issue of any deceased child or children; and to this general intention any particular inconsistent intention ought to bend. The construction decided upon by the Court, after much consideration, was, that the testator's children took estates for life, with remainder to their respective children in tail, with cross-remainders in tail between the grandchildren, *with remainder in tail to the parent* (*i. e.* the testator's children). Lord *Denman*, C. J., after some prefatory remarks, said,—"The argument founded upon the whole will is, that the testator means the estate left to each of his sons and daughters to go to the whole line of issue of those sons and daughters respectively, and only on failure of the whole line of issue to go over, and this on account of the use of the term 'issue' of the sons and daughters, which word 'issue' is here to be construed (as it generally is) a word of limitation, and equivalent to the term 'heirs of the body,' and as embracing the whole line of lineal descendants; and therefore it is contended, that each son and daughter took an estate tail in the portion left to him. *But if the term 'issue' is here a word of limitation, why is it not equally so in the part in which the estate is given over to the surviving children of the sons and daughters, if any of them shall die without leaving issue?* From which it is clear, that the testator does not mean the survivors to take till failure of all the issue of the deceased children. If the term 'issue' has here the same meaning, then the children living at the time of the death of the sons and daughters respectively must take estates tail as tenants in common in their respective shares, with cross-remainders either for life or in tail (which it is unnecessary to decide), with remainder to the sons and daughters in tail in their respective shares, and remainders over; and this construction makes the least sacrifice of the testator's declared intention; it preserves estates to all his grandchildren living at the death of his sons and daughters as tenants in common, which, it is clear, the testator intended to give; *and it also includes the descendants of a grandchild dying in the son's or daughter's lifetime* (*c*), though

Lord *Denman's* judgment in *Doe* v. *Gallini*.

Implication of remainder in tail.

[(*c*) To include these descendants may be considered to have been the principal

the estate to them is postponed to that of the children; and it includes all the issue of each son and daughter before the estate goes over. The estate tail in the sons and daughters takes effect not in derogation of, but by way of remainder on, the express estates given to the children of the sons and daughters, in which respect it resembles the case of *Doe* d. *Bean* v. *Halley* (*d*). It is true that these grandchildren cannot take estates for life as the testator intended, for the rule in *Shelley's case* prevents it (*e*); nor the children of those children estates for life as tenants in common, for the rule of law against perpetuities prevents that; but this is unavoidable, and no construction can carry into effect all the testator wished."

A writ of error was brought in the Exchequer Chamber, and the decision of the Court of King's Bench was there unanimously affirmed. The reasoning of Lord Chief Justice *Tindal* (who delivered the affirming judgment) bears a close resemblance to that of Lord *Denman* in the Court below. After reading the concluding passage in the will above stated, the Lord Chief Justice said,—"The words, undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to have created immediate estates tail. But there has been in the foregoing part of the will not only an express devise to the grandchildren for life, but also words sufficient to enlarge such estates for life in the grandchildren into estates tail. Admitting, therefore, the argument of the plaintiff's counsel to be just, that, if we give to the words 'failure of issue,' when applied to the grandchildren surviving, the force of enlarging their estates for life into an estate tail, we ought to give the same effect to the same words at the end of the devise, when applied to the children of the testator, and, consequently, their estates for life must be similarly enlarged; still the question arises, whether such estate tail in the sons and daughters of the testator is immediate, or whether it is not to be postponed until after the estate tail in the children of such sons and daughters has taken effect? If we consider the clause of the will last referred to as giving an immediate estate tail to the children, the previous devise to the grandchildren as tenants

Lord Chief Justice *Tindal's* judgment in *Gallini* v. *Doe*.

[object of giving the parents an estate tail in remainder, and distinguishes this case from *Blackborn* v. *Edgley*, 1 P. W. 605.]

(*d*) 8 T. R. 5.

(*e*) i. e. The grandchildren could not take a life estate only, consistently with the intention that the estate should devolve to the issue or heirs of the body of such grandchildren.

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in common in tail is defeated: whereas, if we hold the devise to the children of the testator to be an estate in tail, but to be a devise in remainder only, in that case the limitation for life to the children will take effect, and the devise to the grandchildren as tenants in common in tail, in remainder; and the general remainder over, to the children of the testator in tail, will also take effect, and will effectually secure the descent of the property in the line of the testator's family, as long (to use the testator's own expression in his will) as 'there shall be any stock or offspring of the testator remaining.'"

Remarks on *Doe* v. *Gallini.*

These cases would seem to lay down the sound and reasonable rule, that where an estate is devised to a person for life, with remainder to his children, or to his sons or daughters, with a devise over on the failure of the issue of the devisee for life, and the latter words are held to create an estate tail in the parent (but which they will do only under a will which is subject to the old law), the devise to the children, sons or daughters, is not unnecessarily and wantonly sacrificed to this object; but the parent, *i. e.* the devisee for life, takes an estate tail in remainder, expectant on the determination of the prior estates of his children, sons or daughters (as the case may be). And there seems to be no reason why this construction should not prevail as well where the prior devise to the children's sons or daughters confers estates tail in remainder, expectant on the parent's life estate, as where those devisees take estates for life, unless the cases of *Bamfield* v. *Popham* and *Blackborn* v. *Edgley* should be considered as conclusive authorities against such a construction. Indeed, in the case of *Doe* v. *Gallini*, the children of the testator's sons and daughters were held to take estates tail in the first instance, with remainder in tail to the sons and daughters; as, notwithstanding the apparent restriction of the estates of such issue to life estates, they were held to take estates tail by force of the word "issue," as a word of limitation, strongly aided by the context.

Remark upon *Doe* v. *Hopkinson.*

[The reader will now at once perceive how, in the case of *Doe* v. *Hopkinson* (*f*), the Court might have escaped doing violence to the express words of contingency contained in the gift to the children, the limitation might have been held to run thus: to the ancestor for life with contingent remainder in fee to his children living at his death, with alternative contingent remain-

[(*f*) 5 Q. B. 223, ante, p. 444.]

[der to the ancestor in tail with remainder over. The decision as it stands violates principles deducible from two distinct lines of cases.]

General remarks on preceding cases.

3. An examination of the preceding cases will suffice to shew how numerous, and, in some instances, how refined, are the distinctions upon which the construction of words importing a failure of issue depends. They cannot, it is conceived, but suggest the wish, that these words had been more strictly confined to the office of merely connecting the two limitations between which they are interposed: and that whenever the preceding devise embraced *any* class of issue, they had been considered as referential to those objects, which is the established rule in regard to the expression *such* issue. The application of this rule to the cases under consideration would have required only the implication of the word "such." Though, in the state of the authorities, it may seem dangerous to advance any general conclusions upon the subject, the writer ventures to submit the following propositions, as deducible from the cases; in framing which, to avoid the risk of misleading the reader, he has cautiously adhered to the circumstances of the several cases, without extending his propositions to others apparently within the scope of the principle.

Conclusions suggested.

1st. That the words, *in default of issue,* or expressions of a similar import, following a devise to *children in fee-simple,* mean in default of *children* [and following a devise to children in tail, mean in default of children or of issue inheritable under the entail] (*g*). This is free from all doubt.

2nd. That these words following a devise to *all* the sons successively in tail male, and daughters concurrently [or successively] in tail general, [or in tail special] are also to be construed as signifying *such issue,* even in the case of an executory trust (*h*).

3rd. That words devising over the property on failure of issue *male,* following a devise to the whole line of sons successively in tail male, are also referential to those objects (*i*).

(*g*) *Goodright* v. *Dunham,* Doug. 764, ante, p. 435; [*Doe* v. *Duesbury,* 8 M. & Wels. 514, ante, p. 439;] *Ginger* d. *White* v. *White,* Willes, 348; [*Baker* v. *Tucker,* 3 H. of L. Ca. 106, 14 Jur. 771, ante, p. 436.]

(*h*) *Blackborn* v. *Edgley,* 1 P. W. 600, ante, p. 438; *Morse* v. *Marquess of Ormonde,* 5 Mad. 99, 1 Russ. 382, ante, p. 438; [*Peyton* v. *Lambert,* 8 Ir. Com. Law Rep. 485.]

(*i*) *Bamfield* v. *Popham,* 1 P. W. 54, 760, 1 Eq. Ca. Ab. 183, 2 Vern. 427, 449.

[4th. That where the children take a life estate only the words "in default of issue" introducing the gift over will create an estate tail by implication in the parent subject to the children's life estates (*k*).]

5th. That where there is a prior devise to a *definite number of sons only* in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will also be implied in the parent, in order to give a chance of succession to the other sons (*l*).

6th. That in the case of executory trusts, words importing *a dying without issue*, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general, in remainder expectant on those estates (*m*).

7th. That such words (whether they refer to issue or issue male), succeeding a devise to the eldest son [for life or] in tail, are not referable to such son exclusively, but create in the parent an implied estate tail (*n*), in remainder expectant on the estate [for life or in] tail of the son (*o*); and which rule also, it seems, applies where children [only who survive a specified period] take estates tail (*p*).

8th. That the circumstance of the preceding devise to children, &c., being subject to a contingency (*q*), [or not including the whole subject of the devise over (*r*),] is rather unfavourable to the construction, which reads words importing a failure of issue to refer to a failure of the objects of such preceding devise.

This statement of the result of the cases may somewhat assist in the consideration of the subject, though cases are incessantly occurring which present new circumstances, and give rise to nice questions on the application of the rules furnished by the preceding authorities, even admitting those rules to be free from doubt. The reader is recommended, before he unreservedly accedes to the foregoing propositions, to consult the cases them-

[(*k*) *Doe* v. *Gallini*, 3 Ad. & Ell. 340, ante, p. 458; *Parr* v. *Swindels*, 4 Russ. 283, ante, p. 450; and per Lord *Kingsdown*, *Towns* v. *Wentworth*, 11 Moo. P. C. C. 546.]

(*l*) *Langley* v. *Baldwin*, 1 P. W. 759, 1 Eq. Ca. Ab. 185, pl. 29, 1 Ves. 26; *Att.-Gen.* v. *Sutton*, 1 P. W. 754, 3 B. P. C. Toml. 75, ante, p. 445.

(*m*) *Allanson* v. *Clitherow*, 1 Ves. 24.

(*n*) *Stanley* v. *Lennard*, 1 Ed. 87; [*Key* v. *Key*, 4 D. M. & G. 73,] ante, p. 447.

(*o*) *Doe* d. *Bean* v. *Halley*, 8 T. R. 5, ante, p. 447.

(*p*) *Doe* v. *Gallini*, 5 B. & Ad. 621, 3 Ad. & Ell. 340, ante, 453.

(*q*) *Doe* v. *Lucraft*, 8 Bing. 386, 1 M. & Sc. 573; *Alexander* v. *Alexander*, 16 C. B. 59, [*Doe* v. *Gallini*, supra, n. (*p*).]

(*r*) *Franks* v. *Price*, 6 Scott, 710, 5

selves, in order that he may see how far the construction may have been aided by the circumstances of the particular case.

Doctrine of general and particular intention.

4. It may be useful, in this place, to advert to the doctrine of *general* and *particular intention* (*s*), or, to speak more explicitly, that supposed rule of construction by which the particular intent expressed in a will is sacrificed to the general and paramount intention that the estate shall not go over to the next devisee until the issue of the preceding devisee shall have become extinct, and which has been considered to authorize the giving to such prior devisee an estate tail. The doctrine occupies so conspicuous a place in the will-cases of one period, that it must not be dismissed without a few remarks.

Origin of phrase "general intention."

The phrase "general intention," in the above sense, was first adopted in the case of *Robinson* v. *Robinson* (*t*), where, we have seen, the Court of King's Bench held the devisee to take an estate tail male; and their reason for this construction was expressed to be, not that "son" was here a word of limitation (which has been shewn to be, and which Sir *Dudley Ryder* (*u*), before whom the case was first argued, treated as the ground of the decision), but to "effectuate the manifest general intention of the testator." Expressions of a similar nature fell from Lord *Wilmot*, C. J., in *Roe* v. *Grew* (*x*), where his Lordship is made to refer the determination, that the devisee was tenant in tail, to the "weightier" intention that the estate was not to go over until failure of his male issue, and not to the more simple and obvious ground of "issue" being a word of limitation in the devise itself, which was the reason distinctly advanced by two of the other learned Judges.

The next mention of this doctrine is by Lord *Kenyon*, under whose auspices it seems to have first grown into importance; for in scarcely a single instance did this eminent Judge come to the conclusion, that a person took an estate tail under a devise to him and his issue, or to him and the heirs of the body (*y*), without adducing as a reason, that the general inten-

Bing. N. C. 37, 3 Beav. 182.

(*s*) See a masterly and extended dissertation on this doctrine in Mr. Hayes's Inquiry, 284 to 365.

(*t*) Ante, 378.

(*u*) He died pending the cause, and was succeeded by Lord *Mansfield* in 1756.

(*x*) Ante, 395.

(*y*) See *Doe* d. *Blandford* v. *Applin*, 4 T. R. 87, ante, 403; *Denn* d. *Webb* v. *Puckey*, 5 ib. 303, ante, 398; *Doe* d. *Candler* v. *Smith*, 7 ib. 531.

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*General* and *particular* intention.

tion, to which the particular intent must give way, required such a construction, generally referring to *Robinson* v. *Robinson* and *Roe* v. *Grew*; though his Lordship was not always consistent in his mode of treating the former case (*z*).

But it will be asked what is the "particular intent" which is thus to be sacrificed? In the certificate of the Court of King's Bench, in *Robinson* v. *Robinson*, no *particular* intent is referred to; but *Wilmot*, C. J., who first introduced the expression in *Roe* v. *Grew*, appears to have meant by it simply the estate for life; and so, it would seem from his language, did Lord *Kenyon*, in *Doe* v. *Applin* (*a*) and *Denn* v. *Puckey* (*b*). In this sense, however, it is merely descriptive of the operation of the rule in *Shelley's case* (*c*); for the sole reason why the intention to give an estate for life cannot consist with, but must be sacrificed to, the design of letting in a line of issue, is, that *that* rule will not permit a person to be tenant for life, and his heirs or the heirs of his body (which is the construction of "issue" when used as a word of limitation) to be purchasers in the same will. But if this be all that is meant by the expression "particular intention," for what reason is this ambiguous and not very accurate phraseology employed in referring to the operation of such a well-known and familiar rule of law? And why is the case of *Robinson* v. *Robinson* to be exclusively cited for the purpose, when any one of the multitude of decisions illustrating the rule would have been equally in point? It is manifest, indeed, from the use which Lord *Kenyon* made of this case, that he sometimes, at least, included in the phrase "particular intent," an express gift to a particular degree of issue; and this is the more evident from his observations in *Doe* d. *Candler* v. *Smith* (*d*), where, after reading the devise to "heirs of the body" as a gift to *children*, he sacrificed this intent to the "general intention" that "all the progeny of those children should take before any interest should vest in" the devisees over, and accordingly held the parent to be tenant in tail (*e*). Now, if his Lordship were authorized to construe "heirs of the body" as designating

Doctrine of general and particular intention.

(*z*) Ante, pp. 378, 379.
(*a*) 4 T. R. 87.
(*b*) 5 T. R. 303.
(*c*) As to which, see ante, Chap. XXXVI.
(*d*) 7 T. R. 532, ante, 355.
(*e*) Mr. Justice *Grose*, too, in *Doe* v. *Cooper*, 1 East, 229, ante, p. 404, assumed the word "issue" in the devise to mean *children*, and then that it was to give way to the intent, appearing by the words introducing the devise over, to let in all the descendants. Both branches of this hypothesis are equally untenable.

*children* (*f*), on what sound principle, or even plausible pretence, was the express devise to the children to be sacrificed to the intention inferred from the words introducing the devise over? To assign to these words such an operation, is to set up an intention collected merely by inference from phrases of an ambiguous character, against an intention clear, express, and unequivocal; and when, too (which constitutes the great force of the absurdity), *there is no incompatibility or incongruity in the two limitations.* That an implied estate tail in the parent *in remainder after an estate tail in the children* is perfectly consistent with such an estate in them, and would attain the object of letting in all the descendants of the first taker equally well with an immediate estate tail, is too palpable for serious argument. The one undoubtedly is distinct from, but not in the least repugnant to, the other. It is evident, therefore, that to have struck out one of these limitations would have been an unwarrantable interference with the express language of the testator, not called for by the necessity of the case, and in direct contravention of the rule which requires that effect should be given, if possible, to *every* part of a will. It is satisfactory that the case of *Doe* d. *Candler* v. *Smith* may be supported on irrefragable grounds, independently of any such doctrine; for, as it is now established that the words "heirs of the body," in such a context, cannot be read *children* (*g*), the whole assumption upon which the Court proceeded fails, and the case is clearly right upon the uncontrolled operation of "heirs of the body" as words of limitation; but this, while it sustains the authority of *the case* deprives *the doctrine* of all the sanction which that authority would have communicated. Nor is this all: many of the cases antecedently stated afford negative authority against it; for it is observable that in *Langley* v. *Baldwin* (*h*), *Attorney-General* v. *Sutton* (*i*), and *Stanley* v. *Lennard* (*k*), where estates tail were raised in the parent by the effect of the words introducing the devise over, not a word is said of sacrificing the devise to the sons to this object. On the contrary, in *Attorney-General* v. *Sutton*, those who argued for this construction evidently considered that the ulterior estate of the parent was to take effect as a remainder *expectant on* the estate tail of the sons. In

(*f*) But as to which, see ante, p. 404.
(*g*) Ante, Chap. XXXVII.
(*h*) 1 P. W. 759, ante, p. 445.
(*i*) Ib. 754, 3 B. P. C. Toml. 75, ante, p. 445.
(*k*) 1 Ed. 87, ante, p. 446.

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*Allanson* v. *Clitherow* (*l*), too (where, however, the trust was executory), this construction was *expressly* adopted. But the most conclusive authority against the doctrine in question is *Doe* d. *Bean* v. *Halley* (*m*), where even Lord *Kenyon*, its most strenuous champion, held, that the estate tail raised by implication in the parent took effect by way of remainder, after, *and not in derogation of*, the express devise to the eldest son.

Lord *Kenyon's* abandonment of the doctrine in *Doe* v. *Halley*.

In this case, indeed, his Lordship seemed to be on the point of applying in practice the doctrine which he had been so long maintaining in theory; for he said, "We have our choice of two constructions to effectuate the testator's general intent, *either to give an immediate estate tail to A., which would violate the particular intent of the devisor*, or (and to which construction I incline) to say that he took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, in order to let in all his issue male." To have expunged the devise to the eldest son in this case would have been a practical illustration of the doctrine in question; and his Lordship, in refusing to do so, virtually negatived its existence, and thereby established, not the prevalence of the general over the particular intent, but the triumph of sound sense and legal principles over one of the absurdest doctrines that was ever advanced. His Lordship, however, added, "In deciding this case, I will not abandon the general rule recognised and acted upon in *Robinson* v. *Robinson*."

This observation shews, first, that Lord *Kenyon* suspected that his decision might be considered to encroach upon the doctrine which he had taken such pains to rear upon the authority of this case; and, secondly, that he regarded *Robinson* v. *Robinson* as a case in which, by holding the parent to be immediate tenant in tail, the devise to the son *as a designated object* was *sacrificed* to the "general intent," appearing by the subsequent words (*n*), which is the only view in which it can possibly be considered as coming into collision with *Doe* v. *Halley*, where the devise to the eldest son was *preserved*. If that case supported any such doctrine (but which the writer trusts he has satisfactorily shewn it does not), it is clearly overruled by *Doe* v. *Halley*; and Lord *Kenyon's* express reservation can avail but little in pre-

(*l*) 1 Ves. 24.
(*m*) 8 T. R. 5, ante, p. 447.
(*n*) See an observation upon this, ante, pp. 454, 455; and see his Lordship's own allusion to the case, ante, pp. 378, 379.

serving the doctrine from the effect of his own decision, rejecting it in the very case for which, if applicable at all, it appeared to have been designed.

So far, therefore, it is clear that the doctrine of *general* and *particular* intention had existed only in name; the cases in which it was professed to be applied being clearly referable to other grounds, and in those which seemed to call for its application the doctrine being rejected. In the case of *Wight* v. *Leigh* (*o*), already stated, however, we have an instance nearly the converse of the former class; for, without a distinct recognition of the doctrine, a construction, amounting in effect to an application of it, seems to have been adopted.

The confusion temporarily introduced by this case, however, has been completely dissipated by the two more recent cases (*Parr* v. *Swindels* and *Doe* v. *Gallini*), in both which we have seen it was held, upon the authority of *Doe* v. *Halley*, that words importing a failure of issue of the devisee for life conferred on him an estate tail; not in derogation of, but in remainder expectant on the estates devised to the children. In *Doe* v. *Gallini*, the doctrine of general and particular intention underwent much discussion, and Lord *Denman* was pleased to express his concurrence in the views of the writer of these pages. His Lordship observed (*p*), "The doctrine that the general intent must overrule the particular intent has been much, and, we conceive, justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in *Shelley's case*, and it has since been laid down in others where technical words of limitation have been used, and other words, shewing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord *Redesdale* in *Jesson* v. *Wright* (*q*). This

Lord *Denman's* remarks on doctrine of general and particular intention.

(*o*) 15 Ves. 564, ante, 449. (*p*) 5 B. & Ad. 640. (*q*) 2 Bli. 57.

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doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills."

Devises of reversions.

5. Devises of reversions sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a reversion in fee, subject to estates tail belonging to the sons or other partial issue of a person (*r*), devises the reversion as property in the event of that person dying *without issue*, which necessarily raises the question whether these words refer to the determination of the subsisting estates, or to a general failure of issue, or in other words, whether they are words of description or donation: in the former case the devise operates as an immediate disposition of the reversion (*s*); in the latter it is an executory devise, and, as such, is void for remoteness.

Whether words refer to determination of subsisting estates.

A point of this nature occurred in the case of *Lady Lanesborough* v. *Fox* (*t*), where A., having settled the lands in question on the marriage of his son B., to the use of himself (A.) for life, remainder to his son B., for ninety-nine years, if he so long lived, remainder to trustees to preserve contingent remainders with remainder to the use of the first and other sons of B. *on his intended wife to be begotten* successively in tail male, remainder to the heirs *male* of the body of B., with reversion to the right heirs of himself (A.), by his will devised the lands contained in the settlement *on failure of issue of the body of* B., *and for want of heirs male, of his* (A.'s) *body, to his daughter* F. *in tail:* and the House of Lords adjudged, in concurrence with the unanimous opinion of the Judges, that the will did not give an estate tail by implication to B., and that therefore the devise over to F. was executory, and void, as being on too remote a contingency.

Observations upon *Lanesborough* v. *Fox.*

If this case had rested solely on the circumstances that the subsisting estate tail in B. embraced the heirs *male* only, and the devise in the will referred to his (B.'s) issue *generally*, (which certainly was argued as the chief point in the case,) the decision, it is conceived, could hardly have been sustained, consistently

(*r*) The writer has avoided suggesting the case of the limitations being to the testator's *own* sons, because such cases may perhaps be considered as falling within another principle, discussed in the next chapter. See *Sanford* v. *Irby*, 3 B. & Ald. 654, and other cases there discussed.

(*s*) See ante, Vol. I. Chap. XXV. s. 1.

(*t*) Cas. t. Talb. 262.

with the rules of construction deducible from the cases discussed in the present chapter, in many of which we have seen, that words referring in terms to issue or issue male have been held to apply to *children* or *sons*, being the objects of the antecedent limitations (*u*). *A fortiori*, therefore in the present instance would they have been construed to be referential, where the approximation to a correct reference to the subsisting estates was such as to require only the word "male" to be supplied; and the case of *Tuck* v. *Frencham* (*x*) affords an instance (if authority were requisite) of this word being supplied to make words referring to issue generally correspond with the antecedent limitations in favour of issue male created by the same will.

Whether words of contingency refer to subsisting estate tail.

These remarks assume that the principle which governs the application of phrases of this nature to limitations created by the same will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in *Lanesborough* v. *Fox*, the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void (*y*), than in the former, where, as an estate tail can generally be implied, the devise is valid *quâcunque viâ*. The preferable ground, however, upon which the case of *Lady Lanesborough* v. *Fox* appears to stand, is afforded by the other words "and for want of heirs male of my own body;" for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator*, according to the rule discussed in the next chapter (*z*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living), the devise was void (*a*).

The principle was again agitated in the case of *Jones* v. Whether sons of

(*u*) Ante, 457.

(*x*) 1 And. 8, Moore, 13, pl. 50; ante, Vol. I. p. 455.

(*y*) It will be remembered that we are here speaking of the *old* law.

(*z*) Post, 476.

(*a*) It is remarkable that Mr. *Fearne*, in his strictures on this case, Cont. Rem. 447, while he treats the want of the word "male" as a fatal omission in referring to the estate tail of the testator's son, seems to consider it not impossible that the words *for want of the testator's own heirs male* should be held to be referential to the son, though this hypothesis takes so much greater liberty with the testator's language.

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an existing or future marriage were referred to.

*Morgan* (*b*) ; where A. having, on his marriage with B., settled certain estates upon himself and the sons of the marriage in tail male, with reversion in fee to himself, and having two sons of the marriage, devised the estates, in case his said sons, *or any other son or sons of his thereafter to be born, should die without issue male of their bodies,* to his brother T. The question was, whether the testator, by the mention of sons "to be born," was to be understood as meaning after-born sons by his wife B. (who was living), or as having in his contemplation the sons of a future marriage. If confined to sons of A.'s present marriage, it was a good devise of the reversion, as the contingency expressed by him (on which the devise was to take effect) embraced precisely the estates under the settlement, on the determination of which his own reversion would fall into possession, it being the same as if he had said, "Whereas my estate is settled upon my first and every other son in tail male by my marriage settlement; therefore, in case they all die without issue male of their body, I give it to my brother," which would clearly have been good as a devise of the reversion; and a circumstance much relied upon for this construction was, that the testator appointed B. a guardian of his children and executrix of his will, which negatived the supposition of his contemplating a future marriage (*c*). On the other hand, it was contended, that the expressions used by the testator included the sons of an after-taken wife, and, as such sons could not take an estate by implication, the limitation over to the testator's brother was an executory devise void for remoteness. Lord Chancellor *Camden* sent a case to B. R., the Judges of which certified their opinion that the event of a second marriage was not in the testator's contemplation, but that, if it were, the sons of that marriage took an estate tail. Lord *Bathurst*, who, in the mean time, had succeeded to the seals, concurred in the former branch of this certificate, and decreed accordingly; but he dissented from the opinion, that an estate tail was raised by implication, conceiving *Lanesborough* v. *Fox* to be a direct authority against it. The decree was affirmed in the House of Lords, on the ground that a future marriage was not in the contemplation of the testator, and that the devise to his brother was therefore good (*d*).

Words held to refer to subsisting estate-tail.

(*b*) Butl. Fea. App. 578, 3 B. P. C. Toml. 322.

(*c*) See this principle applied to a different species of case, *Wilkinson* v. *Adam*, 1 V. & B. 422, ante, p. 212.

(*d*) In *Trafford* v. *Boehm*, 3 Atk. 442,

Words held not to refer to subsisting estates.

But in *Bankes* v. *Holme* (*e*), where lands having been limited, upon the marriage of A. with B., to the use of A. for life, with remainder to trustees to preserve, with remainder to trustees for certain terms of years, with remainder to B. for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to the daughters as tenants in common in tail, with cross-remainders, with reversion to A., the settlor, in fee; A. made his will, by which he recited, that by the settlement in question, he was seized of, or entitled to, the reversion in fee-simple expectant on the decease of his wife B., in case there should be no child or children of his said wife by him begotten, or there being such, all of them should happen to depart this life *without issue*. The testator then, in case he should die without leaving any children or child, or there being such, "all of them should happen to depart this life *without issue* lawfully begotten," devised the premises upon certain trusts. Sir *J. Leach*, V. C., held, that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in the House of Lords.

Case of *Bankes* v. *Holme* questioned.

Lord *Eldon* observed, in *Morse* v. *Lord Ormonde* (*f*), that this was a "very strong decision" (an expression which, in the mouth of this venerable Judge, always means a *wrong* decision); and it seems, indeed, to be very difficult to reconcile it with the principles of the line of cases just stated. It was manifest, from the recital of the settlement, that the testator had in view the reversionary estate expectant on the limitations of the settlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcileable with *Jones* v. *Morgan*, which it closely resembles. It is not likely that the decision will be followed.

And this conclusion is fortified by the case of *Egerton* v. *Jones* (*g*), where, in pursuance of marriage articles, an estate at C. had been conveyed to the use of A. for life, with remainder to B., his wife, for life, with remainder (subject to a term of

a devise, "after failure of issue" of the testator's wife by him, was construed as an immediate gift of the reversion, the words in question being referential to the subsisting limitations of their marriage settlement; but the will contained an express reference to the settlement (the particular limitations of which do not appear) for another purpose.

(*e*) 1 Russ. 394, n. See also *Bristow* v. *Boothby*, 2 S. & St. 465.

(*f*) 1 Russ. 406, [Sugd. Law of Prop. 351.]

(*g*) 3 Sim. 409; [and see *Eno* v. *Eno*, 6 Hare, 171, further confirming the view taken in the text.

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500 years for raising portions for younger children) to the use of the first and other sons of A. and B. successively in tail male, with remainder to the use of trustees for 600 years upon certain trusts, in the event of there being no male issue of A. and B., who should live to attain the age of twenty-one years, with remainder to the use of A., his heirs and assigns. A. by his will devised as follows:—"And as to the reversion and inheritance of the freehold estate by me already purchased at C. aforesaid, and such other estate or estates as I shall hereafter purchase in pursuance of my marriage articles, *in case of failure of issue of my body by my said wife*, I give," &c. Sir *L. Shadwell*, V. C., expressed a strong opinion, that this devise operated as a valid immediate gift of the reversion; but it was not necessary for him to go further than to declare that the title depending on the opposite construction was too doubtful to be forced on a purchaser.

Devise on failure of issue held to be an immediate devise of reversion.

If the Vice-Chancellor had been called upon to adjudicate on this point of construction, it is conceived his decision must have been in accordance with his expressed opinion. The case of *Jones* v. *Morgan* would have more than warranted, and even *Bankes* v. *Holme* would not have opposed, such a conclusion; for the Court had not here (as in those cases) to supply words in order to restrict the issue spoken of in the will to the issue of a particular marriage (who were the tenants in tail under the settlement), the testator having in the will distinctly referred to the issue of that marriage. The sound rule would seem to be, that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by the neglect of the testator to adapt his language with precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly has been (we have seen) to invalidate the intended devise of the reversion for remoteness (as depending upon a general failure of issue); but in this respect the recent act has made an alteration, which is pointed out in the next section.

Remark on *Egerton* v. *Jones*.

Suggested conclusion from he cases.

1 Vict. c. 26, s. 29.

IV. It remains only to consider how far the doctrines discussed in the present chapter are applicable to wills, which are regulated by the new law.

Words importing a failure of issue to mean issue living at the death, except where merely referential.

The statute of 1 Vict. c. 26, s. 29, provides, "that, in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise;* provided, that this act shall not extend to cases where such words as aforesaid import *if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue* (*h*).

Remarks on failure of issue clause in recent act.

It is evident, therefore, that the question, whether words importing a failure of issue refer to the objects of the preceding devise (which forms the main topic of the present chapter) may still arise under wills that are within the recent enactment; and if this question be decided in the affirmative, the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never, under any circumstances, by their own intrinsic force, have the effect of creating an estate tail by implication; so that to wills made or republished since the year 1837 no scope will be afforded for the application of the doctrine of the cases of *Doe* v. *Halley*, *Parr* v. *Swindels*, and *Doe* v. *Gallini*, to the discussion of which so large a space has been devoted.

Effect under new act of rejecting the referential construction.

The effect of holding the words in question *not* to refer to the issue, who are the objects of a preceding devise, will be to render the estate of the children, conferred by such devise, determinable on the event of the parent dying without leaving

[(*h*) See *Re O'Bierne*, 1 Jo. & Lat. 352; *Harris* v. *Davis*, 1 Coll. 416; *Green* v. *Green*, 3 De G. & S. 480; all noticed post.]

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issue living at his death, as in the case of *Hutchinson* v. *Stephens* (*i*), which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue, gives estates in fee, as it would under wills which are subject to the new law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the new law, increased motive for adhering to the principle of the cases of *Goodright* v. *Dunham* and *Malcolm* v. *Taylor*, which it will be remembered authorize the proposition, that, where a devise to children in fee is followed by a devise over, to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue refer to the children or other issue, who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters.

For instance, if lands are devised to A. for life, with remainder to his sons, and if A. should die without issue, then to B., each son of A., under the original devise, would, immediately on his birth, take a vested remainder in fee-simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death of A., they would subject the vested estate of the sons of A. to an executory devise, to take effect in the event of A. dying without leaving issue *surviving him*, a result which it is conceived the Courts, when applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee-simple without words of limitation will, it is obvious, greatly extend the application of the doctrine of *Goodright* v. *Dunham* and *Malcolm* v. *Taylor*; and in this respect seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

(*i*) 1 Keen, 240; ante, p. 440.

In the preceding remarks the new enactment has been regarded in its effect only upon the *prior* estates. With respect to the *ulterior* estate, *i. e.* the estate which is to take effect on the failure of issue, its operation is more decidedly beneficial, for it prevents such ulterior devise from being rendered void for remoteness, where the words "denoting the failure of issue" would have the effect neither of referring to the objects of the prior devises, nor of creating an estate tail by implication.

# CHAPTER XLI.

## WORDS "DIE WITHOUT ISSUE," ETC., WHETHER THEY REFER TO FAILURE INDEFINITELY, OR FAILURE AT THE DEATH.

I. *General Rule.—Exceptions.*
II. *Circumstances and Expressions adequate to warrant the restricted Construction in regard to Real Estate.*
III. —— *in regard to Personalty.*
IV. *Remarks on* 1 *Vict. c.* 26, *s.* 29.

Die without issue, &c., when restricted to a failure of issue at the death.

I. ANOTHER question which often occurs in the construction of words importing a failure of issue, is, whether they refer to issue indefinitely (*i. e.* to a failure of issue at any time), or to a failure of issue at the death. Upon this depends their operation to confer an estate tail; for it is only when the words denote an extinction of the specified issue, irrespective of time or any collateral circumstance, that they create such an estate.

Few points of testamentary construction have come more frequently under discussion than this; which has arisen, in a great degree, from the discrepancy between the popular acceptation and the legal sense of the phrase in question, and the consequent willingness to admit grounds for departing from the technical doctrine. In ordinary language, when a testator gives an estate to a person and his heirs, with a limitation over, in case of his dying without issue, he means that the devisee shall retain the estate, if he leaves issue surviving him, and not otherwise; and where the phrase is, in case the first taker die *before he has any issue*, or *if he have no issue*, the intention probably is, that the estate shall belong absolutely to the devisee, on his having issue born. But the established *legal* interpretation of these several expressions is different; for it has been long settled (though the rule, it will be remembered, now applies only to wills made before the year 1838), that words referring to the death of a person without issue, whether the terms be, "*if he die without issue*," "*if he have no issue*," or ["*if he die without*

General rule.

[*having issue*" (*a*), or] "*if he die before he has any issue* (*b*)," or "*for want*" or "*in default of issue*," unexplained by the context, and whether applied to *real* or to *personal* estate, (notwithstanding the distinction taken between these two species of property in some of the early cases (*c*),) are construed to import a *general indefinite failure of issue, i. e.* a failure or extinction of issue *at any period* (*d*).

Two exceptions.

This rule, however, admits of two exceptions: the first is, where the phrase is *leaving* no issue; with respect to which the settled distinction is that, applied to *real* estate, it means an indefinite failure of issue (*e*), but in reference to *personal* estate (and [chattels real and also] real estate directed to be converted (*f*) are for this purpose regarded as personalty (*g*)), it imports a failure of issue *at the death*. Under a devise, therefore, to A. or to A. and his heirs, and if he shall die *and leave no issue*, or *without leaving issue*, then over, A. would take an estate tail; but under a bequest of a term of years, or other personal estate, in the same language, A. would take, not the absolute interest, (as he would if the indefinite construction prevailed), but the entire interest of the testator defeasible on his (A.'s) leaving no issue at his death. *Forth* v. *Chapman* (*h*) is the leading authority for this distinction, but it has been confirmed by a long train of subsequent decisions (*i*) extending

First, where phrase is, *leaving* no issue.

[(*a*) *Cole* v. *Goble*, 13 C. B. 445.]

(*b*) *Newton* v. *Barnardine*, Moore, 127, pl. 275. As to this expression applied to *children*, see ante, 383.

(*c*) *Pleydell* v. *Pleydell*, 1 P. W. 748; *Nichols* v. *Hooper*, ib. 198.

(*d*) Fitz. 68; 2 Atk. 308, 376; [1 Vern. 478; 1 Eq. Abr. 207, pl. 9;] Amb. 398, 478; 2 Ed. 205, 3 B. P. C. Toml. 314; 1 B. C. C. 170, 188; 2 B. C. C. 33; 1 Ves. jun. 286; 3 Ves. 99; 5 Ves. 440; 9 Ves. 197, 580; 17 Ves. 479; 1 Mer. 20; 1 B. & Ad. 318; 7 Bing. 226; [2 R. & My. 378; 16 Sim. 290; 2 Jo. & Lat. 176; 13 C. B. 445.]

[(*e*) The word "leaving" is sometimes held to mean "having." *Ex parte, Hooper*, 1 Drew. 264.]

(*f*) As to the doctrine of conversion, see ante, Chap. XIX.

(*g*) *Farthing* v. *Allen*, 2 Mad. 310; but there was ground to contend that "issue" was here synonymous with *children* who were the objects of the preceding bequest. The judgment, however, is not reported, and the decree is silent as to the limitation over. The marginal note of the case omits the material word "leaving." [And see *Hawkins* v. *Hamerton*, 16 Sim. 410.]

(*h*) 1 P. W. 663.

(*i*) *Atkinson* v. *Hutchinson*, 3 P. W. 258; *Sabbarton* v. *Sabbarton*, Cas. t. Talb. 55, 245; *Sheffield* v. *Orrery*, 3 Atk. 282 (where the additional words "behind him"—as to which see post—were used); *Lampley* v. *Blower*, ib. 396; *Sheppard* v. *Lessingham*, Amb. 122; *Gordon* v. *Adolphus*, 3 B. P. C. Toml. 306; [*Taylor* v. *Clarke*, 2 Ed. 202;] *Goodtitle* v. *Pegden*, 2 T. R. 720; *Daintry* v. *Daintry*, 6 T. R. 307; *Radford* v. *Radford*, 1 Kee. 486; [*Mansel* v. *Grove*, 2 Y. & C. C. C. 484; *Heather* v. *Winder*, 5 L. J. N. S. Ch. 41; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Hawkins* v. *Hamerton*, 16 Sim. 421,] where the subject was personal estate; and where the subject was real estate see *Walter* v. *Drew*, Com. Rep. 372; *Denn* v. *Shenton*, Cowp. 410; *Tenny* v. *Agar*, 12 East, 253; *Dansey* v. *Griffiths*, 4 M. & Sel. 61; *Woollen* v. *Andrewes*, 2 Bing. 126; *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & Ell.

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down to the present period, which shew that it applies even where the real and personal estate are comprised in the same gift. Lord *Kenyon*, indeed, in *Porter* v. *Bradley* (*k*), questioned the soundness of the doctrine; but his *dictum* is inconsistent with a multitude of authorities, and has received the pointed reprobation of both Lord *Eldon* (*l*) and Sir *W. Grant* (*m*); his Lordship emphatically declaring, that it went "to shake settled rules to their very foundation" (*n*).

The circumstance, that the prior gift is expressly for the life of the first taker, so that the effect of construing the word "leaving" to refer to issue *at the death*, is, that in the event of there being such issue, the subject of disposition belongs to

636, 3 Nev. & P. 197 (the judgment in which contains an elaborate statement of the authorities); [*Doe* d. *Todd* v. *Duesbury*, 8 M. & Wels. 530; *Bamford* v. *Lord*, 14 C. B. 708; *Biss* v. *Smith*, 2 H. & N. 105; *Feakes* v. *Standley*, 24 Beav. 485. And, since the recent Wills act (s. 29), where the gift is of realty and personalty to A. and the heirs of his body, and if he die without issue over, the words die without issue are construed differently as regards the two kinds of property, *Greenway* v. *Greenway*, 29 L. J. Ch. 601.]

(*k*) 3 T. R. 146.

(*l*) 9 Ves. 203.

(*m*) 19 Ves. 77. Lord *Thurlow* appears to have entertained the same opinion of this distinction as Lord *Kenyon*, for, in *Biggs*, v. *Bensley*, he observed, that the words *leaving* and *after* went far towards overturning the rule. Probably this expression tended to encourage Lord *Kenyon* (who was counsel in *Biggs* v. *Bensley*) in afterwards making his bold denial, in *Porter* v. *Bradley*, of the distinction, which, however, his Lordship expressly recognized in *Daintry* v. *Daintry*, 6 T. R. 314, though his decision is hardly consistent with that recognition.

As to supplying the word *leaving*.

(*n*) The introduction of the word "leaving" being so important in reference to personalty, the question often arises in such cases whether the word may be supplied; as where the testator in one part of his will uses the phrase "without leaving issue," and in another the words "without issue." In such case, the latter expression has been made by construction to correspond with the former in several instances where the general plan of the will seemed to authorize it: *Sheppard* v. *Lessingham*, Amb. 122; *Radford* v. *Radford*, 1 Kee. 486; ante, Vol. I. p. 457. Each of these respective phrases, however, seems to have been allowed to retain its own peculiar force in the recent case of *Pye* v. *Linwood*, 6 Jurist, 618, where a testator gave the residue of his property to his two children, John and Elizabeth, in manner following: one moiety to John, his heirs, executors, administrators and assigns, and in case of his decease without *leaving* lawful issue, then to Elizabeth and her heirs, executors, administrators and assigns; and the other moiety, together with the reversion of the former moiety, the executors were directed to invest in trust for Elizabeth for life for her separate use, and at her decease to go and be equally divided among all her children lawfully begotten, and in case of her decease *without lawful issue*, then to John: Elizabeth had only one child, who died in her lifetime. It was contended that the words "without lawful issue," in reference to the personalty, applied to issue living at the death, and that consequently the bequest over had taken effect; but Sir *K. Bruce*, V. C., held that the deceased child acquired an absolute interest.

Remark on *Pye* v. *Linwood*.

Here it will be observed that there was sufficient difference in the mode of disposing of the several moieties to afford a strong suspicion that the testator might really not have had the same intention in each instance, and therefore the Court seems to have been fully justified in adhering to the literal terms of the will. To divest the interest of a child who happened not to survive its parent was a result which the expounder of a will would not be disposed to strain the testator's language for the purpose of accomplishing. It does not appear whether the particular point for which the case is here cited was presented to the V. C. [And see Chap. XVII. sect. 1, ad. fin.]

neither the prior nor the subsequent legatee, affords no ground for departing from this doctrine (*o*). Nor, on the other hand, is the restricted construction of the words in question extended to *real* estate, merely because the subject of devise is a copyhold estate held of a manor, the custom of which forbids the creation of entails, so that the effect of the contrary (*i. e.* the indefinite) construction is, that the first devisee takes a conditional fee on which no remainder can be engrafted, and the testator's intention, therefore, in favour of the ulterior devisee, is defeated (*p*).

Second exception to general rule.

The other exception to be noticed to the general rule is, where a testator, *having no issue*, devises property in default or on failure of issue *of himself;* in which case it is considered that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue *surviving him* (*q*), and that he does not refer to an extinction of issue at *any* time.

Failure of testator's *own* issue, he having none.

Thus, in *French* v. *Caddell* (*r*), where A., being married, and having *no* issue, made his will, devising the land in question, "*in default of issue male and female of his own body*," upon trust, to pay his debts, legacies, and an annuity to his wife, and then to B. and his issue in strict settlement. It was contended, that this devise was void, as being to take place after an indefinite failure of issue, there being nothing to restrain it to the death of the testator. It was insisted, on the other side, that he plainly meant a failure of issue living at the death, and that the contingency was determined the instant the will took place, *i. e.* his death; and much stress was laid on the circumstance, that the trust was to pay debts, legacies and annuities, which he could not intend should take place 100 or 200 years after his death. The House of Lords, on an appeal from the Irish Court of Chancery, decided in favour of the latter construction, giving validity to the devise.

Reference to testator's *own* issue.

So, in *Wellington* v. *Wellington* (*s*), where a testator (who was *a bachelor*) devised, *in default of issue of his own body*, to trustees and their heirs, in trust to pay certain annuities, until

(*o*) *Andree* v. *Ward*, 1 Russ. 260; [*Webster* v. *Parr*, 26 Beav. 235.]

(*p*) *Doe* d. *Simpson* v. *Simpson*, 5 Scott, 770, 4 Bing. N. C. 333, 3 Scott, N. R. 774, 3 Man. & Gr. 929.

(*q*) This is a very reasonable precaution, and should never be omitted where a testator is married, as his having and leaving issue would not revoke the will. See ante. Vol. I. p. 114.

(*r*) 3 B. P. C. Toml. 257.

(*s*) 4 Burr. 2165, 1 W. Bl. 645.

his debts and legacies should be paid, and, subject to the annuities, debts and legacies, he devised the estate in question to uses in strict settlement. Lord *Mansfield* held it to be a conditional devise, to take effect *at the death of the testator*, if he left no issue, and therefore not to be an executory devise, which was a devise, he said, to take place in futuro.

It is observable, that, if the event, which the testator provided against, had happened, namely, his leaving issue, the devise itself would have been revoked, marriage (which was necessarily involved) and the birth of a child being, even under the old law, primâ facie a revocation (*t*).

Again, in the case of *Lytton* v. *Lytton* (*u*), where A. being seised in fee, subject to the limitations of marriage articles, whereby the lands were agreed to be settled on himself for life, with remainder to the first and other sons of the marriage in tail male, with reversion to himself in fee, and not having any issue (his only child being just dead), made his will, whereby he devised, *on failure of issue male of his body*, the lands in question, upon trusts to raise money for paying debts and legacies (which included annuities), and subject thereto, to L. and his children to uses in strict settlement. Lord *Northington* (upon the authority of the case of Lady *Lanesborough* v. *Fox* (*x*)) held, that the devise to L., being after a general failure of issue, was void, as being too remote. At a subsequent period the question was brought by an amended bill before Lord *Loughborough*, who reversed his predecessor's decree, considering the case of *Lanesborough* v. *Fox* to be inapplicable. "Compare," said his Lordship, "the circumstances of the present case with that, under the circumstances of the family: here the testator had had no child for several years: his only child was just dead. The devisee was his next and immediate heir, but he introduced the devise by the words 'in failure of issue male.' Could this mean more than to take in the event which alone prevented the estate from being the subject of an immediate devise? *He certainly had the articles in his contemplation at the time.* There was no prospect of issue at the time. It was not like Lord *Lanesborough's case, who had issue,* and might have many more. It would be a harsh construction that the testator had here the idea of future issue in contemplation, and an indefinite failure

(*t*) Ante, Vol. I. p. 114. (*u*) 4 B. C. C. 441.
(*x*) Ante, 464.

of that issue: *he meant to give an immediate estate in possession at his decease.* Every clause in the will shews this intention. The other cases (*Jones* v. *Morgan* (*y*), *Wellington* v. *Wellington* (*z*), and *French* v. *Caddell* (*a*)) were all cases where, taking the words strictly, and construing them blindly, without considering the circumstances, the devise would have been upon a general failure of issue, and therefore void. It is manifest here he had no intention of giving an estate on a general failure of issue. *The circumstances of the testator and his family have always been taken into consideration in these cases.*"

Reference to testator's own issue.

So, in the case of *Sanford* v. *Irby* (*b*), where *Sir W. Langham*, the testator, having by his marriage settlement limited lands to the first and other sons of the marriage in tail in strict settlement, with reversion to himself in fee, and having a son and two daughters of the marriage, made his will, whereby he devised all his lands and real estate to his son and his heirs, subject to debts and legacies; but in case his son should depart this life without issue male, *or in case of failure of issue male of his* (the testator's) *body*, then he gave to his daughters certain legacies, which he charged upon his estates, and devised those estates to trustees, for the purpose of raising the "legacies by sale or mortgage;" and he then devised such parts of his real estate as should not be sold or mortgaged, *for want or in failure of issue of his body as aforesaid*, to his brother J. for life, remainder to his issue in strict settlement. And there was also a bequest of his personal estate, in case he should leave no son, or, leaving one son, he should afterwards die without issue before twenty-one, to his brother as therein mentioned. The Court of King's Bench (on a case from Chancery) certified an opinion that the devise of the real estate to testator's brother J. L. and his issue was valid.

Remarks upon *Lytton* v. *Lytton*;

According to the practice of courts of law (so often regretted), the reasons on which the certified opinion was founded are not stated. The case was argued, however, as falling within the principle of the class of cases just stated; or if not, it was contended, that the words referring to the failure of the testator's

(*y*) Ante, 466.
(*z*) Ante, 475.
(*a*) *Ib.*
(*b*) 3 B. & Ald. 654. See also *Doe* v. *Lucraft*, 1 M. & Sc. 573, 8 Bing. 386; where, however, it was not necessary to determine whether the words referred to a failure of issue at the death of the testator or indefinitely; the devise over being in the events which had happened void quâcunque viâ.

own issue created an estate tail by implication in such issue; but, as the latter ground is clearly untenable, we are, it is conceived, warranted in referring the decision to the former.

and *Sanford* v. *Irby*.

It is observable, however, that in both *Sanford* v. *Irby* and *Lytton* v. *Lytton* (*c*) there was some reason to contend that the words under consideration referred to the existing limitations of the settlement and articles, and therefore that the devise operated as an immediate gift of the reversion (*d*), and some of Lord *Loughborough's* reasoning in *Lytton* v. *Lytton* seems to be directed to this point (*e*); but as the general scope of his Lordship's arguments is different, and no such ground was taken in *Sanford* v. *Irby*, and more especially as such a construction is opposed to the principle upon which the case of Lady *Lanesborough* v. *Fox* was professedly decided (*f*), (which has been the subject of comment in the preceding chapter), it is submitted that the safer, and, indeed, the inevitable course, is to treat the cases of *Lytton* v. *Lytton* and *Sanford* v. *Irby* as referable to, and confirmatory of, the rule of construction established by the anterior cases of *French* v. *Caddell* (*g*), and *Wellington* v. *Wellington* (*h*).

It is to be observed, that, in *Sanford* v. *Irby*, the testator *had a son and two daughters living;* but as the death of the son formed one of the events upon which the estate was given over, and as the words under consideration referred to issue *male*, which excluded the daughters and their issue, it seems not to be distinguishable in principle from those cases in which the testator had no issue. It is also observable that the case of *Sanford* v. *Irby* has been characterized by Sir *Launcelot Shadwell* as a strong decision (*i*); but it seems uncertain whether, in making this remark, his Honor had in view the doctrine under discussion, or looked merely at the question whether the devise operated as an immediate gift of the reversion, which was the nature of the point then before him. It is also worthy of notice, that, in every case in which the construction in question has prevailed, the devise over was for the purpose of paying debts and legacies, and this possibly may have had some influence

(*c*) Ante, 476.

(*d*) As to this, see ante, 464.

(*e*) See the words of the judgment, ante, in italics.

(*f*) In *Lanesborough* v. *Fox*, the Court was disinclined to supply even the word "male;" but here the words *issue* or *issue male* must have been held to refer to sons *of a particular marriage*. See *Allanson* v. *Clitherow*, 1 Ves. 24, ante.

(*g*) Ante, 475.

(*h*) *Ib.*

(*i*) See *Egerton* v. *Jones*, 3 Sim. 417.

in restricting the application of the words referring to the failure of the testator's own issue to the period of his death. Indeed, it has been contended, by an able writer, to form the distinguishing feature of this class of cases (*k*),—a conclusion, however, which is not sanctioned by the general reasoning of the Judges who decided them (*l*).

Devise in case of failure of testator's own issue upon trust to sell and pay a legacy.

[Again, in the case of *Rye's Settlement*(*m*), the testator being entitled under his marriage settlement to the reversion in fee in lands expectant on a life estate in himself, and estates in tail male in his first and other sons by his wife then living, by his will noticing the settlement devised the lands, "in case he should depart this life without leaving issue by his said wife," to his wife for life, with remainder to his brother for life, with remainder to trustees in fee, upon trust after the several deceases of his wife and brother to sell the lands, and out of the proceeds to pay 4,000*l.* to his brother's daughter at her age of twenty-one or day of marriage, and to pay the residue of the proceeds to the other children of his brother; Sir *G. Turner*, V. C., said, that the cases appeared to him "to establish the proposition, that where the ulterior limitations in a will are made to depend upon a failure of issue of the testator, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to depend upon a general failure of issue, the will is to be construed as referring to a failure of issue at the death, and not to a general failure of issue. The question is one of intention, and the context of the will proves the intention (*n*)." The learned Judge further observed, that the fixing of the time for payment of the legacy of 4,000*l.* immediately after the deaths of the wife and brother, was wholly inconsistent with the notion that the legacy was meant to take effect only upon the general failure of the testator's issue, and he therefore held the devise to be valid (*o*).]

(*k*) Prior on Issue, 93. Neither in *Wellington* v. *Wellington*, nor in *Lytton* v. *Lytton*, was the fact of the property being subjected to debts and legacies adverted to by Lord *Mansfield* or Lord *Loughborough*; and in *French* v. *Caddell*, and *Sanford* v. *Irby*, the grounds of the determination do not appear.

(*l*) This point is now of less importance, as it cannot arise under a will made or republished since the year 1837, and may therefore be classed among the topics of controversy excluded by the enactment presently considered, which makes words importing a failure of issue refer to issue at the death.

[(*m*) 10 Hare, 106.

(*n*) The terms in which the V. C. stated the doctrine leave it at least doubtful whether he did not consider the cases not to warrant the proposition stated ante, p. 475, and that the view taken by Mr. Prior, supra, n. (*k*), was more correct.

(*o*) This reason assimilates the case to *Nichols* v. *Hooper*, post.]

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What will restrain the words generally.

But to return to the general rule. Though it is clear that, with the exceptions before noticed, the expressions to which it relates, applied to either real or personal estate, import an indefinite failure of issue, it is equally clear that in regard to either they will yield to a *clear* manifestation of intention in the context to use them in the restricted sense of issue *living at the death;* but, as to personalty, it seems they yield more readily to expressions and circumstances in the will tending so to confine them, than when applied to real estate. Such, it is well known, is the conclusion of Mr. *Fearne* (*p*) on this subject, though it cannot be denied that, since the period in which that gentleman wrote, this difference has been much narrowed; the later decisions having, on the one hand, overruled some of the grounds upon which words importing a failure of issue were formerly held, in reference to personalty, to receive a restricted construction, and having, on the other hand, given a restricted construction to the words in relation to *real* estate, by force of a context which in Mr. *Fearne's* period, would not have been considered as authorizing it. Notwithstanding, however, this approximation of the two classes of cases, there is still sufficient distinction between them to render it proper to treat of each class separately, and to suggest the remark, that the expressions which will cut down the established signification of the words, as applied to personalty, will not necessarily have that effect in reference to real estate; and, by parity of reason, where the restricted construction is adopted in relation to the latter, it applies, à fortiori, to the former. This diversity of construction in regard to real and personal estate appears to have originated in an anxiety to avoid an interpretation which would render any part of the will inoperative; for as a gift of *personalty* to arise on a general failure of issue is void for remoteness (*q*), it follows that the construing of the words under consideration in their unrestricted sense is fatal to the bequest over depending on them; whereas in their application to *real* estate, they have, when so construed, the effect of creating in the prior devisee an estate tail, and the limitation, which it is their office to introduce, is then a remainder expectant on that estate.

Difference where applied to real and personal estate.

When restricted

II. We now proceed to inquire into the grounds upon which

(*p*) Cont. Rem. 471.
(*q*) See rule against perpetuities discussed, Vol. I. p. 226.

words importing a failure of issue are restrained to such failure *at the death*, in regard to *real* estate.

in regard to *realty*.

1st. It is clear that they receive this construction where the event of dying is confined to *a definite age*.

Where the dying refers *to a given age*.

Thus a devise to a person and his heirs, with a limitation over if he shall die *under the age of twenty-one, and without issue*, is construed, not as creating an estate tail, with a contingent remainder dependent on the event of the first taker dying under the specified age, (as would be the effect, if the words were considered to import an indefinite failure of issue (*r*),) but as a devise *in fee-simple*, subject to an executory limitation over in the event of the prior devisee's death under the given age, and leaving no issue *surviving him* (*s*).

That the principle of the preceding cases applies wherever the dying without issue is restricted to (whether it be *above* or *under*) a particular age, may be inferred from the case of *Glover* v. *Monckton* (*t*), where real estate was devised to trustees, upon certain trusts, until the testator's son should attain twenty-one, and, when he should arrive at that age, in trust for him, his heirs, &c.; but in case his son should not live to attain such age of twenty-one years, and the testator's daughter should be living at the time of the decease of his son, *or in case his son should live to attain such age, but should afterwards die without lawful issue*, then in trust for the daughter for life, with remainders over. The son attained twenty-one; and the Court of Common Pleas, on a case from Chancery, certified that he took an estate in fee, *with an executory devise over* in the event of his dying without having issue *living at his death*.

Suggested extent of the principle.

The same principle seems to extend to every case in which a dying without issue is combined with *an event personal to the individual*, as the event of his dying without issue, and unmarried, or without leaving a husband or wife (which is the meaning of "unmarried" in this situation).

[Thus, in *Doe* d. *Johnson* v. *Johnson* (*u*), the testator devised

(*r*) Such was the doctrine of the early authorities; and it seems to be more consistent with principle than that which subsequently obtained. See *Soulle* v. *Gerrard*, Cro. El. 525. [Such also would still be the construction if the prior limitation were expressly to A. and the heirs of his body, *Grey* v. *Pearson*, 6 H. of L. Ca. 61. And see *Marshall* v. *Grime*, 29 L. J. Ch. 592, post, 484, n.]

(*s*) *Hinde* v. *Lyon*, 3 Leon. 64; *Price* v. *Hunt*, Pollex. 645; *Eastman* v. *Baker*, 1 Taunt. 174; [*Hanbury* v. *Cockerill*, 8 Vin. Ab. Dev. n. (*a*), pl. 4; *Anon.*, Dyer, 124 a, 354 a; and see 17 Beav. 201.] And in *Hall* v. *Deering*, Hardr. 148, the point was much discussed, but no opinion was given by the Court.

(*t*) 3 Bing. 15.

[(*u*) 8 Exch. 81; but see *O'Donohoe* v. *King*, 8 Ir. Eq. Rep. 185.

[lands to his wife for life, with remainder to his nephew Samuel and his heirs, but in case his nephew should die before he attained the age of twenty-one, or after he should have attained such age of twenty-one, should die unmarried, or having been married, should die without lawful issue, then over. It was held, that the nephew took an estate in fee, with an executory devise over, on the happening of any of the three specified events, and that the last event was his death without leaving issue surviving him. *Martin*, B., who delivered the judgment of the Court, said "The first two events directly point to the period of his (Samuel's) death; and it would be a very forced construction of the devise to hold that the third event pointed, not to his death without leaving issue then living, but to the failure of issue of his body at any period however remote. The same words 'shall die' are in the devise directed to both events, viz. 'being unmarried,' and 'without lawful issue,' and we think that it was the state of things existing at Samuel's death, which was to determine whether the future estate was to come into enjoyment or not" (*x*).]

Devise over, on issue dying under age, not restrictive.

But it seems that the words referring to a failure of issue are not restricted to such failure at the death by the mere insertion of the contingency of the issue dying under age. Thus, if real estate be devised to A. and his heirs, with a devise over, in case A. should die without issue, or such issue should die under the age of twenty-one years, A. would be tenant in tail; for it is said, that does not necessarily shew that the testator is speaking of a failure of issue at the death of A. He is speaking of a general failure of issue, and then he alludes to the case of there being issue, and their dying under the age of twenty-one, *which is a limited portion of the contingency which is expressed by the preceding words* (*y*). But it is not by any means necessary that, because he has used words which have very little meaning, therefore the words "dying without leaving lawful issue," which signify a general failure of issue, must signify a leaving of lawful issue living at his death (*z*).

What is the construction of the words, where the dying

[(*x*) See also *Mahaffey* v. *Rooney*, 5 Ir. Jur. 245; *Greated* v. *Greated*, 26 Beav. 621. And compare *Feakes* v. *Standley*, 24 Beav. 485, observing that the event was there not "personal to the individual."]

(*y*) *i.e.* It is a contingency compounded of two events, one of such events being comprised in the other, and therefore superfluous.

(*z*) Per Sir *L. Shadwell*, in *Grimshawe* v. *Pickup*, 9, Sim. 596.

Effect of a collateral event being associated.

without issue is restricted *to some definite period collateral to the devisee* (as in the case of a devise to A. and his heirs, with a devise over in case he should die without issue *in the lifetime of B.*), is a point which is involved in uncertainty. Three constructions present themselves:—1st, To read the words as applying to the contingency of A. dying in the lifetime of B. without leaving issue living at his (A.'s) death; 2ndly, To construe them as pointing to the event of A. dying in the lifetime of B., and of there being a failure of issue at *any* time, i. e. during the life of B., or afterwards; 3rdly, To read the phrase as denoting the event of A. dying, and of there being an extinction of his issue, but both events happening in the lifetime of B. The second construction would seem to be the most consistent with the general rule, which reads these words as importing a general failure of issue where the context does not demand a different construction; for the fact, that the words are associated with a collateral event, seems not to afford a valid ground for departing from the ordinary construction; and if so, the devisee would be tenant in tail, with a contingent remainder to take effect in the event of his dying in the lifetime of B. In the well-known case of *Pells* v. *Brown* (*a*), however, the Court seemed to incline to the first construction, [and decidedly negatived the second construction, which would give A. an estate tail; and *Parke*, B., in the case of *Doe* d. *Knight* v. *Chaffey* (*b*), seems to have assumed this to be the right view of the question. Neither of these cases, however, raised the question between the first and third constructions, as in both cases A. died within the period without ever having had issue. According to the argument of *Martin*, B., in *Doe* v. *Johnson* (*c*), the first and second constructions would be both excluded; the inference being that as the period of A.'s death is referable to B.'s lifetime, so also is the failure of issue of A.; that is, that

(*a*) Cro. Jac. 590. The devise was to the testator's son Thomas and his heirs for ever, and if he died without issue living William, his brother, then William to have those lands to him and his heirs and assigns for ever: Thomas suffered a recovery and died without issue leaving William: and it was held that this was not an estate tail in Thomas, but an estate in fee, subject to an executory devise; for it was said the clause, *if he died without issue*, was not absolute and indefinite, whensoever he died without issue, but it was with a contingency, if he died without issue *living William*, for he might survive William, *or have issue alive at the time of his death*, living William, in which case William should never have it.

Remark on *Pells* v. *Brown*.

As Thomas seems not to have left issue surviving him, it was not necessary to determine whether, if he had left issue, and such issue had afterwards died in the lifetime of William, the executory devise would have taken effect.

[(*b*) 16 M. & Wels. 664.

(*c*) 8 Exch. 95, where he says "The same words," &c., quoted ante, p. 482.]

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[A. must die without leaving issue living at the death of B.] A solitary example of the third construction applied to a bequest of personalty occurs in the case of *Crowder* v. *Stone* (*d*), where a testator bequeathed stock to his executors, in trust for A. for life, and, after her decease, to B. for life; and, after the decease of the survivor, the stock was to be sold, and the produce divided between the testator's nephew and four nieces, and, in case of the decease of any of them *without lawful issue before their respective shares should become due and payable*, then the part or share of him, her or them so dying without issue as aforesaid, to go to the survivor: Lord *Lyndhurst* held, that the share of a niece, who died before the period of distribution leaving a son, who afterwards also died before that period, passed under the executory gift to the survivor. [The opinion of Sir *W. P. Wood*, V. C., seems also to be in favour of this construction (*e*).]

The reports do not present many instances of devises to take effect on the death of a preceding devisee without issue within a definite period. Among the few cases of this nature is *Bennett* v. *Lowe* (*f*), where the devise over was to take effect on the decease and failure of issue of the prior devisees *before the death of the annuitants;* but this peculiarity in the case does not appear to have attracted much attention, and the construction adopted by the Court rendered it immaterial, so that the case really throws very little light on the point under consideration.

Effect of additional expressions.

2nd. The next species of case to be noticed is, where expressions are added to the words importing a failure of issue, shewing that the testator used those words in a restricted sense.

Express reference to the death of the prior devisee.

Where the testator expressly devises over the estate in the event of the preceding devisee dying without leaving issue *living at the time of his death*, the language of the will seems to exclude all controversy; and yet we have an instance of an adjudication on this simple point in the case of *Doe* d. *Barnfield* v. *Wetton* (*g*).

(*d*) 3 Russ. 217.

[(*e*) *Greenwood* v. *Verdon*, 1 Kay & J. 74, see p. 89.]

(*f*) 5 M. & Pay. 485, 7 Bing. 535.

(*g*) 2 B. & P. 324; [and see *Verulam* v. *Bathurst*, 13 Sim. 388. But if there is a previous express limitation in tail, although the restricted construction is of course inevitable, yet the nature of the previous devisee's estate is not altered: only the limitation over is contingent on the issue failing at the time specified. See *Marshall* v. *Grime*, 29 L. J. Ch. 592.]

The restricted construction, however, has been sometimes adopted, where the intention was much less unequivocally expressed.

Thus, in the case of *Porter* v. *Bradley* (*h*), where the testator devised certain lands to his son P., his heirs and assigns for ever; but his will was, that in case he (P.) should happen to die *leaving no issue* BEHIND HIM, then that his (testator's) wife should take the rents, and have his in-door goods, as long as she should continue his widow, and no longer; and after her decease or marriage, then the lands so devised to P. as aforesaid, the testator gave, *for want of issue by him as aforesaid,* unto his son J. and his heirs, chargeable with 50*l.* apiece to the testator's daughters and their issue within a twelvemonth after he (J.) should enjoy the same; but in case J. should die before P., and P. *should not leave any issue of his body begotten,* then the testator directed the lands to be sold, and the money paid to the daughters. The Court of King's Bench held, upon the authority of *Pells* v. *Brown,* that the words imported a dying without issue living at the death, considering the words "leaving no issue behind him" as equivalent in point of fact to the words "living William" in that case; and Lord *Kenyon* considered the subsequent parts of the will to convey the same idea; for the devisor had mentioned (*quære* treated?) this event as likely to happen in the lifetime of his widow, or of his younger son or daughters.

"Leaving no issue BEHIND HIM."

This case has been considered as standing upon the effect of the words "*behind him*" (*i*).

3rd. Another class of cases, in which the restricted construction of the words under consideration has been adopted, consists of those in which the arguments for that construction have been derived from the nature of the subject-matter and terms of the ulterior devise.

Implicatory grounds of restriction from nature of devise over.

Thus, in *Nichols* v. *Hooper* (*k*), which seems to be the first case of this kind, the circumstance of the lands being chargeable with monies to be paid within a definite period after the decease of the first taker, was held to cut down the words in question to

(*h*) 3 T. R. 143.

(*i*) Many cases regarding the restrictive operation of particular expressions will be found under the section applicable to bequests of personal estate. As to the phrase *on the decease,* in reference to realty, see *Doe* d. *King* v. *Frost,* 3 B. & Ald. 546, post, 491.

(*k*) 1 P. W. 198; 2 Vern. 686; [and see *Rye's Settlement,* 10 Hare, 106, ante, p. 479.]

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Legacy to be paid within a given period after the death.

a dying without issue *at the death.* The devise was to M. for life, remainder to her son T. and his heirs, provided that if T. should die *without issue of his body,* then the testator gave 100*l.* apiece to A. and B., *to be paid within six months after the decease of the survivor of the said mother and son, by the person who should inherit the premises;* and, in default of payment, the testator gave the land to the legatees for payment. It was held, that the words here referred to a dying without issue at the death, and that the issue having survived the son, though they failed within the six months, the legacies did not arise.

Remarks upon *Nichols* v. *Hooper.*

The Lord Keeper laid much stress upon the circumstance of the subject of the ulterior gift being *legacies,* which shews that he regarded it as a bequest of personalty; but the case clearly did not fall within the principle of cases of this description; for even if the words had been held to import a general failure of issue, inasmuch as T. would in that case have been tenant in tail, the legacies payable on the determination of T.'s estate (being barrable by a recovery) would have been good (*l*). The case, therefore, wanted the great influencing motive to the restricted construction in reference to bequests of personal estate, namely, that the contrary interpretation would have invalidated the bequest over.

It seems, however, to have been regarded in the profession as a case of this nature (*m*); to which probably may be ascribed the fact that, for nearly a century (*n*), no other instance occurred in which the restricted construction was attempted to be supported, *in regard to real estate,* on any such grounds: the general impression being, it should seem, that the words in question, applied to realty, were not susceptible of restriction from circumstances or expressions affording inference merely.

Same construction in *Blinston* v. *Warburton.*

[The question was again raised on nearly identical expressions in the late case of *Blinston* v. *Warburton* (*o*), where the devise was of a house to testator's daughter Sarah, in consideration of her paying 50*l.* to Anne C., and in case Sarah died without lawful issue, the said house to go to testator's son Thomas or his heirs in consideration that he should pay to testator's son Joseph, or his heirs, the sum of 250*l.* twelve months after Sarah's death. Sir *W. P. Wood,* V. C., held, that Sarah took an estate in fee

(*l*) *Goodwin* v. *Clark,* 1 Lev. 35. See ante, Vol. I. p. 230, n. (*h*).
(*m*) See Mr. *Fearne's* Treatise, 471.
(*n*) The next case was *Porter* v. *Bradley,* 3 T. R. 143.
[(*o*) 2 Kay & J. 400.

[with an executory devise over. He thought there could have been no doubt on the point if the limitation had been to Sarah expressly in fee, and he addressed himself chiefly to the question whether the result was the same where the fee was given only by implication from the imposition of the charge directed to be paid by Sarah.

Restriction by reason of nature of class to take under gift over.

An instance of the expressions now under consideration being restricted so as to mean failure of issue at a particular time, by the nature of the class to take under the gift over, is furnished by the case of *Ex parte Hooper* (*p*), in which Sir *R. Kindersley* seems to have considered that where the devise over on the death of A. without leaving issue, is to such of a class of persons as shall be living at the death of A., the gift over should be construed as a gift over on the death of A., without issue living at his death (*q*).

So, again, in the case of *Gee* v. *Corporation of Manchester* (*r*), Lord *Campbell*, C. J., considered, that under a devise to A. and his heirs, and if A. die without issue then to B. in fee, but if A. die leaving issue, then to the issue in fee, share and share alike; the words "if A. die without issue," meant die without issue living at the death of A.; for the latter part of the clause expressly provided that if there was issue, they (that is *all* the issue) should take their parent's share, share and share alike; whereas, if the former part of the clause were construed to give an estate tail, the eldest son *only* would take his parent's share, and the two parts would thus be inconsistent. The Court thought that in this view A. would take an estate for life, with alternative contingent *remainders* to B. or the issue of A., living at his (A.'s) death according to the event.

Gift on death without issue to persons then surviving.

And in the case of *Greenwood* v. *Verdon* (*s*), where the testator gave legacies to certain persons by name, and then devised all the residue of his personal property and all his real property to his wife and son for their lives, and after the decease of the wife, to the son his heirs and assigns for ever, and from and after the decease of the wife and of the son without issue, to be equally divided among the *three surviving legatees*, share and share alike; Sir *W. P. Wood*, V. C., held, that the failure of issue of the son was restricted by the gift over, and that the son took an estate in

[(*p*) 1 Drew. 264; and see *Carter* v. *Bentall*, 2 Beav. 551, 554.

(*q*) But there were words of limitation, as to which see *Massey* v. *Hudson*, post.

(*r*) 17 Q. B. 737.

(*s*) 1 Kay & J. 74.]

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[fee with an executory gift over, if he died without issue during the period of the lives of the legatees or any of them, to the surviving legatees.]

Ulterior gifts being *for life* only.

Another ground upon which the restricted construction has been adopted is, that the ulterior devises confer estates *for life* only.

Thus, in *Roe* d. *Sheers* v. *Jeffery* (*t*), where a testator devised to his daughter A. for life, and, after her death, to his grandson B. and to his heirs for ever; but in case B. should depart this life, *and leave no issue,* then his will was, that the said premises should be and return *unto E., M. and S. or the survivors or survivor of them, equally to be divided between them;* Lord *Kenyon,* after citing *Pells* v. *Brown* (*u*) as a leading authority, said,—"On looking through the whole of this will, we have no doubt that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, *and life estates are only given to them.*"

Lord *Hardwicke,* in *Trafford* v. *Boehm* (*v*), seems also to have entertained an opinion that words referring to a dying without issue, followed only by limitations for life, were "confined to a failure of issue during the lives in being;" but the case before his Lordship did not raise the question, as the devise (which was of money, to be laid out in land) operated as an immediate disposition of the reversion.

Observations on *Roe* v. *Jeffery.*

That the mere circumstance of the subsequent estates being for life only should be made a ground for varying the construction is extraordinary, since it is every day's practice to limit an estate for life in remainder after an estate tail, which involves precisely the absurdity which is here supposed to flow from holding the words to import an indefinite failure of issue. Indeed, this view of the case appears to have been a surprise to the parties; for, in the opinions of counsel taken on behalf of the ulterior devisee (with a perusal of which the writer has been favoured), the only ground upon which his claim was considered to be tenable (if at all) was, that the case of *Porter* v. *Bradley* (*x*) had decided, in opposition to former authorities, that the words *leaving* no issue, per se, and *without any aid from the context,* were to be construed *leaving no issue living at the death.* As

(*t*) 7 T. R. 589.
(*u*) Ante, 483, n.
(*v*) 3 Atk. 449.
(*x*) Ante, 485.

this hypothesis, however, is clearly overthrown by the long line of authorities before referred to (*y*), the cases of *Porter* v. *Bradley* and *Roe* v. *Jeffery* must rest on their peculiar circumstances, *i.e.* the former on the explanatory force of the superadded words "behind him," and the latter on the circumstance of the devises over being exclusively for life.

But *all* the estates must be for life.

At all events, it is clear that the doctrine of the case of *Roe* v. *Jeffery* applies only where *all* the ulterior estates are merely for life; for, in *Barlow* v. *Salter* (*z*), Sir *W. Grant* refused to extend it, even to a bequest of personal estate, where *one* of several ulterior legatees took a *life* interest, and the others *absolutely*. "It appears, in some of the early cases," said his Honor, "that the Judges inclined to hold these words to mean without issue at the death of the person named; but ever since the case of *Beauclerk* v. *Dormer* (*a*), I think a different rule has prevailed; and it is now settled, that, *unless there are expressions or circumstances from which it can be collected that these words are used in a more confined sense, they are to have their legal signification, viz. death without issue generally.* The Court ought not certainly to profess to adopt one of these rules, and yet to proceed as if the other was the right one, which however, is done when the meaning of the words is held to be narrowed by expressions or circumstances that do not raise any fair inference of a restricted intention. The single circumstance in this case relied upon in favour of the restricted construction is, that one of the four persons to whom the bequest over is made is to take only a life interest in his part, which is to be divided among the survivors. If there is any case which has ascribed to the circumstance of a devise over for life the effect here contended for, I beg leave to doubt the soundness of the decision. *The case of Roe* d. *Sheers* v. *Jeffery certainly gives no countenance to that doctrine,* as the devise over was *only* of life estates, and, on that ground, Lord *Kenyon* compared it to *Pells* v. *Brown* (*b*). So, in *Trafford* v. *Boehm,* the ground was, that *all* the estates were for lives, and for lives only."

Sir *W. Grant's* statement of the general rule.

Property devised over

In two more modern cases, the circumstance of the property being in the devise over charged with sums of money, to be

(*y*) Ante, 473.

(*z*) 17 Ves. 479. See also *Doe* d. *Jones* v. *Owens*, 1 B. & Ad. 318; [*Rye's Settlement*, 10 Hare, 111; *Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485.]

(*a*) 2 Atk. 308.

(*b*) Cro. Jac. 590.

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charged with legacies,

disposed of by the will of the first devisee, (though not made payable within a definite period after his death, as in *Nichols* v. *Hooper* (*c*),) seems to have formed the principal ground for holding the words under consideration to import a dying without issue at the death.

Thus, in *Doe* d. *Smith* v. *Webber* (*d*), a testator devised and bequeathed real and personal estate to his niece H., her heirs, executors, administrators and assigns for ever, and provided that in case she should happen to die and leave no child or children, then he devised unto his niece B. his freehold lands called W., to her and her heirs for ever, *paying* 1,000*l. unto the executor or executors of his said niece H., or to such person as she by her last will and testament should direct.* It was held, that H. took an estate in fee, subject to an executory devise on her leaving no issue *at her death.* Lord *Ellenborough* disclaimed any stress on the word "children" as distinguished from *issue*, as, where the intent required it, it had been held to include all descendants, mediate and immediate (*e*); and the present case, he observed, called for such a construction; otherwise, in the event of H. dying without leaving any child surviving her, but leaving grandchildren, B., the devisee over, would take, in exclusion of such grandchildren (*f*), which would be contrary to the manifest intention of the testatrix. But the circumstance upon which his Lordship mainly relied was, that of the 1,000*l.* being payable to the executors or nominee of H. in the event of her leaving no issue, which he said was equally strong with the circumstance in *Roe* v. *Jeffery* of the devises over being for life only, it being a personal provision, and to be made to a person or persons to be appointed by H. in her will. The event contemplated by the testatrix seemed to have been a proximate, and not a remote event, namely, a failure of issue at H.'s death, and not an indefinite failure of issue which might happen at any remote period. Lord *Ellenborough* also observed, that as two tenements *only* were given over on that event, that was an additional reason to shew that the devise over could not be considered as converting the prior devise into an estate tail; as

—to be paid to the executors, &c., of the prior devisee.

(*c*) Ante, 485.
(*d*) 1 B. & Ald. 713.
(*e*) See ante, 93, 382.
(*f*) As "grandchildren" they took nothing. His Lordship must here be understood as referring to the possible benefit they might take by gift or descent from their ancestor, and which is considered to be in the testator's contemplation in making the devisee's estate indefeasible on his leaving such objects.

that would make the same words of devise operate to give two different estates, an estate tail in part, and an estate in fee in the residue (*g*).

So, in *Doe* d. *King* v. *Frost* (*h*), where a testator devised to his son W. and his heirs certain real estate, and after giving to his wife an annuity thereout, to be paid by W., provided that, if W. should have no children, child, or issue, the estate was *on the decease of W.*, to become the property of the heir-at-law, *subject to such legacies as he* (*W.*) *might leave by will to any of the younger branches of the family;* it was held, that W. took an estate in fee, with an executory devise over, in the event of his dying leaving no issue at his death, to such person as should be then and in that event heir-at-law; Lord C. J. *Abbott* observing, that it was the plain intention of the testator that, at the period of the decease of his son W., it should be ascertained whether the estates devised to him by the will should then vest in him in fee absolutely, or pass over to some other person, subject to any such legacies as the son might by his will devise to any of the younger branches of the family.

Words "on the decease of A."

Effect of charge of legacies to be bequeathed by prior devisee.

In this case Mr. J. *Holroyd* adverted to the words "*on* the decease of the said W.;" but in the earlier case of *Walter* v. *Drew* (*i*), where the devise was that if W. (the testator's eldest son) should happen to die, and leave no issue of his body lawfully begotten, that then in that case, and not otherwise, *after the death* (*k*) of W., the testator gave and bequeathed all his lands of inheritance to R., to have and to hold the same after the death of W. to him and his heirs; *Comyn*, C. B., held it to be an estate tail in W. (*l*).

Words *on* or *after* the decease.

So again, in *Doe* d. *Cock* v. *Cooper* (*m*), no notice was taken of a similar expression, notwithstanding the stress laid on the words introducing the devise over as conferring an estate tail.

(*g*) An observation somewhat similar was made in *Goodright* v. *Dunham*, Doug. 251; but the obvious answer to such reasoning is, that the construction turned not on the first words limiting the property to the devisee and his heirs (which were common to *both* devises), but on the subsequent qualifying words, which applied to the two tenements *exclusively*. This remark (it will be perceived) does not affect the general grounds of the decision.

(*h*) 3 B. & Ald. 546. [And see *Stratford* v. *Powell*, 1 Ba. & Be. 1, noticed post.]

(*i*) Com. Rep. 373.

(*k*) See this expression in regard to personalty, *Pinbury* v. *Elkin*, 1 P. W. 563, post, 497, and other cases.

(*l*) As to estates tail by implication, see ante, Vol. I. Chap. XVII. sect. 6; Vol. II. p. 444.

(*m*) 1 East, 229, ante, 404. Where, as in this case, the prior devise confers an estate tail, it could hardly be contended that such words rendered the remainder over contingent on his leaving no issue at his death; as to which, see some observations ante, 423, and see post, 492, 493.

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Words "*after* his death" held not restrictive.

[And in *Jones* v. *Ryan* (*n*), where the devise was to A. and his heirs for ever, and, in case A. should die without lawful issue, the testator desired that *after* his (A.'s) death the property should go to B. and her heirs, and, in case A. and B. should both die without lawful issue, then to C. and his heirs, and *after* his (C.'s) death without issue, to D. and his heirs; Sir *E. Sugden* held, that A. took an estate tail. The learned Judge laid some stress on the fact, that B. undoubtedly took an estate tail, and that it was not likely, from the frame of the will, that A. and B. were intended to have different estates: but it is evident that independently of this fact, he would have held that A. was tenant in tail; observing that though the gift over was "after the death of A., yet it was after his death without issue."

Words "*at* his death" restrictive.

On the other hand, in the recent case of *Ex parte Davies* (*o*), lands were devised to M. in fee, and, in case M. should die without leaving any lawful issue of his body, the lands were *at his death* devised to C. and F. in fee, in equal shares. Sir *R. Kindersley*, V. C., considering that no distinction could be raised between the words "at" and "on," decided on the authority of *Doe* v. *Frost*, that M. took an estate in fee, with an executory devise over, in case he left no issue living at his death. There were some other expressions in the will which the V. C. considered favourable to his view of the case, but he said he was prepared to have given the same decision if those expressions had not occurred.

Words "*on* his decease" held restrictive.

Again, in the case of *Parker* v. *Birks* (*p*), where a testator devised lands to his nephew A., his heirs and assigns for ever; but in case A. should die without child or children of his body lawfully begotten, he devised the same lands to the children of his niece B., their heirs and assigns for ever, *on the decease* of the said A.; it was held by Sir *W. P. Wood*, V. C., that A. took an estate in fee-simple subject to an executory devise over, in case he died without issue (*q*) living at his death.

Result of the cases as to words "on," "at" and "after."

Thus far, therefore, the cases seem to make a distinction between the words "at" and "on" and the word "after," the two former words pointing to the moment of death, the latter taking in any period subsequent to death, and therefore having no restrictive effect (*r*). But in the two last cases was cited

[(*n*) 9 Ir. Eq. Rep. 249.
(*o*) 2 Sim. N. S. 114.
(*p*) 1 Kay & J. 156.
(*q*) *Doe* v. *Webber*, 1 B. & Ald. 713.
(*r*) And see accordingly, per Sir *W. Grant*, M. R., 1 Mer. 22.

[the earlier authority of *Broadhurst* v. *Morris* (*s*), where the devise was to A. "and his children lawfully begotten for ever, but in default of such issue *at his decease*, to B. his heirs and assigns for ever;" and the decision was that A. took an estate tail. No opinion was given on the effect of the devise over. But the former point "being clear, the rule," said Sir *W. P. Wood*, "applied with great force, that the limitation 'on' should not be construed to be an executory devise, when it might be a contingent remainder after an express estate tail." And again, "In no case in which a clear estate in fee simple has been limited by the first words has that estate been reduced to an estate tail, in order to construe the words of the gift over on the death of the devisee without issue to be a remainder. It is begging the question to say that the gift over is to be taken to be a remainder; because it is necessary first to make out that the gift in fee is cut down to an estate tail (*t*)."

Supposing, however, the distinction between the words "on" and "at" and the word "after" to be substantial; and admitting the remarks of the V. C. to be well founded: yet neither are the words "on" or "at" so inflexible, nor is the existence of a previous devise in fee simple so conclusive, as not to yield where an intention is shewn by the context to use the words denoting a failure of issue in their largest sense. Thus, in the case of *Peyton* v. *Lambert* (*u*), where a testator devised lands to his sisters B. and M., as tenants in common in fee; and in case B. should die without issue, her share to go to her husband for life, and to descend immediately on his death to her sister M. and her issue: "and in case M. should happen to die without issue, *then* her half to descend *upon her death* to B. and her issue," and if she leave no issue, to her husband for life, and in case both the testator's sisters should die without issue, he devised the land to H. C. in fee. B.'s moiety alone was in question; but the limitation of M.'s moiety, "that in case M. should die without issue, *then* her half was to descend *upon her death* to B. and her issue," was referred to as giving the restricted construction to the words, "die without issue," in that part of the will, and as affording an explanation of their

"Upon her death" held not restrictive.

[(*s*) *Broadhurst* v. *Morris*, 2 B. & Ad. 1.

(*t*) See 1 Kay & J. 166, 167. But see *Jones* v. *Ryan*, sup.

(*u*) 8 Ir. Com. Law. Rep. 485.]

[import in the previous part relating to B.'s moiety. But the Court of Q. B. (Ir.) considering that there was a clear cross limitation of an estate tail to each sister of the moiety originally devised to the other sister, followed by a devise over of the entire estate to H. C. in fee in the event of both sisters "dying without issue;" and that if the original limitations to the sisters were read as conferring on them estates in fee simple, with executory devises over in the event of their dying without issue living at their respective deaths, the different moieties of the estate would (in the event of either cross limitation taking effect) be held by the same person for different estates, with power as to one moiety to bar the subsequent estates, and no such power as to the other moiety; and that other results might follow equally at variance with the testator's apparent intention;—held that the sisters took estates tail in their respective moieties; and that although the expressions relied on had in some cases had the effect contended for, yet in the present case it was more likely the expressions were used to denote that the cross limitation to B. was to take effect immediately upon the failure of the estate which M. took under the preceding limitation, and not as intended to fix the death of M. as the period for ascertaining whether her estate should determine or become absolute.]

Distinction suggested, where prior devise is for life only.

It will be observed [as stated by Sir *W. P. Wood*], that, in all the preceding cases, [in which the restrictive construction was adopted], the prior limitation on which the words under consideration were engrafted would, standing alone, have given the fee to the devisee. It is proper to notice this fact, as between such cases and those in which the preceding devise would confer a *life estate* only, some distinction, it is conceived, will be found to exist. Undoubtedly, the two cases are parallel in regard to the effect of words importing an indefinite failure of issue of the first taker, which, in both instances, create in him an estate tail; yet it is by no means clear that they concur as to the force of expressions or circumstances requisite to confine those words to a dying without issue at the death; since that construction is attended with very different degrees of convenience in the respective cases. Where the preceding devisee would take the fee, the convenience is all on the side of the restricted construction, which renders such fee defeasible on his not leaving issue at his death, and places the estate out

of the power of the first taker, who might, if he were tenant in tail (as he would be if the words were construed to mean an indefinite failure of issue), defeat the ulterior estate by means of an inrolled conveyance, now substituted for a common recovery. To prevent this consequence, the Courts have generally, in such cases, lent a willing ear to the arguments in favour of the restricted (and which we have seen to be the popular) interpretation of these words.

On the other hand, where the first devise would confer an estate for life only, the restricted construction imputes a very improbable intention to the testator; for, as it raises no estate tail in the first devisee, nor (it should seem) an implied estate by purchase in the issue, the land goes absolutely from the devisee at his death, whether he leave issue or not; and that event is material only as bearing on the right of the ulterior devisee; for, although the property ceases to belong to the prior devisee, whether he leave issue surviving him or not, yet it is to pass over to the remainder-man only in case the prior devisee do *not* leave issue, which it is hard to suppose could have been really meant. And, if the distinction suggested by these observations has not been a recognized principle of construction in any one of the cases, yet its influence may be traced in some of them.

Estate tail created, notwithstanding restrictive expressions.

Thus, in *Wyld* v. *Lewis* (*x*), where a testator devised to his wife E. without any words of limitation, and then proceeded to declare, that "if it shall happen that my said wife E. *shall have no son or daughter* (*y*) by me begotten on the body of the said E. *and for want of such issue,* then the said premises to return to my brother J., *if he shall be then living,* and his heirs for ever, only paying to his two brothers (A. and B.) the sum of 150*l. within one year after the decease of the said E.*; Lord *Hardwicke* held, that E. took an estate tail; observing that the objection, that by the opposite construction the grandchildren would be excluded, was a strong argument for this.

But his Lordship might have included in this observation the *children* of E., none of whom could have taken unless she had an estate tail.

This case had two circumstances, either of which, according

(*x*) 1 Atk. 432, West's Cas. t. Hardw. 311.

(*y*) "Son" and "daughter" seem to have been here used as words of limitation, as to which, see ante, 377.

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Observations upon *Wyld* v. *Lewis*.

to the doctrine of the preceding cases, would have restrained the words to issue living at the death: 1st, That of the ulterior devisee being to take only if he should be then living, which would seem to bring it within the principle of *Roe* v. *Jeffery* (*z*) (assuming that case to be rightly decided), to say nothing of the argument which might be founded on the reasoning of the Court in *Pells* v. *Brown* (*a*); 2ndly, The charge imposed on the devisee over, which, it will be remembered, was the ground of the restricted construction in *Nichols* v. *Hooper* (*b*), *Doe* v. *Webber* (*c*), and *Doe* v. *Frost* (*d*); and has greater force in *Wyld* v. *Lewis* than in the two latter cases, on account of the direction to pay within a definite period after the death. Lord *Hardwicke*, indeed, admitted that in general this was a very proper circumstance to induce that construction.

It is evident, therefore, that the case of *Wyld* v. *Lewis* can only be reconciled with the line of decisions just referred to on the hypothesis before suggested; and hence we are conducted to the conclusion, that the cases in which a limitation over in default of issue, succeeding a gift to a person *and his heirs*, has been confined to a failure of issue at the death, do not necessarily apply to cases in which they are preceded by a gift expressly or constructively for life only (*e*).

What will restrict in regard to *personal* estate.

III. Our next inquiry is, what expressions or circumstances in the context will cut down the words under consideration to issue *living at the death*, in regard to *personal* estate.

Expressions held to be restrictive.

1st. As to the *expressions* which have been held to have this effect.

Death without issue coupled with another contingency.

[As in the case of real estate so with respect to personalty, a gift over on death under the age of twenty-one, and without issue, is held to refer to death without leaving issue before the age specified (*f*).

We will now proceed to consider the construction put upon the words "at," "on" and "after" death, when applied to gifts over of personal estate.]

(*z*) Ante, 488.
(*a*) See ante, 483.
(*b*) Ante, 485.
(*c*) Ante, 490.
(*d*) Ante, 491.
[(*e*) See also *Simmons* v. *Simmons*, 8 Sim. 22; *Butt* v. *Thomas*, 11 Exch. 235, 1 H. & N. 109.

(*f*) *Martin* v. *Long*, 2 Vern. 151; *Pawlett* v. *Doggett*, ib. 86; *Bradshaw* v. *Skilbeck*, 2 Bing. N. S. 182, the words in this case were ambiguous, but held equivalent to the expression in the text; and see *Balguy* v. *Hamilton*, Mose. 186.]

In *Pinbury* v. *Elkin* (*g*), a testator having made his wife executrix, and given her all his goods and chattels, provided that if she should die without issue by him (*h*), then *after her decease* (*i*), 80*l.* should remain to his brother J. Lord *Parker*, C., held, that the words imported a dying without issue at the death, for that a contrary construction would be repugnant to the words "after (*i. e. immediately* after) her decease," which would be carrying the payment beyond the day, and would, his Lordship said, be as absurd as to appoint the day of payment to be to-morrow, if it shall rain this day twelvemonth.

"After his decease" held restrictive.

Sir *W. Grant* has (*k*) intimated a doubt whether the word "after" was properly construed *immediately after* in the last case. But, of course, there can be no difficulty (as this *dictum* impliedly admits) where such is the *expression*. Accordingly, in *Stratton* v. *Payne* (*l*), [it seems to have been thought] that in case of a bequest to A. and the heirs of her body, and for want of such issue to the children of B., *immediately after the decease of A.*, the latter gift was good by reason of the words in italics; [but as it turned out that the words "after the decease of A." were not properly part of the will, the point was not decided.]

"Immediately after the decease of A."

The case of *Pinbury* v. *Elkin* seems to have been followed in several subsequent instances. Thus, in *Wilkinson* v. *South* (*m*), where a term of years was bequeathed to A., and to the heirs of his body, and to their heirs and assigns for ever (*n*), and, in default of such issue, then *after his decease* to B. and his heirs; this was held to be an executory bequest to B., in case of A. dying without having issue *at his death*.

"After his decease" held restrictive.

So, in *Trotter* v. *Oswald* (*o*), where a testator gave the residue of his real and personal property to the use of B. during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body, *after his decease* he gave all such residue to O.; the question was, whether the bequest over of the personalty was good. Sir *Lloyd Kenyon*, M. R., said, that, if the will had stopped at the bequest to B.

"After his decease" held restrictive.

(*g*) 1 P. W. 563, 2 Vern. 758, 766, Pre. Ch. 483.

(*h*) See ante, 354.

(*i*) As to this expression applied to *devises*, see ante, 491.

(*k*) See *Donn* v. *Penny*, 19 Ves. 548, 1 Mer. 22.

(*l*) 3 B. P. C. Toml. 99, cit. in *Read* v. *Snell*, 2 Atk. 647.

(*m*) 7 T. R. 555.

(*n*) The circumstance of the limitation being in these special terms is not material. They amount simply to an absolute gift; see post.

(*o*) 1 Cox, 317.

and the lawful heirs of his body, it would clearly have given him the absolute property [in the personal estate], and so if it had rested at the words "if he die without issue;" but the important words follow, "after his decease I give," &c. These, he said, made it a contingency with a double aspect; if he had had a child at his death, then the limitation over would have been at an end; but, if not, it was within legal limits.

"After him" held not to be restrictive.

But, in the case of *Donn* v. *Penny* (*p*), the words "after *him*" were held not to vary the construction. The devise was in the following words: "I give my dearly beloved wife all the real and personal estates for her life, and after her, I give the same to my cousin R., all my real and personal estates to him and his male issue; for want of issue male *after him*, I give the same to W. and his male issue; for want of issue male, I give the same to W. and S., taking the name of D., and their male issue." R. having died without leaving issue, the personal estate was claimed by W., the next legatee; and it was contended for him, that the words "after her" following the gift to the widow meant, immediately after her decease, and that the words "after him" in the gift in question might receive the same construction. But Sir *W. Grant* held, that the expression was too ambiguous to divert the words of the devise from their legal construction. He considered the testator could not have had a different intention with respect to this legatee, and the several legatees whose bequests were in the same words, without this expression, and who were postponed to him; and his Honor, as already noticed, questioned the soundness of *Pinbury* v. *Elkin* (*q*).

Remarks upon the preceding cases.

The observations just quoted, and those which occur in *Barlow* v. *Salter* (*r*), evince the extreme reluctance of this distinguished Judge to permit words importing a failure of issue to be cut down by an equivocal context. That no Judge of later times would have departed from the legal sense of the words upon such an expression as that in *Pinbury* v. *Elkin*, admits of little doubt; but with great deference it is submitted that, followed as that case has since been, and particularly in *Trotter* v. *Oswald*, and *Wilkinson* v. *South* (neither of which was cited in *Donn* v. *Penny*), it is too late to question its authority. We are

(*p*) 19 Ves. 545, 1 Mer. 20, with which compare *Porter* v. *Bradley*, 3 T. R. 143, ante, 485.

(*q*) Ante, 497.

(*r*) 17 Ves. 483; ante, 489.

taught, however, by Sir *W. Grant's* decision in *Donn* v. *Penny*, that the doctrine of the case of *Pinbury* v. *Elkin* will not be applied to any case in which the variation of phrase is such as fairly to take it out of the reach of its authority.

Words "at his decease" restrictive.

[Where the words are, "at the decease" of the first taker, the applicability of the doctrine of *Pinbury* v. *Elkin* cannot now, it is conceived, be denied, since such words have been held restrictive even where the subject of gift was realty (*s*). We have an instance of these words applied to personalty in the case of *Stratford* v. *Powell* (*t*), where personalty was bequeathed to the testator's wife absolutely, "and after failure of issue *at and on* the decease of my wife," then over. Lord *Manners* held, that the gift over was good as referring to failure of issue at death.]

"At their death" held restrictive.

Again, in the case of *Rackstraw* v. *Vile* (*u*), where a testator having by his will given his son one-fourth share in his personal estate, by a codicil declared that his son's share should be only for the natural life of himself and his wife, *provided they had no issue, and at their death* should become a part of the residue. Sir *J. Leach*, V. C., held that the failure of issue was plainly confined to the death of the survivor, by the direction that the share was to become part of the residue at their death.

Word "then" as interposed between two limitations.

Of course the word "then," as commonly interposed between two limitations, has no effect in restricting words importing a failure of issue to issue living at the death. Used in this way, "then" is a particle of inference, connecting the consequence with the premises, and meaning "in that event," or "if that happens." It is, therefore, a word of reasoning rather than of time (*x*).

Bequest over involving a personal trust.

2ndly. Another ground upon which the words in question have received a restricted construction is, that the bequest over involves a *personal* trust and confidence. To this principle Mr. *Fearne* (*y*) refers the case of *Keily* v. *Fowler* (*z*), where a testator bequeathed his worldly substance unto his daughter, in case she married with consent; in case she married without consent, she was to have only twenty cows and a horse; and,

[(*s*) Ante, 491, 492.
(*t*) 1 Ba. & Be. 1.]
(*u*) 1 S. & St. 604.
(*x*) Per Lord *Brougham*, in *Campbell* v. *Harding*, 2 R. & My. 411. See also *Stanley* v. *Lennard*, 1 Ed. 87, ante; *Beauclerk* v. *Dormer*, 2 Atk. 308. The above-quoted passage in Lord *Brougham's* judgment was cited with commendation by Sir *Knight Bruce*, in the case of *Pye* v. *Linwood*, 6 Jur. 619, where an attempt was again made, and with no better success, to found an argument for the restrictive construction on the word "then."
(*y*) Fea. 482.
(*z*) 3 B. P. C. Toml. 299, Wilm. 298.

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after appointing executors, he provided that in case his daughter should die without issue, his substance should return back to his executor, to be distributed as he should therefore direct; and, lastly, *in case his said daughter should* marry without consent, or *die without issue, his substance should return back to his executors, to be by them distributed in manner following*, viz. to J. D. 100*l.* and several other pecuniary legacies, and to his daughter twenty cows and a horse. It was held, that the bequest over was to take effect on the death of the daughter without issue living at the death.

Observations upon *Keily* v. *Fowler.*

This case, and the ground for it above suggested, were disapproved of by Lord *Thurlow* in *Bigge* v. *Bensley* (*a*), who observed, "that it would be better to say that in *Keily* v. *Fowler* there was no rule of construction than Mr. *Fearne's.*" The fact probably was, that this very learned writer, finding the case so decided, put it upon the best ground he could discover. The ground, however, to which he has referred it does not exist; for the trust was not necessarily personal to the executors named, but might have been executed by the representatives of the survivor: and as it is clear that a transmissible *trust* raises no stronger argument against the ordinary construction than a transmissible *interest;* è consequentiâ, a personal trust (*i. e.* exclusively personal) *does* raise as strong an argument as a personal interest (*b*). The argument founded on the nature of the property given over to the daughter, namely, cows and horses, to which Mr. *Fearne* also alludes, appears to be not more conclusive.

Where the gift over is to *survivors.*

A limitation to the *survivor* of several persons in default of issue of either [forms] another exception to the rule which construes these words to import an indefinite failure of issue; ["for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession (*c*)."

Presumption from the word that the restricted construction was intended.

Thus, in the case of *Hughes* v. *Sayer* (*d*), where a testator gave a share of his residuary personal estate to A. and B., "and upon either of their dying without children, then to the

(*a*) 1 B. C. C. 187. [The citation in the text is from Fea. C. R. 484, n. by Butler. Brown's report is different, and not very intelligible.]

(*b*) As to which, see ante, 488, 489.

[(*c*) Per Sir *W. Grant*, M. R., *Massey* v. *Hudson*, 2 Mer. 133.

(*d*) 1 P. W. 534.]

[survivor," it was held that he words "dying without children" (which were understood to oe equivalent in that case to "dying without issue") must be taken to be children living at the death of the party, because if either of the legatees died leaving issue, it was not probable that the survivor would live to see a failure of issue, in the general sense.]

With this agrees the case of *Ranelagh* v. *Ranelagh* (*e*), where one of several grounds upon which words referring to the failure of the issue of certain pecuniary legatees were held not to import an indefinite failure of issue (so as to turn express life interests previously given to the legatees into absolute interests), was, that the ulterior gift which the word in question served to introduce was in favour of the "survivors" of the legatees. [And a similar decision was made in the recent case of *Westwood* v. *Southey* (*f*).

The case of *Turner* v. *Frampton* (*g*) was a yet stronger case, the words there being "if either of them shall happen to die before me *or at any time after* without issue, then I give the share of him or her so dying and without issue to the survivor of them." Sir *J. K. Bruce*, V. C., held, that a failure of issue at death was referred to (*h*).

Presumption repelled where the gift to "survivor" contains words of limitation.

But the presumption in favour of a limited construction of the words "in default of issue" arising from the use of the word "survivor" is repelled where words of limitation are superadded to that word. The addition excludes the presumption that it was a mere personal benefit that was intended for the survivor: for, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim in his right whensoever the failure of issue should happen. Sir *W. Grant*, M. R., who thus stated the rule in *Massey* v. *Hudson* (*i*), acted upon it in

(*e*) 2 My. & K. 441.

[(*f*) 2 Sim. N. S. 192. See also per Lord *Brougham*, 2 R. & My. 405; *Fisher* v. *Barry*, 2 Hog. 153; but *Chadock* v. *Cowley*, Cro. Jac. 695, seems contrà.

(*g*) 2 Coll. 331.

(*h*) The word "survivors" is, as is well known, sometimes held to mean others, post, Chap. XLVII.; but the question agitated in the cases, which have been noticed in the text, cannot arise where such a construction is adopted, since the gift over would then clearly be on an indefinite failure of issue, and void; and it was remarked by the learned Judges who decided the cases of *Westwood* v. *Southey* and *Turner* v. *Frampton*, that where there was a doubt what construction should be put upon the word the law leaned in favour of adopting that interpretation which would support the bequest over, which supplied in the cases before them a sufficient reason for not departing from the strict and natural sense of the word "survivors."

"Survivor" not held to mean "other" where the gift over would be void.

(*i*) 2 Mer. 134; see also *O'Donohoe* v. *King*, 8 Ir. Eq. Rep. 185.

[that case: and on the same occasion discovered that the case of *Nicholls* v. *Skinner* (*k*), with which, as reported, his decision appeared to clash, was in fact, an additional authority in favour of it.

It is to be observed that the reasons given by the M. R. for the distinction allowed in cases where the representatives of the "survivor" are expressly mentioned seem to apply with equal force to every case where the survivor takes more than a life interest under the will, whether the representatives are mentioned or not. The cases, however, shew that it is the fact that they are mentioned, rather than the effect produced, which creates the distinction (*l*); since a limited meaning of words importing a failure of issue has prevailed in consequence of the use of the word "survivor," in many cases where such survivor has taken a transmissible interest (*m*).]

So, if the ulterior bequest, which is to take effect on the failure of issue, be to persons who shall be living *at the time*, the same reasoning seems to apply; but, in order to let in the force of this argument, the ulterior bequest must be so framed as to be confined to persons living at the death of the testator, and must not embrace an indefinite range of unborn persons (*n*); [but it seems sufficient that one of the ulterior legatees is a person named, though the other legatees are an indefinite class (*o*).]

Distinction where ulterior gift is to a person living at death of person whose issue is referred to.

And, of course, if the event which is made the condition precedent of the ulterior gift is not the fact of the legatee surviving the extinction of issue, but merely that of his surviving the person whose failure of issue is referred to, no ground is thereby laid for the restricted construction, as the ulterior gift

[(*k*) Pr. Ch. 528.

(*l*) See accordingly *Lonsdale* v. *Berchtoldt*, Kay, 646.

(*m*) *Hughes* v. *Sayer*, *Turner* v. *Frampton*, *Westwood* v. *Southey*, *Greenwood* v. *Verdon*, all stated ante, 501, 487.]

(*n*) See *Campbell* v. *Harding*, 2 R. & My. 390; *Webster* v. *Parr*, 26 Beav. 236; [see also Prior on Issue, p. 85. In *Greenwood* v. *Verdon*, 1 Kay & J. 74, the terms used were "then *surviving*," which seem of themselves to confine the class to which the selected objects belong to persons born at the testator's death, *Davidson* v. *Dallas*, 14 Ves. 576; *Mann* v. *Thompson*, Kay, 644. In *Destouches* v. *Walker*, 2 Ed. 261, a bequest, in case the prior legatee should die without issue, to such of the testatrix's "nearest relations as should at that time be living," was held to be void, though the word "relations" meant such as should answer the description at the testatrix's death; see ante, p. 114.]

[(*o*) *Jones* v. *Cullimore*, 3 Jur. N. S. 404, in which case, however, the conclusion might have been further supported by the preceding alternative limitation on failure of issue "to such of my children as may be then living," to which was added the limitation in question "if none of them should happen to be then alive."]

might be intended to confer a *vested interest* on the death of such person, to take effect *in possession* in favour of the representatives of the legatee on the failure of issue at any remote period.

Thus, in the case of *Garratt* v. *Cockerell* (*p*), where a testator, after bequeathing his personal estate to his children, added, "should all my children die without *heirs*, my property in that case to be divided equally between the children of my brothers and sisters *alive at the death of my last child.*" The question was, whether the word "heirs" (which, it was admitted, was synonymous with *issue*) imported an indefinite failure of issue, in which case the gift over was void for remoteness. Lord *Langdale*, M. R., and Sir *Knight Bruce*, V. C., successively decided in the affirmative, being of opinion, that the terms of the gift over did not (as contended) restrict the contingency as to the failure of issue at the decease of the last child. "Can the words 'at the death of my last child,'" said his Honor, "be applicable to the actual division of the property as well as to the period at which the collateral relatives intended to be benefited were to be ascertained? Are they sufficient, in a case of this kind, to shew that he meant the selected collateral relatives to become entitled in possession 'at the death of his last child,' if at all? Do they, in short, furnish grounds solid enough to support the restrictive construction of the phrase 'die without heirs?' Here, as it seems to me, lies the difficulty of the case. It is true, as Sir *W. Grant* said, in *Massey* v. *Hudson* (*q*), 'a bequest to A. after the death of B. does not import that A. must himself live to receive the legacy. The interest vests at the death of the testator, and is transmissible to representatives, who will take whenever the event of B.'s death may happen. So, if the bequest be to A., in case B. shall die without issue. If that were allowed to be a good bequest, A.'s representatives would be entitled to take at whatever time the issue might fail. It is for that reason that it is held too remote.'"

Prior (implied) gift to issue at the death.

3rdly. Another class of cases remaining to be noticed is, where the words importing a failure of issue are preceded by a power implying, in default of appointment, a gift to the issue of the donee living at his decease. In this situation the words in question are evidently referential, and, as such, may seem to

(*p*) 1 Y. & C. C. C. 494. (*q*) 2 Mer. 130.

belong to the preceding chapter, where indeed the cases have been briefly noticed; but they suggest a few observations which will more properly find a place here.

The authorities for this exception to the indefinite construction are *Target* v. *Gaunt* (*r*) and *Hockley* v. *Mawbey* (*s*). In *Target* v. *Gaunt*, a term of years was bequeathed to H. for life, and no longer; and, after his decease, *to such of the issue of H. as he should by will appoint, and in case H. should die without issue*, then over. The question was, whether the bequest over was good; and *Parker*, L. C., decided in the affirmative, observing that it must be intended such issue as H. should, or at least might, appoint the term to, which must be intended *issue then living;* and that this construction should be the more favoured, in regard it supported the will, whereas the other (*i. e.* that the testator meant whenever there was a failure of issue) destroyed it.

To such of the issue of H. as he should by will appoint.

In *Hockley* v. *Mawbey*, a testator devised freehold and leasehold estates to A. for life, and, after her decease, to his son *R.*, *and his issue lawfully begotten or to be begotten, to be divided among them, as he* (*R.*) *should think fit, and, in case he should die without issue*, over. One question was, whether R. took an estate tail in the realty, and an absolute interest in the personalty, or a life interest only in both. Lord *Thurlow* was of opinion that he had only an estate *for life*. It was evident, he said, that the testator did not intend the property to go to the issue as heirs in tail; for he meant that they should take distributively (*t*), and according to the proportions to be fixed by the son, and that it had often been decided, that where the gift was in that way, the parties must take as purchasers. After some further remarks, his Lordship intimated an opinion that the children took an interest independently of the power, which only authorized the son to fix the proportions, and not to choose whether they were to take at all: and that the objects, whosoever they were, *must be in existence during the life of the son.*

To R. and his issue to be divided as he should think fit.

It will be observed, that, in the preceding cases, there was no express gift to the issue, except as objects of the power. It

(*r*) 1 P. W. 432, 10 Mod. 402, Gilb. Eq. Ca. 149.

(*s*) 1 Ves. jun. 143, 3 B. C. C. 82; [see also *Keating* v. *Keating*, Ll. & G. t. Plunk. 291.] But see *Simmons* v. *Simmons*, 8 Sim. 22, post; and see *Martin* v. *Swannell*, 2 Beav. 249; *Crozier* v. *Crozier*, 2 Con. & L. 294, 3 D. & War. 373.

(*t*) As to this, see ante, 406.

is now clear, however (though doubted in *Target* v. *Gaunt*), that an implied gift would be raised in them in default of the exercise of the power (*u*); and, if the power extended only to issue living at the death, the trust was likewise so confined, as were, pari ratione, the words referring to the failure of issue.

Observations upon *Hockley* v. *Mawbey*.

But the case of *Hockley* v. *Mawbey* has sometimes been cited (*x*) as if the power had embraced issue generally, subject only to the restriction on its exercise, imposed by the rule against perpetuities; but this supposition not only imputes to Lord *Thurlow* an inaccuracy of statement in regard to the limits of the rule, (which allows a term of twenty-one years, in addition to a life (*y*),) but is entirely inconsistent with his Lordship's restriction of the implied gift, and the words introducing the limitation over, to issue living at the death, for which there was no pretext, unless the power was confined to such issue: and the effect of the words in question, if not restricted, must inevitably have been to make the devisee tenant in tail, which is the conclusion against which all his Lordship's reasoning is directed.

Without entering into a discussion of the doctrine, which restricts the word "issue," in such cases, to objects living at the death, on the reasoning derived from the power, it is sufficient, for the present purpose, to shew, that, where the term is so restricted, the words under consideration (*i. e.* the words introducing the devise over on failure of issue) receive the same construction (*z*).

It may be remarked, however, that if, in *Target* v. *Gaunt* and *Hockley* v. *Mawbey*, there had been an *express* limitation to the issue in default of appointment, it seems that such *limitation* could not, by implication, have been confined to issue living at the death, because the power embraced such objects only (*a*).

Principle of the early cases noticed.

The reader will have perceived, in this view of the cases regarding personal estate, how readily the courts from an early period laid hold of expressions of an ambiguous character in order to confine words denoting a failure of issue to a dying

(*u*) See *Brown* v. *Higgs*, 4 Ves. 708, 5 ib. 495, 8 ib. 561; and other cases cited ante, Vol. I. p. 515.

(*x*) See 1 Sug. Pow. 7th Ed. 475.

(*y*) See ante, Vol. I. p. 228.

[(*z*) And compare the case *Gee* v. *Corporation of Manchester*, stated ante, 487.]

(*a*) See *Smith* v. *Death*, 5 Mad. 371, ante, Vol. I. p. 515; [*Seale* v. *Barter*, 2 B. & P. 285; and per *Wigram*, V.C., *Davidson* v. *Procter*, 19 L. J. Ch. 396, 14 Jur. 32; *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 823.] See also *Jesson* v. *Wright*, 2 Bli. 1, ante, 341.

without issue at the death, and thereby avoid the giving to the first taker the absolute interest, to the exclusion of the legatee over. It is clear, that, in some of these cases, such an effect has been attributed to expressions which would not, at this day, if the question were res integra, be held to warrant a departure from the ordinary legal signification; and they were decided, too, at a time when it was not so well settled as it now is, that the restricted construction did involve a departure from that signification, as to personal estate (*b*).

It is not surprising, therefore, that some cases should have occurred in which the limited construction has prevailed, even where such slight grounds as these have been wanting (*c*); but, as to which, it scarcely need be observed, that they possess no authority whatever.

And even where the restricted construction is apparently well sustained by the early authorities, the practitioner should act upon the doctrine with caution, seeing that, in some recent cases, the Courts have evinced a disposition not to pay very strict regard to the distinctions (unsubstantial as they certainly are) presented by those authorities. This remark is forcibly suggested by the case of *Simmons* v. *Simmons* (*d*), where the testator gave all his real and personal estate to a trustee, in trust for his daughter for her life for her separate use, adding, "*at her decease she shall be at liberty to will the same to her issue* as she may think fit; but in case of her *dying without issue*," the testator gave the property to his brother and sister, for their lives, and, in the event of his brother's death prior to the death of his daughter, then to the children of his brother. It was contended, on the authority of the cases of *Roe* v. *Jeffery* and *Target* v. *Gaunt*, that the gift over was to take effect in the event of the daughter dying without leaving issue living at her death. *i. e.* issue to whom she might "will" the property; but Sir *L. Shadwell*, V. C., held, that the daughter took an estate tail in the lands of inheritance, and the absolute interest in the personalty.

It does not appear whether his Honor, by this decision,

(*b*) The contrary was maintained in most of the cases on the subject in *Peere Williams*, and the circumstance upon which reliance is now placed, as taking the case out of the rule, was merely thrown in as an auxiliary argument in favour of the limited construction.

(*c*) *Chamberlain* v. *Jacob*, Amb. 72. See also *Donne* v. *Merrefield*, cit. Cas. t. Talb. 56. In *Atkinson* v. *Hutchinson*, 3 P. W. 258, cited in the same place, the material word *leaving* is omitted.

(*d*) 8 Sim. 22.

meant to deny the authority or the applicability of the cited cases.

1 Vict. c. 26, s. 29. Words importing a failure of issue, refer to failure at death;

IV. The rule of construction, which has been the subject of discussion in the present chapter, is abrogated in regard to wills made or republished since the year 1837 by the recent act; the 29th section of which, we have seen (*e*), provides that words which may import a want or failure of issue of a person in his lifetime or at his death, or an indefinite failure of issue, shall be construed to import a want or failure of issue in the lifetime or at the death (*f*); but on this enactment are engrafted an exception and proviso, which exclude the operation of the statute, in cases where the words in question are simply referential to the objects of a subsisting estate tail (*g*), or a prior gift. The result, then, of the new doctrine, appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established. First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i. e.* where the words *may* import *either* a failure of issue at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A., or to A. and his heirs, and if A. shall die and his issue shall fail *at any time*, then to B., A. will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine.

——except in two cases.

[It seems also that the act does not deal with such an expression as "dying without an *heir*," or "without *heirs of the body*," the popular notion of the words "heir" and "heirs of the body" not differing from the legal sense in the same way as with respect to the word "issue." Such at least appears to be the result of the case of *Harris* v. *Davis* (*h*), where freeholds and leaseholds were given to be divided between several

Act does not apply to "dying without heirs of body."

(*e*) Ante, 469.

[(*f*) See *Re O'Bierne*, 1 Jo. & Lat. 352, in which an attempt seems to have been made to argue that the very words "should he die without issue" indicated "the contrary intention."

(*g*) See *Green* v. *Green*, 3 De G. & S. 480; *Greenway* v. *Greenway*, 29 L. J. Ch. 601.

(*h*) 1 Coll. 416.

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[persons or (read "and") their lawful heirs, and in case of there being no heir, then the share or shares to be divided in equal parts among the *surviving* (read "other" (*i*)) legatees. The legatees being related, "heir" was held to mean "heir of the body" (*k*), and the words "there being no heir" to point to an indefinite failure of issue, so that the share in the leaseholds of one legatee who died in the testator's lifetime lapsed. No reasons are given for this decision. It is clear, however, that but for the gift over by which the word "heir" was explained to mean "heir of the body," no estate tail would have been created; and as a devise "to A. and his heirs," and "to A." simply, create under the late statute precisely the same interest, and an inference could therefore scarcely be drawn from the existence or absence of the word "heirs," it would seem to follow that if in *Harris* v. *Davis* words of limitation had been omitted,—that is, if the devise had been "to A. and if he die without heirs," then over to a relation, the decision ought to have been the same; and if so, the case would go to establish the distinction above mentioned.

Remark on *Harris* v. *Davis*.

Act does not apply where "die without issue" would not previously have been taken indefinitely.

Neither does the act apply where the words importing a failure of issue would, under the old law, have been construed not to refer to an indefinite failure of issue. Thus, in the case of *Morris* v. *Morris* (*l*), where, in a will made in 1839, the devise was to A., and if he should die without issue or before he should attain the age of twenty-one years, then over, it was contended that "or" was not to be read "and," and that consequently, though A. had attained twenty-one, yet the gift over would take effect if he died without leaving issue at his death; but Sir *J. Romilly*, M. R., held, that "or" must still be read "and," and that A. having attained twenty-one, took an indefeasible estate in fee. He said, the 29th section had no application to cases where the words "die without issue" were coupled with other words which had been the subject of authority and decision, such as "dying under twenty-one," nor did it in such cases alter such a gift, so as to make it determinable upon a dying without issue living at death or under twenty-one (*m*).]

Cases in which ground is afforded by the context for excluding

[(*i*) But see ante, 501, note (*h*).
(*k*) Ante, 303.
(*l*) 17 Beav. 198.
(*m*) See cases on this subject, ante, Vol. I. p. 471.]

[the operation of the statute] will, probably, be of rare occurrence; for, as the legal and the popular signification will now coincide, it cannot be supposed that the context of the will will often furnish grounds for negativing the restrictive interpretation; and, for the same reason, there will be less anxiety on the part of the judicial expounders of wills than formerly to discover grounds for departing from the general rule—an anxiety which contributed not a little to incumber that rule with its numerous distinctions and exceptions. Where, however, the context does require that the words should be read as importing a general failure of issue, this construction must be attended with the same consequence as under wills not within the statute, whether that consequence be the raising of an estate tail by implication in the person whose issue is referred to, as in the case already suggested, or the invalidating of the gift over, which is dependent on the failure of issue. Hence, it is not strictly true (as some have supposed) that the recent act absolutely excludes the implication of an estate tail from words denoting a failure of issue; it merely requires that the construction on which such implication is grounded be sustained by *other* expressions found in the will; and, as we may confidently assume, for the reason already suggested, that such cases will be very infrequent, the act will eventually (though it may be not very speedily) reduce to insignificance the doctrine respecting the implication of estates tail from the words in question, as well as the numerous points of construction incidentally treated of in the present chapter.

# CHAPTER XLII.

## WHAT WORDS RAISE CROSS-REMAINDERS BY IMPLICATION AMONG DEVISEES IN TAIL.

*Words "in default of such Issue," &c., raise Cross-Remainders, when.—Alleged Exceptions;—where the Devise is to more than two;—where there is an* express *Cross-Limitation;—where the Devise in Tail is limited to the Devisees* respectively. — *Words "Remainder," "Reversion," raise Cross-Remainders, when.*
*As to Executory Trusts.—General Conclusions.*

Introductory remarks.

WHERE lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, inter se, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds (*a*), they need not be limited expressly (though in correctly drawn wills they are never omitted), but may be implied from the context. To shew what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.

General principle of the cases.

The principle has been long admitted that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders in tail among themselves.

What expressions raise cross-remainders.

The great struggle has been to determine when the word *in default of such issue*, or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject

(*a*) *Edwards* v. *Alliston*, 4 Russ. 78. [*Doe* v. *Birkhead*, 4 Exch. 110. The latter case, though not impugning the principle stated in the text, overrules the former on another ground. And see *Doe* v. *Wainwright*, 5 T. R. 427; *Doe* v. *Dowell*, ib. 518.]

fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant.

Devise over, if *all the devisees died without issue;*

One of the earliest leading authorities is an anonymous case in *Dyer* (*b*), (sometimes erroneously referred to as *Clache's case* (*c*),) where a man, having five sons, and his wife enceinte, devised two-thirds of his lands to his four younger sons and the child en ventre sa mère, if it was a son, and to the heirs male of their bodies begotten, *and if they all five should happen to die without issue male of their bodies, or any of their bodies, lawfully begotten,* then the testator willed that the said two parts should revert to his right heirs. It was held, that four of the devisees having died without issue male, the survivor was entitled *to the whole;* it being evidently the true intent of the devisor, that, *so long as there was any issue male of his body* [qu. of the bodies of any of the five devisees?], no part should revert to the heirs.

——in case the devisees died without issue.

So, in *Holmes* v. *Meynell* (*d*), where a testator devised certain lands to his *two* daughters and their heirs, equally to be divided between them; *and in case they happen to die without issue,* then over; the daughters were held to be tenants in tail in common, *with cross-remainders in tail.*

These early cases accurately represent the state of the law at this day; but it should be observed that at one period a notion appears to have obtained that cross-remainders could not be implied between more than two persons.

House to each, with devise if they all die, &c.

Thus, in *Gilbert* v. *Witty* (*e*), a testator having three sons, and being seised of three houses, devised one of the houses to each son and his heirs, providing that *if all his said children should depart this life without issue of their bodies lawfully begotten,* then all his said messuages should remain and be to his wife and her heirs for ever: it was held by *Doddridge, Houghton* and *Chamberlain,* Justices (*Lea,* C. J., doubting), that these words did *not* create cross-remainders between the sons, but that, on the death of any one of them without issue, his house should go over to his mother. *Doddridge* said that cross-remainders might be implied between two, but not in a devise *of several houses* to *three or more* persons, on account of the uncertainty and inconvenience.

(*b*) 303 b, 13 Eliz.
(*c*) Dy. 330 b, post, 513.
(*d*) Raym. 452, 2 Show. 136.
(*e*) Cro. Jac. 655.

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Distinction between two and a larger number of devisees.

Here the objects were not devisees in common of undivided shares in the same land, but were respectively devisees of separate tenements; and it is also observable, that Lord *Hale*, in *Cole* v. *Levingston* (*f*), in stating the inadmissibility of the implication among more than two devisees, illustrated it by a similar species of case.

The alleged ground for the distinction between the favoured number of two and a larger body of devisees seems to be altogether futile (*g*), for it is obvious that the uncertainty and confusion would not be greater in the case of implied than in that of express remainders; and its origin can hardly be otherwise accounted for than by attributing it to the general indisposition of our courts in early times to adopt modes of construction which were considered (though, in this instance, erroneously) to have a tendency to create questions of a complex or subtle character. The doctrine, indeed, which rejected the implication between more than two devisees did not long (if *in effect* it ever did) exist, but, for a considerable period after it was virtually exploded, it was permitted to preserve a *semblance* of authority; for the Judges, not venturing altogether to discard the distinction in regard to the number of devisees, said, that the presumption was in favour of cross-remainders between two, but between more than two they were rather to be presumed against, though such presumption against them might be repelled by a plain indication of intention (*h*).

Such has been the language held upon this subject down to nearly the present time; but an attentive consideration of the cases will shew, that at this day at least there is no real difference with respect to the number of persons between whom cross-remainders can be implied. They will *not* be raised between two unless an intention to this effect can be collected; and, if such intention appear, they *will* be raised among a larger number.

Not the least of the absurdities flowing from the distinction

(*f*) 1 Vent. 224.

(*g*) Indeed, the implication of cross-remainders is *convenient*, as preventing the subdivision of shares. In one case, the rejection of the implication doctrine would have entitled the lessor of the plaintiff to recover twenty-five undivided three-hundred-and-sixtieth parts! *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234.

(*h*) See Lord *Hardwicke's* judgment in *Marryat* v. *Townly*, 1 Ves. 104. Lord *Mansfield's* judgments in *Doe* d. *Burden* v. *Burville*, 2 East, 48, n.; *Pery* v. *White*, Cowp. 780; and *Phipard* v. *Mansfield*, ib. 800; and Sir *L. Kenyon's*, in *Staunton* v. *Peck*, 2 Cox, 8; *Atherton* v. *Pye*, 4 T. R. 713; *Doe* v. *Cooper*, 1 East, 236; and *Watson* v. *Foxon*, 2 East, 40.

in question was the impossibility of applying it to a devise *to a class* of unascertained objects, who might consist of any number of persons in esse at the testator's death, or at some subsequent period; a difficulty which was noticed by Lord *Eldon* in the case of *Green* v. *Stephens* (*i*).

Whether *express* cross limitation excludes implication.

It was held in *Clache's case* (*k*), that cross-remainders could not be *implied* where there were *express* cross-limitations among the devisees in tail in certain events. [In that case] a testator devised a messuage to his daughter A. and her heirs for ever, and his principal messuage he gave to T. his youngest daughter and her heirs, *and if she died before the age of sixteen, A. then living,* he willed that A. should enjoy the principal messuage to her and her heirs for ever; *and, if A. should die having no issue, T. living,* then he willed that T. should enjoy the share of A. to her and her heirs for ever; *and if both his daughters should die having no issue,* then the testator devised *all* his said messuages over. T. died *having attained sixteen,* without issue, which raised the question whether cross-remainders could be implied between the daughters; and the Court held that they could not; for the testator never intended that the principal house should go to A., unless T. had died within the age of sixteen years; and *no implication of cross-remainders could arise when an express and special gift and limitation was made by the devisor himself. Dyer* thought there was no entail, but a fee-simple conditional: but the other three Judges were of a contrary opinion.

The doctrine of *Clache's case* was much canvassed in the case of *Vanderplank* v. *King* (*l*), in which Sir *J. Wigram*, V. C., decided, after much consideration, that the introduction of an express limitation of cross-remainders among *another* class of devisees in the same will did not repel the implication; his Honor observing, that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders by implication in another, where either case was clearly within the scope of all the reasoning upon which courts have proceeded in implying cross-remainders. [It is clearly distinguishable from *Clache's case,* which has been recently followed by Sir *J. Romilly*, M. R., and by Lord *Chelmsford,* C., in *Rabbeth* v. *Squire* (*m*).]

(*i*) 17 Ves. 74.
(*k*) Dy. 330 b.
(*l*) 3 Hare, 1.
[(*m*) 19 Beav. 77, 4 De G. & J. 406.]

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In the case of executory trusts, express limitation not exclusive of implication.

It has been long settled, that, in regard to *executory trusts* (*n*), an express direction to insert cross-remainders among another class of objects, or even an express cross-limitation among the *same* objects, does not exclude the implication.

Thus, in *Burnaby* v. *Griffin* (*o*), where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and, after her decease, the testatrix directed the trustees to *convey* and *settle* the said moiety unto and upon the daughters of E. as tenants in common in tail general, *with cross-remainders* for the benefit of such daughters, remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general; and, as to the other moiety, upon trust for the testatrix's niece C. for life, with the same limitations to her daughters and sons as to the children of E.; and, if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that *her sister E. should receive all the rents for life; and in case E. and C. should die without issue of their respective bodies, or all such issue should die without issue*, she then gave her real estate to four cousins. Lord *Hardwicke* decreed, that, in the settlement to be executed under this trust, cross-remainders were to be inserted not only between the children of E. and C. inter se, *but between the two families.*

Word "*respective*" held, at one period, to negative the implication.

Another ground upon which, at one period, it was held that the words "in default of such issue," following a devise to several persons in tail, did *not* create cross-remainders, was, that such devise was limited to the objects "*repectively;*" and it was even so determined where the devisees consisted of the favoured number of two.

To R. and A. and the heirs of their *respective* bodies, and for default, &c.;

Thus, in *Comber* v. *Hill* (*p*), where the devise was to the testator's grandson and granddaughter, R. and A., equally to be divided, and the heirs of their *respective* bodies, *and for default of such issue*, then over; it was held that there were no cross-remainders by implication; for it was said the mere words, "and for default of such issue," being relative to what went before, only meant "and for default of heirs of their *respective* bodies;" and then it was no more than if it had been a devise of one moiety to R. and the heirs of his body, and of the other moiety to A. and the heirs of her body, and for default of heirs

(*n*) As to such trusts, see ante, 318.
(*o*) 3 Ves. 266.
(*p*) 2 Stra. 969, Lee's Cas. t. Hardw. 22.

of their respective bodies, then over: in which case there could be no doubt.

In the case of *Williams* v. *Brown* (*q*), the devise was in nearly similar words, and received the same construction.

—— and the *several* and *respective* issues of their bodies, and for want, &c.

Again, in *Davenport* v. *Oldis* (*r*), where a testator devised to his son and daughter, to be equally divided between them, and the *several and respective* issues of their bodies, *and for want of such issue*, to his wife in fee; Lord *Hardwicke* held that there were not cross-remainders, which, not being favoured by the law, could only be raised by an implication absolutely necessary; and that was not the case here, for the words, "*several and respective*," effectually disjoined the title.

Lord *Mansfield*, too, on several occasions (though Lord *Kenyon*, in *Watson* v. *Foxon* (*s*), treated his opinion as being the other way), recognized the distinction founded on the word "respective," particularly in the opinion certified by the Court in *Wright* v. *Holford* (*t*), and in its determination in *Pery* v. *White* (*u*).

Doctrine in regard to the word *respective* overruled.

But the stress laid upon expressions of this nature has been disapproved of by the most distinguished modern Judges, and the cases which were founded on the doctrine are now clearly overruled (*x*).

It is observable, indeed, that both in *Comber* v. *Hill* and *Davenport* v. *Oldis*, the word "respective" was wholly inoperative upon the construction, since not only were there other expressions sufficient to create a tenancy in common, but the limitations in tail being to persons who could have no common heirs of their bodies, they of necessity took several, and not joint, estates of inheritance, without any words of severance (*y*).

Before we proceed to consider the cases by which the distinction in question has been overruled, it will be proper to state two or three anterior leading authorities for the general position, that the words *in default of issue*, or *in default of such issue*, following a devise to several persons in tail, raise cross-remainders between them.

To daughters

Thus, in *Wright* v. *Holford* (*z*), where the testatrix devised to

(*q*) 2 Stra. 996.
(*r*) 1 Atk. 579.
(*s*) 2 East, 42, post, 517.
(*t*) Cowp. 34, post. See also *Doe* d. *Burden* v. *Burville*, 2 East, 48, n., post; *Phipard* v. *Mansfield*, Cowp. 797, post.
(*u*) Cowp. 777, post.
(*x*) *Atherton* v. *Pye*, 4 T. R. 710, post; *Watson* v. *Foxon*, 2 East, 36; *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 238, post; *Green* v. *Stephens*, 17 Ves. 64, post. See also *Staunton* v. *Peck*, 2 Cox, 8.
(*y*) See ante, 232.
(*z*) Cowp. 31; *S. C.* in equity, nom. *Wright* v. *Lord Cadogan*, 2 Ed. 239; *S. C.* nom. *Wright* v. *Englefield*, Amb. 468.

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in tail, *and for default of such issue.*

her sons, and in default of such issue to all and every the daughter and daughters of herself and P., and to the heirs of their body and bodies, such daughters, if more than one, to take as tenants in common, and not as joint tenants; *and for default of such issue,* to the use of her (testatrix's) right heir; Lord *Mansfield,* and the other Judges of B. R., on a case from Chancery, certified, that as there were no words intimating any intention to limit over the *respectixe* shares of the two daughters dying without issue (*a*), and as nothing was given to the heir-at-law whilst any of the daughters or their issue continued, they must among themselves take cross-remainders.

As to devises to *classes;*

Here the devise was to daughters as a class, a species of case of which Lord *Eldon* has observed (*b*), that as, if there are no objects at the death of the testator (and, if the devise be future, whether there are or not (*c*) ), the shares of subsequently existing objects are liable to be diminished by the birth of additional children, the consequence of not implying cross-remainders would be, that the shares of such after-born children, which had been so taken from the existing children, would, upon their death without issue (perhaps the day after birth), go *instanter* to the remainder-man, which could never be the intention (*d*).

——to three in tail, and "*in default of such issue;*"

In the next case, of *Phipard* v. *Mansfield* (*e*), we find the implication of cross-remainders applied in the case of a devise to *three* persons nominatim. The testator devised to his brothers W. and J. and his sister E. and the heirs of their bodies lawfully begotten and to be begotten, as tenants in common, and not as joint tenants; *and for want of such issue,* to his own right heirs for ever. On a question whether there were cross-remainders, Lord *Mansfield,* after stating the rule of presumption to be in favour of cross-remainders between two, and against them between more than two (*f*), and reasoning at length upon the cases, and the terms of the will, decided in the affirmative. Want of issue (he said) meant issue of *all* of them. The rest of the Court concurred.

(*a*) See ante, 514.

(*b*) See judgment in *Green* v. *Stephens,* 17 Ves. 75.

(*c*) See ante, 143.

(*d*) This is the substance, though not the precise terms, of his Lordship's observations.

(*e*) Cowp. 797.

(*f*) It is certainly very extraordinary that his Lordship should have continued to propound this doctrine, when in *Comber* v. *Hill* (ante, 514), and *Davenport* v. *Oldis* (ante, 515), the implication had been rejected between *two* devisees, on the mere force of the word "respective;" and when, with those cases before him, his Lordship was himself in this very case determining that [nearly] the same words *did* raise cross-remainders among three devisees.

In *Atherton* v. *Pye* (*g*), a testator devised (in remainder) to all and every the daughter and daughters of his daughter, and the heirs male of the body of such daughter or daughters, equally between them if more than one, as tenants in common, and not as joint tenants; *and for and in default of such issue*, the testator gave and devised *all* his said premises unto his own right heirs for ever. The daughter had four daughters. Lord *Kenyon*, though he adverted to the distinction between two and more, said, that there was no doubt, from the words of the limitation over, that the devisor intended to raise cross-remainders between the granddaughters. Mr. Justice *Buller* observed, that the devise over was of *all* the devisor's estates, and they could not all go together, but by making cross-remainders.

——to daughters in tail, and "*in default of such issue*;"

In the next case of *Watson* v. *Foxon* (*h*), the effect of the word "*respective*" came under consideration. The testator devised all that his farm, &c., situate at W. and H., to all and every the younger children of M. begotten or to be begotten, if more than one, equally to be divided between them, and to the heirs of their *respective* bodies, to hold as tenants in common; and if M. should have only one child, then to such only child and to the heirs of his or her body issuing; *and for default of such issue*, the testator gave *the said premises* to C. M. had four children. On the question whether cross-remainders could be implied, Lord *Kenyon* recurred to Lord *Mansfield's* statement of the rule of presumption, observing, however, that such presumption might be overruled by plain intention. His Lordship strongly disapproved of Lord *Hardwicke's* reasoning in *Davenport* v. *Oldis* (*i*) on the word "respective," which he characterised as unworthy of his great learning and ability. Lord *Kenyon* observed, that in *Atherton* v. *Pye* (*k*) the devise over, "in default of such issue," was of all the testator's said lands, and stress was laid by some of the Judges on the word *all* for raising cross-remainders, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word *all* was not decisive of that case, and in truth made no difference in the sense; for a devise over of "the said premises," or "the premises," or "*all* the said premises," meant exactly

——to children "and the heirs of their *respective* bodies;" and for default of such issue.

(*g*) 4 T. R. 710.

(*h*) 2 East, 36. See also *Staunton* v. *Peck*, 2 Cox, 8, where Lord *Kenyon*, then at the Rolls, had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(*i*) Ante, 515.

(*k*) Supra.

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the same thing. Admitting, therefore, the general rule, that the presumption was not in favour of cross-remainders by implication between more than two, still *that* was upon the supposition that nothing appeared to the contrary from the apparent intention of the testator. He had no doubt that the testator intended to give cross-remainders among the issue of M., and that all the estate should go over at the same time. His Lordship thought that Lord *Mansfield's* quarrel with *Davenport* v. *Oldis* (*l*) was well founded, and he agreed with *Wright* v. *Holford,* and *Phipard* v. *Mansfield* (*m*), from which he could not distinguish this case.

*Davenport* v. *Oldis,* &c., overruled.

With *Watson* v. *Foxon,* we take leave of all direct judicial recognition of the distinction as to implying cross-remainders between two and a larger number, which subsequent Judges, except in one remarkable instance presently commented on (*n*), have rejected in expression, as well as in fact.

In the next case (*Roe* d. *Wren* v. *Clayton* (*o*)) cross-remainders were implied among several *branches* of issue, by the force of expressions referring to a preceding devise to daughters in tail, among whom cross-remainders were held to be implied.

Cross-remainders implied among several stocks of issue.

The testator devised all his real estate to his niece F. for life, remainder to her first and other sons in tail successively, and in default of such issue, to all and every the daughters of his niece and the heirs of their bodies, to take as tenants in common; *and, for default of such issue,* then to the issue of his sisters S., J., W. and B., in tail, *in such manner as he had limited the same to his said niece F.'s issue, and, for default of such issue,* to testator's right heirs. One question was, whether, supposing the several stocks of issue of S., J., W. and B., to take the estate in equal fourths per stirpes (and not the whole per capita, as was also contended), there were cross-remainders between such stocks. This rendered it necessary to consider whether cross-remainders would have been created between the daughters of the niece; though it was contended, that even admitting the implication in regard to *them,* it did not follow that the words, "in like manner," &c., should be construed to do more than raise cross-remainders between the issue of each sister inter se. Lord *Ellenborough,* and the other Judges, thought the implica-

(*l*) But when did his Lordship quarrel with it? See ante, 515.
(*m*) Ante, 515, 516.
(*n*) Vide post.
(*o*) 6 East, 628.

tion of cross-remainders among the daughters of the niece was perfectly clear, inasmuch as it was the plain intent of the testator that no part of his estate should go over to the issue of his sisters till default of issue of his niece; and they were further of opinion, that cross-remainders were to be implied among the several *classes* of the issue of the sisters, the testator's devise being tantamount to his saying, "I mean that all my estate shall be enjoyed by the issue of my four sisters, so long as there are any such, and, in default of such issue, all to go together to my own right heirs." Lord *Ellenborough* laid some stress upon the word *all*, used in the devise.

Devise to three in tail *respectively, and in default*, &c.; cross remainders implied;

The next case, of *Doe* d. *Gorges* v. *Webb* (*p*), again elicited from the bar *both* the old arguments founded on the number of the devisees and the word "respective," and from the bench, a more distinct denial of their force and authority. A testatrix devised a moiety of certain lands to particular limitations, with remainder to her three daughters F., M. and A., and the heirs of their bodies *respectively*, as tenants in common; *and, in default of such issue*, she gave the same to her own right heirs; and it was held, that cross-remainders were raised between the daughters by implication. Sir *James Mansfield*, C. J., adverting to the distinction between two and more, observed, that it was wonderful how it ever became established; and, in regard to the word "respective," the learned Chief Justice remarked, that it could make no difference; a devise to two as tenants in common, and the heirs of their bodies, must necessarily mean to the heirs of their *respective* bodies (*q*). Mr. Justice *Lawrence* said, that the cases which *had founded themselves on the distinction of that expression must now be considered as overruled.*

——to B., C., and D., and their *several and respective* heirs for ever, and *in default of such issue.*

The implication-doctrine was again discussed in *Green* v. *Stephens* (*r*), where the testator (after certain limitations) devised to the use of all and every the daughter and daughters of his nephew A. lawfully to be begotten, and to her and their heirs for ever, as tenants in common; *and, for want of such issue*, to the use of his (the testator's) three nieces B., C. and D., and their *several and respective* (the exact words which occurred in *Davenport* v. *Oldis* (*s*)) heirs for ever, as tenants in common; *and for want of such issue*, to his own right heirs; and the

(*p*) 1 Taunt. 234.

(*q*) Assuming that they could not have common heirs of their bodies, as to which, vide ante, 232.

(*r*) 12 Ves. 419, 17 Ves. 64.

(*s*) Ante, 515.

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testator bequeathed his personal estate to be invested in the purchase of land which he directed to be *conveyed* and *settled* to the same uses. The question was, whether a sum of money, which had not been laid out belonged wholly to the heir in tail of the surviving niece (the other two nieces having died without issue), or one-third only to him, and the other two-thirds to the devisee of the remainder-man; and this depended upon the question, whether the Court, in executing the trust, would have inserted cross-remainders between the nieces. Lord *Eldon*, after referring to the authorities, and reprobating the distinctions which had been taken in some cases in regard to the expressions, "*all* the premises," "the same," &c., decided in the affirmative. He said, that, conceiving it to be the intention of the will before him to raise cross-remainders among the daughters of the nephew (respecting whom he made some observations, which have been before referred to (*t*)), he could not think that the testator had not the same intention in regard to his nieces; there was nothing to distinguish them except the word "respective," which, upon the authority of *Doe* d. *Gorges* v. *Webb* (*u*), did not make a distinction upon which judicial construction should turn.

Remarks upon *Green* v. *Stephens*.

As the implication of the cross-remainders in this case was so clear upon the direct devises, it was not necessary to found the decision on the circumstance of the trust being *executory*, though it is well known that the Courts, in executing such trusts, are in the habit of dealing with them for this and other purposes with a freedom peculiar to, and derived from, the nature of such trusts (*x*). Lord *Eldon*, however, chose to decide the case upon the construction of the anterior devises, in reference to which it seems to be open to some observation. Much of his Lordship's reasoning, it will be perceived, proceeds upon the assumption that cross-remainders would have arisen by implication between the *daughters* of the testator's nephew; but it is submitted, with deference to such authority, that if the devise be accurately stated in the report (of which there can be little doubt, as Lord *Eldon* twice refers to the devise in the very terms of it), *the daughters would have taken estates as tenants* IN FEE-SIMPLE, on which of course no remainders, either express or implied, could

(*t*) Ante, 516.
(*u*) Ante, 519.
(*x*) See *Marryatt* v. *Townly*, 1 Ves. 102, and other cases cit. 17 Ves. 67. As to the implication of cross-remainders in marriage articles, see *Duke of Richmond's case*, 2 Coll. Jur. 347.

have been engrafted. The limitation was to the daughters as a *class* and their *heirs*, and, in default of *such* issue, over to the nieces nominatim and their heirs, and, in default of such issue, over. Now, the authorities have clearly established, that the words "such issue," in the limitation over after the limitation to the *daughters*, are referable to the *daughters* (*y*), and not to their *heirs*, so as to give to the word "heirs" the sense of "heirs of the body;" but as to the *nieces*, who were to take as individuals named, *and who were not a class of "issue,"* the words "in default of such issue" necessarily referred to their *heirs*, and, consequently, reduced *their* estates to estates tail. The words "such issue" may be variously construed with reference to devises differently constituted. The case underwent considerable discussion, but the difficulty of raising estates *tail* in the daughters (which was a necessary preliminary to the admission of cross-remainders) does not appear to have attracted the attention of either the bar or the bench.

The point is principally important (since no daughter of A. appears ever to have come in esse) as it would have induced the necessity of construing the devise to the nieces, in regard to the implication of cross-remainders, per se, detached from the devise to the daughters; and, even in this point of view, it would not be material, if there was sufficient upon that devise alone (as it is conceived there was) to raise the implication; for the circumstance, that the words "in default of such issue" had already been operative to cut down the estate of the prior devisees to an estate tail, which is the only novel feature in the case, seems to form no valid reason for denying to them the additional effect of raising cross-remainders between those devisees. We now return to the general subject.

Cross-remainders implied from words "for want of issue males," &c.

The next case of this class is *Doe* d. *Southouse* v. *Jenkins* (*z*), where a testator, after the failure of some estates previously given, devised certain farms to his four grandsons (naming them), subject to certain annuities; adding, "they to have share and share all alike of all the aforesaid premises, and then I give to the heir male of all my said grandsons, and then to go to my grandsons' heirs male that part that belonged to their father, and then to them, and then to the last liver, to their heirs male of my said grandsons, *and, for want of issue males of*

(*y*) See *Hay* v. *Earl of Coventry*, 3 T. R., and other cases cited, ante, 431.
(*z*) 3 M. & Pay. 59, 5 Bing. 469.

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*my grandsons*, I give," &c. One question was, whether cross-remainders among the four grandsons could be implied. It was contended, that the implication was here controlled by the testator's declaration, that he gave to the heirs male "that part which belonged to their father," by which it must be inferred that he meant to exclude the part that belonged to an uncle. The Court, however, considered that the case fell within the general rule. Lord C. J. *Best* observed, that although the words "to them, and then to the last liver" were unintelligible, it was evident that the testator meant that the estate should not go over to the ulterior devisee until the failure of issue of all the grandchildren, and therefore cross-remainders were to be implied.

So, in the case of *Livesey* v. *Harding* (*a*), where a testator, upon the failure of issue of his eldest or only son, limited his estate in the words following:—"To the use of all and every the daughter and daughters of me the said Edmund Livesey, and the heirs of their bodies, to take as tenants in common, if more than one, equally; and if but one, to the use of such only daughter of me the said Edmund Livesey, and the heirs of her body, for ever; *and, for default of such issue*, to the use of my own right heirs for ever." One question was, whether the daughters took cross-remainders in tail? Sir *J. Leach*, M. R., decided in the affirmative, on the ground that no part of the estate was to go over, unless there were a failure of issue of all the testator's daughters. "Where," he said, "there is a gift to two persons only, and the heirs of their bodies, cross-remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively, and then the remainders over will be several and respective."

From words "and for default of such issue."

It could scarcely be meant that cross-remainders will arise between two devisees *without subsequent words* (*b*),—a proposition which would have the effect of reviving the exploded distinction in regard to the number of the objects, and to found on it a construction untenable, it is submitted, both on principle and authority; for the argument in favour of the implication of cross-remainders among *any* number of devisees, rests wholly

Remark upon *Livesey* v. *Harding*.

(*a*) 1 R. & My. 636.

[(*b*) See *Cooper* v. *Jones*, 3 B. & Ald. 425.

on the words introducing the devise over; and, if there is no such devise, the ground for the implication is wanting. No case can be adduced, in which the doctrine here propounded (and extra-judicially, for the case suggested by Sir *John Leach* was purely hypothetical) has been even contended for. Possibly the observations of the learned Judge were misunderstood.

Estates in fee cut down to estates tail with cross-remainders.

[In the recent case of *Forrest* v. *Whiteway* (*c*), the devise was to two sisters, and their heirs and assigns for ever; but, in case *both* should die without issue, then over. The Court of Exchequer held, that the sisters took joint estates for life, with several inheritances in tail, with cross-remainders between them in tail.]

General observations upon the cases.

Here closes the long line of cases establishing the operation of the words "in default of such issue," and other similar expressions, to raise cross-remainders among devisees in tail. It may seem to be extraordinary that so large an assemblage of decisions should have grown up in relation to a point which appeared to have been determined more than two centuries ago (*d*); but the reluctance evinced by some of the Judges of an early day to admit the implication between more devisees than *two*, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors until a much later period, and more particularly the exception to the implication-doctrine, founded on the words "several" and "respective," introduced by the cases of *Comber* v. *Hill*, *Williams* v. *Brown* and *Davenport* v. *Oldis* (which was too absurd to be submitted to even with such reiterated adjudication in its favour), are the sources from which the controversies have sprung that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

Lord *Kenyon's* attack upon *Comber* v. *Hill* and that line of cases in *Watson* v. *Foxon* was certainly bold, recognized as they had repeatedly been by his immediate predecessor (*e*); but as his Lordship's decision has been since, after much consideration, confirmed in the case of *Doe* v. *Webb* (*f*) and *Green* v. *Stephens* (*g*), we may confidently hope that the argument founded on the words "several" or "respective," or the exploded distinction

[(*c*) 3 Exch. 367; and see *Stankhouse* v. *Gaskell*, 17 Jur. 157.]

(*d*) See *Anon. case* in Dyer, and *Holmes* v. *Meynell*, ante, 511.

(*e*) See ante, 516.

(*f*) Ante, 519.

(*g*) Ib.

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in regard to the number of the devisees (which is equally untenable upon principle and authority), will never more be seriously advanced in a court of justice.

Cross-remainders have also been implied from the word "*remainder.*"

Devise to daughters in tail, *with remainder* over;

Thus, in *Doe* d. *Burden* v. *Burville* (*h*), where a testator (after limitations to his sons successively in tail) devised to the use of all and every his daughter and daughters as tenants in common and to the heirs of her and their body and bodies, *with remainder* to the heirs of his (testator's) brother A. for ever: Lord *Mansfield* was of opinion that cross-remainders were to be implied between the daughters. He observed, that, in limiting the remainder to the singular number, the testator conceived that it could not take effect until the death of the last daughter without issue; and that, under the preceding limitations, all the female line of each son must fail before the male line of the other could take, and all must fail before the daughters could take. It would be absurd to suppose that he had a different intention as to his own daughter.

cross-remainders implied.

In another case, however, the same eminent Judge held cross-remainders *not* to be raised by a limitation of "*the reversion,*" after devises somewhat differently constituted.

Whether the word *reversion* will raise cross-remainders.

Thus, in *Pery* v. *White* (*i*), where the testator devised (in remainder) to his four sisters and a niece for their lives as tenants in common, remainder to their sons successively in tail male, remainder to their daughters in tail, *the reversion* to his own right heirs: Lord *Mansfield* held, that there were no cross-remainders. His Lordship relied much upon the devise being in effect to the sisters and niece and their sons *respectively*. "During their lives," he observed, "there is a division: each is to have a fifth for life, to enjoy in severalty. Then follows, 'the remainder to their sons successively in tail.' What is the meaning of the expression, 'their sons?' It is impossible to construe it otherwise than 'respectively;' that is, remainder of the share of the sister dying to her sons successively; remainder to her daughters as coparceners, and then the *reversion* to the right heirs, that is, the reversion of the share of the several tenants for life and their issue *respectively*. It is absurd to say that the children of the other sisters should take the share of a deceased sister as purchasers in the lifetime of their mother."

(*h*) 2 East, 47, n.; 13 Geo. 3.

(*i*) Cowp. 777; 18 Geo. 3.

Remarks upon *Pery* v. *White*.

His Lordship seems, therefore, to have thought, that if cross-remainders were raised, it must have been among *the children* only. His reasoning, it will be observed, proceeds upon the hypothesis now exploded (*k*), that by a devise to persons *respectively* the implication is excluded, and not upon any distinction between the words "reversion" and "remainder," the expression in the last case, which must have been in his Lordship's recollection, having been decided by him only three years before. It would certainly not be impossible to construct a plausible defence of such a distinction; but it is probable that the Courts, instead of reconciling the two cases in this manner, would be inclined to go the length of saying that *any* words carrying on the limitations would raise cross-remainders between anterior devisees in tail. So far as the case of *Pery* v. *White* rests upon the force of the word *respective*, it is now clearly overruled (*l*).

Executory trusts.

Allusion has been made to the more ready implication of cross-remainders in executory trusts (*m*) than in direct devises. It may be further remarked, in regard to such trusts, that in the case of *Horne* v. *Barton* (*n*), where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of twenty-one years or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, *with cross-remainders*, and the testator directed his trustees to execute a settlement accordingly; Sir *W. Grant*, M. R., held, that cross-remainders were to be inserted, not only as between the children respectively, but also as between the families.

Cross-remainders implied among devisees for life.

In a former work (*o*) the writer suggested the probability that the principles of construction upon which cross-remainders have been implied among devisees in tail would be held to apply to estates for life; and, consequently, that if a testator manifested an intention that property previously devised to several persons for life, as tenants in common, should not go over to the ulterior devisee until the decease of all the devisees for life, it would be concluded, by the same process of reasoning as had conducted

(*k*) Ante, 519.
(*l*) Ib.
(*m*) Ante, 520.
(*n*) Coop. 257, 19 Ves. 398.
(*o*) 2 Powell on Dev. 623, n.

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to a similar conclusion in regard to devisees in tail, that the testator meant the surviving devisees or devisee for the time being to take the shares of deceased objects. Such a devise recently occurred in the case of *Ashley* v. *Ashley* (*p*), where a testator devised real estate to the use of his daughter A. for her life, and after the determination of that estate, to the use of trustees to preserve, and after her decease, to the use of all and every the child or children lawfully begotten and to be begotten on the body of A., to take as tenants in common, and not as joint tenants; *and, for want of such issue* of A., then to the use of another daughter and her children in like manner. The Master reported, that the children of A. took life estates only, without cross-remainders between them; but Sir *L. Shadwell*, V. C., expressed a strong opinion against the finding of the Master. He observed, that but one subject was given throughout; the expression "for want of such issue" meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. His Honor accordingly declared that the children of A. took estates for life as tenants in common, with cross-remainders between them for life.

Conclusions from the cases.

The conclusions from the authorities on the subject are,—

1st. That under a devise to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross-remainders are to be implied among the devisees in tail.

2ndly. That this rule applies whether the devise be to two persons or a larger number, though it be made to them "*respectively*," and though in the devise over the testator have not used the words "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.

3rdly. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication.

(*p*) 6 Sim. 358. See also *Pearce* v. *Edmeades*, 3 Y. & C. 246. [But see *Ewington* v. *Fenn*, 16 Jur. 398.]

4thly. That the word "remainder," following a devise to several in tail, will raise cross-remainders among them (*q*).

5thly. That it is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail (*r*).

6thly. That a devise to the children of A. for life, and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees (*s*).

(*q*) As to "reversion," see ante, 524.

(*r*) *Vanderplank* v. *King*, 3 Hare, 1. In this case the inequality was produced by the application of the cy près doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to which vide ante, Vol. I. p. 280. See also Lewis on the Law of Perpetuity, 426.

(*s*) The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the recent Statute of Wills, that the writer conceives that the enactment does not affect the implication of cross-remainders from expressions of this nature. Such undoubtedly is his opinion; in support of which it will be sufficient to observe, that the 29th section expressly excepts out of the statutory rule of construction, cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words, "in default of such issue," &c., from which the cross-remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine. [The whole line of limitations may, however, by the new construction, be so altered as to prevent any question as to cross-remainders arising; as, for instance, in *Forrest* v. *Whiteway*, 3 Exch. 367, stated ante, p. 523, if the will in that case had been made subsequent to 1837.]

Implication of cross-remainders not affected by recent act.

# CHAPTER XLIII.

## WHETHER CROSS EXECUTORY LIMITATIONS CAN BE IMPLIED AMONG DEVISEES IN FEE OR LEGATEES.

Cross executory limitations not to be implied.

THE question whether cross executory limitations can be implied among devisees *in fee* arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this:—In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until *all* the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all* (*a*). On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

To introduce cross limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could

(*a*) The doctrine against perpetuities would have presented [no] obstacle to its taking effect [as a legal limitation; otherwise of an equitable limitation. See ante, Vol. I. p. 237 (*Cole* v. *Sewell*), and pp. 239, 261, 262.]

not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He *may* have such an intention; and, if not, the answer is, voluit sed non dixit.

If, therefore, a gift is made to several persons in fee-simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age.

Among the early cases, indeed, examples may be found of a different rule being applied to bequests of personalty, between which and devises in fee there seems, as before suggested, to be an intimate analogy.

Thus, in *Scott* v. *Bargeman* (*b*), one bequeathed personalty to his wife, upon condition that she would pay 900*l.* into the hands of S., in trust to lay out the same, and pay the interest to the wife for life, if she should so long continue a widow, and, after her death or marriage, in trust that S. should divide the 900*l.* among his (the testator's) three daughters at their respective ages of twenty-one or marriage, provided that *if all his three daughters should die before their legacies should become payable,* then the wife should have the whole 900*l.* paid to her. Two of the daughters died under age and unmarried, and the question was, whether the other was entitled to her sisters' shares. Lord *Macclesfield* decided in the affirmative, inasmuch as the mother was plainly excluded unless all the daughters died under twenty-one or marriage, and their shares did not vest absolutely in any of the three daughters under age, in regard that they might all die before twenty-one or marriage, in which case the whole was devised to the mother.

Cross executory trusts implied among legatees.

This decision must be supported, if at all, on the ground that the Court was authorized to insert cross limitations among the daughters by necessary inference from the terms of the gift over, —a conclusion which it will be found very difficult to reconcile with subsequent decisions (*c*).

Observations upon *Scott* v. *Bargeman.*

In the case of *Mackell* v. *Winter* (*d*), the next on this subject, personal property was bequeathed to three persons, with an

(*b*) 2 P. W. 68.

(*c*) *Schenck* v. *Legh*, 5 Ves. 452, 9 ib. 300; *Bayard* v. *Smith*, 14 ib. 470. And more particularly *Skey* v. *Barnes*, 3 Mer. 334, 342, post, [where the decision is referred to another ground.]

(*d*) 3 Ves. 236, 536.

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express bequest over to the other or others in case of the death of *one* particularly named, or of either of two couples of the three individuals named, under age (but not of the other couple), and a bequest over of the entirety on the death of *all* three. Two eminent Judges differed in opinion whether a cross executory trust providing for the death of such other couple could be implied. The case was this:—A testatrix directed her household goods, &c., to be sold, and the money arising from the sale, together with the residue of her personal estate, she bequeathed to her grandsons G. and J., and to her granddaughter C., to be equally divided between them, share and share alike; the shares of her grandsons, with the interest or accumulation thereof, after a deduction for their maintenance and preferment, to be paid to them respectively on their attaining the age of twenty-one years, and the share of her granddaughter, with the interest and accumulation, at twenty-one or marriage. Then, after a direction for maintenance and preferment out of the interest, the testatrix declared, that in case her granddaughter C. should happen to die under the age of twenty-one years and unmarried, the share of the residue of her personal estate so given to her, with the accumulated interest thereon, should go and be equally divided between her two grandsons; and in case of the death of either of them, the whole should be paid to the survivor; and that in case either of her grandsons should die under the age of twenty-one, the share of her grandson so dying should go to the survivor of her two grandsons; *and in case her two grandsons should die under the age of twenty-one, and her granddaughter under twenty-one and unmarried,* the whole of their respective shares of the residue of her personal estate, with the accumulation thereon as aforesaid, should go and be paid to her nephew B. (It will be observed that the event, which happened of the death of both the grandsons under twenty-one, and of them *only,* was not provided for.) Sir *R. P. Arden,* M. R., considered that there was no doubt that the grandchildren took a vested interest; *and as it was not taken out of them in the event that had happened, he conceived himself not authorized to supply the defect* in favour of the granddaughter; though he had no doubt as to the intention. But Lord *Loughborough,* on appeal, reversed this decree; his Lordship thinking, on the one hand, that the shares did not vest in the grandsons until twenty-one, and, on the other, that there was a necessary implication in

Bequest to A., B. and C., with bequest over if *one* only, or certain two, or *all* died, but not providing for the death of the other *two.*

Implication of cross executory bequest rejected by Sir *R. P. Arden,* but

his decree overruled by Lord *Loughborough.*

favour of the granddaughter, it being clear that what defeated (quære *would precede*?) the gift over to the nephew, who could only take the entirety of the fund, and that on the death of *all* the grandchildren, must be a disposition of the whole in favour of the grandchildren, the preferable objects of the testator's bounty, *and to avoid a partial intestacy*.

Remarks upon *Mackell* v. *Winter*.

The views taken of this case by the Master of the Rolls and the Lord Chancellor, it will be seen, were wholly different: the former considering the gift as vested in the grandchildren, to be divested only in the event expressly provided for; and the latter as a *contingent* bequest to them, with an express cross executory contingent bequest in a certain event, and an *implied* cross bequest in another event. There is certainly great difficulty in both branches of Lord *Loughborough's* hypothesis. According to the doctrine of all the authorities, the bequest clearly conferred a vested interest (*e*); and, if vested, it was impossible, consistently with sound principles of construction, to divest it, except on the happening of the prescribed event; and the obstacle to this was the more insuperable, from the circumstance, that the express cross limitations, so far as they went, did not establish a complete reciprocity between the legatees; for the share of the granddaughter at her death, under age, was to go to both the grandsons, but the share of one of the grandsons so dying was to belong exclusively to the other grandson. But, independently of this very material circumstance, there seems to have been no valid ground for divesting the shares in the event which had happened; nor, it is important to observe, does Lord *Loughborough* advance any such doctrine, for he evidently considered the holding the granddaughter to be entitled to be consequential on his holding the bequest of the whole to be *contingent*, his object being to "avoid a partial intestacy;" and it by no means follows, that if he had considered the interest as vested, he would have felt himself authorized to imply another gift in derogation of it. His Lordship's reasoning does not appear to have satisfied the Master of the Rolls, who, in a subsequent case (*f*), expressed his conviction that his own determination was right.

Bequest to

[In *Beauman* v. *Stock* (*g*), there was a bequest to the testator's

(*e*) See cases passim, Chap. XXV. Vol. I. Lord *Loughborough* certainly appears to have been greatly inclined to hold gifts to be contingent upon very slight grounds, as will appear by several of his Lordship's decisions in the chapter just referred to.

(*f*) *Booth* v. *Booth*, 4 Ves. 402.

[(*g*) 2 Ba. & Be. 406.]

two, and, if they die without issue under twenty-one, over.

[two children equally to be divided between them, but, if his two children should die without issue or before they reached the age of twenty-one years, then over. One child died under twenty-one and without issue, and Lord *Manners* held that the surviving child, and not the representative of the deceased child, was entitled.

Notwithstanding these decisions, the law appears now to be settled in accordance with the original decision of Sir *R. P. Arden* in *Mackell* v. *Winter*.]

Gift to children of A., payable at twenty-one, and in case *all* should die, &c.

Thus, in *Skey* v. *Barnes* (*h*), the testator bequeathed his personal estate to trustees for his daughter for life, and after her decease to and among all and every the child or children of his daughter and the lawful issue of a deceased child, in such proportions as his daughter should appoint, and in default of appointment, then the same to go to and be equally divided between them, share and share alike, and if there should be but one child, then to such only child; the portion or portions of such of them as should be a son or sons, to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as should be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage; *but, in case there should be no such issue of the body of his daughter, or* ALL *such issue should die without issue before his or their respective portions should become payable as aforesaid,* then 1,000*l.* for his sister M. and her family, and 1,500*l.* for his niece A. and her family; and in case there should be no issue of either, for his nephew T., whom he also made his residuary legatee. The will contained a proviso, authorizing the trustees to apply the interest of the children's portions for their maintenance until they became payable. One of the children having survived her mother, and died under twenty-one and unmarried, her share was claimed by the survivors and the representatives of those who had attained their majority and died, principally on the authority of *Scott* v. *Bargeman* (*i*). Sir *W. Grant*, though he thought that case to be right in its result, held that the bequests vested immediately, *and that the contingency had not happened on which they were to be divested;* consequently the share of the deceased child belonged to her representative.

Cross bequest *not* implied.

(*h*) 3 Mer. 334. See also *Turner* v. *Frederick*, 5 Sim. 466; [*Templeman* v. *Warrington*, 13 ib. 265; *Cohen* v. *Waley*, 15 ib. 318; *Mair* v. *Quilter*, 2 Y. & C. C. C. 465; *Edwards* v. *Tuck*, 23 Beav. 268; *Beaver* v. *Nowell*, 25 Beav. 551.]

(*i*) Ante, 529.

Gift to two, and, if neither should be living at a given period, over.

[So, in the recent case of *Baxter* v. *Losh* (*k*), the residue was bequeathed to be equally divided between A. and B., their executors, administrators and assigns, absolutely for ever; but, in case it should happen that the said A. and B. should *neither* of them be living at a particular period, then over; A. died in the lifetime of the testatrix, and B. survived the period specified, and it was contended on behalf of B., that there was an implied gift to him of the share of A.; but Sir *John Romilly*, M. R., held, that there was no such implied gift, and that the event not having happened on which the gift over was to take effect, the moiety of A. had lapsed.

There is no distinction whether prior gift vested or contingent.

But for the case of *Beauman* v. *Stock* (*l*), a distinction might have been drawn between the cases where the gift is in the first instance vested, and where it is contingent; more especially as it was upon this ground that Sir *W. Grant*, in *Skey* v. *Barnes* (*m*), accounted for the decisions in *Scott* v. *Bargeman* (*n*), and *Mackell* v. *Winter* (*o*). But in *Beauman* v. *Stock*, Lord *Manners* disregarded the distinction, declaring, that he did not feel the force of the reasoning upon which it was founded. "If," said the learned Judge, "it be a vested legacy, the representative of the legatee is entitled till the happening of the contingency (*i. e.* upon which the gift over is limited to arise); if it be a contingent legacy, why is not the representative of the testator entitled till the happening of the same contingency? And how does the latter raise a gift in favour of the surviving tenant in common on a limitation to him in the nature of a cross-remainder? Why have not the words the same effect in the one case as in the other? The only argument used to distinguish the two cases is, that the testator did not intend to die intestate; why, that is only inference; for whatever his intention might be, if he has only disposed of his property on certain events which have not happened, he does die intestate."]

The cases of *Skey* v. *Barnes* [and *Baxter* v. *Losh*] may, however, it is conceived, be considered to have fixed the rule of law on this important doctrine of testamentary construction, [in those cases at least where the gift is in the first instance vested.]

[(*k*) 14 Beav. 612. In *Currie* v. *Gould*, 4 Beav. 117, the precise ground of the decision does not appear, but the gift seems clearly to have been a joint-tenancy to the children.

(*l*) 2 Ba. & B. 406.
(*m*) 3 Mer. 335.
(*n*) 2 P. W. 69.
(*o*) 3 Ves. 236, 536.]

# CHAPTER XLIV.

## RULE THAT WORDS WHICH CREATE AN ESTATE TAIL IN REAL ESTATE CONFER THE ABSOLUTE INTEREST IN PERSONALTY.

I. *Rule considered in relation to various Words by which an Estate Tail may be created.*
II. *Bequests over after such Gifts.*
III. *Effect of Limitations in strict Settlement upon Personal Property, &c.*

Words which create an estate tail in realty confer the absolute interest in personalty.

I. It has been established by a long series of cases (*a*), that where personal estate (including of course terms of years of whatever duration) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative (whether he leaves issue or not), and not to his heir in tail.

Rule applies to estates tail *by implication;*

This rule is not confined, as has been sometimes affirmed (*b*), to cases in which the words, if used in reference to realty, would create an *express* estate tail; for it applies also to those in which an estate tail would arise *by implication,* except in the particular case in which words expressive of a failure of issue receive a different construction in reference to real and personal estate (*c*). Thus, where, by a will, which is regulated by the old law, personalty is bequeathed to A. or to A. and his heirs, and, if he shall die without issue, to B. (which would clearly make A. tenant in tail of real estate), he will take the absolute interest (*d*).

—— to cases

The rule under consideration also applies to those cases in

(*a*) Roll. Rep. 356; Bunb. 301; 2 Ch. Rep. 14; 1 Lev. 290; 2 Vern. 324; 1 P. W. 290, Pre. Ch. 421; 8 Vin. Ab. 451, pl. 25, 2 Eq. Ca. Ab. 325; 3 B. P. C. Toml. 99, 204, 277; 7 ib. 453, [1 Mad. 488;] 1 Ves. 133, 154; 2 Ed. 216; 2 B. C. C. 33, 127; 11 Ves. 257; 2 V. & B. 63; 1 Mer. 20, 271; 19 Ves. 73, 170, 574; 3 Mer. 176; 4 Mad. 360; 8 Sim. 22; [3 Drew. 668.]

(*b*) *Atkinson* v. *Hutchinson,* 3 P. W. 259; [*Doe* v. *Lyde,* 1 T. R. 596.]

(*c*) See ante, 473.

(*d*) *Love* v. *Windham,* 2 Ch. Rep. 14, 1 Lev. 290; [*Chandless* v. *Price,* 3 Ves. 102;] *Campbell* v. *Harding,* 2 R. & My. 390; *Dunk* v. *Fenner,* 2 R. & My. 557; *Simmons* v. *Simmons,* 8 Sim. 22; [*Caulfield* v. *Maguire,* 2 J. & Lat. 176; *Cole* v. *Goble,* 13 C. B. 445; *Webster* v. *Parr,* 26 Beav. 236; *In re Andrews,* 29 L. J. Ch. 291.]

which, by the operation of the rule in *Shelley's case* (*e*), the terms of the bequest would, in reference to real estate, create an estate tail.

falling within the rule in *Shelley's case.*

Thus in *Garth* v. *Baldwin* (*f*) where a testator devised real and personal estate to A., in trust to pay the rents and profits to S. for life, and after her death to pay the same to E. *for life*, and afterwards to pay the same to *the heirs of his body*, and for want of such issue, over; Lord *Hardwicke* held, that E. was tenant in tail of the real estate, and entitled absolutely to the personalty.

And of course it is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty, creating an estate tail.

Though the bequest be referential to the devise.

As in the case of *Brouncker* v. *Bagot* (*g*), where a testator devised his real estate to B. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the *heirs of the body* of B.; and by a codicil he bequeathed his personal estate unto the same persons, and in the same manner, as he had by his will devised his real estate. It was contended, that although as to real estate this rule of law was too strong for the intention of the testator, yet that a different construction might be put upon the words as applied to personalty, to prevent the application of the rule where it went to defeat the obvious intention, as in this case; but Sir *W. Grant*, M. R., held, that the testator having declared his intention respecting his personal estate, only by referring to the terms of the devise of the real estate, and as the law had ascertained those terms to give an estate tail in the realty, they would give the absolute interest in personalty.

The next question is, whether words of distribution or other expressions marking a course of enjoyment inconsistent with the devolution of an estate tail, annexed to the limitation to

*Words of distribution*, &c., annexed to the limitation to the heirs of the body, &c.

(*e*) As to which, see ante, 334.

(*f*) 2 Ves. 646; see also [Co. Lit. 54 b. cited ante, p. 308; *Webb* v. *Webb*, 1 P. W. 132, 2 Vern. 668; *Davis* v. *Gibbs*, 3 P. W. 29;] *Butterfield* v. *Butterfield*, 1 Ves. 133, 153; *Tothill* v. *Earl of Chatham*, 7 B. P. C. Toml. 453; *S. C.* at the Rolls, nom. *Tothill* v. *Pitt*, stated 1 Mad. 488; [*Kinch* v. *Ward*, 2 S. & St. 409; *Earl of Verulam* v. *Bathurst*, 13 Sim. 374; *Harvey* v. *Towell*, 7 Hare, 231, see *S. C.* 12 Jur. 241; *Ousby* v. *Harvey*, 17 L. J. Ch. 160. The fact of the income only, and not the property itself, being given to A. for life, is no argument against his taking the absolute interest, *Butterfield* v. *Butterfield*, 1 Ves. 133, 154; *Glover* v. *Strothoff*, 2 B. C. C. 33, and other cases overruling *Smith* v. *Cleaver*, 2 Vern. 38; *Fonnereau* v. *Fonnereau*, 3 Atk. 315.]

(*g*) 2 Mer. 271, 19 Ves. 574; see also *Douglas* v. *Congreve*, 1 Beav. 59.

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the *heirs of the body,* are in *these* cases inoperative to vary the construction, as we have seen they are now held to be in devises of real estate (*h*). The affirmative would seem to follow from the principle of the preceding cases, though such a conclusion involves a direct contradiction of the case of *Jacobs* v. *Amyatt* (*i*), where personalty was bequeathed to A. for life, and after her decease unto the heirs of her body lawfully begotten, *equally to be divided between them, share and share alike;* and, in default of such issue, over; and it was held by Lord *Thurlow,* confirming a decree of Sir *R. P. Arden,* M. R., that A. took a life interest only.

Observations upon *Jacobs* v. *Amyatt.*

Lord *Thurlow* seems to have decided this case, not upon any distinction between gifts of real and personal estate, in regard to the rejection of the words of distribution, but upon the ground that a similar construction would have been adopted of a devise of real estate in the same terms; since he found it necessary, in order to arrive at this conclusion, to deny the authority of *King* v. *Burchell* (*k*) and *Doe* v. *Applin* (*l*), in both which the devises were of real estate. As [the principle upon which] these cases [were decided has] been since fully confirmed (*m*), and as it is now clear that a devise such as that in *Jacobs* v. *Amyatt would* create an estate tail in realty (*n*), the latter case, and also the earlier case of *Wilson* v. *Vansittart* (*o*), may, it is conceived, be classed among those which have been overruled by the decisions establishing that the words "heirs of the body" are not to be controlled by expressions pointing at a different mode of devolution or enjoyment.

"Heirs of body" explained to mean "children."

[Nor is this conclusion opposed to the late case of *Symers* v. *Jobson* (*p*), where under a bequest in trust for A., the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body, share and share alike; Sir *L. Shadwell,* V. C., held, that A. took for life, with remainder to her children as tenants in common, the ground of the decision being that the testator had in other parts of the will explained "heirs of the body" to mean children, which, as we have before shewn, is one recognized mode of depriving those words of their ordinary effect (*q*).]

(*h*) See ante, 334.
(*i*) 4 B. C. C. 542.
(*k*) Amb. 379, 1 Ed. 424, ante, 336, 397.
(*l*) 4 T. R. 82, ante, 403, 460.
[(*m*) Though not, strictly speaking, the cases themselves.] See ante, 404.
(*n*) See *Jesson* v. *Wright,* 2 Bli. 1, and other cases ante, 341, et seq.
(*o*) Amb. 562.
(*p*) [16 Sim. 267.
(*q*) See ante, 418.]

The principle, that where an estate tail is created by the effect of the words "heirs of the body," and, by reason of the inadequacy of certain superadded expressions to control them, the same words applied to personalty would confer the absolute interest, was, in the recent case of *Congreve* v. *Douglas* (*r*), considered as so clear and indisputable, that the question was argued as being identical in the respective cases, the only subject of contention being whether there was or was not an estate tail in the realty.

A point of still greater difficulty arises in determining to what extent the rule under consideration applies to cases in which the word *issue*, occurring in devises of real estate, is a word of limitation.

Where the bequest is to a person and his *issue* simply.

This, at least, is clear, that a simple bequest to A. and his issue, [A. having no issue,] which, if the subject of disposition were real estate, would indisputably make A. tenant in tail (*s*), confers on him the absolute ownership in personalty.

Whether "issue" explained to mean issue *at the death.*

Lord *Hardwicke*, in *Lampley* v *Blower* (*t*), admitted this proposition, though he held that a bequest over to the survivor, in case either of the legatees died without *leaving* issue (which in legal construction means, in regard to *personalty* (*u*), issue living *at the death*), explained "issue" in the body of the devise to be used in the same sense.

To four persons and the issue of their respective bodies, if any die without issue at death, over.

This seems to be rather a strained construction, and is inconsistent with the subsequent case of *Lyon* v. *Mitchell* (*x*), which is a direct authority as to the effect of a bequest simply to A. and his issue. A testator bequeathed personalty to his four sons, share and share alike, as tenants in common, *and to the issue of their several and respective bodies lawfully begotten;* but in case of the death of any or either of them without issue lawfully begotten *living at the time of his or their respective deaths,* then the part or share of him or them so dying should go to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten. [At the date of the will the sons had no issue.] Sir *T. Plumer*, V. C., after reviewing the authorities, held, upon the general rule, that as the words of the bequest would have made the sons tenants in tail of real estate, they *took absolute interests* in the personalty, with

(*r*) 1 Beav. 59; see also *Tate* v. *Clarke*, ib. 100, ante, 409.
(*s*) See ante, 388.
(*t*) 3 Atk. 397. [See remark on this case, ante, p. 390, n. (*x*).]
(*u*) See ante, 473.
(*x*) 1 Mad. 467.

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benefit of survivorship in case any or either of them died without issue living at their death respectively.

Bequest to several and their lawful issue.

[Again, in *Parkin* v. *Knight* (*y*), where the limitation was of real and personal property to the testator's nephews or (read "and") their lawful issue, the nephews having no issue at the time of the testator's death; Sir *L. Shadwell*, V. C., held, that they took an estate tail in the realty, and an absolute interest in the personalty.

To be settled on A. and his issue.

This construction has been even extended to a case where money was directed to be *settled* on A. and his issue (*z*).

Bequest to A. and his issue, A. having issue.

Where the bequest is to A. and his issue, A. having issue at the time, the same doubt seems to exist in the case of personalty as before mentioned (*a*) in the case of realty, whether the issue take concurrently with or by *quasi* descent from their ancestor. Some of the observations attributed to Lord *Hardwicke*, in *Lampley* v. *Blower* (*b*), appear to go the full length of asserting that the ancestor takes the entire interest, notwithstanding the existence of issue. But perhaps when they are taken in connection with the rest of the judgment they do not reach quite so far; for though the bequest was to the testator's niece of "one half of his bank stock, and to her issue," yet the words which followed, namely, "in case she should die and *leave no issue*," were considered by the L. C. to shew that the issue were intended to take by purchase after the death of the mother. If not, why was the gift over made to depend on the contingency of the mother leaving no issue living at her death? In the case of *Clay* v. *Pennington* (*c*), it was held by Sir *L. Shadwell*, V. C., that the issue took concurrently.]

Bequest to A. *for life*, and after his death to his issue.

Our next inquiry is, whether a bequest to A. *for life*, and after his death to his issue, operates, by force of the same rule of construction, to vest the absolute interest in A.

Now as such a *devise* would clearly create an estate tail in A., and as it has been shewn that the rule which makes the legatee absolute owner of personalty where he would be tenant in tail of real estate, applies to gifts falling within the rule in *Shelley's case* (*d*), where *heirs of the body* are the words of limitation, as

[(*y*) 15 Sim. 83. See also *Beaver* v. *Nowell*, 25 Beav. 551.

(*z*) *Samuel* v. *Samuel*, 9 Jur. 222, 14 L. J. Ch. 222, as to which, see ante, p. 321, n. (*g*).

(*a*) Ante, 389.

(*b*) 3 Atk. 397. See ante, p. 390, n. (*x*).

(*c*) 7 Sim. 370; and see Prior on Issue, pp. 37, 38.]

(*d*) That the rule in *Shelley's case* applies, whatever be the word of limitation used, see ante, 312.

well as to those in which an *implied* gift is raised in the *issue;* and as, lastly, as we have just seen, the rule applies where the gift to the ancestor and issue is in one clause (*e*); [the same rule, if strictly followed out, would lead to the conclusion,] that, in the case suggested, A. would be absolutely entitled.

Lord *Thurlow's* construction in *Knight* v. *Ellis.*

This conclusion, however, is encountered by the case of *Knight* v. *Ellis* (*f*), where the testator gave certain monies to trustees, upon trust to permit his nephew T. to receive the interest *during his natural life,* and after his decease he gave the said monies to the *issue male* of his nephew, and in default of such issue he gave the same over. The question was whether T. was entitled for life, or absolutely. Lord *Thurlow* decided that he had a life interest *only.* In reference to the cases establishing the rule, that words which would create an estate tail in real estate confer an absolute interest in personalty, his Lordship said, "It must have occurred to the Judges who decided those cases, that under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and then there is no wonder that the Court should try to get out of the technical rule by any means that it can. Now what do the cases come to? A man by his will devises to A. for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A., and any other gift would be effectual after his death. The testator then gives the same fund (quære *land*) over to B. after failure of issue of A. What is the Court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B., while there is any issue of A. The consequence is, that as no interest springs to B., and no express estate is given after the death of A., the intermediate interest would be undisposed of, unless A. was considered as taking for the benefit of his issue, as well as of himself; and as the words in this case are capable of such amplification, the Court naturally implies an intention in the testator that A. should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his

(*e*) As to such cases of *devises,* see ante, 388.
(*f*) 2 B. C. C. 570.

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issue. Now, an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule; but the issue may take as purchasers, and then there is an end of the enlargement of any kind, of the estate of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase. It no longer rests on conjecture."

Bequest to two for their lives, and at their deaths to their issue.

[Again, in the case of *Heather* v. *Winder* (*g*), the first gift was of leaseholds to the testator's son William for his life, and after his death to his issue; but in case he should leave no lawful issue, then to the testator's daughters, Alice and Hannah, conjointly, during their lives, and at their deaths to their lawful issue; the testator's three children survived him, and William and Hannah died without leaving issue; Alice had several children. Sir *J. Leach*, V. C. held, that Alice became entitled on the death of William, but whether on the ground that William took a life estate only, or by executory bequest on the principle of *Lyon* v. *Mitchell* (*h*), does not appear. Sir *C. Pepys*, M. R., however, professing to follow Sir *J. Leach*, decided that Alice under the gift over took only for life; as she was living it was not necessary to decide as to the rights of her issue.]

*Att.-General* v. *Bright* opposed to *Knight* v. *Ellis*.

The cases of *Knight* v. *Ellis* [and *Heather* v. *Winder*] seem to be directly opposed to the subsequent case of *Attorney-General* v. *Bright* (*i*), where a testator, after bequeathing to two persons the interest of a sum of 500*l*., four per cent. stock, gave the fund, after the decease of the survivor, to A., to receive the interest during her life, and then *to her issue;* but, in case of her death without issue, the 500*l*. stock to be divided between her father's children by his second wife; and, in default of any children by his second wife living at the testator's decease, he gave the same to such second wife. It was contended, on the authority of *Knight* v. *Ellis*, and some earlier cases, that A. had a life interest only. But Lord *Langdale*, M. R., held that the effect of giving the interest of the 500*l*. stock to the legatee

[(*g*) 5 L. J. Ch. N. S. 41.
(*h*) Ante, 537.]

(*i*) 2 Kee. 57; [and see *Harvey* v. *Towell*, 7 Hare, 231, 12 Jur. 242.

for her life, and then the principal to her issue, was to give her an absolute interest in that sum.

*Knight* v. *Ellis* confirmed by *Wynch's Trust.*

[The law on this point seems, however, to be now settled in favour of the decision in *Knight* v. *Ellis*, by the recent case of *Wynch's Trust* (*j*), where the testator bequeathed an annuity to A. "for her life and the issue from her body lawfully begotten, on failure of which to revert to my heirs." Lord *Cranworth*, C. (who said the will was clearly to be read as if the gift to the issue had been expressly limited after the death of A.) and Sir *G. J. Turner*, L. J., affirming the decision of *Stuart*, V. C., held that A. had only a life interest, and that the issue took by purchase. They agreed with the decision in *Knight* v. *Ellis*, and moreover considered that it was binding upon them, and that the decision in *Attorney-General* v. *Bright* was not sustainable. Sir *J. Knight Bruce*, L. J., agreed with the other two learned Judges in the result at which they arrived but on a different ground, namely, the effect of a deed executed by A. The decision of the two former Judges has since been followed by Sir *J. Romilly*, M. R., in the case of *Goldney* v. *Crabb* (*k*).

Distinction where the limitation is to one at a time or to all the issue together.

In the course of the argument in *Knight* v. *Ellis*, Lord *Thurlow* said that it made all the difference in gifts of this nature, whether by the will all the issue were to take or one only. "The question is," said his Lordship, "whether they are words of limitation? If it went to one son, it must be by way of limitation; if to all, it must be by purchase. If it is to go by way of limitation, then it vested in the ancestor; if by purchase, all the sons must take (*l*)." Upon this distinction, probably, the authority of the case of *Jordan* v. *Lowe* (*m*) may be sustained. In that case, leaseholds were bequeathed upon trust for A. for life, and, after his decease, for his issue male lawfully begotten, severally and respectively according to their respective seniorities, and for default of such issue male as aforesaid, then over; the M. R. held, that the words were such as would have created an estate tail, and A. was therefore absolutely entitled. "Upon what grounds Lord *Langdale* proceeded" (to adopt the words of the Lord Chancellor in the case

[(*j*) 5 D. M. & G. 188; and see *Stonor* v. *Curwen*, 5 Sim. 264; *Hall* v. *Nalder*, 22 L. J. Ch. 242, 17 Jur. 224.

(*k*) 19 Beav. 338; and see *Banks' Trust*, 2 Kay & J. 387; *Waldron* v. *Boulter*, 22 Beav. 284.

(*l*) 2 B. C. C. 575.

(*m*) 6 Beav. 350.]

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[of *Wynch's Trust*) "we are left in entire ignorance. But it may be that he thought there, that the words must be treated as words of limitation, as it was to go to them in succession for ever according to their seniorities. That might have been the ground upon which he proceeded in that case: that also would not be inconsistent with *Knight* v. *Ellis*."]

General conclusion.

Upon the whole the result is, that, though it is clear that, by the rule of construction under consideration, a bequest to a person and his *issue* simply, confers the absolute interest, and though the unqualified terms in which such rule has been often laid down would seem to impel the Courts to the same conclusion, wherever the language of the will is such as would create an estate tail of land, yet they [will not] carry it to the extreme point to which the cases have gone in adjudging "issue" to be a word of limitation as to real estate (*n*); the effect of such construction, by entitling the first taker absolutely, being in general to defeat the intention of the testator. Hence (as elsewhere hinted (*o*)), the inclination to adopt the construction which reads the words "child," "son," or any other such informal expression, as a word of limitation, is much less strong in reference to personal than real estate. Thus (*p*),

Bequest over in case of death without having any child or children.

where a testator bequeathed the residue of his personal estate to A.; and, in case A. should die in his lifetime or afterwards, *without having any child or children*, then gave the residue over. A. having died without having had a child, it was contended, on the authority of *Chandless* v. *Price* (*q*), that there was no distinction between dying without children, and without having children; and, as the former expression would raise an estate tail in real estate (*r*), it would have the effect of conferring the absolute interest in personalty. But Sir *L. Shadwell*, V. C., held, that the legatees over were entitled, conceiving that he ought not to put upon the words in question a construction which they did not strictly bear, for the purpose of defeating the intention of the testator.

In not a few cases, too, bequests to a person and his children have been read as conferring on the original legatee a life interest only, with an ulterior gift of the absolute interest in favour of the children (*s*),—a species of construction which

(*n*) Ante, 416.
(*o*) Ante, 372, et seq.
(*p*) *Stone* v. *Maule*, 2 Sim. 490. See also *Malcolm* v. *Taylor*, 2 R. & My. 416. [But see *Scott* v. *Scott*, 15 Sim. 47.]
(*q*) 3 Ves. 99.
(*r*) See ante, 377.
(*s*) Vide cases stated ante, 373.

further illustrates the disinclination of the Courts to hold ambiguous terms of this description to operate as words of limitation in reference to personal estate.

Gift to issue by way of substitution.

The word "issue," under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favour of these objects, in the event of the failure of the original gift to the ancestor, [by his death either in the lifetime of the testator or of a previous tenant for life, the ancestor,] if the gift to him takes effect, becoming solely and absolutely entitled.

[Where there is a distinct direction that the issue are to take only their parent's share there can be no doubt that the issue are merely to take by substitution (*t*), but the same construction has been put on other expressions not so obviously conveying the same meaning.]

To five persons and their respective issue per stirpes.

Thus, in the case of *Pearson* v. *Stephen* (*u*), where the testator, John Pearson, bequeathed to trustees so much stock as should be sufficient to pay thereout the yearly sum of 1,000*l.* to his wife for her widowhood; and, after her decease or marriage, in trust for his five sons (naming them) *and their respective issue,* if any, to be divided among them in equal shares; such issue to take per stirpes, and not per capita. He also gave 4,000*l.* to be invested in stock, in trust to pay the dividends to his daughter S. during her coverture, and, upon the death of G., her husband, to transfer the capital to her for her sole use; but, in case G. should survive testator's daughter, then in trust for his said five sons *and their respective issue* (if any), to be divided among them in equal shares and proportions; such issue to take per stirpes, and not per capita. The testator also gave the residue of his personal estate to his said five sons "*and their respective issue* (*if any*);" such issue to take per stirpes, and not per capita, to be divided among them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one years, to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age, to be paid to them when and as they should respectively attain such age. The question

[(*t*) *Hedges* v. *Harpur*, 9 Beav. 479.]

(*u*) 2 D. & Cl. 328, 5 Bli. N. S. 203. Of course there is less difficulty in the adoption of this construction where the gift is to a person or his issue, vide ante, Vol. I. p. 482; also *Price* v. *Lockley*, 6 Beav. 180.

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was, what interests the five sons (all of whom survived the testator) took under these bequests? Sir *J. Leach*, M. R., held, that the sons took life interests only (subject, as to the 4,000*l.*, to the contingency mentioned in the will), with the ulterior interest for their children. But this decree was reversed in the House of Lords, where it was decided that, under the first bequest, the sons became absolutely entitled; and that, with respect to the 4,000*l.*, in the event of S. dying in the lifetime of G., the sons of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S., would be entitled to the share or shares of the fund, which their parents would have been entitled to, if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by the Lord Chancellor (*Brougham*), that, if any of the sons had died in the lifetime of the testator, his children, living at his (the testator's) death, would have taken, by substitution, the share of the parent.

Remarks on *Pearson* v. *Stephen*.

Here, it will be observed, the words "and their respective issue" were considered to raise a gift by substitution, to take effect, as to all the bequests, in the event of any of the legatees dying in the testator's lifetime leaving issue, and, as to the 4,000*l.* stock, in the further event of their dying during the suspense of the contingency leaving issue. The clause directing that the issue should take per stirpes, seems to be decisive against the word being construed as a word of limitation.

To the daughters of T. and their issue, with benefit of survivorship.

The case of *Pearson* v. *Stephen* was referred to in *Gibbs* v. *Tait* (*x*), where a testator bequeathed the residue of his personal estate to his wife during her widowhood, and, after her decease or marriage, he gave what should be remaining one moiety to J., the son of T., his executors and administrators, and the other moiety equally among all the daughters of T. *and their issue*, with benefit of survivorship and accruer: Sir *L. Shadwell*, V. C., held, that the daughters living at the distribution of the fund were absolutely entitled, and not (as had been contended) concurrently with their issue, which, his Honor observed, was an inconvenient construction. He observed, that the case was

(*x*) 8 Sim. 132.

weaker than *Pearson* v. *Stephen*. This remark shews that the Vice-Chancellor considered the case before him to belong to the same class as the cited authority: perhaps the clauses of accruer (which are not stated) may have aided this interpretation.

Remark on *Gibbs* v. *Tait*.

[The decision in *Pearson* v. *Stephen* was again followed by Lord *Langdale* in the case of *Dick* v. *Lacy* (*y*), where real and personal estate was bequeathed to A. for life, and after her decease to the daughters of B. *and their descendants per stirpes*, to hold to them their heirs and assigns for ever, and it was held, that the limitation to descendants per stirpes was a gift to them by way of substitution for their ancestress, in case she died in the lifetime of the tenant for life.]

Bequest to several and their descendants per stirpes.

Sometimes a testator having, in one instance, made an express and particular substitution of issue, thereby affords a ground for applying a similar construction to a bequest in the same will to a person and his issue simply; the inference being, on a view of the entire will, that the intention is the same in the respective cases.

Thus, in the case of *Butter* v. *Ommaney* (*z*), where a testator bequeathed 2,000*l*. to the children of his late sister B. and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A.), the sum of 2,000*l*. to be equally divided among them, share and share alike, to be paid within twelve months next after his (the testator's) decease. At the date of the will, there were three children of the testator's brother, who had children, and other children were dead leaving issue. It was contended, that the words "and their issue" were words of purchase, and let in the issue of the deceased children; but Sir *J. Leach*, M. R., held, that the three children of Jacob living at the date of the will were absolutely entitled to the legacy.

Issue not entitled concurrently with ancestor.

And here it may be observed that, where (as in the two preceding cases) the original legatees are living at the death of the testator or the period of distribution (whichever may happen to be the period of ascertaining the objects), it becomes unnecessary to determine whether "issue" is a word of limitation or of substitution; the original legatees being entitled to the whole,

[(*y*) 8 Beav. 214.] (*z*) 4 Russ. 70.

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according to either construction. Hence the only really adjudged point in the two last cases was the rejection of the claim of the issue to participate concurrently with the original legatees.

Bequests over after gifts in question, when void.

II. A necessary consequence of the rule, that words which create an estate tail in realty confer the absolute interest in personalty, is, that all bequests ulterior to such a gift are void; but this principle does not apply to cases in which personal estate is limited in such terms to several persons not in esse successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

Thus, where a term of years is limited to A. for life, with remainder to his first and other sons successively in tail male, with remainder to the first and other sons of B. in tail. If A. die without having had a son, it is clear that the bequest to the *first* son of B. (for no son after the first could ever take) is good; but if A. have a son, that son becomes entitled absolutely, to the exclusion of the ulterior legatees; so that the limitation is *in effect* a bequest for life, and after his death to his first son absolutely, and, if he have no son, to the first son of B.; and being necessarily to take effect within the period of a life in being, is free from objection on the ground of remoteness.

To illustrate in detail a point apparently so clear upon principle might seem to be gratuitous labour, were it not that at one period the authorities (including a decision of the Supreme Court of Judicature) sanctioned a contrary doctrine.

In *Brett* v. *Sawbridge* (*a*), a testator who was a mortgagee in possession of a term of years, devised it (supposing himself to be seised of an estate of inheritance) to J., son of H., for life, remainder to his first and other sons in tail male, remainder to two other sons of H., and their sons successively in tail in like manner, remainder to all other the sons of J. successively in tail, with remainder to the right heirs of B. and W. Though it appeared that none of the tenants in tail had come in esse,

(*a*) 3 B. P. C. Toml. 141, 1736. This case seems to have escaped the research of Mr. *Fearne*. See also *Backhouse* v. *Bellingham*, Pollex. 33; *Burgis* v. *Burgis*, 1 Mod. 115.

Sir *J. Jekyll*, M. R., held, that the limitation over was void; and his decree was affirmed in the House of Lords. The reasons urged in its support were, first, that as the testator intended to dispose of the inheritance, the term did not pass; and secondly, that the limitation over being after an indefinite failure of issue, was void for remoteness. It is not stated upon which ground the House proceeded, but, most probably, as the reporter assumes, upon the latter, as the objection that the testator intended to dispose of the inheritance could not be sustained for an instant as a reason against the devise operating upon the term.

*Brett* v. *Sawbridge* overruled by *Pelham* v. *Gregory*.

In regard to the alleged remoteness of the limitation to the heirs of B. and W., however, the case is completely overruled by the determination of the House of Lords in *Pelham* v. *Gregory* (*b*), which arose on the will of the Duke of *Newcastle*, who devised all his freehold and leasehold estates to T. for life, with remainder to his first and other sons in tail male, with remainder to H. for life, with remainder to *his* first and other sons in tail male, with remainders over: T. was living, but had no son; H. had a son, who during the life of T. died, and it was held, that the administrator of such son was absolutely entitled to the leasehold estates, subject only to be defeated by the birth of a son of T. the prior tenant for life.

Such gifts may be made defeasible on a collateral event.

It is scarcely necessary to observe, that a bequest of a term for years or other personal property in the language of an estate tail, may be made defeasible on a collateral event in the same manner as any other bequest carrying the whole interest. Thus, a legacy to A. and the heirs of his body, and if he die without issue *living B.*, to C., is clearly a good executory gift to C. (*c*).

Effect of Act 1 Vict. c. 26, s. 29, on this rule of construction.

And here it occurs to remark that the recent enactment (*d*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to personalty, operate to restrain such words from passing the absolute interest, and also to bring within the compass of the

(*b*) 3 B. P. C. Toml. 204. See also [*Higgins* v. *Dowler*, 1 P. W. 98;] *Stanley* v. *Leigh*, 2 P. W. 686; *Sabbarton* v. *Sabbarton*, Cas. t. Talb. 55, 245; *Gower* v. *Grosvenor*, 3 Barn. 54; *S. C.* cit. in *Daw* v. *Pitt*, stated 1 Mad. 503; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; [*Boydell* v. *Golightly*, 14 Sim. 327; *Lewis* v. *Hopkins*, 3 Drew. 668.]

(*c*) *Lamb* v. *Archer*, 1 Salk. 225.

(*d*) Ante, 469.

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rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator, by a will made or republished since 1837, bequeaths personal estate to A., and in case he shall die without issue then to B., A. will not take the absolute interest (as formerly), from the ulterior gift being void; but A. will take a vested interest in the personalty so bequeathed, defeasible in favour of B., on his (A.'s) leaving no issue at his death.

Where the bequest is to A. expressly for life, and in case of his dying without issue to B., the construction seems also free from doubt. A. will, according to the newly-enacted doctrine, take a life interest in *any* event, and B. will take the ulterior interest, only in the event of A.'s leaving no issue; in the converse event of A. leaving issue, the ulterior interest will be undisposed of.

As to annexing personal to real estate, devised in strict settlement.

III. When it is intended that leasehold estates, or personal chattels in the nature of heirlooms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth; and, as the freehold lands in that event pass over to the next remainder-man, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons in esse) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in any tenant in tail [by purchase (*e*)] until twenty-one, or death under that age, leaving

[(*e*) As to the necessity of these two words, see Vol. I. p. 254. The limitation proposed in the text does not carry the personalty as far along with the realty as might be done, since it vests it absolutely in a tenant in tail dying under twenty-one leaving issue, in which case it becomes distributable as his personal estate, and does not devolve by purchase on his issue in tail, as it clearly may be made to do without infringing on the rules against perpetuity. In order to carry on the pensonalty as far as possible, the declaration should be, that it shall not vest absolutely in *any* tenant in tail by purchase who shall die under the age of twenty-one years, but at his death shall devolve as nearly as possible in the same manner as the freehold lands. See Davidson's Common Forms, p. 216. Under this limitation, the issue in tail of a tenant in tail by purchase who dies under twenty-one will take the whole by purchase, instead of taking as next of

By direct gift.

issue inheritable under the entail. Whether the Courts are authorized to put this construction upon a [direct bequest of] chattels to go with the lands so long as may be, or so long as the rules of law will permit, has been vexata quæstio. Lord *Hardwicke*, in *Gower* v. *Grosvenor* (*f*), expressed an opinion in the affirmative, but in *Foley* v. *Burnell* (*g*) and *Vaughan* v. *Burslem* (*h*), Lord *Thurlow* held that the property vested absolutely in the tenant in tail on his birth, [and this decision has since been followed in several cases (*i*)]. The doctrine was much canvassed in the House of Lords in the case of *The Duke of Newcastle* v. *Countess of Lincoln* (*k*), which arose on marriage articles [containing a covenant to assign leaseholds, and the trusts being executory, it was decided that the Court had power to modify the limitations so as to carry out the intention.] Lord *Eldon*, however, entered into a full examination of the authorities; his own opinion being, that the question was concluded by Lord *Thurlow's* decision, on which point he appears to have differed from Lord *Erskine*, the then Chancellor. [He also expressed his opinion that there was no difference in the execution of an executory trust created by a will and of a covenant in marriage articles, and the case of the *Duke of Newcastle* v. *Countess of Lincoln* would therefore be an authority that an executory trust in a will, in the terms now under consideration, must receive a different construction from a direct bequest; but this point seems never to have been actually decided (*l*).

By executory trust.

Cases may, of course, arise in which the intention that the personal property should not vest in the first tenant in tail immediately on his birth is less doubtfully expressed. Thus, in the case of *Potts* v. *Potts* (*m*), the testator devised lands of inheritance to his nephew James for life, with remainder to his first and other sons in tail, with similar limitations to two other nephews and their sons. He then bequeathed leaseholds and other personal property to trustees upon trust for James for life,

Instances of personalty not vesting in tenant in tail on birth.

[kin of and through his ancestor; in the latter case, if not sole next of kin, he would only be entitled to a share.]

(*f*) 3 Barnard. 54. See also *Trafford* v. *Trafford*, 3 Atk. 347.

(*g*) 1 B. C. C. 274.

(*h*) 3 B. C. C. 101.

[(*i*) *Fordyce* v. *Ford*, 2 Ves. jun. 536; *Carr* v. *Lord Errol*, 14 ib. 478; *Stratford* v. *Powell*, 1 Ba. & Be. 1; *Rowland* v. *Morgan*, 6 Hare, 463, 2 Phil. 764; *Doncaster* v. *Doncaster*, 3 Kay & J. 26.]

(*k*) 3 Ves. 387; *S. C.* in D. P., 12 Ves. 218.

[(*l*) See opinion of Sir *L. Shadwell*, *Boydell* v. *Golightly*, 14 Sim. 346; and see observations bearing on the question, 14 Ves. 487; 2 Phil. 771; 1 Ba. & Be. 25; 1 J. & W. 574, ante, p. 327, and *Doncaster* v. *Doncaster*, 3 Kay & J. 26.

(*m*) 3 Jo. & Lat. 353.

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[and after his decease to permit the several other persons aforesaid to whom an estate for life was thereinbefore limited successively and as each of them should become seised of the said devised lands, to receive the rents and profits thereof for their life and lives respectively, and after the decease of the last of the last-mentioned tenants for life, or if none of them should so become seised, then *after the decease of James*, upon trust to grant, assign and convey the terms for years, and personal estate to such person or persons as should *then* become seised of the said real estates under any of the limitations aforesaid, their executors, administrators and assigns. It was contended that under this bequest, the personal property vested in, and passed by, the will of the eldest son of James who died in his father's lifetime, but Sir *E. Sugden* held, that the vesting was postponed until some person became actually entitled in possession as tenant in tail of the lands of inheritance, and consequently that the son of the second son of James (which second son had also died in the lifetime of James) was entitled. This decision was affirmed by the House of Lords upon appeal (*n*).

Limitation to the person "entitled in possession."

And in the case of *Cox* v. *Sutton* (*o*), the testatrix having an estate in fee in a messuage and mill, subject to the life estate of W. C., devised it to the first and other sons of W. C. in tail, and bequeathed 2,000*l.* upon trust after the decease of W. C. "upon the application or request in writing of the person or persons who, for the time being, might be entitled in possession," to apply the income in the repair of the messuage and mill "to the end and intent that the said stock or sum of 2,000*l.* and the interest and dividends thereof, may be and be continued so long as the rules of law and equity will permit, as a fund for keeping the said messuage and mill at all times in good and substantial repair, for the benefit of the persons who might from time to time be so in possession thereof." Sir *W. P. Wood*, V. C., though he did not consider the case so strong as *Potts* v. *Potts*, thought the words "in possession" could not be got over, and that the representative of the first tenant in tail, who died in the lifetime of W. C., was not entitled.

Chattels given to the person entitled to "the actual freehold."

Again, in the case of *Lord Scarsdale* v. *Curzon* (*p*), where the trust of chattels was for the person or persons who should be

[(*n*) 1 H. of L. Ca. 671.
(*o*) 25 L. J. Ch. 845, 2 Jur. N. S. 733.
(*p*) 1 Johns. & H. 40, 66, 67. See 7 Jur. N. S. Pt. II., p. 71.]

["seized of or entitled to the actual freehold" of certain estates before devised in the usual manner in strict settlement, Sir *W. P. Wood* decided that as there could be no children of the tenant for life who would not be entitled to the freehold simpliciter either in possession or remainder, "actual" must mean in possession, or the clause would have no meaning; and, therefore, an eldest son who had died in the lifetime of the tenant for life, was not entitled, though he lived to attain the age of twenty-one years, but the chattels vested in the next brother who had survived the tenant for life and attained that age.]

# CHAPTER XLV.

## WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

I. *Liability of Real Estate to Simple Contract Debts.—Whether charged by a general Direction in a Will that Debts shall be paid.—Distinction where a specific Fund is appropriated;—where the Direction is to Executors, being or not being Devisees.—Whether Legacies chargeable by same Words as Debts, &c.*

II. *Whether Direction to raise Money out of Rents and Profits authorizes a Sale.*

Sketch of the law as to real estate being assets.

I. By the common law of England, the real estate of a deceased person was not liable to answer his simple contract debts, no action being maintainable against the heir in respect of descended assets, except by creditors whose debts were constituted by an instrument under seal, *i. e.* a specialty obligation; and not even then, unless an intention to charge the heir of the debtor were distinctly indicated: and the claim of a specialty creditor did not extend to copyholds (*a*); nor did it extend to devised freeholds, until the act of 3 & 4 William & Mary, c. 14, gave a right of action against the devisee of the debtor, concurrently with the heir, to a certain class of specialty creditors, namely, those whose demands were recoverable by an action of debt (*b*). [But even these were held to have no remedy under the act where there was no heir, the remedy provided being against the heir and devisee jointly (*c*).]

Stat. 47 Geo. 3, c. 74. See also 1 Will 4, c. 47, s. 9.

The first relaxation of this rigid doctrine (so adverse to the policy of a great commercial country) was the act of 47 Geo. 3, c. 74, which let in the claims of the simple contract creditors of a deceased person upon the real assets, *i. e.* the freehold estates, if the debtor was at the time of his decease (*d*) subject to the bankrupt laws. This act was the fruit of the persevering exer-

(*a*) *Parker* v. *Dee*, 2 Ch. Cas. 201.

[(*b*) *Wilson* v. *Knubley*, 7 East, 128; extended to action of covenant by 1 Will. 4, c. 47.

(*c*) *Wilson* v. *Knubley*, 7 East, 128; *Hunting* v. *Sheldrake*, 9 M. & Wel. 256. The act 1 Will. 4, c. 47, supplied a remedy against the devisee *alone*.]

(*d*) *Hitchon* v. *Bennett*, 4 Mad. 180.

tions of Sir *Samuel Romilly*, whose labours in this righteous cause are well known, and was all that those exertions were able to wring from the legislature of that day. But what was denied to the zealous advocacy of this able and upright lawyer, was conceded, without, it is believed, a dissentient voice by the Parliament of William the Fourth,—a striking illustration of the change which public opinion had undergone on this subject. The act of 3 & 4 Will. 4, c. 104, provided, that after the 29th of August, 1833, when any person should die seised of or entitled to any estate or interest in lands, tenements or hereditaments corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, which he should not by his last will have charged with or devised subject to the payment of his debts, the same should be assets, to be administered *in courts of equity*, for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir-at-law, customary heir and devisees of such debtor, should be liable to all the same suits *in equity* at the suit of any of the creditors, whether by simple contract or by specialty, as the heir-at-law or devisees were theretofore liable to in respect of freehold estates at the suit of creditors by specialty in which the heirs were bound; but it is provided that in the administration of assets by courts of equity *under and by virtue of the act*, all creditors by specialty in which the heirs are bound, shall be paid the full amount of their debts before creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demand.

3 & 4 Will. 4, c. 104.

Real estates to be assets for payment of debts by simple contract.

Priority reserved to specialty creditors.

[Under this act, lands of which a person dies seised without having charged them with his debts are assets for the payment of his debts, although he died without an heir: for it is held, that the effect of the former clause charging the lands is not limited by the latter, which provides that as against the heir and devisee the same suits may be brought as before might be brought against them by a specialty creditor (*e*).]

Real estate assets, though debtor die without heir.

During the period when real estate was not liable, unless charged by its deceased owner, to pay his simple contract debts, of course it was a question of importance (and sometimes too of no small difficulty) to determine whether such charge were in point of fact created by the will of the debtor; and this

Difference of effect between enactment and actual charge.

[(*e*) *Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749.

question is not wholly precluded by the recent enactment; for it will be observed that the statute does not interfere with the general rule regulating the priority between creditors by specialty binding the heirs and other creditors,—a specialty creditor, whose security binds the heirs, having precedence over a creditor by simple contract or by specialty not binding the heirs, in the administration of assets under the act (*f*); while, on the other hand, under a general charge both classes of creditors came in pari passu (*g*). Another difference is, that under the statute the creditors have not (as in the case of an actual charge) any lien on the estate (*h*). If, therefore, it is parted with by the heir or devisee before the creditor has pursued his remedy, the estate cannot be followed; though the creditor's lien under an actual charge is of no great value to him, since it does not prevail against a bonâ fide purchaser for a pecuniary consideration; the well-known rule being that such purchasers are not bound to see their money applied in payment of debts under a general charge (*i*). Hence it is obvious that the inquiry whether real estate is or is not charged with debts by certain expressions in a will is still important, even in regard to the wills of testators dying since the 29th of August, 1833.

General direction that debts shall be paid.

Whether a general direction by a testator that his debts shall be paid charges the real estate with the payment, is a point which has been much agitated from an early period (*k*).

[(*f*) *Richardson* v. *Jenkins*, 1 Drew. 477.

(*g*) See next chapter, sect. 1.]

(*h*) 4 My. & Cr. 268. [See also *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Pimm* v. *Insall*, 1 Mac. & G. 449.]

(*i*) 3 Sug. Vend. & P. 10th Ed. 154, [11th Ed. 838.] And where debts and legacies are charged, the exemption extends to both, and even, it seems, to annuities. [*Page* v. *Adam*, 4 Beav. 269, and cit. 1 D. M. & G. 650.

What things are included under a charge of "debts."

(*k*) What constitutes a debt is a question unaffected by the charge. Therefore under a charge of "debts" in a will are included all liabilities to which the personal estate is liable; as, mortgage debts, *Stone* v. *Parker*, 1 Dr. & Sm. 212, damages for a breach of covenant occurring after the testator's death; see *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 587; *Lomas* v. *Wright*, 2 My. & K. 769; *Willson* v. *Leonard*, 3 Beav. 373; *Morse* v. *Tucker*, 5 Hare, 79; *Eardley* v. *Owen*, 10 Beav. 572; *Bermingham* v. *Burke*, 2 Jo. & Lat. 699. So, a sum covenanted to be left by *will* (which is a specialty debt), *Eyre* v. *Monro*, 26 L. J. Ch. 757, and claims for dilapidations against a former incumbent, see *Bisset* v. *Burgess*, 23 Beav. 278. And a charge of "debts, funeral expenses and costs of proving and attending the execution of the trusts of a will," includes the costs of an administration suit, *Alsop* v. *Bell*, 24 Beav. 469. Debts barred by the Statute of Limitations are not included, *Burke* v. *Jones*, 2 V. & B. 275, next chapter. And the Act 3 & 4 Will. 4, c. 104, has been held to be equally extensive, *Ex parte Hamer*, 2 D. M. & G. 366. If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the statute of fraudulent devises, *Hughes* v. *Doulbin*, 2 Cox, 170. Under a charge of the debts of another person all debts due from him and not barred at *his* death are payable, *O'Connor* v. *Haslam*,

Cases in which lands held *not* to be charged.

In an anonymous case in Freeman (*l*), it was held that the land was *not* charged in such cases; "for, if that should be so, the debts of every testator would be charged upon his land, for there are but few wills but have some such expressions, whereby the testator desires his debts to be paid."

Expressions which have been held to charge.

A similar doctrine was propounded in *Eyles* v. *Cary* (*m*); but it seems to be irreconcileable with that of numerous other early authorities, in which a direction for the payment of debts generally, or (though this is certainly stronger) for the payment of them *out of the testator's estate*, has been held to onerate the real estate devised by the will.

"*My debts being first deducted*, I devise all my estate," &c.

Thus, in *Newman* v. *Johnson* (*n*), where the testator said, "*My debts and legacies being first deducted*, I devise all my estate, both real and personal, to J. S.;" Lord *Nottingham*, held, that it amounted to a devise to sell for payment of debts.

"First, I will that all my debts be paid," "also I devise," &c.

So, in *Bowdler* v. *Smith* (*o*), where a testator devised as follows:—"*As to my temporal estate wherewith God hath blessed me, I give and dispose thereof as followeth: First, I will that all my debts be justly paid which I shall at my decease owe;* also I devise all my estate in G. to A." This was all the real estate the testator had; and it was held that the will charged it with the debts.

Similar expression.

And, in *Trott* v. *Vernon* (*p*), where a testator devised in these words:—"*Imprimis, I will and devise that all my debts, legacies, and funeral expenses, shall be paid and satisfied in the first place:* Item, I give and devise;" and then proceeded to dispose of his real and personal estate: Lord Chancellor *Cowper* held, that the testator having willed his debts, &c., to be satisfied in the first place, these words must be intended to give a preference to those purposes to any other whatever; and he held the real estate to be charged.

"As to my worldly estate, *my debts being first satisfied*," &c.

Again, in *Harris* v. *Ingledew* (*q*), where the testator said, "As to my worldly estate, *my debts being first satisfied*, I devise the same as follows," and then proceeded to devise certain freehold

[5 H. of L. 170; but not generally interest thereon, *Askew* v. *Thompson*, 4 Kay & J. 620.]

(*l*) Freem. Ch. Ca. 192.

(*m*) 1 Vern. 457, 1 Eq. Ca. Ab. 198, pl. 3.

(*n*) 1 Vern. 45, 1 Eq. Ca. Ab. 197, pl. 1. And see *Harris* v. *Ingledew*, 3 P. W. 91; *Davis* v. *Gardiner*, 2 P. W. 187.

(*o*) Pre. Ch. 264. See also *Coombes* v. *Gibson*, 1 B. C. C. 273.

(*p*) Pre. Ch. 430, 2 Vern. 708, 1 Eq. Ca. Ab. 198, pl. 6. See also *Beachcroft* v. *Beachcroft*, 2 Vern. 690.

(*q*) 3 P. W. 91. [See also *King* v. *King*, ib. 358.]

and leasehold lands; Sir *J. Jekyll*, M. R., held, that nothing was devised until the debts were paid. He thought it would have been sufficient, though the word "first" had been omitted.

Lands charged under general direction, though particular debts were to be paid out of the first "*money*" that was received.

So, in *Hatton* v. *Nichol* (*r*), where the testator commenced his will thus:—"As to the worldly estate with which it hath pleased God, in His abundant goodness, to bless me, I give, devise, and dispose thereof, as followeth:—*Imprimis, I will that the charges of my funeral, and all debts which shall be owing by me at the time of my death, be justly paid and satisfied,* especially that due to my poor carriers, which I will shall be discharged out of the first *money* of mine that shall be received;" and then he proceeded to devise his real estate to certain uses. Lord *Talbot* held, that the debts were well charged upon the real estate.

"In the first place I will that all my just debts," &c., be paid.

Again, in *Stangor* v. *Tryon* (*s*), where the words were, "*In the first place, I will that all my just debts and funeral expenses be fully paid and satisfied;*" and the testator then devised copyhold lands: Sir *T. Sewell*, M. R., held the copyholds liable to the debts. The case of *Kay* v. *Townsend* (*t*), decided about the same period, is to the same effect.

Debts to be paid "*out of my estate.*"

In *Legh* v. *Earl of Warrington* (*u*), a testator thus commenced his will:—"As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts, which I shall owe at the time of my decease, be discharged and paid *out of my estate* (*x*);" and he then proceeded to dispose of his real and personal estate, expressly charging the former with an annuity. It was contended, that these were merely the usual introductory words, and did not indicate an intention to charge the real estate; but the House of Lords, affirming a decree of Lord *King*, held the real estate to be charged.

This case has always been regarded as a leading authority. It was recognized by Lord *Hardwicke* in the case of the *Earl of Godolphin* v. *Penneck* (*y*), and by Lord *Loughborough* in *Williams* v. *Chitty* (*z*).

(*r*) Cas. t. Tal b. 110.

(*s*) See Mr. *Raithby's* note to *Trott* v. *Vernon*, 2 Vern. 709.

(*t*) Ibid.

(*u*) 1 B. P. C. Toml. 511.

(*x*) These words are added from a manuscript report stated by Mr. *Belt*, in his Supplement to Ves. 361.

(*y*) 2 Ves. 271. As this case is rather loosely stated, and seemed very little to illustrate the general doctrine, it has been omitted.

(*z*) 3 Ves. 552.

So, in *Kentish* v. *Kentish* (*a*), where the testator said, "*First, I will that all my just debts shall in the first place be paid and satisfied.* Item—I give and bequeath;" and went on to devise his real estate; *Buller*, J., held it to be charged.

Simple direction that "debts be in the first place paid."

In *Kightley* v. *Kightley* (*b*), too, Sir *R. P. Arden*, M. R., assumed that debts were charged on the real estate by the words, "First, I will and direct that all my legal debts, legacies, and funeral expenses, shall be fully paid and satisfied," which were followed by a direction to the testator's executors about his funeral, and a devise of his lands. But the legacies (*c*) he held were not charged by these words.

Lord *Alvanley's* opinion of the effect of a general direction.

So, in *Shallcross* v. *Finden* (*d*), where a testator began his will thus:—"*After payment of my just debts, funeral expenses, and the expenses of the probate hereof* (*e*), as likewise of my testamentary articles, I give and bequeath unto" H. 50*l.*, "and as to such expectancies in fee," &c.; and the testator then proceeded to devise his interest in certain lands; Sir *R. P. Arden*, M. R., held, that the real estate in question was charged with the debts. The words "after payment of my debts," he said, meant that the testator would not give anything until his debts were paid.

"*After payment of my just debts*," &c., "I bequeath," &c.

With singular inconsistency, however, the same learned Judge, in *Hartley* v. *Hurle* (*f*), assumed, in the discussion of another question, that a general direction by a testator that his debts, funeral and testamentary expenses, should be paid, was a direction *to his executors*, the persons who take the personal estate, to pay them.

In *Williams* v. *Chitty* (*g*), a testator ordered and directed *all his just debts and funeral expenses to be first paid;* and then proceeded to devise his real estate. Lord *Loughborough's* first impression was, that the real estate was not charged; but he ultimately came to a different conclusion upon the authorities, which he considered had established the rule, "that wherever there is mention of debts in a will, and that will devises real estate, that shall throw the debts upon the real estate."

Mere direction that debts, &c., should be paid.

Next in chronological order is the case of *Clifford* v. *Lewis* (*h*),

"I will that

(*a*) 3 B. C. C. 257.
(*b*) 2 Ves. jun. 328.
(*c*) As to the distinction between them, see post, this s., ad fin.
(*d*) 3 Ves. 738.
(*e*) For a similar expression, see *Batson* v. *Lindegreen*, 2 B. C. C. 94; *Kidney* v. *Coussmaker*, 12 Ves. 136, post; [*Tompkins* v. *Tompkins*, Pre. Ch. 397.]
(*f*) 5 Ves. 545.
(*g*) 3 Ves. 545.
(*h*) 6 Mad. 33. [*Bradford* v. *Foley*, 3 B. C. C. 351, n.]

"my just debts," &c., "be paid."

where a testator commenced his will by saying, "I will and direct that my *just debts, funeral and testamentary expenses, be paid and satisfied.*" He then, after some recitals, bequeathed an annuity to his wife, charging his real estate in certain counties therewith; and went on to dispose of the rest of the real and personal estate. Sir *J. Leach*, V. C., said, "The question is, whether the expression with which he has commenced his will imports a general and primary purpose that the payment of his debts, funeral and testamentary expenses, should precede the subsequent dispositions which he has made of his property. In *Finch* v. *Hattersley* (*i*), the will began thus: '*First*, I direct that my debts, &c. &c., be paid.' In *Legh* v. *Warrington*, '*Imprimis*, I direct my debts to be paid.' Both these wills must be read thus: '*In the first place*, I direct my debts to be paid.' This testator has *in fact* first directed his debts to be paid; and I cannot attribute to him a different intention, because *in the form of the expression* he has not remarked that it was *in the first place.*"

Remarks upon *Clifford* v. *Lewis*.

Sir *John Leach* here seems to have treated the question before him as lying within a very narrow compass, namely, whether a direction inserted at the commencement of the will was equivalent to an express direction to pay "in the first place;" though it is not a little singular that, on a subsequent occasion (*k*), the same learned Judge, when Master of the Rolls, referred to the case of *Clifford* v. *Lewis*, as distinguished from the one before him by the circumstance, that the testator's debts were directed in the first place to be paid. In some of the early cases, undoubtedly, reliance was placed on expressions of this nature; but most of them proceeded upon the broad ground that a general direction that debts should be paid with or without such concomitant expressions, and, whatever was its position in the will (*l*), charged the real estate. The words "in the first place," indeed, as here used, it is submitted, are merely introductory words of form, denoting the commencement of the testamentary act (*m*), or, if they have any meaning, only denote the

Circumstance of devisee being appointed executrix.

(*i*) Cit. 7 Ves. 210, stated 3 Russ. 345, n. The testator directed that his debts and funeral expenses [should be paid by his executrix,] and then devised his real estate to his wife for life, *whom he appointed executrix.* The circumstance of the devisee being appointed executrix was, in *Powell* v. *Robins*, 7 Ves. 211, considered by Sir *W. Grant* as the ground of the decision.

(*k*) See *Douce* v. *Lady Torrington*, 2 My. & K. 600.

(*l*) That the position of such clauses is immaterial, see *Ridout* v. *Dowding*, 1 Atk. 419; *Clark* v. *Sewell*, 3 Atk. 96.

(*m*) See *Beeston* v. *Booth*, 4 Mad. 161.

order of payment, not the fund out of which payment is to be made.

As to debts being directed to be paid "first," or in the first place.

Some stress certainly was laid on a phrase of this nature in the subsequent case of *Ronalds* v. *Feltham* (*n*), where a testator commenced his will in these words: "First, I direct all my just debts and funeral expenses to be fully paid and satisfied;" and then proceeded to dispose of all his copyhold, freehold, and leasehold estates, and all his other property, among his wife and children. Sir *T. Plumer*, M. R., held, that the real estate was charged, observing, in reference to the argument upon the word "first" in this will being nothing more than the ordinary technical form of introductory words, that here it was not followed by other words denoting succession, such as secondly, thirdly, &c.

But a more sensible view of this point was taken by Sir *L. Shadwell*, in the case of *Graves* v. *Graves* (*o*), where his Honor said, "I do not think that the charge is made to rest on the mere circumstance that the testator has used the words 'imprimis,' or, 'in the first place;' for, if a testator directs his debts to be paid, is it not, in effect, a direction that his debts shall be paid in the first instance?"

In the case of *Irvin* v. *Ironmonger* (*p*), we have another instance of real estate being held to be charged by a general direction at the commencement of the will without the words "in the first place," and that too by Sir *John Leach*, whose reliance on such words has been already the subject of comment; though his Honor certainly does not appear to have uniformly maintained the efficacy of a general direction, as appears by the case of *Douce* v. *Lady Torrington* (*q*), where the testator, after directing all his just debts, funeral and other incidental expenses, to be paid with all convenient speed after his decease, and confirming his marriage settlement, devised all his real estate to trustees (whom he also appointed executors) and their heirs, upon trust to pay his wife an annuity, and upon the further trusts therein mentioned. By a codicil, the testator directed that his trustees should, out of the rents arising from one of his estates, pay his wife's annuity, and also an annuity to his son, and apply the surplus in discharge of the simple

Real estate held not to be charged by general introductory words.

(*n*) T. & R. 418.
(*o*) 8 Sim. 55.
(*p*) 2 R. & My. 531. [See also *King* v. *Denison*, 1 V. & B. 260, 274; *Walter* v. *Hardwick*, 1 My. & K. 396, 402.]
(*q*) 2 My. & K. 600.

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contract debts owing by him (the testator). One question was, whether the other estates were charged with the testator's debts by the effect of the general direction at the commencement of his will. Sir *J. Leach*, M. R., decided in the negative: he intimated the strong inclination of his opinion to be, that the introductory words had no such effect, but that it was unnecessary to decide the question upon that ground, as it was plain from the codicil that the testator did not intend a general charge upon his real estate, for by that codicil he directed the surplus only of a particular estate, after payment of the annuities, to be applied in payment of the simple contract debts.

Sir *L. Shadwell's* condemnation of *Douce* v. *Lady Torrington*.

Of this case, Sir *L. Shadwell*, in *Graves* v. *Graves* (*r*), observed, that it seemed to have been an amicable decision, and to have been made without sufficient consideration. Indeed, so far as it denied effect to general introductory words, the case directly clashes with the preceding authorities, to which may now be added several more recent cases, which preclude all hesitation in affirming the rule to be, that, subject to the question presently noticed, a general direction to pay debts, in whatever part of the will contained, operates to throw them on the testator's real estate.

Recent cases in which real estate held to be charged by general words.

Thus, in the case of *Ball* v. *Harris* (*s*), a will which commenced with the following words—"First, I direct all my just debts, funeral and testamentary expenses, and the charges of the probate of this my will, to be paid;" and then contained pecuniary legacies and devises of real estate—was held by both Sir *L. Shadwell* and Lord *Cottenham* to charge the testator's real estate.

So, in the case of *Harding* v. *Grady* (*t*), a similar construction was given by Sir *Edward Sugden* to the following concluding passage in a will: "I desire that all my just debts be paid as soon as conveniently after my decease." In this case

(*r*) 8 Sim. 56.

(*s*) 8 Sim. 485, 4 My. & Cr. 264. In this case, and in *Shaw* v. *Borrer*, 1 Kee. 559, the doctrine that a general direction to pay debts charged them on the real estate was treated as too clear for discussion, the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was decided in the affirmative. [See also *Gostling* v. *Carter*, 1 Coll. 644; *Mather* v. *Norton*, 17 Jur. 309, 21 L. J. Ch. 15; *Doe* d. *Jones* v. *Hughes*, 6 Exch. 223. In this last case it was decided that a simple charge of debts did not give the executor not taking the legal estate a power of sale. *Robinson* v. *Lowater*, 17 Beav. 592, and *Wrigley* v. *Sykes*, 21 Beav. 337, are contra; and see *Colyer* v. *Finch*, 5 H. of L. Ca. 905; and 2 Jur. N. S., Part 2, 68. But the rule for all future cases is settled by 22 & 23 Vict. c. 35, ss. 14 to 18.]

(*t*) 1 D. & War. 430.

there was the peculiarity that the will embraced real estate only, but the Chancellor's remarks render it probable that his adjudication would have been the same if the will had included personalty.

So, in *Parker* v. *Marchant* (*u*), Sir *K. Bruce*, V. C., treated it as clear that real estate was charged by the following words: "I direct, in the first place, all my debts to be paid;" the will then proceeding to dispose of personal, and ultimately of real estate.

General observations upon the cases.

Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid, charges them upon his real estate. Though certainly in some of the wills there were expressions which might fairly be considered to sustain the construction independently of any such doctrine, it seems to be generally admitted that the Courts have allowed their anxiety to prevent moral injustice, by the exclusion of creditors, "and that men should not sin in their graves," to carry them beyond the limits prescribed by established general principles of construction; though Lord *Alvanley's* observation in *Shallcross* v. *Finden* (*x*), that the restricting the direction to pay to personalty renders it nugatory, that being before liable, is not without weight.

Absence of any devise or mention of realty.

The only doubt which the preceding authorities admit of is, whether a general direction that debts shall be paid will throw them on real estate when contained in a will, the dispositions of which are otherwise confined to personalty; for it is observable that in all the cases which have yet occurred the will appears to have embraced real estate. The total absence of any devise or mention of realty would certainly be a new feature; though, considering the strong tendency of the recent cases in favour of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as the case of *Shallcross* v. *Finden* (*x*), we have a dictum of Sir *R. P. Arden* which seems to bear upon the point under consideration: "I am very clearly of opinion," said this able Judge, "that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir-at-law* or devisee."

Exceptions to the general rule.

The rule, however, seems to be subject to two material exceptions. First, where the testator, after generally directing

(*u*) 1 Y. & C. C. C. 290; *Shaw* v. *Borrer*, 1 Kee. 559. See also *Price* v. *North*, 1 Phill. 85.

(*x*) 3 Ves. 739.

his debts to be paid, has provided a specific fund for the purpose.

Where testator has appropriated a specific fund to pay the debts, &c.

Thus, in *Thomas* v. *Britnell* (*z*), where the testator first ordered all his debts to be honourably paid immediately after his decease; and in a subsequent part of his will devised certain hereditaments, *excepting H. and R.*, to trustees, upon trust, out of the money arising by the sale, to pay and discharge his *debts*, funeral expenses, and all legacies given by that will, or any other writing under his hand. He afterwards directed that H. and R. should be in the first place for payment of the *legacies* mentioned in his will. Sir *J. Strange*, M. R., held, that H. and R. were not subject to the payment of debts. Though on the first part, he said, the Court might take the whole real estate to be charged with debts, yet as there was no *express* lien on the real by these general words, and afterwards the testator appropriated certain part of his real for debts (*and legacies*), and other part for legacies, it was too much to lay hold of the general words to say that the whole should be charged with payment of debts. It could be done only by implication on the general words, which might be explained afterwards, and that implication destroyed.

So, in the case of *Palmer* v. *Graves* (*a*), where the testator commenced his will with the following words: "In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will to be duly paid;" and then proceeded to dispose specifically of certain freehold and leasehold property. The testator gave to his son A., his heirs, executors, administrators and assigns, all the residue of his real and personal estate, with the rents and profits of his freehold and leasehold hereditaments up to the quarter day next ensuing after his decease, *which rents and profits he charged with the payment of his debts, funeral expenses, and the charges of proving his will;* and the testator appointed A. executor. Lord *Langdale*, M. R., held that the real estate was not charged by the introductory words, as the general charge by implication was controlled by the specific charge in the subsequent part of the will.

However, it is clear, that a charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not

(*z*) 2 Ves. 313.

(*a*) 1 Kee. 545. [See also *Douce* v. *Lady Torrington*, 2 My. & K. 600, ante, 559; *Legh* v. *Earl of Warrington*, 1 B. P. C. Toml. 511, cit. 2 Ves. 272, and Belt's Suppl. 361.]

actually inconsistent with such charge. As where (*b*) a testator, after willing all his just debts, funeral expenses, and the charges of proving his will to be paid, devised real estate, and gave some legacies, and then proceeded to bequeath all the residue of his personal estate, *after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies therein-before bequeathed.* Lord *Lyndhurst*, C., held, that the latter words were not inconsistent with an intention to charge the real estate as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors; and the presumption in favour of them was not to be repelled by anything short of a clear and manifest evidence of a contrary intention.

Not affected by express charge on residuary personal estate,

And Sir *L. Shadwell*, V. C., came to a similar conclusion on a special and very inaccurately framed will in the case of *Graves* v. *Graves* (*c*).

[So, in *Taylor* v. *Taylor* (*d*), the same Judge decided that a direction that all the testator's just debts and funeral expenses should be fully paid and satisfied, was not cut down by a subsequent charge of specific sums on particular estates. And in the case of *Forster* v. *Thompson* (*e*) it was held that no such result followed from a subsequent charge of a specific debt on *all* the real estate.

—— nor by charge of specific sums either on particular lands,

—— or on all the real estates.

Lastly, in *Jones* v. *Williams* (*f*), where a testator began by directing his debts, funeral and testamentary expenses to be paid, and provided that in aid thereof the purchase-money of an estate called C. and a debt due to him from A. should be applied for that purpose; and he devised his property called T. to his wife and her heirs in trust to sell and apply the proceeds in further aid and discharge of his debts, and then devised other lands and personalty to his wife and daughter, and directed certain articles to be kept as heirlooms (*g*), Sir *J. Knight Bruce* said that, without intimating either assent or dissent as to the cases of *Douce* v. *Lady Torrington* and *Palmer* v. *Graves*, he was of opinion upon that will that there was at the commencement of it, plainly expressed, an intention to charge

Whether express particular charge controls previous general charge depends on the whole tenor of will.

(*b*) *Price* v. *North*; 1 Phill. 85, [reversing the decision of the Ch. B. 4 Y. & C. 509.]

(*c*) 8 Sim. 43. [See also *Noel* v. *Weston*, 2 V. & B. 269.

(*d*) 6 Sim. 246. See also *Clifford* v. *Lewis*, 6 Mad. 33, ante, 557.

(*e*) 4 D. & War. 303; see also *Cross* v. *Kennington*, 9 Beav. 150; *Dormay* v. *Borradaile*, 10 Beav. 263.

(*f*) 1 Coll. 156, 8 Jur. 373.

(*g*) A similar direction was relied on by Sir *L. Shadwell* in *Graves* v. *Graves*.]

[all the property with all the debts, and that the following parts of the will did not contain any sufficient indication of a contrary intention. The point, however, was not open to his decision.

It would seem, therefore, that the controlling effect on a general charge of debts of a subsequent appropriation of specific parts of a testator's realty to the payment of them is not to be too readily relied on, unless an intention to exempt the remaining realty be indicated by a context, or by terms as strong as the express exception in *Thomas* v. *Britnell*.]

And here, it should be observed, that the doctrine of the preceding cases extends only to charges on real estate created by general and ambiguous expressions; for, of course, a clear and explicit charge on real estate is not liable to be controlled by an express appropriation of particular lands to the purpose (*h*), or a qualified charge of the real estate in the same will (*i*).

Second exception, where the payment is to be made by the executors.

The second exception to the general rule under discussion occurs where the debts are directed to be paid by *executors*, in which case, unless land be devised to them, it will be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their respective character.

Thus, in *Brydges* v. *Landen* (*k*), where the testator commenced his will as follows:—"Imprimis, that all my debts and funeral charges and expenses be, in the first place, paid *by my executrix* hereinafter named: then as to my real and personal estate, I dispose of as follows;" and, after making such disposition, he charged and made liable all his real and personal estate, with two sums of 150*l*. to each of his daughters. All the cases were considered by Lord *Thurlow*, who was clearly of opinion that the real estate was not charged.

It is remarkable, that this decision did not, in some degree, abate the confidence with which Sir *R. P. Arden*, and Lord *Loughborough*, the former in *Kightley* v. *Kightley* (*l*), and *Shallcross* v. *Finden* (*m*), and the latter in *Williams* v. *Chitty* (*n*), insisted that a general direction that debts should be paid, charged the real estate, inasmuch as it seems to have been

(*h*) *Ellison* v. *Airey*, 2 Ves. 568; *Coxe* v. *Bassett*, 3 Ves. 155; [*Wrigley* v. *Sykes*, 21 Beav. 337.]

(*i*) *Crallan* v. *Oulton*, 3 Beav. 1.

(*k*) [3 Russ. 346, n., and] cited 3 Ves. 550, [where it is said that the circumstance that the debts were to be paid by the executrix was considered very important.]

(*l*) Ante, 557.

(*m*) Ibid.

(*n*) Ibid.

decided by Lord *Thurlow*, without allusion to the circumstance, that the direction to pay was *to the executors*. The case was afterwards followed, however (but with the same apparent disregard of this peculiarity), by Sir *R. P. Arden* himself.

Direction to *executors* to pay debts held not to charge real estate.

Thus, in *Keeling* v. *Brown* (*o*), the words were, "Imprimis, I will and direct that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease *by my executrix and executors hereinafter named.* Item, I give devise and bequeath unto J. all that my messuage," &c.; and, after other devises, and giving his wife an estate for life in part of the real estate, the testator appointed his wife and two other persons (who took *no* interest in the real estate) executrix and executors. Sir *R. P. Arden*, M. R., said he could not, with all the disposition he always felt to give such a construction to wills as should make testators honest, construe this into a charge upon the real estate; it would be a violence to all language, and making a will for the testator.

Again, in *Powell* v. *Robins* (*p*), where a testator first *devised* that all his just debts and funeral expenses might be satisfied and paid *by his executors therein named* as soon after his decease as might be, and then gave certain leasehold premises to his wife, and afterwards devised a freehold estate to his son D., and appointed W. and G. executors. Sir *W. Grant*, M. R., upon the authority of *Brydges* v. *Landen* (*q*), *Williams* v. *Chitty* (*r*), and *Keeling* v. *Brown* (*s*), held, that this estate was not charged, inasmuch as no real estate passed *to the executors who were directed to pay.*

Again, in the case of *Willan* v. *Lancaster* (*t*), where a testator directed that his debts should be paid by his executors, and "*then*" devised his lands, it was contended that the word "then" was equivalent to *after payment of the debts* (*u*); but

(*o*) 5 Ves. 359.

(*p*) 7 Ves. 209.

(*q*) Ante, 564.

(*r*) Ibid. But this was a determination the other way, the direction being general, and not expressly to the executors. Lord *Loughborough's* arguments at the hearing, indeed, pointed to the conclusion that it was not a charge; but he afterwards decided the contrary, upon the authorities.

(*s*) Supra.

(*t*) At the Rolls, 14th Nov. 1826, MS., 3 Russ. 108. See also *Braithwaite* v. *Britain*, 1 Kee. 206; (but where it is observable that the direction *to the executors* to pay the debts, on which Lord *Langdale* relied in his judgment, does not occur in the will, as reported:) [and *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.]

(*u*) As to this expression, see ante, 557, Chap. XXV. sect. 2, ad fin. The argument founded on the word "then," in this case, very much resembles that which lays stress on the words "imprimis," "in the first place," as to which see ante, 559.

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Sir *J. S. Copley*, M. R., held that it was merely used in the sense of *further*, and that the debts were not charges on the real estate.

Distinction where *executor is devisee of real estate.*

Where, however, the executor is devisee of real estate, a direction even *to him* to pay debts or legacies will cast them upon the realty so devised. Thus, in the early case of *Awbrey* v. *Middleton* (*x*), where a testator gave several legacies and annuities, to be paid *by his executor*, and then devised all the rest and residue of his goods and chattels *and estate* (*y*) to his nephew (who was his heir-at-law), *and appointed him executor of his will;* [the will also contained an express devise of some lands to another person;] Lord *Cowper* held the real estate was chargeable with the legacies and annuities in aid of the personal estate.

So, in the case of *Alcock* v. *Sparhawk* (*z*), the testator devised certain lands to A. (his heir-at-law) and his heirs; he then gave a legacy to B. to be paid *by his executor* within five years after his decease; and appointed A. sole *executor* of his will, desiring him to see the will performed; it was held that the legacy was charged upon the land devised to A.

Direction to trustees for sale (also executors) to pay what testator should appoint, held to extend to debts directed to be paid *by his executors.*

So, in *Barker* v. *Duke of Devonshire* (*a*), where a testator devised all his real and personal estate unto and to the use of several persons, their heirs, &c., in trust by sale or mortgage thereof to pay *whatsoever he should thereafter by will or codicil appoint.* He then appointed these persons his executors, and proceeded to direct that *his just debts, funeral expenses, &c. should be paid by his executors,* and devised the residue of his estate (after giving several specific legacies) to his son. Sir *W. Grant* held, that this authorized a sale for the payment of debts, though it was contended that the direction being *to the executors,* shewed the intention of the testator to confine it to personal estate.

Again, in the case of *Henvell* v. *Whitaker* (*b*), where a testator directed that all his just debts and funeral expenses should be

(*x*) 2 Eq. Ca. Ab. 497, pl. 16, Vin. Ab. Charge (D), pl. 15.

(*y*) As to the operation of this word to carry the real estate, [and as to the controlling effect on words primâ facie including realty of appointing the devisee executor, see ante, Chap. XXII.]

(*z*) 2 Vern. 228, 1 Eq. Ca. Ab. 198, pl. 4. See also *Goodright* d. *Phipps* v. *Allen*, 2 W. Bl. 1041; *Doe* d. *Pratt* v. *Pratt*, 6 Ad. & Ell. 180; [*Elliott* v. *Hancock*, 2 Vern. 143; and of course the construction is not varied by the renunciation of the probate by the person named executor, *Lypet* v. *Carter*, 1 Ves. 499; and per Lord *Thurlow*, 1 Ves. jun. 446.]

(*a*) 3 Mer. 310.

(*b*) 3 Russ. 343. See also *Dover* v. *Gregory*, 10 Sim. 393.

paid by his executor thereinafter named, and then gave all his real and personal estate to his nephew A., his heirs, executors, administrators and assigns, and appointed him executor: Sir *J. Leach*, M. R., decided, that the direction to the nephew to pay the debts operated to charge all the property, both real and personal, which he derived under the will.

Debts charged on realty by direction to executors, who are also devisees, to pay them.

[So, in the case of *Cross* v. *Kennington* (*c*), where a testator began by directing his debts and funeral and testamentary expenses to be first duly paid, and then devised a real estate to his executors, and gave divers legacies which he directed to be paid by his executors in six months after his decease if the money could be got in: and the testator then proceeded to give a number of pecuniary legacies and charged his executors with the payment thereof; and subsequently gave the residue of his real and personal estate to A. and B., whom he appointed his executors. Lord *Langdale*, M. R., held, that the legacies were charged on the real estate.

Same rule where executor is devisee *in trust*.

And even where the land is devised to the executors upon trust for other persons, it seems the effect is the same. Having the estate, and being charged with the payment of the debts, they are to consider the creditors as having the first claim upon the trust. Thus, in the case of *Dormay* v. *Borradaile* (*d*), where a testator commenced by giving all his property to his wife: he next appointed her and two others executors, and "to them his executors" gave certain real estates in trust for his wife and children, and concluded thus, "my executors are charged with the payment of my just debts," Lord *Langdale*, M. R., held, that the real estates were charged with the debts.

Remark on *Dormay* v. *Borradaile*.

This is perhaps an extension of the rule laid down in the former cases; but it appears to agree with a remark of Sir *W. Grant*, who, in *Powell* v. *Robins* (*e*), in which the specific devise to the son D. was followed by a gift of the residue of the *real* and personal estate to W. and G. (whom he appointed executors), upon certain specified trusts, expressly declared that his decision proceeded on the idea that there was no real estate but what was devised to the son.]

It is difficult to reconcile with this line of authorities the case

[(*c*) 9 Beav. 150. See also *Harris* v. *Watkins*, Kay, 438; *Gallimore* v. *Gill*, 2 Sm. & Gif. 158; *Preston* v. *Preston*, 2 Jur. N. S. 1040; but see *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*d*) 10 Beav. 263. See also *Hartland* v. *Murrell*, 27 Beav. 204.

(*e*) 7 Ves. 211 a, ante, 565.]

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of *Parker* v. *Fearnley* (*f*), where a testatrix, having directed legacies to be paid by her executor, to whom she devised all her real estates in fee, and also the residue of her personalty, after payment of her debts and funeral expenses, Sir *J. Leach*, V. C., held, that the pecuniary legacies were not charged on the real estate devised to the executor.

Remark on *Parker* v. *Fearnley*.

As this case was prior to, it must be considered as overruled by *Henvell* v. *Whitaker* [and the subsequent cases cited above], with which it is clearly inconsistent. Neither *Awbrey* v. *Middleton* nor *Alcock* v. *Sparhawk* was cited to, or noticed by, the *Vice-Chancellor*.

Effect where debts are to be paid by tenant in tail, &c.

And the circumstances that the estate given to the devisee is an *estate tail*, and the direction to pay the debts is connected by juxtaposition with the bequest of the personalty and the appointment of executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial.

Thus, in *Clowdsley* v. *Pelham* (*g*), where a testator devised land to *A. and the heirs of his body*, remainder over; and in another part of his will gave to A. all the personal estate, and appointed him executor, *willing him to pay the testator's debts*; it was held that the real estate was charged.

Where by tenant for life.

It is not equally clear, however, that a direction to an executor to pay debts would have the effect of charging lands devised to him *for life* only. Undoubtedly, in *Finch* v. *Hattersley* (*h*), the real estate was held to be charged under circumstances of this nature; but it does not appear that the fact of the executrix being a devisee for life of the real estate had any influence upon the Court; and as the case was decided when a general direction to an executor to pay debts might possibly have been considered sufficient to charge them upon real estate *not devised to the executor* (the doctrine upon the subject being more lax and the distinctions less defined than at present), the case cannot be relied on as an authority on the point above suggested. [The case of *Doe* d. *Ashby* v. *Baines* (*i*), in which it was decided under similar circumstances that the real estate was *not* charged with debts, is not more satisfactory as an authority on the point; the Court of Exchequer in that case appearing to deny the efficacy in any case of a direction to the

(*f*) 2 S. & St. 592.
(*g*) 1 Vern. 411, 1 Eq. Ca. Ab. 193, pl. 2.
(*h*) 3 Russ. 345, n.
[(*i*) 2 C. M. & R. 23.

[executor to pay debts for the purpose of charging the real estate devised to him. None of the cases in Chancery noticed above were cited in this case. However, in the recent case of *Harris* v. *Watkins* (*k*), Sir *W. P. Wood*, V. C., though he said it might be argued that it was not a probable intention of the testator to effect a charge on a life estate by such a direction; yet as the executor had an absolute interest in the residuary real estate, as well as a life interest in a specific portion, decided that both were charged with debts. And in *Cook* v. *Dawson* (*l*), under a direction to the executrix to pay the debts, followed by a devise to her for life, Sir *J. Romilly*, M. R., while holding that the fee was not charged, expressed a clear opinion that the life estate was.]

Effect where devisee is *one* of several executors.

It is quite clear, however, that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts, under a direction to the executors to pay them (*m*). Indeed, such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

Thus, in the case of *Warren* v. *Davies* (*n*), where a testator directed that his debts and legacies, funeral expenses and testamentary charges, should be paid by his executors hereinafter named; and, after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas Davies, in fee, and gave him the residue of his real and personal estate. The testator appointed Thomas Davies *and another* executors. Sir *J. Leach*, M. R., held, that the estate devised to Thomas Davies was not to be considered as charged with the debts and legacies directed to be paid by the executors, merely because the devisee happened to be one of the executors. And the same rule seems to have been acted upon by the same learned Judge, though without any distinct recognition of this ground of decision, in the subsequent case of *Wasse* v. *Helsington* (*o*).

Where direction to executors to pay debts is followed by a devise to one of them "subject as aforesaid."

[But if a testator commences his will with a direction that his debts and legacies shall be paid by his executors and then goes on, without any intermediate gift, to say, "*and subject as aforesaid* I give all the residue of my real estate to A. (who is a stranger or one of several co-executors), the real

[(*k*) Kay, 438, 447.
(*l*) 7 Jur. N. S. 130.]
(*m*) See *Keeling* v. *Brown*, 5 Ves. 359.
(*n*) 2 My. & K. 49.
(*o*) 3 My. & K. 495.

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[estate will be charged with debts and legacies; since there is no other way of giving a sense to the words "subject as aforesaid" (*p*).]

Where a testator gives his real and also his personal estate, after payment of debts, &c., it is sometimes a question whether these words extend to charge both the preceding subjects of gift, or apply only to the immediate antecedent, namely, the personal estate.

Thus, in the case of *Withers* v. *Kennedy* (*q*), where a testator, after bequeathing to his wife certain effects, gave, devised and bequeathed all his freehold, copyhold, and leasehold estates whatsoever and wheresoever, and all the residue of his personal estate and effects *after payment of his just debts and funeral expenses, and the charges of proving his will, and of carrying the trusts thereof into execution*, to trustees, their heirs, executors, and administrators, upon trust for his wife for life, with other limitations over; it was contended, that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir *J. Leach*, M. R., though he admitted that the expression in the will afforded some colour to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate. His Honor considered it to be an objection to the opposite construction, that it imputed to the testator the intention of exempting his leaseholds from the payment of his debts, &c., which species of property was by law subject to them.

Whether charge extends to several preceding subjects of disposition.

[So, in the case of *Moores* v. *Whittle* (*r*), which perhaps admitted of less doubt, in which a testator gave to his daughter C. as long as she continued unmarried all his copyhold estates at P., and also all his live and dead stock, household furniture, monies and securities for money and farming gear of every description *after payment of his just debts, funeral expenses, and the costs of proving his will;* and if C. should marry, then the whole of the estates above described, together with the live and

[(*p*) *Dowling* v. *Hudson*, 17 Beav. 248.]

(*q*) 2 My. & K. 607.

[(*r*) 22 L. J. Ch. 207. See also *Jones* v. *Price*, 11 Sim. 557; *Preston* v. *Preston*, 2 Jur. N. S. 1040.]

[dead stock, household furniture, farming implements and goods to be sold, and the proceeds divided as therein mentioned: Sir *J. Parker*, V. C., considering that the rule of the Court was to enlarge rather than to narrow a charge of debts, and that the testator had in the subsequent parts of his will dealt with the whole property as one mass, held the copyholds to be charged with the debts.]

In *Kidney* v. *Coussmaker* (*s*), the question was much contested, whether, where a testator devises lands in trust to be sold, declaring that the produce shall go in the same manner as the personal estate, and then bequeaths the personalty, "after payment of his debts," the produce of the real estate was by these words (which were clearly inoperative in regard to the *personalty*) charged with the debts. It was not necessary to decide the point; [which, however, has since been decided in the affirmative (*t*).]

Charge of debts "I *have* contracted."

Here it may be observed, that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will (*u*), yet it has been held, that a charge of all the debts, "I *have* contracted since 1735," extended to future debts (*x*); [and in like manner where a testator charged his real estate with his debts, adding "of which I shall leave an account," but neglected to enumerate all, yet all were held to be charged (*y*).]

Whether same words will charge legacies as debts.

It has sometimes been made a question, whether the same words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite. Sir *R. P. Arden*, M. R., and Lord *Loughborough*, were long at issue upon the point; the former maintaining, and the latter denying, the distinction (*z*), which, however, did not originate with Sir *R. P. Arden*; for it is to be traced in the early case of *Davis* v. *Gardiner* (*a*), where the testator com-

(*s*) 1 Ves. jun. 436; *S. C.* in D. P. 7 B. P. C. Toml. 573. See also 2 Ves. jun. 267.

[(*t*) *Soames* v. *Robinson*, 1 My. & K. 500; *Shakels* v. *Richardson*, 2 Coll. 31; *In re Woollard's Trust*, 18 Jur. 1012; *Bright* v. *Larcher*, 3 De G. & J. 148.]

(*u*) Ante, Vol. I. p. 299.

(*x*) *Bridgman* v. *Dove*, 2 Atk. 201.

[(*y*) *Dormay* v. *Borradaile*, 10 Beav. 263.]

(*z*) *Kightley* v. *Kightley*, 2 Ves. jun. 328; *Williams* v. *Chitty*, 3 Ves. 551; *Keeling* v. *Brown*, 5 Ves. 361.

(*a*) 2 P. W. 187.

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"As to my worldly estate, *after my debts and legacies paid.*"

menced his will thus: "As to my worldly estate, I dispose of the same as follows, *after my debts and legacies paid;*" and then gave several legacies, adding, "After all my legacies paid, I give the residue of my *personal* estate to my son," and then devised his lands: and Lord *Macclesfield* held, that the legacies were not a charge upon the realty; his Lordship observing, that "as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir, which is a disinherison pro tanto." In a note to this case, the reporter adds, that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.

As to distinction between debts and legacies.

The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone in holding *debts* to be charged by loose and equivocal expressions, the unfairness of which, when applied to legacies, became apparent, "there being no reason (as Sir *R. P. Arden* has observed), why a specific devise should not take effect as much as a pecuniary one" (*b*).

In *Trott* v. *Vernon* (*c*), however, and several of the other cases before stated (*d*), in which debts and legacies were coupled in one clause, there is no mention of any such distinction; and [the doctrine of the later cases, including one of the highest authority, is to reject all distinction between them.]

Whether giving legacies, and then *the rest* of the real and personal estate, charges the legacies.

Thus, in *Hassel* v. *Hassel* (*e*), where the testator devised and bequeathed certain legacies, and then gave, devised, and bequeathed all his real and personal estate *not thereinbefore disposed of;* Lord *Bathurst* held that the legacies were charged upon the real estate.

And Lord *Hardwicke*, in *Brudenell* v. *Boughton* (*f*), seems to have thought that where a testator gave certain legacies, and then the *rest* of his estate, *real* and personal, to A., whom he appointed executor, the legacies were charged upon the land; but the case was not decided on this point.

Blending real

So, in the case of *Bench* v. *Biles* (*g*), where the testator

(*b*) 3 Ves. 739.
(*c*) Ante, 555.
(*d*) Ibid. [See also *Tompkins* v. *Tompkins*, Pr. Ch. 397; *Alcock* v. *Sparhawk*, 2 Vern. 228; *Cross* v. *Kennington*, 9 Beav. 150; *Bright* v. *Larcher*, 3 De G. & J. 148.]
(*e*) 2 Dick. 527. [See also *Smith* v. *Butler*, 1 Jo. & Lat. 692.]
(*f*) 2 Atk. 268, referred to ante, Vol. I. p. 88.
(*g*) 4 Mad. 187.

and personal estate together.

gave all his real and personal estate to his wife for life, and, after her decease, gave various legacies, and all the *rest, residue and remainder* of his *real and personal* estate, he gave, devised and bequeathed to his nephews P. and W., share and share alike, their heirs, executors, administrators or assigns for ever. The case of *Awbrey* v. *Middleton* (*h*) was cited as an authority that the legacies were charged: and Sir *John Leach*, V. C., decided accordingly, considering the intention in favour of the legatees to be clearer than in the cited case. "The testator," he said, "here gives all his real and personal estate to his wife for life, blending them together as one fund for her use, and, after her death, he gives several pecuniary legacies, and then the rest, residue and remainder of his real and personal estate to his nephews. He plainly continues after his death to treat them as one fund, 'the rest, residue and remainder' of which, after payment of his legacies, is to go to his nephews."

Remarks upon *Bench* v. *Biles*.

It should be remarked, however, that in *Awbrey* v. *Middleton*, the executor, *being the devisee of the real estate*, was expressly directed to pay the legacies and annuities, which has always been held sufficient to charge the real estate.

Case of *Hassel* v. *Hassel*.

The case of *Hassel* v. *Hassel* (*i*), though not cited, more closely resembles *Bench* v. *Biles*; but even that was rather stronger in favour of the charge, from the circumstance of there being no precedent gift affecting the real estate (unless the legacies were so considered), to which the words "not hereinbefore disposed of" could be referred, though this expression might have been taken to apply exclusively to the personalty, referendo singula singulis. In *Bench* v. *Biles*, on the other hand, the words "rest and residue" might have had reference to the precedent devise of the real estate to the wife for life (*k*).

Whether the giving the "residue" after bequeathing legacies charges lands.

That a bequest of legacies, followed by a gift of all the *residue* of the testator's real and personal estates, operates to charge the entire property with the legacies, was again decided by Sir *J. Leach*, in *Cole* v. *Turner* (*l*); to which may now be added the case of *Mirehouse* v. *Scaife* (*m*), where a testator, after bequeathing certain pecuniary legacies, declared his will to be, that all his debts and all the above legacies should be paid within six

(*h*) Ante, 566.
(*i*) Ante, 572.
[(*k*) See also *Francis* v. *Clemow*, Kay, 435.]
(*l*) 4 Russ. 376.
(*m*) 2 My. & Cr. 695.

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months after his decease; and all the *residue* of his estate, both real and personal, lands, messuages and tenements, the testator gave to A., by her to be freely possessed at his decease. It was held by Lord *Cottenham* that by these words the real estate was charged, as well with the legacies as the debts. [His Lordship observed, that the blending of the real and personal estate, and the gift of the residue of both following a direction to pay debts and legacies, relieved the case from the question discussed by Lord *Rosslyn* and Lord *Alvanley* in *Williams* v. *Chitty* and *Keeling* v. *Brown*, as to whether words admitted to be sufficient to charge lands with debts, ought to be held sufficient to charge them with legacies.]

It is worthy of remark, that neither in this case, nor in *Cole* v. *Turner*, was there any specific devise of real estate to which the term "residue" might be referred (*n*): [but in the case of *Francis* v. *Clemow* (*o*), where a testator, after directing payment of his debts, bequeathed certain legacies, and then devised some parts of his real estate, and gave "all the rest, residue and remainder of his estate and effects, both real and personal," to A., whom he appointed executor. Sir *W. P. Wood*, V. C., on the authority of *Bench* v. *Biles*, held that, notwithstanding the previous devises, the legacies were charged on the real estate by force of the residuary gift.

Finally, in the case of *Greville* v. *Browne* (*p*), where a testator after bequeathing an annuity and some pecuniary legacies, gave "all the rest residue and remainder of any property he might die possessed of or entitled to of what nature soever," to his son, it was held in D. P. that the legacies were charged on the real estates. There was no previous devise of real estate; but it was laid down in the most general terms, that where there is a bequest of legacies followed by a gift of the residue of the testator's property real and personal, the legacies are charged on the realty; and, as had previously been held by Sir *W. P. Wood* (*q*), that the principle of the decisions was the same in the case of legacies as in that of debts. And it was

[(*n*) In *Mirehouse* v. *Scaife* there was a devise of a field called Gillfoot; but it did not appear whether it was freehold or leasehold.

(*o*) Kay, 435. See also *Wheeler* v. *Howell*, 3 Kay & J. 198 (where the V. C. appears to treat the fact of the devisee being executor as material: sed. qu.).

(*p*) 7 H. of L. Ca. 689, 5 Jur. N. S. 849; dissentiente Lord *Wensleydale*. See also *Thorman* v. *Hilhouse*, 5 Jur. N. S. 563.

(*q*) *Wheeler* v. *Howell*, 3 Kay & J. 198.

[said that in reading *a devise of real estate* to one person, and of personal legacies to another, and of the residue of the real and personal property to a third person, there *might* be a mode of interpreting it, reddendo singula singulis, meaning to give the rest of the personal property to one person, and the rest of the realty to another. *But that was not the natural meaning of the words.*

Legacies not charged on realty by joining realty and personalty in same gift.

But the mere joining in one devise or bequest of the real and personal estate is not of itself enough to charge legacies on real estate. In all the cases some other circumstance has been involved leading to that conclusion (*r*). Neither will legacies be charged on real estate by a will which gives the whole real and personal estate to trustees and executors for the maintenance and education of the testator's infant son and daughters, followed by a provision, that as they attained majority, his property, real and personal, should be divided as follows, viz., a legacy of 100*l.* to his son, and his property at G. amongst his daughters (*s*).]

Whether general charge extends to lands specifically devised.

Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter.

As, in *Spong* v. *Spong* (*t*), where a testator, after specifically devising certain lands to A. and other persons, and charging his real and personal estate with his legacies, and then bequeathing some pecuniary legacies, gave the residue of his real and personal estate to A. The House of Lords, reversing a decree of the Exchequer, held the legacies not to be charged upon the lands specifically devised; for that, in construing charges of this nature, specific and residuary devises, though, for many purposes, governed by a common principle, were to be distinguished; especially as, in the case under consideration, the testator had shewn such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee.

[So in *Conron* v. *Conron* (*u*), where the testator by will dated in 1836, after making certain specific devises and bequests, and giving certain general pecuniary legacies, charged "all his

[(*r*) See *Nyssen* v. *Gretton*, 2 Y. & C. 222.

(*s*) *Bentley* v. *Oldfield*, 19 Beav. 225.]

(*t*) 1 You. & J. 300, 3 Bli. N. S. 84, 1 D. & Cl. 365.

[(*u*) 7 H. of L. Ca. 168.

[real and chattel estates and property of every description," with payment thereof; and subsequently devised "all the residue of all his real and freehold estates, goods, and effects of every kind" to A. in fee; it was held in the House of Lords that the charge of legacies did not extend to the specifically devised estates. "The true rule," said Lord *Cranworth*, "deducible from *Spong* v. *Spong*, is that a mere charge of legacies on the real and personal estate (and 'on *all* the real and personal estate' must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. I think that the rule is a very reasonable one, and is likely to be in general conformable to the intentions of testators."

Both these cases occurred under the old law. Since the statute 1 Vict. c. 26, the same result would follow à fortiori.

And here may be mentioned a case where, after several specific devises there followed a residuary devise subject to a clear charge of debts, and by codicil the testator specifically devised a house to his daughter, "it being his wish that she should reside therein if she should think fit." It was held by the M. R. that the house was exempted from the charge (*x*).]

*Annuities* usually included in a charge of *legacies.*

It may here be observed, that, under a charge of legacies, annuities will generally be included (*y*), unless the testator manifests an intention to distinguish them (*z*), as by sometimes using both words (*a*).

Direction to raise monies out of the rents and profits.

II. It is clear, that a devise of the *rents and profits* of land is equivalent to a devise of the land itself, and will carry the legal as well as beneficial interest therein (*b*); but the question which has chiefly given rise to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale (*c*); the doubt being, whether,

[(*x*) *Wheeler* v. *Claydon*, 16 Beav. 169.

(*y*) *Duke of Bolton* v. *Williams*, 2 Ves. jun. 216, cit.; *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Hare, 334; *Ward* v. *Grey*, 26 Beav. 485; *Mullins* v. *Smith*, 1 Dr. & Sm. 204.]

(*z*) *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441.

(*a*) See *Nannock* v. *Horton*, 7 Ves. 391. [*Woodhead* v. *Turner*, 4 De G. & S. 429. But see *Heath* v. *Weston*, 3 D. M. & G. 601; *Ward* v. *Grey*, 26 Beav. 485.]

(*b*) *Johnson* v. *Arnold*, 1 Ves. 171; *Baines* v. *Dixon*, ib. 42; *Doe* v. *Lakeman*, 2 B. & Ad. 42; [and see ante, Chap. XXIV. ad fin.

(*c*) An express prohibition against a sale would generally include a mortgage or other virtual alienation of the estate. See *Bennett* v. *Wyndham*, 23 Beav. 521. A sale is of course excluded where the expression is "*annual* rents and profits," *Marsh* v. *Marsh*, 2 Jur. N. S. 348; *Forbes* v. *Richardson*, 11 Hare, 354; *Scott* v. *Clements*, 8 Ir. Ch. Rep. 1.]

in such cases, the testator or settlor, by the words "rents and profits," means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or "profits" of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance.

Where it authorizes a sale:

[From the earliest times a sale has been admitted] where the purpose was to pay debts and legacies (*d*), or to raise a portion by a definite period, within which it could not be raised out of the annual rents (*e*); and this rule was extended by Lord *Hardwicke* to a case in which the portions, being payable in such manner as a third person should appoint, *might* have become payable within a definite time (*f*).

where definite time is fixed for payment.

Where no time is fixed.

[And notwithstanding a different opinion extra-judicially expressed by an eminent Judge (*g*), the Courts seem to have been always disposed, even where no time was specified for payment, to hold that a direction to raise a gross sum out of rents and profits authorized a sale or mortgage. Thus, in the case of *Heycock* v. *Heycock* (*h*), Lord Keeper *North* declared he took it to be the law of the Court, that where there was a devise of a sum certain to be raised out of the profits of lands; if the profits would not amount to raise the sum in a convenient time the Court would decree a sale. And in *Sheldon* v. *Dormer* (*i*), Lord *Somers* remarked that a time being there fixed for payment made the case stronger than those in which, without that circumstance, the Court had frequently decreed a sale to raise a sum of money charged by the will on the rents and profits.

So, in the case of *Stanhope* v. *Thacker* (*k*), where by settlement a remainder was limited to the daughters of the marriage till they should, out of the rents, issues and profits, have raised

(*d*) *Lingon* v. *Foley*, 2 Ch. Cas. 205; *Anon.*, 1 Vern. 104; *Berry* v. *Askham*, 2 Vern. 26; *Rawlins* v. *Brotherson*, Exch. 1783, cit. 2 Ves. jun. 480. [(The last case seems of doubtful authority, the expression there being "*annual* rents and profits.") See also *Talbot* v. *Earl of Shrewsbury*, Pre. Ch. 394.]

(*e*) *Sheldon* v. *Dormer*, 2 Vern. 310; *Warburton* v. *Warburton*, ib. 420; *Jackson* v. *Farrand*, ib. 424; *Gibson* v. *Lord Montfort*, 1 Ves. 491; *Okeden* v. *Okeden*, 1 Atk. 550. Some parts of Lord *Hardwicke's* judgment in this case are irreconcileable. He is made in one place to assume that the portion was to be raised at the period of vesting, and in another to state the contrary. It seems difficult to support the latter hypothesis. And see *Hall* v. *Carter*, 2 Atk. 354; [*Backhouse* v. *Middleton*, 1 Ch. Ca. 173, 176.]

(*f*) *Green* v. *Belcher*, 1 Atk. 505. See also *Allan* v. *Backhouse*, 2 V. & B. 65, stated post, 583.

[(*g*) Per Lord *Macclesfield*, *Ivy* v. *Gilbert*, Pre. Ch. 583, 2 P. W. 13; *Mills* v. *Banks*, 3 P. W. 1.

(*h*) 1 Vern. 256.

(*i*) 2 Vern. 311.

(*k*) Pre. Ch. 435.

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[and received the sum of 3,000*l.*; Lord *Cowper*, after deciding that this remainder was in the nature of a security for the money, said, that if the ordinary or annual rents and profits of the land would not raise the money in a convenient time to answer the intent of the settlement, which was to provide portions for the daughters, the same might be decreed in a Court of Equity to be raised by a sale or mortgage thereof, which were the extraordinary profits of the same lands.

Again, in the case of *Trafford* v. *Ashton* (*l*), the trust of a term limited by a marriage settlement was declared to be out of the rents and profits to raise 8,000*l.* for the daughters of the marriage, to be paid them as soon as conveniently could be (without limiting any express time when the portions were payable); and Lord *Macclesfield* decreed that they should be raised by sale or mortgage.

And succeeding Judges,] looking at the inconvenience of raising a large sum of money by a gradual accumulation of the annual profits as they arise, [have acquiesced in and acted upon the doctrine of these early cases.] Thus, in *Green* v. *Belcher* (*m*), Lord *Hardwicke* stated the rule to be, that, "where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and, as a devise of the rents and profits will at law pass the lands (*n*), the raising by rents and profits is the same as raising by sale."

Lord *Hardwicke's* dicta.

So, in *Baines* v. *Dixon* (*o*), the same eminent Judge observes, that "the Court has gone by several gradations. When any particular time is mentioned, within which the estate would not afford the charge, the Court directed a sale, and then went farther, till a sale was directed on the words 'rents and profits' alone, when there was nothing to exclude or express a sale;" though his Lordship admitted, that there was not one case in ten, where it had been agreeable to the testator's intention. Lord *Hardwicke* held, however, that, in the case before him, where legacies were to be paid with all convenience, as the

[(*l*) 1 P. W. 415.]
(*m*) 1 Atk. 505.
(*n*) See ante, 576.
(*o*) 1 Ves. 42.

profits of the estate should advance the money, the word "advance" limited it to annual profits (*p*).

Lord *Thurlow's* and

The same opinion, too, seems to have been entertained by Lord *Thurlow*, who, in the case of the *Countess of Shrewsbury* v. *Earl of Shrewsbury* (*q*), said—"If a term was created to raise by the rents and profits, I should say it might be done by sale or mortgage."

Lord *Eldon's* opinion.

Lord *Eldon*, also, in *Bootle* v. *Blundell* (*r*), observed, that he had understood it to be "a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage."

Position of text writers.

These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they shew the rule of construction to be rather the reverse (*s*), and that these words are to be taken in their widest sense, namely, as authorising a sale, unless restrained by the context; but perhaps it more accords with the principle of the authorities to say, that the signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will.

General doctrine of the authorities.

(*p*) See also *Okeden* v. *Okeden*, 1 Atk. 550; *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; and *Gibson* v. *Lord Montfort*, 1 Ves. 490.

(*q*) 1 Ves. jun. 234.

(*r*) 1 Mer. 233.

(*s*) Vide Mr. *Cox's* note to *Trafford* v. *Ashton*, 1 P. W. 418; Mr. *Raithby's* note to an anonymous case, 1 Vern. 104; and Mr. *Belt's* supplement to Ves. sen. 221. Mr. *Belt's* observation, that Lord *Hardwicke*, in *Conyngham* v. *Conyngham*, 1 Ves. 522, more fully stated by Mr. *B.*, Suppl. 221, seems to have thought that his predecessors had gone too far in holding that money to be raised out of rents and profits might be raised by a sale, is quite at variance with the general tenor of his Lordship's judgments, which [are as much] in favour of a sale [as those of] any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true his Lordship held the charge to affect the annual income only; but the will was so clear on this point, that with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to trustees and their heirs, in trust for payment of his funeral expenses, debts and legacies, and to keep the plantation in good repair, and to keep the negroes, with their increase and the stock thereon, in as good a condition as they were in at his death, out of the rents and profits; and he directed that the produce of his estate should be [from time to time] shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. [And the better to secure such consignments, he directed all who should inherit his plantation to send an account every year of the produce thereof.] Lord *Hardwicke* thought himself not warranted to decree a sale; it happened, he said, to be sometimes attended with inconvenience, as in *Ivy* v. *Gilbert*, 2 P. W. 13; but he could not go further unless there was some other right of incumbrance.

Lord *Hardwicke's* inclination to hold a direction to pay out of rents and profits to authorize a sale.

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Exception where estate is treated as existing entire after raising of debts.

If the testator or settlor manifests, by the context of the instrument, that he contemplates the identical subject, out of whose "rents and profits" the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of the money be made consistent with the preservation of the entire subject of disposition (*t*).

So, if the testator treats the raising of the money as a process requiring time, and defers a devisee's perception of the rents or an annuitant's receipt of his annuity out of them until such purpose shall have been accomplished, the irresistible inference is, that the testator intends the money to be raised by a gradual appropriation of the rents and profits as they arise, and not in a mass by sale or mortgage.

Rents and profits confined to annual profits by the effect of particular expressions.

Thus, in the case of *Small* v. *Wing* (*u*), where a testator devised to his eldest son certain premises, and directed him to pay his executors 250*l.* per annum. The testator devised to his executors the rents, issues and profits of his other lands, in trust that they should therewith, and with the annuity, raise and pay all the testator's debts: but if the trustees should neglect to receive the rents or apply them towards the payment of the testator's debts, then the power to cease; and then he appointed A., B. and C. to be his trustees to receive the annuity and the profits of the premises for the payment of his debts, until the same and certain legacies should be raised and satisfied: and the testator devised all his lands in M. (subject to an annuity) to testator's wife during her life, to commence after the payment of the testator's debts. He gave other lands to his son John and his heirs, and declared it to be his will, that neither of his sons should enter on or receive to his own use the rents of the premises to them respectively devised until all his (the testator's) debts should be paid. Lord *Macclesfield* held, that the debts should be raised out of the yearly rents without a sale; and the decree was affirmed in the House of Lords.

Effect where

Such also is the effect when the testator proceeds to direct

(*t*) See *Wilson* v. *Halliley*, 1 R. & My. 590.

(*u*) 5 B. P. C. Toml. 66. [And see *Harper* v. *Munday*, 7 D. M. & G. 369. But see *Lord Londesborough* v. *Somerville*, 19 Beav. 295, in which *Small* v. *Wing* was not cited.]

"residue" of rents and profits is given.

that the *residue* of the rents and profits (after answering the charge) shall be paid over to the devisee *for life*; especially if he has included annuities in the charge, these being, from their nature, evidently intended to come out of the annual income (*x*). The latter circumstance, however, was, by Lord *Hardwicke*, considered to be inconclusive in the case of *Okeden* v. *Okeden* (*y*), where the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising 5,000*l.* for A., if he should live to attain twenty-five, and to pay certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits (being for the maintenance of infants, and making repairs, and to pay an annuity), yet his Lordship was [inclined to think] that a sale of the inheritance might be decreed for raising the portion, if the rents during the minority of the devisee of the land, during which the trustees took an estate, did not amount to the sum. [The point, however, was not decided (*z*).]

Rule where some of the prescribed purposes require a sale, and some not.

Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raiseable in one manner. [And this ground is strengthened by the case of *Heneage* v. *Lord Andover* (*a*), where much reliance was placed by *Alexander*, C. B., on annuities being directed to be paid out of "rents and profits," for the purpose of shewing that those words had the same meaning when used with reference to the raising of gross sums.

So, in the case of *Taylor* v. *Emerson* (*b*), where by deed A. conveyed his life estate in certain leaseholds to a trustee, in trust out of the interest proceeds or annual rents to pay the head rent and the premiums on a policy of insurance on A.'s life, and the sum of 400*l.* due to B., and then to reconvey the premises. Sir *E. Sugden* held, that annual rents and profits alone were applicable to the payment of the 400*l.*; and this on the ground that the head rent and premiums were annual pay-

(*x*) *Heneage* v. *Lord Andover*, 3 You. & J. 360. [See also *Forbes* v. *Richardson*, 11 Hare, 354. But in *Torre* v. *Browne*, 5 H. of L. Ca. 555, where a term was limited to trustees to provide 200*l.* annually for the maintenance of the testator's children, it was held that the whole interest in the term was charged.]

(*y*) 1 Atk. 550.

[(*z*) Ib. 552, n. (3), by Sanders.

(*a*) 3 Y. & Jerv. 360, 371.

(*b*) 2 Con. & Law. 558.]

[ments, and that there was but one trust for all the purposes of the deed.]

In the case of *Wilson* v. *Halliley* (*c*), however, where debts and legacies were to be raised out of rents and profits, Sir *J. Leach*, M. R., treated it as clear, that, though a sale might have been effected, if necessary, for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raiseable out of the annual rents only. His Honor relied much on the circumstance, that the estates (the rents and profits of which were made applicable to this purpose) were afterwards devised, "subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid."

Direction to raise out of the rents and profits, *or* by sale or mortgage.

Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respective modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raiseable out of the annual rents, and the sums in gross by sale or mortgage (*d*).

Direction to raise by lease.

Of course, where the direction is to raise a sum of money by leases for lives or years *at the old rent*, the intention to confine the charge to annual rents is beyond all doubt (*e*). [And a like intention is manifested where portions are to be raised by making a lease, which is directed to cease as soon as the portions are raised; since, if they were raised by sale or mortgage, the term must continue for the benefit of the purchaser or mortgagee (*f*). And in a settlement which contained a charge in these terms, and another to be effected by "lease, mortgage, or otherwise," a third clause giving a power to raise portions by lease only (without more), was held to be confined by the context to annual rents (*g*).]

As to raising

Provisions for the renewal of leases out of the rents and

(*c*) 1 R. & My. 590.

(*d*) *Playters* v. *Abbott*, 2 My. & K. 97. See also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104, where debts and legacies were to be raised "by perception of the rents, or by leasing or mortgaging."

(*e*) *Ivy* v. *Gilbert*, 2 P. W. 63, Pre. Ch. 583. See also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; [*Mills* v. *Banks*, 3 P. W. 1.

(*f*) *Evelyn* v. *Evelyn*, 2 P. W. 659, 670.

(*g*) Ib.]

profits often give rise to the point under consideration. In such cases, if the terms of renewal are such that the fine may be called for suddenly, so as to render the raising of it out of the annual rents impossible or inconvenient, a strong argument is afforded for holding the words to authorize a sale or mortgage. Indeed, this construction prevailed in a modern case, in spite of some expressions in the context rather strongly pointing the other way.

Fines for renewal of leases.

Thus, in the case of *Allan* v. *Backhouse* (*h*), where the testator, after devising certain leasehold estates, *held upon bishop's leases for lives,* and all other his real estate, to certain uses, directed the renewal of the leaseholds, and that the expenses should be raised *out of the rents and profits* of the leasehold premises, or of any part of the freehold estates; and he declared that the renewed leases should be held upon the same trusts as were declared of the freehold and copyhold estates, *to the end that they might be enjoyed therewith so long as might be;* Sir *Thomas Plumer,* V. C., held, that, as the purpose for which the money was to be raised out of the rents and profits might require it suddenly (for the lessor could not be expected to wait for the gradual payment out of the rents), and as there was nothing in the will to give to these words the abridged sense of annual rents and profits, except the purpose to preserve the estate entire (which his Honor thought warranted the sacrificing of part for the preservation of the remainder), the money might be raised by sale or mortgage (*i*). [This decision was affirmed by Lord *Eldon* (*k*).]

Expenses of renewed lease to be paid out of rents and profits.

Sale decreed.

(*h*) 2 V. & B. 65. [See *Garmstone* v. *Gaunt*, 1 Coll. 577.]

(*i*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

As to the mode of contribution towards renewal-fines by tenant for life and remainder-man, see 9 Jarm. Convey. 347; and to the authorities there cited add *Shaftesbury* v. *Duke of Marlborough*, 2 My. & K. 111; *Greenwood* v. *Evans*, 4 Beav. 44. In the former case, the fact of the testator having made a provision for raising the fine was allowed an influence upon the question of contribution to which it has not commonly been considered as entitled. [See also *Hudleston* v. *Whelpdale*, 9 Hare, 775; *Mortimer* v. *Watts*, 14 Beav. 616.

(*k*) Jac. 631.]

# CHAPTER XLVI.

## ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, ETC.

I. *Several Species of Property liable to Creditors.—Order of their Application.—Contribution to Charges —where thrown on mixed Fund.*
II. *Charges upon Estates, when to be paid out of other Funds.—General Rules.—Distinction where the Mortgage is created not by the Testator, but by a prior Owner,—where Mortgage Money never went to augment Mortgagor's Personal Estate.—Stat.* 17 & 18 *Vict. c.* 113.
III. *What a sufficient indication of a Testator's intention to exempt the Personal Estate from its primary liability to Debts, &c.*
IV. *As to marshalling Assets in favour of Creditors and Legatees.*

What funds liable to creditors.

I. WHERE a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made any disposition, it often becomes material to consider the order, and sometimes the proportions and mode, in which the several subjects of property are applicable to the liquidation of the debts; for every description of property is (we have seen) now constituted assets (*a*).

As to legacies.

And the same question may arise in regard to pecuniary legacies, where the testator has thrown them upon the land or some specific fund, which would be either not liable or not exclusively liable to them; for otherwise they are payable out of but one fund, namely, the general personal estate (*b*).

Creditors admitted pari passu under trusts and charges.

Under a trust for the payment of debts they are paid, not in the order of their legal priority (*c*), but according to the rule of a Court of Equity, which, regarding "equality as equity," places the creditors of every class on an equal footing (*d*); and this rule is now established to apply, in opposition to the old doc-

(*a*) Vide ante, 553.

(*b*) *Greaves* v. *Powell*, 2 Vern. 248. The distinction taken in *Walker* v. *Meager*, 2 P. W. 550, has long been overruled.

(*c*) As to the legal order of paying debts, see Williams's Law of Executors, vol. 2, p. [848, 4th Ed.;] Ram on Assets, 1.

[(*d*) It has been held that a testator may give a preference to simple contract creditors, *Millar* v. *Horton*, Coop. 45.]

trine, to mere charges, by which the descent is not broken (*e*), and to devises in trust for the payment of debts, though made to the same persons as are constituted executors (*f*). In all such cases, therefore, specialty and simple contract creditors come in pari passu; and it is held that specialty creditors, claiming the benefit of such a trust or charge, must admit the simple contract creditors to an equal participation even of the personal estate (*g*), as equity will not allow a creditor to share in the equitable assets, or, in other words, in that portion of the property which is distributable according to the maxims of a Court of Equity, without relinquishing his legal priority in regard to that portion of the property which constitutes legal assets. It is clear, however, that a trust to pay, or a charge of debts, does not make simple contract debts carry interest (*h*), or revive a debt which has been barred by the statute of limitations (*i*); though the contrary of both these propositions has been heretofore maintained (*k*).

Direction to pay interest confined to debts carrying interest.

And in *Tait* v. *Lord Northwick* (*l*), Lord *Loughborough* held, that a direction to pay such debts as the testator should at the time of his death owe by mortgage, bond, or other specialty, or by simple contract or otherwise however, *and all interest thereof*, was confined, in respect of the interest, to debts which carried interest.

Equitable interests not necessarily

But it should be observed [that property is not distributable as equitable assets merely because it is an object of equitable

(*e*) *Burt* v. *Thomas*, cit. 7 Ves. 323; *Batson* v. *Lindegreen*, 2 B. C. C. 94; *Bailey* v. *Ekins*, 7 Ves. 319; [*Shippard* v. *Lutwidge*, 8 Ves. 26; *Barker* v. *May*, 9 B. & Cr. 489;] overruling *Freemoult* v. *Dedire*, 1 P. W. 430; *Plunket* v. *Penson*, 2 Atk. 290.

(*f*) *Newton* v. *Bennet*, 1 B. C. C. 135, and cases cited ib. 138, 140, n.; [*Chambers* v. *Harvest*, Mose. 123.] See also *Prowse* v. *Abingdon*, 1 Atk. 484; *Lewin* v. *Okeley*, 2 Atk. 50; [*Clay* v. *Willis*, 1 B. & Cr. 364;] overruling *Girling* v. *Lee*, 1 Vern. 63, and several other early cases.

(*g*) *Wride* v. *Clarke*, 1 Dick. 382; *Deg* v. *Deg*, 2 P. W. 412; *Haslewood* v. *Pope*, 3 P. W. 323; *Morrice* v. *Bank of England*, Cas. t. Talb. 220, 2 B. P. C. Toml. 465, 3 Sw. 573. See also *Sheppard* v. *Kent*, 2 Vern. 435, 1 Eq. Ca. Ab. 142, pl. 6.

(*h*) *Lloyd* v. *Williams*, 2 Atk. 110; *Barwell* v. *Parker*, 2 Ves. 363; *Earl of Bath* v. *Earl of Bradford*, ib. 587; *Shirley* v. *Earl Ferrers*, 1 B. C. C. 41. [Whether a charge of another person's debts carries interest or not, see *Askew* v. *Thompson*, 4 Kay & J. 620.]

(*i*) See *Burke* v. *Jones*, 2 V. & B. 275. [If the statute has not run at the testator's death, a charge of a debt on the testator's real estate prevents the debt being barred by the statute, a charge being a trust to be executed by the devisee or heir, *Hargreaves* v. *Mitchell*, 6 Mad. 326; but a charge of a debt on leaseholds or other personalty does not alter the rights of the creditor, and the statute runs notwithstanding, *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499.]

(*k*) *Carr* v. *Countess of Burlington*, 1 P. W. 228; *Blakeway* v. *Earl of Strafford*, 2 P. W. 373, 6 B. P. C. Toml. 630.

(*l*) 4 Ves. 816.

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distributable as equitable assets.

[jurisdiction. The true principle seems to be that whatever the executor will be charged with as assets, in an action at law against him by a creditor, whether it be recoverable by the executor as against a third person in a court of law or only in a court of equity, provided he so recover it merely virtute officii as executor, is legal assets (*n*). And therefore the trust of all chattels, real as well as personal (*o*), is legal assets, though recoverable only in equity. Formerly an equity of redemption of leaseholds was supposed to be equitable and not legal assets (*p*): but this apparently rested on the precarious nature in former times of the mortgagor's interest in the property (*q*), and would be otherwise determined now that the mortgagor is looked upon as the real owner of mortgaged property, subject only to the security in the mortgagee (*r*).

Trust of chattels is legal assets,

—— including equity of redemption of leaseholds.

Simple trust of freeholds made legal assets by Statute of Frauds;

As to freehold lands, we have already seen that these were assets in the hands of the heir to answer those specialty debts in which the heir was expressly bound; but no further (*s*). The Statute of Frauds (*t*) first made freehold lands held upon a simple trust for the debtor, (which but for the Act would have been equitable assets,) liable at law in the hands of the heir, executor, or administrator (*u*), and by subsequent statutes made such lands liable also at law in the hands of the devisee (*x*), for payment of the specialty debts of the cestui que trust which bound his heirs. But the case was otherwise where there was no clear and simple trust (*y*): thus an equity of redemption of freeholds was equitable assets (*z*). Here the creditor (not the executor, who indeed had no locus standi at all) was compelled to

—— but not an equity of redemption.

[(*n*) *Cook* v. *Gregson*, 3 Drew. 547; *Shee* v. *French*, ib. 716; *Att-Gen.* v. *Brunning*, 6 Jur. N. S. 1083, where held that purchase money due to the testator for land contracted to be sold but not conveyed by him are legal assets. The separate estate of a married woman is necessarily distributable as equitable assets, since she is incapable of binding herself by specialty. *Anon.*, Mose. 328. In this case, it was held that a mortgagee had no preference, since a feme coverte by law could not make a mortgage. It is clear that such is not the law now, see Macqueen, Husb. & Wife, pp. 300, 304.

(*o*) See cases cited by Cox, 3 P. W. 344, n. (2).

(*p*) *Case of Sir C. Cox's Creditors*, 3 P. W. 342; *Hartwell* v. *Chitters*, Amb. 308.

(*q*) Not because it was the subject of equitable jurisdiction, for in the same case, Sir *J. Jekyll* said, that the trust of a bond or of a term was legal assets, 3 P. W. 342.

(*r*) *Cook* v. *Gregson*, 3 Drew. 547.

(*s*) Ante, p. 552.

(*t*) 29 Car. 2, c. 3, ss. 10, 12.

(*u*) *Plunket* v. *Penson*, 2 Atk. 293; *King* v. *Ballett*, 2 Vern. 248.

(*x*) 3 & 4 Will. & M. c. 14, and 11 Geo. 4 & 1 Will. 4, c. 47.

(*y*) See Sugd. V. & P. 654, 657, 11th Ed.

(*z*) *Plunket* v. *Penson*, 2 Atk. 294; *Plucknett* v. *Kirk*, ib. 411; *Solley* v. *Gower*, 2 Vern. 61; *Clay* v. *Willis*, 1 B. & Cr. 374. *Bayley*, J., 1 B. & Cr. 371, and *Cranworth*, V. C., 15 Jur. 73, seem to have thought that an equity of redemption was not assets either at law or in equity.

[come into equity for relief, and was therefore obliged to submit to the rule of that court with regard to assets.

Contra since 3 & 4 Will. 4, c. 104.

But by the Statute 3 & 4 Will. 4, c. 104 (*a*), an equity of redemption of freehold lands has been made legal assets (*b*), *i. e.*, specialty creditors in which the heirs are bound are to be paid in full before other specialty and all simple contract creditors.

Judgment creditors have a right to redeem, and therefore priority, though assets equitable.

In the case of *Sharpe* v. *The Earl of Scarborough* (*c*), judgment creditors were held entitled to have their debts paid out of the produce of the sale of mortgaged estates in priority to the claims of other creditors by bond and simple contract; but this was on the ground that the judgment creditors had a right to *redeem* and not on account of the nature of the assets; and since a judgment now operates as a charge on every interest (*d*) in land, judgment creditors will of course be entitled to payment out of such interest in priority to all other creditors.]

Right of the creditor to take property out of its proper order.

It may be further premised, that the order in which the several funds liable to debts are to be applied, regulates the administration of the assets only among the testator's own representatives, devisees and legatees, and does not affect the right of the creditors themselves to resort in the first instance to all or any of the funds to which their claim extends, though as we shall presently see, equity takes effectual steps to prevent the established order of application from being eventually deranged by the capricious exercise of this right.

Effect of exercising power of appointment.

It should also be stated, that property over which the testator has a general power of appointment only (and in which he takes no transmissible interest in default of appointment), is assets for the payment of creditors, provided the power be exercised (*e*), but not otherwise (*f*); [except in the case of judgment creditors

[(*a*) Ante, p. 553. This statute applies to property which the testator has appointed under a power to appoint by will, *Fleming* v. *Buchanan*, 3 D. M. & G. 976.

(*b*) *Foster* v. *Handley*, 1 Sim. N. S. 200, better reported 15 Jur. 73; *Lovegrove* v. *Cooper*, 2 Sm. & Gif. 271. In this case it is not directly stated, but would appear from the third paragraph, p. 271, that the real estate was mortgaged; the grounds of the learned Judge's decision could not have been applied to the monies arising from the sale of this real estate, see ante, 584, note (*f*).

(*c*) 4 Ves. 438.

(*d*) See 1 & 2 Vict. c. 110, and *Russell* v. *M'Culloch*, 1 Kay & J. 313.]

(*e*) *Lascelles* v. *Lord Cornwallis*, 2 Vern. 465, Pre. Ch. 232; *Troughton* v. *Troughton*, 3 Atk. 656; *Lord Townsend* v. *Windham*, 2 Ves. 8; [*Jenney* v. *Andrews*, 6 Mad. 264; *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Williams* v. *Lomas*, 16 Beav. 1. The rule does not apply to an appointment by a feme coverte so as to charge the property as her separate estate with her debts, *Vaughan* v. *Vanderstegen*, 2 Drew. 165. But it is otherwise where she fraudulently represents herself as a feme sole. See *S. C.* 2 Drew. 363, 408.]

(*f*) *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206.

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[since the statute 1 & 2 Vict. c. 110, whereby (*g*) lands over which the debtor has a disposing power, which he might without the assent of any other person exercise for his own benefit, are bound in favour of such creditors whether the power be exercised or not:] and, it will be remembered, that in wills made or republished since the year 1837, every general or residuary devise or bequest operates as a testamentary appointment, unless a contrary intention appear.

Order in which funds to be applied.

The order of the application of the several funds liable to the payment of debts, then, is as follows:—

1st. The general personal estate (*h*) not expressly or by implication exempted (*i*).

2ndly. Lands expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited (*k*).

3rdly. Estates which descend to the heir (*l*), whether acquired before or after the making of the will (*m*).

4thly. Real or personal property devised or bequeathed, [either to the heir or a stranger,] charged with debts, and disposed of, subject to such charge (*n*): [but since the Act, 1 Vict. c. 26, realty included in a general or residuary devise must be exhausted before having recourse to specifically devised realty (*o*).

5thly. Real estate comprised in a general or residuary devise (*p*).]

[(*g*) Sects. 11, 13.]

(*h*) *Sir Peter Soames' case*, cit. 1 P. W. 694; *Lord Gray* v. *Lady Gray*, 1 Ch. Cas. 296; *White* v. *White*, 2 Vern. 43; *Johnson* v. *Milksop*, ib. 112; *Evelyn* v. *Evelyn*, 2 P. W. 664. See also *Milnes* v. *Slater*, 8 Ves. 304.

(*i*) See post, Sect. 3 of this Chap.

(*k*) *Anon.*, 2 Vent. 349; *Bateman* v. *Bateman*, 1 Atk. 421; *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Powis* v. *Corbet*, 3 Atk. 556, 3 Ves. 116, n.; *Ellison* v. *Airey*, 2 Ves. 569; *Tweedale* v. *Coventry*, 1 B. C. C. 240; *Coxe* v. *Bassett*, 3 Ves. 155; [*Phillips* v. *Parry*, 22 Beav. 279.]

(*l*) *Chaplin* v. *Chaplin*, 3 P. W. 368; *Galton* v. *Hancock*, 2 Atk. 424 et seq.; [*Bainton* v. *Ward*, 2 Atk. by Sanders, 172, n. (2);] *Manning* v. *Spooner*, 3 Ves. 117; *Barnewall* v. *Lord Cawdor*, 3 Mad. 453.

(*m*) See *Milnes* v. *Slater*, 8 Ves. 295.

(*n*) *Wride* v. *Clarke*, 2 B. C. C. 261, n.; *Davies* v. *Topp*, ib. 259, n.; *Donne* v. *Lewis*, ib. 257; *Manning* v. *Spooner*, 3 Ves. 117; *Harmood* v. *Oglander*, 8 Ves. 124; *Milnes* v. *Slater*, ib. 306; *Watson* v. *Brickwood*, 9 Ves. 447; *Irvin* v. *Ironmonger*, 2 R. & My. 531.

[(*o*) *Harris* v. *Watkins*, Kay, 448. Under the old law it was sometimes a question whether a general charge extended to the specific lands as well as those which were residuary in expression, ante, p. 575.

(*p*) *Dady* v. *Hartridge*, 1 Dr. & Sm. 236; *Barnwell* v. *Iremonger*, ib. 242; *Rotheram* v. *Rotheram*, 26 Beav. 465. These cases (overruling *Eddels* v. *Johnson*, 1 Gif. 22, and the dictum in *Emuss* v. *Smith*, 2 De G. & S. 734, 735) decide that the Will Act, 1 Vict. c. 26, ss. 24, 25, by abolishing all distinction between real and personal estate in the construction of residuary gifts (see n. (*s*) infra), has the effect of charging with debts real estate included in a residuary devise in priority to specific legacies and real estate comprised in a specific devise. They do not expressly decide the point of priority between the residuary devisee and a pecuniary legatee: but the reasons given

6thly. General pecuniary legacies pro ratâ (*q*).

7thly. Specific legacies (*r*) [and real estate specifically (*s*) devised are liable pro ratâ to contribute to the payment of debts by specialty in which the heirs are bound (*t*); and also, it is conceived, to the payment of debts by simple contract and by specialty in which the heirs are not bound (*u*).]

[by Lord *Macclesfield* in *Clifton* v. *Burt*, 1 P. W. 679, and by Lord *Cottenham*, in *Mirehouse* v. *Scaife*, 2 My. & Cr. 695, against marshalling in favour of pecuniary legatees as against residuary devisees under the old law, viz. that every devise of real estate, whether residuary in its terms or not, was in fact specific, impliedly assert that since the alteration in the law already noticed, the rule must be otherwise, and warrant the position taken in the text with respect to the property 5thly and 6thly liable to debts. It must be observed, however, that Sir *J. Stuart*, V. C., in *Pearmain* v. *Twiss*, 2 Gif. 130, adhered to his decision in *Eddels* v. *Johnson*. But the distinction taken by the learned Judge between land as freehold and land as leasehold seems too technical to prevail.]

(*q*) *Clifton* v. *Burt*, 1 P. W. 680. The devisee of lands which the testator had contracted to purchase, and which he directed his executors to pay for, was in *Headley* v. *Redhead*, Coop. 50, treated as a pecuniary legatee in respect of the purchase-money, and therefore the estate not being sufficient to pay the legacies, and complete the contract, the legatees and devisee were held to contribute rateably. [And see *Herne* v. *Meyrick*, 2 Salk. 416, 1 P. W. 201.]

(*r*) But see and consider cases, post, next section. As to what legacies are pecuniary or general, and what specific, see 1 P. W. 539; 2 P. W. 328; Amb. 565, (but see 2 B. C. C. 111); 2 B. C. C. 18; 2 Ves. jun. 639; 4 Ves. 150, 555, 568; 5 Ves. 199, 461; 11 Ves. 607; 15 Ves. 384; 1 Mer. 178; 5 Sim. 530; [1 De G. & Jo. 438.]

(*s*) Under the old law every devise, however general in terms, was virtually specific. *Forrester* v. *Lord Leigh*, Amb. 173; *Scott* v. *Scott*, 1 Ed. 459; *Keeling* v. *Brown*, 5 Ves. 359; *Milnes* v. *Slater*, 8 ib. 303, overruling *Gower* v. *Mead*, Pre. Ch. 3. And see particularly *Mirehouse* v. *Scaife*, 2 My. & Cr. 695, where Lord *Cottenham* took a general view of the authorities for the proposition that pecuniary legatees are not entitled to have the assets marshalled as against a residuary devisee of lands, the principle applicable to specific and residuary devises being identical. The ground for this doctrine was, that, as the testator could dispose only of the lands actually belonging to him when he made his will, any devise therein, however general in terms, amounted in reality to nothing but a gift of the lands he then had. Thus, if a testator having lands called Blackacre and Whiteacre, before the year 1838, devised Blackacre to A. and the residue of his real estate to B., the devise to B., though residuary in expression, was in point of fact a mere devise of Whiteacre, and was so regarded for all purposes. Therefore, if in such a case the testator owed specialty debts, which were to be satisfied out of his real estate, Whiteacre, the property of B., was not first applicable (as would be the case if the respective subjects of disposition were personal estate), but A. and B. stood upon an equal footing, both estates being applied pro ratâ.

Every devise specific under old law.

[(*t*) *Long* v. *Short*, 1 P. W. 403, 2 Vern. 756; *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 655 (where Sir *L. Shadwell* overruled his own previous decision in *Cornewall* v. *Cornewall*, 12 Sim. 298); *Young* v. *Hassard*, 1 Jo. & Lat. 472; *Jackson* v. *Hamilton*, 3 Jo. & Lat. 711; compare *Bateman* v. *Hotchkin*, 10 Beav. 426; and see *Fielding* v. *Preston*, 1 De G. & J. 438.

(*u*) Since the statute 3 & 4 Will. 4, c. 104, making real estate assets for payment of all debts. There does not seem to be any direct authority on the point; but since (as decided by the cases in the last note) the Statute of Fraudulent Devises (3 & 4 Will. & M. c. 14, and now 11 Geo. 4 & 1 Will. 4, c. 47) gave the specific legatee a right to contribution from the specific devisee towards payment of a specialty debt in which the heirs were bound, it seems to follow pari ratione, that the statute 3 & 4 Will. 4, c. 104, would give a like right of contribution towards payment of a simple contract creditor. Both statutes were probably framed with a view to benefit the creditor solely, but there seems no reason why, since the earlier statute has been held to extend to alter the rights *inter se*

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8thly. [Real and personal property which the testator has power to appoint and which he has appointed by his will (*x*).]

Point as to descended assets.

In fixing these several gradations of liability, the great struggle for a long period was to determine whether the descended assets were applicable before or after devised lands which the testator had simply charged with (not particularly selected and appropriated for the payment of) his debts (*i.e.*, between the third and fourth classes in the preceding series), and the question was finally settled in favour of the prior liability of the heir (though with disapprobation of the rule), by Lord *Thurlow* in *Donne* v. *Lewis* (*y*), and by Lord *Alvanley* in *Manning* v. *Spooner* (*z*). And in the case of *Harmood* v. *Oglander* (*a*), Lord *Eldon* recognizes the distinction between a mere charge of debts, and a devise directing the mode in which the debts are to be paid, which he characterizes as "thin," but considers as too firmly established by authority to be disturbed. A devise to the heir, though inoperative according to the old law (*b*) to break the descent, was held to demonstrate an intention to place, and to have the effect of placing, the heir on an equal footing with the devisees, properly so called, in this respect (*c*).

In what order lapsed interests descending to the heir contribute.

[In general lapsed devises are chargeable in the hands of the heir or residuary devisee pari passu with realty coming to them by descent or as not previously disposed of (*d*). But where the lapsed interest is a remainder the rule appears to be different. Thus in *Wood* v. *Ordish* (*e*), where a testator by will dated in 1832 devised his real estate subject to the payment of his debts to one for life, with remainder to three persons as tenants in common, and afterwards purchased other lands which were of course unaffected by the will: one of the shares in remainder lapsed, and it was held by Sir *J. Stuart*, V. C., that the lapsed share was applicable for payment of debts in the same order as

[of the donees under the testator's will, the statute 3 & 4 Will. 4 should not also have the same effect. The fact that under the latter statute the simple contract creditors have a remedy against the realty in equity only, while the former gave the specialty creditors a remedy at law, does not, it is submitted, furnish a sufficient ground for distinction. And see observations of *K. Bruce*, V. C., *Collis* v. *Robins*, 1 De G. & S. 131.

(*x*) *Fleming* v. *Buchanan*, 3 D. M. & G. 976. *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 305. See also *Troughton* v. *Troughton*, 3 Atk. 660, 661; *Bainton* v. *Ward*, 2 Atk. 172, n. by Sanders.]

(*y*) 2 B. C. C. 257.

(*z*) 3 Ves. 114.

(*a*) 8 Ves. 125.

(*b*) But now see stat. 3 & 4 Will. 4, c. 106, s. 3; ante, Vol. I. p. 70.

(*c*) *Biederman* v. *Seymour*, 3 Beav. 368. [And since 3 & 4 Will. 4, c. 106, see *Strickland* v. *Strickland*, 10 Sim. 374.

(*d*) *Williams* v. *Chitty*, 3 Ves. 545; *Dady* v. *Hartridge*, 1 Dr. & Sm. 236.

(*e*) 3 Sm. & Gif. 125.

[the devised estates (*i.e.*, not until after exhausting the estate which simply descended on the heir), on the ground that the devisee for life had, as devisee, a clear right to have her life estate in the entirety exonerated by the descended estates. This decision does not appear to be referable to the charge of debts; for in *Williams* v. *Chitty* (*f*), where the entirety in certain property lapsed to the heir in possession, and was held liable in exoneration of the devised estates, there was also a charge of debts; though undoubtedly the charge may be so imposed as materially to affect the question. Thus in *Fisher* v. *Fisher* (*g*), where the testator devised his freehold and leasehold estates to his seven children, and bequeathed the residue of his personalty exonerated from his debts; and then charged his freehold estates as the primary fund, and his leaseholds as the secondary fund for payment of his debts: one share of the freehold and leasehold estates lapsed, and it was held by Lord *Langdale* on the construction of this will that the interest conferred by the lapsed devise was only so much as remained after deducting debts; and therefore that so much only lapsed; a construction which virtually gave to the heir the benefit of contribution from the co-devisees, in respect of that particular item of descended realty.]

Principle of contribution, when applied.

Where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A. and Whiteacre to B., and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their respective portions of the property (*h*). And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent), the same principle of contribution obtains (*i*).

[(*f*) 3 Ves. 545.
(*g*) 2 Keen, 610.]
(*h*) See *Heveningham* v. *Heveningham*, 2 Vern. 355, 1 Eq. Ca. Ab. 117; *Growcock* v. *Smith*, 2 Cox. 397; *Carter* v. *Barnardiston*, 1 P. W. 504; [*Johnson* v. *Child*, 4 Hare, 87.] See also 3 P. W. 98.
(*i*) See Lord *Eldon's* judgment in *Aldrich* v. *Cooper*, 8 Ves. 390. See

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Immaterial that part of the property charged is real and part personal.

And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden pro ratâ (*k*).

It should seem then, that, although personalty not expressly charged with debts is applicable before real estate not so charged, yet when both species of property are expressly onerated [and the personalty is specifically bequeathed], no distinction of this nature is admitted, but the whole stands on an equal footing.

Effect where real and personal estate constitute a mixed fund to answer charges.

In precise accordance with this principle, too, where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but that each shall contribute rateably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate.

Real and personal estate made a mixed fund to answer certain charges.

Thus, in the case of *Roberts* v. *Walker* (*l*), where a testatrix gave to trustees certain freehold copyhold and leasehold estates and shares in certain companies, and all other real and personal estate, upon trust to sell and convert the same, and as to the monies arising therefrom, and the rents and profits in the mean time, upon trust in the first place to pay all her debts funeral and testamentary expenses, and in the next place to pay certain legacies with interest and the duty thereon, and to apply the residue in such manner as the testatrix by any codicil should direct. The testatrix died without making any codicil. The question being, whether the debts and legacies were to be paid out of the personalty so far as it would go, in exoneration of the real estate and for the benefit of the heir, or whether they were to be borne by the real and personal estate proportionally, Sir

this case as to the question whether a mortgage equally affects both subjects comprised in it, or the one was to be *first* applied.

(*k*) *Irvin* v. *Ironmonger*, 2 R. & My. 531.

(*l*) 1 R. & My. 752; see also *Dunk* v. *Fenner*, 2 R. & My. 557; [*Fourdrin* v. *Gowdey*, 3 My. & K. 383; *West* v. *Cole*, 4 Y. & C. 460; *Falkner* v. *Grace*, 9 Hare, 282; *Cradock* v. *Owen*, 2 Sm. & Gif. 241; *Young* v. *Hassard*, 1 Jo. & Lat. 466; *Robinson* v. *London Hospital*, 10 Hare, 19; *Simmons* v. *Rose*, 6 D. M. & G. 411.]

*J. Leach*, M. R., decided in favour of the latter construction, observing, "When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estate which have been converted into that fund shall answer the stated purposes and every of them pro ratâ, according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund."

Charges thrown on real and personal estate as a mixed fund.

So, in the case of *Stocker* v. *Harbin* (*m*), where a testator gave all his real and personal estate to A., B. and C., upon trust to sell all his real estate and convert into money his personal estate; and he directed his trustees to stand possessed of the monies to arise by virtue of his will, in trust to pay all his just debts and funeral and testamentary expenses, and then to appropriate and take out of his said *trust monies* the sum of 1,000*l.*, and invest the same in manner therein mentioned, for the benefit of his son D., which sum, in a certain contingency, was to revert to and become part of his *residuary monies and estate;* and the testator then proceeded to give certain directions concerning his residuary monies and estate. The testator, by an unattested codicil, revoked the legacy of 1,000*l.*; and Lord *Langdale*, M. R., held, that, as the codicil was inoperative in regard to the freehold estate, the legacy remained in force as to such proportion of it as was payable out of the produce of the freeholds, for the legacy being given out of a mixed fund, constituted of both real and personal estate, would have been payable out of both, in proportion to their respective amounts (*n*).

(*m*) 3 Beav. 479; [*Shallcross* v. *Wright*, 12 Beav. 505.

(*n*) But if the gift out of the real estate had been of a *legal* interest as a

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Again, in the case of *Salt* v. *Chattaway* (*o*), where a testator devised and bequeathed his real and personal estate in trust to sell, and out of the proceeds and out of the ready money he might die possessed of, to pay to J. 100*l.*, and to divide one-third of the residue of the monies to arise as aforesaid among J. and five other persons; J. died in the testator's lifetime. It was held that the next of kin and the heir were entitled to their proportionate parts of the lapsed share of the residue, and that the legacy of 100*l.* fell into the residue and passed by the gift thereof (*p*). Lord *Langdale* observed, that the two sorts of estate being blended, each contributing in proportion to fulfil the purposes which could be accomplished, the share of residue which had lapsed must be deemed to consist of proportionate parts of the two sorts of estate.

Conversion the only mode of creating a blended fund.

[It would seem that the only mode of creating, for the purpose now under consideration, a blended fund, is by directing a conversion: it has been frequently decided that a devise of real and personal estate to trustees, with a direction to pay out of the issues, dividends, interest and profits thereof, does not prevent the personal estate from being primarily liable (*q*).

Implied exoneration of a legatee from order of administration directed.

The order in which a testator directs his estate to be administered may be such as impliedly to shew that one of two devisees or legatees is to have priority over the other, though under the gift simply to them they would have contributed rateably to payment of debts. Thus, in *Legh* v. *Legh* (*r*), a testator devised his B. estate to certain uses, and he devised his M. estate to trustees upon trust to sell and raise portions for his younger children, *and from and after the complete performance and satisfaction of all and every the trusts powers and authorities thereby given and declared and subject thereto in the first instance*, and also subject to the payment of debts and other legacies, he directed the trustees to stand possessed of the M. estate in trust for his eldest son absolutely. The M. estate was only sufficient to pay the portions and some of the debts, and it was contended

[rent-charge, a court of law would have given effect to the whole charge out of the real estate, *Locke* v. *James*, 11 M. & Wels. 912, where it is suggested that there might be a remedy in a court of equity, *sed quære.*]

(*o*) 3 Beav. 576. [See also *Att.-Gen.* v. *Southgate*, 12 Sim. 77; *Shallcross* v. *Wright*, 12 Beav. 505; *Fream* v. *Dowling*, 20 Beav. 631.]

(*p*) As to this, vide ante, Vol. I. p. 608.

[(*q*) *Boughton* v. *Boughton*, 1 H. of L. Ca. 406, reversing 1 Coll. 26; *Blann* v. *Bell*, 5 De G. & S. 665; *Tidd* v. *Lister*, 3 D. M. & G. 857; *Bentley* v. *Oldfield*, 19 Beav. 225; *Tench* v. *Cheese*, 6 D. M. & G. 453; *Ellis* v. *Bartrum*, 25 Beav. 110.

(*r*) 15 Sim. 125.

[that the portions and the B. estate ought to contribute rateably towards remaining debts; but Sir *L. Shadwell*, V. C., held, that the B. estate was alone liable in the first instance. That this was the true construction is evident from the fact that the testator directed the portions to be paid in priority to the debts, while he must be considered to have known that the law ranked the debts in priority to the devisees of the B. estate, which latter priority he had not disturbed; the order of priority contemplated by him therefore was—1, Portions; 2, Debts; 3, Devisees of the B. estate; and the property being insufficient for all three classes, the deficiency fell on the devisees in exoneration of the portions.

Apportionment of charge does not affect person entitled to charge.

It must be remembered that apportionment is made only as between the persons respectively entitled to the real and personal property charged, and does not affect the person entitled to the charge; thus if the real property charged is by codicil given freed from the charge, the personalty remains subject to the whole charge (*s*).]

Legatee of an incumbered chattel entitled to claim exoneration.

II. As to the general right of a devisee, [in cases not affected by the statute 17 & 18 Vict. c. 113, hereafter stated,] to be exonerated from an incumbrance to which the testator, either before or after the making of his will, has subjected the devised estate, there cannot, at this day, be any doubt or controversy. And it is clear that the legatee of any chattel, specifically bequeathed, has the same right.

Arrears of rent not primarily payable by donee of lease.

[Thus where a testator holding lands for which he received rent and paid a head-rent, died leaving arrears of rent due to him which he specifically bequeathed, and also arrears of head-rent due from him, it was held that the latter must be paid out of the general personal estate in exoneration of the specific legatee (*t*).

Nor renewal fines fallen due in testator's lifetime.

So a sum due from the testator to his lessor, in respect of a renewal granted during the testator's lifetime, is payable out of the general personal estate, in exoneration of a specific legatee of the leasehold (*u*). And the specific legatee of leaseholds, on which the testator had covenanted to build, has been held (*x*) entitled

Nor the cost of

[(*s*) *Tatlock* v. *Jenkins*, Kay, 654.

(*t*) *Barry* v. *Harding*, 1 Jo. & Lat. 489.

(*u*) *Fitzwilliams* v. *Kelly*, 10 Hare, 266. But not fines falling due on renewals effected upon deaths happening after the testator's death, ib.

(*x*) *Marshall* v. *Holloway*, 5 Sim. 196.

performing a covenant to build.

Secus, as to dilapidations.

[to have the covenant performed at the expense of the general personal estate, although the time for performing the covenant has not expired (*a*). But the principle has not been held applicable to a bequest of leaseholds, where the testator was liable for dilapidations at the time of his death; in which case, therefore, the specific legatee must bear the burden of repairs (*b*).

Chattel must be redeemed for specific legatee.

Again,] if a testator bequeaths a watch or a painting, and it turns out that at his decease the watch or painting is in pawn, the legatee is entitled to have it redeemed. And by parity of reason if a testator specifically bequeaths a legacy to which he is entitled under a will, and afterwards assigns such legacy by way of mortgage, the legatee may claim to have the mortgage debt liquidated in exoneration of the subject of gift; and it would be immaterial that the mortgage deed contained a power of sale, by virtue of which the mortgagee might have absolutely disposed of the property and thereby have defeated the bequest (*c*); for in all these cases the mortgage being considered to have been created by the testator for his own convenience, and not for the purpose of subtracting so much from the bequest, the act is not, as between the parties claiming under the will, an ademption pro tanto, and cannot, without at least equal impropriety, be termed a partial revocation, though the latter designation has been commonly applied to it. If, therefore, the testator's right of redemption remain unbarred at his decease, the devisee or legatee is entitled to require that it shall be exercised for his benefit.

Specific legatee, when entitled to have subscription on shares paid up,

Upon the same principle, it has been held that the specific legatee of shares in a railway company or any other such adventure, on which at the testator's death the whole amount subscribed has not been paid, is entitled to have the future calls paid out of the general personal estate, or any other fund on

[(*a*) This last fact led Sir *G. J. Turner*, in *Fitzwilliams* v. *Kelly*, 10 Hare, 277, to refer *Marshall* v. *Holloway* to the circumstance that the debts were there specially charged on the general personal estate. But the charge appears to leave untouched the question, what is a debt of the testator.

(*b*) *Hickling* v. *Bowyer*, 3 Mac. & G. 643. Sir *R. T. Kindersley* doubted the principle of this decision, 1 Drew. 182, 183; but at this day it is not likely that the liability of the general estate will be enlarged; see post. Moreover, the case of dilapidations differs from others in being a continuing breach, and giving the covenantee a right to proceed at law against the assignee (or legatee after assent) for dilapidations permitted before as well as for those happening after the lessee's death, *Mascall's case*, Moore, 242.]

(*c*) *Knight* v. *Davis*, 3 My. & K. 358. In this case the mortgage was created for the benefit of the legatee himself.

which the testator may have thrown the burden of his debts (*d*). [But the inconvenience of keeping a portion of the testator's assets tied up to meet liabilities of this kind, has been felt to be so great, that there is now a disposition to say that these cases have gone too far (*e*). Sir *J. Romilly*, M. R., refused to follow them where the company had been long in operation, and the testator's interest had been treated by him and all other persons concerned as complete (*f*); and in *Addams* v. *Ferick* (*g*), he held that the liability of the general estate depended on the question whether the calls were made before or after the testator's death. Sir *R. T. Kindersley*, too, has said that until the rule had been settled by an appellate tribunal he should adopt this principle, that whatever payment was due at the time of the testator's death to constitute him a complete shareholder in the concern, and whatever calls were made at his death, must be paid out of his general assets; but if at his death he was constituted a complete shareholder in the concern, whether it was a going concern at his death or not, whether it was partially or wholly completed, all calls made subsequently to the death of the testator must be borne by the specific legatee (*h*).

—— when not.

Where the person named as legatee repudiates the legacy, he cannot of course be subjected to any of the liabilities attaching to the testator's interest (*i*).]

Legatee may escape the burden by declining the legacy.

But the points which [in cases not falling within the statute 17 & 18 Vict. c. 113,] have been chiefly in controversy and are here to be considered, are :—

1st, Whether the will indicates an intention that the devisee or legatee shall take cum onere (*k*); and, if not, then, 2ndly, Out of what funds he is entitled to claim exoneration (*l*). The Courts require very clear expressions in order to fasten the incumbrance on the devisee or legatee of the property in question.

Mortgaged estate, when to be exonerated.

(*d*) *Blount* v. *Hipkins*, 7 Sim. 51; [*Jacques* v. *Chambers*, 4 Railw. Cas. 499, 11 Jur. 295, reversing *S. C.* 2 Coll. 435; *Wright* v. *Warren*, 4 De G. & S. 367; *Clive* v. *Clive*, Kay, 600.

(*e*) By Sir *E. Sugden*, 1 Jo. & Lat. 490.

(*f*) *Armstrong* v. *Burnet*, 20 Beav. 424.

(*g*) 26 Beav. 384.

(*h*) *Day* v. *Day*, 29 L. J. Ch. 466, 468, 6 Jur. N. S. 365.

(*i*) *Moffett* v. *Bates*, 3 Sm. & Gif. 468.

(*k*) It may happen that a devisee for life is to take cum onere, while a remainderman is entitled to exoneration, see *Sargent* v. *Roberts*, 12 Jur. 429, 17 L. J. Ch. 117; and vice versâ, *Whieldon* v. *Spode*, 15 Beav. 537.

(*l*) As to the right to exoneration being barred by lapse of time, see *Newhouse* v. *Smith*, 2 Sm. & Gif. 344.]

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Devise *subject to the mortgage.*

Thus it is settled that a devise of lands, *subject to the mortgage or incumbrance thereupon*, does not so throw the charge on the estate, as to exempt the funds which by law are preferably liable (*m*); the testator being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting his devisee to the burden,—a construction which, though well established, it is probable generally defeats the intention.

Devise subject to specified part of mortgage.

[And in *Goodwin* v. *Lee* (*n*), where a testator having two estates subject to a mortgage for 1,200*l.*, devised one to A. subject to the payment of 200*l.* part of the 1,200*l.*, and devised the other to B. subject to the payment of 1,000*l.* residue of the 1,200*l.*; Sir *W. P. Wood*, V. C., held that this only fixed the proportions in which the estates inter se were to bear the charge, and was nothing more than the usual case of a devise of a mortgaged estate subject to the mortgage, which did not imply that the devisee was to take it cum onere.]

Devise upon trust to sell and pay mortgages does not make mortgaged lands primarily liable.

And even where lands were devised upon trust for sale, and the proceeds were to be applied in the first [place to pay off a mortgage debt of 6,000*l.* charged on another estate (*o*), and in the next place to pay off all other mortgages charged on the lands devised,] Sir *J. Leach*, M. R., held, that, as it appeared on the whole will that the testator did not intend to exonerate his personal estate from the mortgage debts, the devisees of the residue of the proceeds of the fund were entitled, under the general rule, to have the personalty applied in exoneration of the lands devised (*p*).

Effect of words "he paying the mortgage thereon."

[Where an estate in mortgage was devised to A. "he paying the mortgage thereon," Lord *Langdale* held, that this imposed a condition on the devisee and exonerated the personal estate (*q*); the case, however, can hardly be considered an authority, for it

(*m*) *Serle* v. *St. Eloy*, 2 P. W. 386; *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Astley* v. *Earl of Tankerville*, 3 B. C. C. 545, 1 Cox, 82; [*Barnewell* v. *Lord Cawdor*, 3 Mad. 453; *Phillips* v. *Parker*, Taml. 136;] *Bickham* v. *Crutwell*, 3 M. & Cr. 763; [*Townshend* v. *Mostyn*, 26 Beav. 72.] See also Lord *Eldon's* judgments in *Milnes* v. *Slater*, 8 Ves. 306; *Bootle* v. *Blundell*, 1 Mer. 227, and *Noel* v. *Lord Henley*, in D. P., 1 Dan. 336.

[(*n*) 1 Kay & J. 377.

(*o*) The payment of this mortgage debt was by a codicil expressly thrown on the mortgaged estate in exoneration of the personal estate, and it is presumed, though the report is not clear on the subject, that the personalty was not, in direct contravention of the codicil, held liable to the discharge of this debt.]

(*p*) *Wythe* v. *Henniker*, 2 My. & K. 635. [But according to *Webb* v. *Jones*, post, the decision should have been otherwise, for another reason.

(*q*) *Lockhart* v. *Hardy*, 9 Beav. 379. See *Hatch* v. *Skelton*, 20 Beav. 453.

[is directly opposed to two earlier cases (*r*) not cited before his Lordship, in which it was decided that similar words applied to debts and legacies did not impose a condition.]

Funds liable to exonerate mortgaged estate.

Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged estate is entitled to have the incumbrance discharged out of the following funds:—1st, *The general personal estate* (*s*); 2ndly, *Lands expressly devised for payment of debts* (*t*); 3rdly, *Lands descended to the heir* (*u*); and 4thly, *Lands devised charged with debts* (*x*): and if the charge happened to reach the last class of estates, and if the devised mortgaged estate were included therein (as it of course would be if the charge were general), the devisee in question would be liable to contribute rateably with the other devisees (*y*).

Not specific legacies;

But the devisee of a mortgaged estate is not entitled to have it exonerated out of *personalty specifically bequeathed*,—a point which was determined in the case of *O'Neal* v. *Mead* (*z*), where a testator having devised lands, which he had mortgaged, to his eldest son in fee, and bequeathed a leasehold estate to his wife, it was held that the leasehold premises, being specifically bequeathed, were not liable to pay off the mortgage.

And à fortiori a specific legatee of incumbered leaseholds cannot call upon a specific legatee of unincumbered leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money shall be paid out of the general personal estate would not confer such right (*a*).

nor pecuniary legacies;

It is clear, also, that the devisee of a mortgaged estate cannot claim exoneration as against pecuniary legatees. Thus, in *Lutkins* v. *Leigh* (*b*), where the testator, having mortgaged certain lands, devised them to his wife for life, with remainder over, and

[(*r*) *Bridgman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120, noticed post.]

(*s*) *Phillips* v. *Phillips*, 2 B. C. C. 273, and cases cited.

(*t*) *Serle* v. *St. Eloy*, 2 P. W. 386; [*Lomax* v. *Lomax*, 12 Beav. 285;] and other cases cited ante, 588.

(*u*) *Galton* v. *Hancock*, 2 Atk. 424, 427, 430; [*Davies* v. *Topp*, 2 B. C. C. 259, n.;] and other cases cited ante, 588.

[(*x*) *Bartholomew* v. *May*, 1 Atk. 487, 1 West, 255; *Middleton* v. *Middleton*, 15 Beav. 450.]

(*y*) *Carter* v. *Barnardiston*, 1 P. W. 505; [*Middleton* v. *Middleton*, 15 Beav. 450; *Harper* v. *Munday*, 7 D. M. & G. 369.]

(*z*) 1 P. W. 693; [*Emuss* v. *Smith*, 2 De G. & S. 737, 738.]

(*a*) *Halliwell* v. *Tanner*, 1 R. & My. 633.

(*b*) Cas. t. Talb. 53. See also *Lucy* v. *Gardener*, Bunb. 137; and Lord *Loughborough's* judgment in *Hamilton* v. *Worley*, 2 Ves. jun. 65; [*Johnson* v. *Child*, 4 Hare, 87.]

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gave her a legacy of 1,500*l.*, and bequeathed the residue of his personal estate to other persons. The personal estate not being sufficient to pay the 1,500*l.* and liquidate the mortgage, Lord *Talbot* held that the devisees must take the devised estate cum onere.

nor other devised lands.

And, of course, such a devisee is not entitled to call upon the devisees of other lands, not charged by the testator with debts, for contribution, although such other estates were liable to the *creditor* (*c*). It is true that a devisee of incumbered land can only claim exoneration out of property which the creditor of the testator can reach, but the converse of the proposition is not true.

As to descended estates exonerating devised estates.

The application of descended estates in exoneration of a devised estate has generally been thought to be a hardship upon the heir; but such an opinion can only be maintained on a ground which would go to prove that the estate ought not to be exonerated at all, namely, that the devisee was intended to take cum onere, which is probably in general the case; for if it be admitted that the testator meant the incumbrance to be liquidated, it would seem to follow that the devisee should be placed in the same position as if the mortgage were a debt not affecting the estate, and should only be liable to contribute to or pay it, precisely to the same extent as any other claim upon the *general* assets: though the Courts, it will be observed, have not carried the rule quite so far. The extent of the devisee's claim to exoneration seems now to be well defined by the cited cases.

*Heir* entitled to exoneration.

So where an estate *descends* subject to a mortgage, the heir is entitled to exoneration out of those funds which in the established order of application (*d*) are anterior to the descended assets, namely, the general personal estate, and realty expressly devised for the payment of debts (*e*).

Exoneration doctrine does

The principle of the preceding cases, however, extends only to incumbrances created by the testator or ancestor himself;

(*c*) Lord *Hardwicke's* judgment in *Galton* v. *Hancock*, 2 Atk. 438; [*Emuss* v. *Smith*, 2 De G. & S. 722.] In the first case the debt was secured by bond, a circumstance not now a necessary ingredient in the case. Vide ante, 553.

(*d*) See ante, 588.

(*e*) *Hill* v. *Bishop of London*, 1 Atk. 621; [*Chester* v. *Powell*, 7 Jur. 389; *Yonge* v. *Furse*, 20 Beav. 380. The first case is a peculiar one. The mortgaged lands were copyholds (which were not then assets either at law or in equity), and the copyhold heir was held entitled to be exonerated out of lands specifically devised, though merely *charged* with debts. If he had been heir of fee-simple lands, the lands descended would have been liable before the lands charged, see order of liability, ante, 588.]

for the claim to exoneration is founded on the notion that the personal estate of the testator who made the mortgage had the benefit of its creation, and therefore shall be the fund to liquidate it; and cases which do not fall within the reason are excluded from the operation of the rule. Thus it is clear that where the estate has come to the last owner, either by devise or descent, incumbered with a mortgage, and he has done no act in his lifetime evincing an intention to make the debt his own, the personal estate (not having had the benefit of the mortgage) will not be liable to pay it; but the devisee or heir of the last owner will take the estate cum onere: nor, it seems, will the act of such last owner, rendering himself personally liable to the debt, [even though he be also residuary legatee of the first mortgagor's personal estate,] in every instance transfer it to himself as between *his own* representatives, unless such appears upon the whole transaction to have been his deliberate intention (*f*).

not extend to estates which came to the testator cum onere.

Unless he manifest an intention to adopt the debt.

Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect (*g*), even though [the conveyance on transfer be made freed from the old equity of redemption and subject to a new proviso, and] include an agreement to pay a higher rate of interest (*h*), or a further sum be advanced to pay an arrear of interest on such mortgage (*i*), in which case the effect is merely to convert interest into

Acts *not* amounting to adoption.

(*f*) *Scott* v. *Beecher*, 5 Mad. 96; [*Earl of Ilchester* v. *Earl of Carnarvon*, 1 Beav. 209; *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Swainson* v. *Swainson*, 6 D. M. & G. 648. In *Bond* v. *England*, 2 Kay & J. 44, Sir *W. P. Wood*, V. C., said these decisions proceeded on the ground that the same party had both funds under his control. This is not easily to be collected from the reports. However, the V. C. held them not applicable to the case then before him, where the testator had never administered at all to the estate of the original mortgagor, and so could not be said to have ever had his personal estate under his control.]

(*g*) *Bagot* v. *Oughton*, 1 P. W. 347; *Evelyn* v. *Evelyn*, 2 ib. 664; *Leman* v. *Newnham*, 1 Ves. 51; *Lacam* v. *Mertins*, ib. 312. See also *Robinson* v. *Gee*, ib. 251; *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, 2 B. C. C. 57.

(*h*) *Shafto* v. *Shafto*, 1 Cox, 207, 2 Cox's P. W. 664, n. [This case seems to overrule *Donisthorpe* v. *Porter*, 2 Ed. 162, where it was held that a bond and covenant and reservation of a new equity of redemption made the personal estate of the heir primarily liable, but the exact nature of the transaction is not stated; it seems to have been a mortgage to a person already entitled to a charge raiseable under the trusts of a term.]

(*i*) *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, [2 B. C. C. 57; and see *Shafto* v. *Shafto*, supra, where it was held that an arrear of interest due on the death of the devisee in fee was a charge on the mortgaged property, in exoneration of his personal estate; contra as to a devisee for life, or an infant devisee in tail, who must keep down the interest so far at least as the rents and profits will go. *Burgis* v. *Mawbey*, T. & R. 167. A further sum, advanced for the owner's own personal benefit, will of course remain his own personal debt, *Lacam* v. *Mertins*, 1 Ves. 312.]

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principal; and in the case of the *Duke of Ancaster* v. *Mayer* (*k*) it was so decided, though a small further principal sum was advanced, and a further real security given for the whole.

Nor in such a case is the personal estate of the last owner rendered primarily liable by a covenant or bond given for particular purposes, as upon the apportionment of the debt among several persons entitled to different parts of the property subject to the charge (*l*). [Nor where the equity of redemption has become divided among several persons does a new proviso for redemption, providing for reconveyance to each person of his own share, throw the debt upon such persons personally, since it only expresses what the law would imply (*m*).

Where debt or security divided into two parts, held a new mortgage.

But in the case of *Barham* v. *Earl of Thanet* (*n*), *part* of the mortgage debt and *part* of the lands only were included in the transfer, each portion of the lands becoming a security for each portion of the debt only; also a different rate of interest was made payable, and there was a new proviso for redemption on payment of the principal money and interest at the end of *five* years; and Sir *J. Leach* held, that the devisee had taken the debt upon himself, and that the transaction was not an assignment of part of the original mortgage debt, but a *release* of part of the security and a new mortgage. It is presumed the learned Judge considered that nothing could be considered as mere assignment which did not leave the *whole* lands subject to the *whole* debt. By the transaction in the case before him the equities were certainly altered, for the mortgagor might, as he in fact did, redeem one mortgage without the other.

Case where held that heir had elected to make debt his own.

Again, in the case of *Bruce* v. *Morice* (*o*), a mortgaged estate was devised to the testator's eldest son in tail, and other lands were devised to trustees, upon trust to sell and pay debts, and pay the surplus to his said son; but if the son should satisfy the creditors, the trustees should desist from the sale. The son was also residuary legatee and executor. The trustees never acted, and the son entered on both estates, never paid the mortgage debt, but joined in a transfer and covenanted for payment, a

(*k*) 1 B. C. C. 454; but see *Woods* v. *Huntingford*, 3 Ves. 128; [and *Lushington* v. *Sewell*, 1 Sim. 435.]

(*l*) *Forrester* v. *Leigh*, Amb. 171, 2 Cox's P. W. 664, n.; *Billinghurst* v. *Walker*, 2 B. C. C. 604. As to which, see Sir *W. Grant's* judgment in *Earl of Oxford* v. *Rodney*, 14 Ves. 425.

[(*m*) *Hedges* v. *Hedges*, 5 De G. & S. 330.

(*n*) 2 My. & K. 607.

(*o*) 2 De G. & S. 389.

[different rate of interest being reserved; there was also a new proviso for redemption. On his death it was held, by Sir *J. K. Bruce*, V. C., that his personal estate was primarily liable. The learned Judge remarked on the fact that the son was residuary legatee, but this he had himself, though unwillingly, and in deference only to prior decisions, held immaterial (*p*); he also noticed that the son had, on the mortgage being made, become surety for the debt of his father, which, however, it is conceived, could not have been material: and the real ground on which to rest the decision seems to be that last stated, namely, that the trustees never having acted, the son himself, as heir-at-law, became the trustee, and having entered on both estates, and never having attempted to sell the one devised for payment of debts, must be presumed to have acted in accordance with the will, which gave him the option of preventing a sale by taking the debts on himself.

In the case of *Townshend* v. *Mostyn* (*q*) there was at the testator's death a debt of 20,000*l.* secured by mortgage on an estate which had come to him from his father subject to a portion of the debt, the testator having himself created the residue of the debt and covenanted for payment of the whole. Sir *J. Romilly*, M. R., held that the whole 20,000*l.* had become the debt of the testator, and that the devisee must be exonerated.]

Charge of debts confined to testator's own debts.

Where a testator charges his estate with the payment of his debts, an incumbrance on a real estate devised or descended to him will not be considered as his debt, so as to bring it within the operation of the charge.

Thus, in *Lawson* v. *Lawson* (*r*), where A., being the devisee of real estate which was subject to certain incumbrances, died, leaving the estate so subject, and having by his will charged his real and personal estate with the payment of his debts, and devised the real estate to B., and appointed his wife executrix. The wife having in the administration of the assets paid off the charge on the real estate devised by the first testator, it was held that she was entitled to satisfaction from B., whose estate was thus exonerated; for that A., in charging his estate with his debts, could not intend to incumber it with debts which were not his in contemplation of law.

[(*p*) *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688.
(*q*) 26 Beav. 72.]
(*r*) *Lawson* v. *Lawson*, 3 B. P. C. Toml. 424. See also *Lawson* v. *Hudson*, 1 B. C. C. 58; *Hamilton* v. *Worley*, 2 Ves. jun. 62, 4 B. C. C. 199.

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Acts not amounting to adoption of debt.

And where a person, to whom lands are devised or descend subject to the payment of debts or legacies, executes a bond [or promissory note] or a mortgage of the devisor's or ancestor's estate to raise money for payment of the debts (*s*), or to a legatee to secure his legacy (*t*), he has not by these acts primarily subjected his personal estate. Such also was adjudged to be the result where the heir mortgaged an estate to pay simple contract debts owing by his ancestor to which the real estate was not liable (*u*).

Rule where testator purchases cum onere.

The same doctrine, to a certain extent at least, applies to cases in which the estate was *purchased* by the testator subject to the charge; for it has been held that "where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to shew an intention to transfer the debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally (*x*);" but at his death the person upon whom the estate devolves takes it cum onere (*y*).

Covenant with the *vendor*;

And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it (*z*).

—— with the *mortgagee*: this amounts to adoption of debt.

But if the *mortgagee* be a party to the transaction, the vendee covenanting with *him* to pay the debt, and the estate be subjected to a fresh proviso for redemption, it will be considered, with respect to the purchaser's representatives, as a purchase of the whole estate, not of the equity of redemption merely (*a*).

And the same principle of course applies where upon the purchase the mortgage is transferred to a new mortgagee, who advances a further sum of money.

(*s*) *Perkyns* v. *Baynton*, 2 Cox's P. W. 664, n.; *Bassett* v. *Percival*, 1 Cox, 268; *Noel* v. *Lord Henley*, 7 Pri. 241, 12 ib. 213, Dan. 211, 322.

(*t*) *Hamilton* v. *Worley*, 2 Ves. jun. 62, 4 B. C. C. 199; [*Matheson* v. *Hardwicke*, 2 Cox's P. W. 665, n.]

(*u*) *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, 2 B. C. C. 57.

(*x*) Per Sir *R. P. Arden*, M. R., in *Woods* v. *Huntingford*, 3 Ves. 128.

(*y*) *Cornish* v. *Shaw*, Ch. Cas. 271; *Pockley* v. *Pockley*, 1 Vern 36; *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454.

[(*z*) *Tweddell* v. *Tweddell*, 2 B. C. C. 101, 152;] *Butler* v. *Butler*, 5 Ves. 534.

(*a*) *Parsons* v. *Freeman*, 2 Cox's P. W. 664, n., [Amb. 115, Blunt's ed. note, where it appears that there was a separate agreement by the purchaser with the mortgagee, which prevents the case from being opposed to the authorities cited in the last note, as to which, see per *Sugden*, C., in *Barry* v. *Harding*, 1 Jo. & Lat. 485, 486.] *Earl of Oxford*, v. *Lady Rodney*, 14 Ves. 417; *Waring* v. *Ward*, 5 Ves. 670, 7 Ves. 332.

Thus in *Woods* v. *Huntingford* (*b*), where the deceased ancestor, having purchased the equity of redemption in consideration of his agreeing to take upon himself the mortgage debt, afterwards obtained a further sum from the mortgagee, and executed to him a mortgage for the whole; Sir *R. P. Arden* held that he had made the mortgage debt his own, so as to entitle the heir upon whom the land had descended to have it exonerated out of the personal estate.

Distinction between purchaser of equity of redemption and heir or devisee.

From the observations of the Master of the Rolls in this case, it is to be inferred that he thought that almost any dealing by *a purchaser* of an equity of redemption with the mortgagee, by which he had rendered himself liable to him to pay the debt, would amount to an adoption of the debt, as between his own representatives. He observed, that in most of the cases collected by Mr. *Cox*, in his note to *Evelyn* v. *Evelyn* (*c*), (on which he pronounced a high encomium), the estate had come to the owner *by descent or devise* (*d*).

Debt belongs to purchaser *where it forms part of the price.*

But it is clear that an actual dealing with the mortgagee is not essential to render the debt personal to the purchaser, for the same effect will be produced if the transaction between the vendor and vendee is such as to shew that the purchase was inclusive of the mortgagee's interest in the land, not of the equity of redemption only, the mortgage *debt forming part of the price of the estate* (*e*).

This doctrine was distinctly recognized by Lord *Thurlow* in *Billinghurst* v. *Walker* (*f*); but it is difficult to reconcile with that recognition his Lordship's decision in *Tweddell* v. *Tweddell* (*g*), that the debt had not been adopted by the purchaser, where the purchase-money, as stated in the recital of the conveyance, included the mortgage debt, although in the testatum clause the

(*b*) 3 Ves. 128. Compare this case with *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454, noticed ante, 602, which it is remarkable was not cited by the M. R.

(*c*) 2 P. W. 664, n.

(*d*) The principal exception is *Forrester* v. *Leigh*, 1753, 2 Cox's P. W. 664, n., Amb. 171, where the testator had purchased several estates subject to mortgages, with regard to one of which he entered into a covenant for payment of the mortgage money, for the purpose *of indemnifying a trustee;* and as to another, which was part only of an estate subject to a mortgage, upon splitting the incumbrance, both parties reciprocally covenanted to pay their respective shares and indemnify each other. Lord *Hardwicke* thought that these covenants would not have the effect of making the mortgages personal debts of the testator, being entered into for *particular purposes* only.

(*e*) *Cope* v. *Cope*, 2 Salk. 449; *Earl of Belvidere* v. *Rochfort*, 5 B. P. C. Toml. 299, but as to which, see post, 606?

(*f*) 2 B. C. C. 608.

(*g*) 2 B. C. C. 101, 151. See Sir *W. Grant's* observations upon this case, in *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 423.

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consideration was stated to be the amount of the mortgagor's proportion exclusive of that debt, and the covenant thereinafter contained; and the vendee then covenanted to indemnify the vendor against the payment of the mortgage debt.

Case of *Earl of Belvidere* v. *Rochfort.*

Still more difficult is it to reconcile with the rule in question Lord *Thurlow's* disapproval of the case of the *Earl of Belvidere* v. *Rochfort* (*h*), which was as follows:—A. mortgaged to B. for 450*l.* and interest. A. afterwards agreed with C. for the sale of the premises for 900*l.*, and subsequently, in consideration of 900*l.* conveyed the premises to C. and his heirs. In the covenant against incumbrances the mortgage made to B. was excepted, and it was added, "which said principal money of 450*l.* with interest thereof from the 10th day of February last past before the date hereof is to be paid and discharged by the said C. (the purchaser), his heirs and assigns, *out of the consideration money in this present deed expressed* (*i*)." And indorsed on the conveyance was a receipt, signed by A. (the vendor), acknowledging the receipt of the 900*l.* thus, "450*l.* sterling in money on the perfection of the deed, and 450*l.* *allowed on account of the mortgage.*" C. did not pay off the mortgage debt in his lifetime, and devised the premises to D. in fee, whom he made his residuary legatee and executor. D. also died without paying off the mortgage debt, and by his will devised the estate in question to E. in fee, and bequeathed the residue of his personal estate to F., whom with another he made executors. On a bill filed in the Irish Chancery, Lord *Lifford* decreed that the mortgage was to be considered as the debt of C. (the original purchaser), and that his personal estate, which came to the hands of D. his executor, and since to the hands of F. (the residuary legatee and one of the executors of D.), was liable to its liquidation (*k*). Against this decree F. appealed to the House of Lords, contending that the mortgage was not the debt of C., and, if it were, that E., as the devisee of D., the devisee of C., was not entitled to have it exonerated out of the assets of C., the original testator. On the other side it was insisted that the transaction of C. with A. was upon the face of it a contract, not for the purchase of the equity of

Mortgage money held to form part of the price.

(*h*) 5 B. P. C. Toml. 299.

(*i*) It appears from the answer of the defendant in the original cause, that there was a covenant to indemnify the vendor from the debt, but it is not stated in the case, and according to the view in which that circumstance is now regarded, was certainly not material.

[(*k*) Wallis, by Lyne, 45.]

redemption only, but of the land itself. The plain intent of the deed was to put the purchaser in the place of the vendor, who was to be no longer liable (*l*), and, that he might not be so, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he had himself covenanted to pay it off, and either the vendor or mortgagee might upon that contract have compelled him to pay it off. The decree was affirmed.

*Earl of Belvidere* v. *Rochfort* disapproved of by Lord *Thurlow*.

Of this case Lord *Thurlow* has observed (*m*), "The House of Lords were of a different opinion to what I entertain upon this case: the personal estate never was liable, and the party never was liable to an action of covenant. In that case *George* (i. e. D. in the preceding statement) had a fee-simple in the estate; he was capable of giving it after the charges were extinguished; however it was held, *contrary to my opinion*, that the personal estate was liable."

Observations.

It is true that the purchaser was not liable to an action of COVENANT *at the suit of the mortgagee* (to whom his Lordship must have referred), who was not a party to the deed. If this be considered necessary, in order to transfer the debt to the purchaser as between his own representatives, it is idle to say that the mortgage money *may* form part of the price between the mortgagor and his vendee. But surely there can be no doubt that the purchaser would be liable to an action *for money had and received*, at the suit of the mortgagee, where, as in *Belvidere* v. *Rochfort*, the mortgage debt constitutes part of the purchase-money, and is retained by him expressly on account of the mortgagee. To affirm that the mortgage debt does not form part of the price in such a case, is virtually to declare that it never can.

Observations on *Earl of Belvidere* v. *Rochfort*.

Lord *Thurlow's* disapproval of this case is rendered more extraordinary by the circumstance of his having been the leading counsel *for the respondent* in the appeal, and, it is probable, contributed greatly by the force of his arguments (which are unanswerable) to the result.

But the writer cannot help distrusting his own impressions

(*l*) *I. e.* as between the vendor and vendee, for it is clear they could not affect the right of the mortgagee to resort to the vendor, his original debtor.

(*m*) See *Tweddell* v. *Tweddell*, 2 B. C. C. 107.

upon the subject, strong as they certainly are, when he finds that the opinion of Lord *Thurlow* (himself a high authority) has been acquiesced in by Lord *Alvanley*, who in *Woods* v. *Huntingford* (*n*), said, "Lord *Thurlow* intimates his doubt of *Lord Belvidere* v. *Rochfort*, upon which therefore I shall not rely, *as there are many difficulties occurring against that judgment, though by so high an authority.*"

Conveyance in consideration of mortgage money and another sum, but mortgagee does not execute.

[In *Barry* v. *Harding* (*o*) the conveyance of the estate to the testator was expressed to be made by the mortgagor and mortgagee, in consideration of the amount of the mortgage money paid to the latter, and of a further sum (stated to be the price of the equity of redemption) paid to the former; but in fact the mortgage money was never paid, and the mortgagee never executed the deed. Under these circumstances Sir *E. Sugden* held that there was no contract between the vendor and purchaser to make the mortgage money the debt of the latter, the only contract was that it should be immediately paid, and he held that this did not throw the debt personally on the purchaser.]

General remark on the doctrine.

It were much to be wished, that instead of adopting a rule out of which have grown so many distinctions, the Courts originally had said, that, wherever a man purchases an equity of redemption, since he is liable in equity, whether he makes an express stipulation or not (*p*), to indemnify the vendor from the payment of the mortgage debt, and his own personal estate has in effect had the benefit of it in the reduced price of the estate, the debt has become for all purposes his own. But whatever be the purchaser's intention on the subject, such intention should, in order to avoid dispute, be distinctly expressed in the deed by which the equity of redemption is conveyed to him.

Money settled and secured by mortgage held primarily a charge on the land.

[Another exception to the general rule is where the mortgage money never was strictly a debt but merely money agreed to be settled, even though the security comprise a covenant for payment. In such cases the mortgaged property is primarily charged. Thus where a testator on the marriage of his daughter agreed to secure to trustees 6,000*l.* for her marriage portion to be paid at the end of twelve months after his death, and for that purpose demised certain lands to the trustees for

(*n*) 3 Ves. 131.
[(*o*) 1 Jo. & Lat. 475.]
(*p*) See Lord *Eldon's* judgment in *Waring* v. *Ward*, 7 Ves. 337.

[a term of years by way of mortgage for securing the principal sum and interest, for the payment of which he also bound himself personally by covenant, and then devised the lands subject to the charges and incumbrances existing thereon, Sir *L. Shadwell*, V. C., said the covenant was a mere matter of form and only auxiliary, and that at the time the charge was created it was not the personal debt of the party, but merely a provision by settlement which must be satisfied out of the property on which it was secured (*q*).

Money raised under power by tenant for life not his personal debt;

Again, where a tenant for life of settled property raises by mortgage under a power a sum of money for his own use, and covenants for payment of it, his personal estate is not primarily liable, though it received the benefit (*r*); and the same holds with respect to a debt incurred and secured on the property by the settlor himself, prior to the settlement, which is afterwards made expressly subject to the charge (*s*), and if the settlor subsequently pays off any of the charges he becomes himself an incumbrancer to that extent (*t*). On the other hand, where the settlement contains a covenant for payment of the charge by the settlor his personal estate is primarily liable (*u*).

nor money previously charged, and to which the settlement is made subject.

*Contra* where a covenant to pay the charge.

Where a tenant for life with a power to charge and (after intermediate limitations) the remainder in fee to himself creates a charge, and afterwards by failure of the intermediate limitations becomes entitled in fee, it does not seem certain whether his personal estate would be primarily liable; clearly if he had died tenant for life it would not (*x*), and perhaps even the devolution upon him during his life of the fee-simple in possession would not be held to change the order of liability (*y*).

Whether failure of limitations in lifetime of tenant for life affects primary liability of land, and vice versâ.

[(*q*) *Graves* v. *Hicks*, 6 Sim. 398; and *Coventry* v. *Coventry*, 2 P. W. 222, 1 Stra. 596; *Edwards* v. *Freeman*, 2 P. W. 437; *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Lechmere* v. *Charlton*, 15 Ves. 193; *Loosemore* v. *Knapman*, Kay, 123.

(*r*) *Jenkinson* v. *Harcourt*, Kay, 688; in this case the power was an absolute power over the whole estate, which makes it stronger, as more nearly approaching a mortgage by an owner in fee.

(*s*) *Vandeleur* v. *Vandeleur*, 9 Bli. N. S. 157, 3 Cl. & Fin. 82; *Ibbetson* v. *Ibbetson*, 12 Sim. 206; and see *Lewis* v. *Nangle*, 1 Cox, 240; *Alen* v. *Hogan*, Ll. & Go. t. Sugd. 231.

(*t*) Ib.; *Redington* v. *Redington*, 1 Ba. & Be. 131; per Lord *Eldon*, *Ex parte Digby*, Jac. 235; *Jameson* v. *Stein*, 21 Beav. 5: in *Vandeleur* v. *Vandeleur*, the settlor paid off some of the charges, and declared such payment to be in ease of the estate, and the remainder only continued on the estate.

(*u*) *Barham* v. *Earl of Clarendon*, 10 Hare, 126; the covenant need not, it is conceived, be an express covenant for payment of the charge, the ordinary covenants for title would have the same effect.

(*x*) See per Lord *Redesdale*, *Noel* v. *Lord Henley*, Dan. 331, 332; *Lady Langdale* v. *Briggs*, 2 Jur. N. S. 932, 26 L. J. Ch. 27.

(*y*) See *Scott* v. *Beecher*, 5 Mad. 96; *Lord Ilchester* v. *Lord Carnarvon*, 1 Beav. 209. But see per *K. Bruce*, V. C., 1 Y. & C. C. C. 711.

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[In the converse case, namely, where a settlor with reversion in fee to himself covenants to discharge the settled estate from an incumbrance primarily charged thereon, and afterwards by failure of the limitations in his lifetime becomes again entitled to the inheritance, it seems less open to question that his personal liability ceases, since the money would be at home in the hands of the covenantor (*z*).

Stat. 17 & 18 Vict. c. 113, making mortgage debts primarily chargeable on land.

By statute 17 & 18 Vict. c. 113, it is enacted, that "When any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged, shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the 1st of January, 1855."

Operates in favour of the crown, where no next of kin.

Where the personalty goes to the Crown for want of next of kin, it has been held, notwithstanding the words of the Act "as between the different persons claiming through or under the deceased person," that the statute applies, and the Crown takes exonerated from mortgage debts (*a*).

What will prevent the operation of the Act.

A devise and bequest of the residue of the testator's real and personal estate subject to mortgage and other debts and funeral

[(*z*) Per *Turner*, V. C., *Barham* v. *Earl of Clarendon*, 10 Hare, 133.

(*a*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

[and testamentary expenses (*b*), or simply upon trust for payment of his just debts, funeral and testamentary expenses (*c*), will exclude the operation of the Act: but not a direction that all the testator's debts, funeral and testamentary expenses shall be paid by his executors as soon as may be after his death (*e*), or shall be paid by his executors out of his estate (*f*).

Applies to deposit of title deeds with memorandum.

The Act has been held to apply to the case of a mortgage by deposit of title deeds with a memorandum stated in the report to have been in the usual form (*g*). It is not stated whether or not the memorandum contained an agreement to execute a legal mortgage when required: so that the case is not a clear authority that the words "*charged* with the payment of any sum or sums *by way of mortgage*," include charges made by deposit of deeds without an agreement to execute a mortgage, or by agreement that the land shall stand charged, or by conveyance upon trust for sale (*h*), or to any other case where the remedy against the land would be, not by foreclosure, but by sale. These cases, however, are as much within the mischief intended to be remedied by the Act as the case of a charge under a regular mortgage. But a lien for unpaid purchase money is clearly not within the terms of the enactment, or within the mischief aimed at by it (*i*).

But not to lien for purchase money.

How charge apportioned between the different parts of the land charged.

The Act directs that every part of the mortgaged hereditaments, according to its value, shall bear a proportionate part of the mortgage debts charged on the whole thereof; subject, however, with the other provisions of the Act, to a contrary or other intention appearing by the will or deed or other document of the person creating the charge (*k*). Now suppose two estates A. and B. to be mortgaged, and then the mortgagor to devise A. specifically, and leave B. to descend or to pass by a residuary devise. In such a case it would probably be held that the specific devise of A. was itself sufficient evidence of "a contrary or other intention" (*l*), so as to make B. primarily liable to the whole debt. In *Stringer* v. *Harper* (*m*), where a testator

[(*b*) *Greated* v. *Greated*, 26 Beav. 621.
(*c*) *Stone* v. *Parker*, 1 Dr. & Sm. 212.
(*e*) *Pembrooke* v. *Friend*, 1 Johns. & H. 132.
(*f*) *Woolstencroft* v. *Woolstencroft*, 6 Jur. N. S. 1170, Campbell, C.
(*g*) *Pembrooke* v. *Friend*, 1 Johns. & H. 132.
(*h*) *Ex parte Gorfett*, 14 Jur. 53, 19 L. J. Ch. 173.
(*i*) *Hood* v. *Hood*, 26 L. J. Ch. 616.
(*k*) On the construction of directions for apportionment of the charge between the different estates charged, see *Woodward* v. *Woodward*, 5 Jur. N. S. 1281.
(*l*) See Vol. I. p. 310.
(*m*) 26 Beav. 33.

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[mortgaged estate A. for 800*l.*, and on the same day by deposit of title deeds and memorandum agreeing to execute a mortgage charged estate B. by way of further security to the extent of 200*l.*, and afterwards by will dated in 1855, devised B. specifically, but made no disposition of A., it was held by Sir *J. Romilly*, M. R., that the case depended on the construction of the two written instruments of even date, and not on the Act: that A. was primarily charged, and B. only in aid, for part of the debt.

Cases where statute does not apply.

It must be remembered that, as this enactment takes effect from the 1st of January, 1855, in those cases only where the rights of persons claiming under any will, deed or document made before that date will not be affected, it cannot apply to any case where a testator dying after 1854 has by will dated before 1855 disposed of the mortgaged property specifically or has made a general residuary devise of his real estate: nor, would it seem to apply to a case where a testator dying after 1854 has by will made before 1855 made a general residuary bequest of his personal estate, but died intestate as to his mortgaged estate; in other words the heir would, as against the residuary legatee, still appear to be entitled to have the mortgage debt discharged out of the residuary personal estate (*n*), since the enactment, if held to operate, would "affect," though beneficially, the rights of the residuary legatee. However, in the case of *Power* v. *Power* (*o*), before the Irish Court of Chancery, *Smith*, M. R., decided the contrary, observing that otherwise the proviso would defeat the plain object of the legislature. But it does not seem that in this particular case the object of the legislature is so very plain.

Act applies against the heir of person dying after 1854, though mortgage dated before.

The heir is not within the protection afforded by the concluding proviso of the Act, since he does not claim under any will, deed, or document, but by descent. Therefore in the case of an intestate dying after the 1st January, 1855, the mortgaged property must bear its own burden, though the mortgage was made before that date (*p*).

Statute only applies to interests in land.

The statute extends only to "any estate or interest in land or other hereditaments" (*q*), and, while seeking to remove a supposed objectionable principle of law, has rendered the law itself more

[(*n*) *Chester* v. *Powell*, ante, 600.
(*o*) 8 Ir. Eq. Rep. 340.
(*p*) *Piper* v. *Piper*, 1 Johns. & H. 91.
(*q*) Including copyholds, *Piper* v. *Piper*, 1 Johns. & H. 91.

[complex by introducing a new rule as to one species of property and leaving the old rule still applicable to the other species; for it is evident that the legatee of a chattel or fund (not being an interest in land), which the testator has pledged or mortgaged, will still be entitled to have it exonerated at the expense of the general personal estate; and the use of the terms "heir or devisee to whom such lands or hereditaments shall descend or be devised" seems to leave a specific legatee of mortgaged leaseholds in a similar position (*r*). The enactment should have extended to make all real and personal property the primary security for any charge affecting it: the law would then at least have been consistent.]

As to leaseholds, *qu.*

III. The next subject of inquiry is as to what will exempt the general personal estate from its primary liability to debts and other charges, for which the testator has provided another fund; in other words, what demonstrates an intention that such primary liability shall be transferred to the fund in question; a point which, it will be seen, has been a prolific source of litigation.

What will exempt personal estate.

That the making a provision for debts or legacies out of the real estate does not discharge the personalty, is implied in the very terms of this question. There must be an intention not only to onerate the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable.

Addition of another fund does *not*.

Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them (*s*), nor a devise upon trust for sale, however formally or anxiously framed (*t*), nor the creation of a term of years for the purpose of such charge (*u*), will exonerate the personalty.

Mere charge on land does not exonerate personalty.

Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts and legacies (*x*).

[(*r*) And the statute of course will not apply to such cases as *Jacques* v. *Chambers*, and *Clive* v. *Clive*, ante, 600.]

(*s*) *White* v. *White*, 2 Vern. 43; [*French* v. *Chichester*, ib. 568;] *Bridgman* v. *Dove*, 3 Atk. 201; [*Walker* v. *Hardwick*, 1 My. & K. 396; *Ouseley* v. *Anstruther*, 10 Beav. 453; *Quennell* v. *Turner*, 13 ib. 240.]

(*t*) *Lord Inchiquin* v. *French*, 1 Cox, 1, 1 Wils. 82, Amb. 33; [*Samwell* v. *Wake*, 1 B. C. C. 144;] *Hancox* v. *Abbey*, 11 Ves. 186; [*Collis* v. *Robins*, 1 De G. & S. 131.]

(*u*) *Tower* v. *Lord Rous*, 18 Ves. 132.

(*x*) *Bridgman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120; *Watson* v. *Brickwood*, 9 Ves. 447; [but see *Lockhart* v. *Hardy*, 9 Beav. 379, ante, 598.]

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History of the implication doctrine.

In order to exonerate the personal estate, the very early cases required express words (*y*); but this rule was subsequently relaxed, not only by the admission of implication, but that implication was held to be raised by circumstances of a very slight and equivocal character, affording little more than conjecture (*z*). Judges of a later period, however, feeling the evils to which this latitude of interpretation had given rise, and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence, collected from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated, that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, for it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication doctrine was, at one period, applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject indicate to have prevailed half a century ago. From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity.

Rule now established.

It is well settled, that the intent is to be collected from the whole will (*a*), and must appear by "evident demonstration," "plain intention," or "necessary implication;" though it must be confessed, that such propositions rather change the terms than afford a solution of the question; for, upon being told that

(*y*) *Fereyes* v. *Robinson*, Bunb. 301.

(*z*) *Adams* v. *Meyrick*, 1 Eq. Ca. Ab. 271, as to which, see 2 Atk. 626; 3 Ves. 110; *Walker* v. *Jackson*, 2 Atk. 624, and the other cases referred to, post.

(*a*) Though this has been frequently stated as a rule peculiarly applicable to particular classes of cases, yet the student should be reminded that it is not confined to *any* class of cases, for it would not be possible to specify any point of testamentary construction which is excluded from its operation; nor is it of novel or recent introduction, for the old authorities never denied the effect of the context to express a particular intention, or control particular expressions. One cannot help, therefore, feeling some surprise that Lord *Eldon* should treat the applicability of this rule to the cases under consideration as a discovery of Sir *W. Grant*. "We have," said his Lordship, in *Gittins* v. *Steele*, 1 Sw. 28, "now reached the sound rule, that for the purpose of collecting the intention every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls."

the implication must be necessary, or must amount to evident demonstration, we are inevitably led to inquire what in judicial construction has been held to constitute such "necessary implication," or "evident demonstration;" the answer to which must be an appeal to the cases.

Parol evidence inadmissible.

It has also long been established, in opposition to some early decisions (*b*), that in order to exonerate the personalty, parol evidence is not admissible (*c*); and that no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and real estate (*d*); for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.

Relative amount of debts and personalty not to be considered.

This was decided in the case of *Tait* v. *Lord Northwick* (*e*), which is a leading authority on the general doctrine. The testator appointed certain estates to trustees, upon trust, by sale or mortgage thereof, or by sale of timber thereon, *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave 100*l.* to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord *Loughborough* held that the personal estate was first to be applied, as far as it would go, to pay the debts.

But in *Gray* v. *Minnethorpe* (*f*), the same Judge thought that where the purchase-money of an estate, devised in trust to be sold to pay debts and certain pecuniary legacies, was inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption; since the adequacy of the fund to pay debts must depend upon the amount of those debts at the death of the testator, and their amount at that period can afford no indication of his intention when he made his will.

Mere extension

It is clear that the charging the land with (in addition to

(*b*) *Gainsborough* v. *Gainsborough*, 2 Vern. 252. [In *Granville* v. *Beaufort*, ib. 648, the evidence was admitted only to rebut an alleged implied trust, which was allowable, see ante, Vol. I. p. 385, et seq.]

(*c*) *Inchiquin* v. *French*, 1 Cox, 1, 1 Wils. 82, Amb. 33 *Stephenson* v. *Heathcote*, 1 Ed. 39.

(*d*) Cro. El. 205; Cowp. 833; 1 Cox, 9; 2 B. C. C. 273, 297; 2 Ves. jun. 593; 3 Ves. 299; [1 Ed. 43;] 1 Ba. & Be. 315, 542; 1 Mer. 222, which overruled Pre. Ch. 101; Cas. t. Talb. 262; 1 B. C. C. 457, n.

(*e*) 4 Ves. 816.

(*f*) 3 Ves. 103.

of the charge to funeral and testamentary expenses not sufficient.

debts) *funeral* or *testamentary* expenses, or both, will not per se exempt the personalty; for although it seems improbable that the testator should mean to create an *auxiliary* fund to answer expenses, which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary onus to the new fund.

As to funeral expenses, &c., being included.

Many opinions have been expressed on this point. Thus Lord *Hardwicke*, in *Walker* v. *Jackson* (*g*), remarked, that the words "debts, legacies and funeral expenses," were only words of style, an observation in which Sir *W. Grant*, in *Brydges* v. *Phillips* (*h*), seems to have concurred. The circumstance of funeral expenses being included in the charge, was also disregarded by Lord *Northington*, in *Stephenson* v. *Heathcote* (*i*), and by Lord *Kenyon*, in *Williams* v. *Bishop of Llandaff* (*k*), (though the latter Judge decided in favour of the exemption, on grounds perhaps not less equivocal), and by Lord *Manners*, in *Aldridge* v. *Wallscourt* (*l*). On the other hand, Sir *R. P. Arden*, in *Burton* v. *Knowlton* (*m*), thought a direction to pay funeral expenses a strong circumstance in favour of the exemption where the trustees of the fund, on whom the direction was imposed, were not the executors to whose duty it naturally belonged. This case, however, has been commented upon both by Lord *Loughborough* (*n*) and Lord *Eldon* (*o*) in terms which throw great doubt upon its authority; and, if it rest on this ground (and it is difficult to find one more solid), the decision is clearly overruled by the cases already referred to and those which remain to be stated.

Thus, in *Gray* v. *Minnethorpe* (*p*), where the testator devised certain lands to W. and J., and their heirs, in trust to sell, and out of the monies arising therefrom to pay all his just debts and *funeral expenses*, and the residue over, and appointed his brother G. sole executor; Lord *Loughborough* held that the executor did not take the personal estate exempt from debts.

So, in *Hartley* v. *Hurle* (*q*), where the testator directed that

(*g*) 2 Atk. 624.
(*h*) 6 Ves. 570.
(*i*) 1 Ed. 38.
(*k*) 1 Cox, 254.
(*l*) 1 Ba. & Be. 312; post, 624.
(*m*) 3 Ves. 108.
(*n*) See *Tait* v. *Lord Northwick*, 4 Ves. 823.
(*o*) *Bootle* v. *Blundell*, 1 Mer. 229.
(*p*) 3 Ves. 103.
(*q*) 5 Ves. 540.

all his just debts *and funeral and testamentary expenses* be in the first place fully paid and satisfied, and then, after making a certain bequest, devised all his lands and hereditaments and monies in the funds, to A. and B., upon trust out of the rents of his lands and the dividends of his monies to pay all his *just debts,* FUNERAL AND TESTAMENTARY EXPENSES, *and certain legacies* (*r*), and the residue over. After other bequests, the testator devised and bequeathed all the residue of his real and personal estate, not by him otherwise given and disposed of, to C. his daughter, and he appointed A., B. and C. executors. Sir *R. P. Arden,* M. R., held that the residuary personal estate was not exempt from the payment of debts.

Remark on *Hartley* v. *Hurle.*

The M. R. distinguished this case from *Burton* v. *Knowlton* (*s*) on the ground of the general introductory words, which he said were a direction to *the executors* to pay the debts, &c., and therefore favoured the non-exemption (*t*); but we have seen that a direction in such terms, followed by the appropriation of a particular fund for the purpose, has reference to the provision so made (*u*). Such a distinction is clearly untenable.

Personalty held not exempt, though charge extended to funeral expenses.

So, in *M'Leland* v. *Shaw* (*x*), where a testatrix devised certain lands to trustees to sell, and out of the money arising from such sale, "in the first place" desired her FUNERAL EXPENSES *and the debts which she should owe at her death to be paid;* secondly, she directed the payment of several sums to persons who were creditors of her late husband. She then gave several legacies, including one to her executors for their trouble, adding, "the said several sums to be paid by my said executors and trustees out of the money arising from the sale of my said lands, which I do order to be sold with all convenient speed after my decease, and such of the said purchase-money as shall remain after paying the said legacies, and the execution of this my will, I bequeath in the following manner." The testatrix then disposed of such residue. There was no disposition of the personal estate, otherwise than by the appointment of executors, who, having legacies for their trouble, could not take beneficially (*y*). The next of kin claimed to take it exempt from debts, legacies and funeral expenses; but Lord *Redesdale* held, that there were not suffi-

(*r*) The legacies were held to be payable out of the real estate *only,* see post.
(*s*) 3 Ves. 107. See post.
(*t*) See an observation upon this, ante, 616.
(*u*) Ante, 566.
(*x*) 2 Sch. & L. 538.
(*y*) But now see 1 Will. 4, c. 40.

cient words to raise an implication of intent to exempt the personalty from these charges. His Lordship, however, thought the sums to be paid to the creditors of the husband were to be satisfied out of the real estate *only* (*z*).

Trust to pay legacies, funeral and testamentary expenses.

It is not denied, indeed, that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies, funeral and testamentary expenses, favours the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt (*a*); but no case which rests on this simple circumstance is now to be relied on. Such seems to be the situation of the case of *Gaskell* v. *Gough*, cited by Sir *R. P. Arden*, in *Burton* v. *Knowlton* (*b*), which, however, is too loosely stated to enable us to form a satisfactory opinion of the grounds of it. It does not appear who was the executor, or in what terms the personalty was given.

Effect of testamentary charges being thrown on real estate.

In the much considered case of *Bootle* v. *Blundell* (*c*), the extension of the charge to funeral and testamentary expenses seems to have been treated by Lord *Eldon* as having much weight, though it was there aided by the circumstance, that some particular charges incident to the administration of the estate, namely, that of supporting the will against any attempt to invalidate it, was, by a codicil, imposed *exclusively* on the real estate. "On looking through the precedents," said his Lordship, "it is impossible to deny that this is a circumstance on which great stress has always been laid; namely, where the real estate is made liable to such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will."

Where personalty is *expressly* subjected to *other* charges.

It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle *expressio unius est exclusio alterius*, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

Thus, in *Brydges* v. *Phillips* (*d*), where the testator devised certain real estate upon trust for sale, and out of the money

(*z*) As to this, see cases cited post.

(*a*) See Sir *W. Grant's* judgment in *Tower* v. *Lord Rous*, 18 Ves. 159. Also *Greene* v. *Greene*, 4 Mad. 148; *Michell* v. *Michell*, 5 Mad. 69; *Driver* v. *Ferrand*, 1 R. & My. 681.

(*b*) 3 Ves. 111. See also *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n., post, 624, n.

(*c*) 1 Mer. 193.

(*d*) 6 Ves. 567; [and see *Davies* v. *Ashford*, 15 Sim. 42.]

arising thereby *to pay his debts* and certain legacies, and devised over the lands which should remain unsold. The testator then gave certain other legacies, *and directed the last-mentioned legacies to be paid out of his* PERSONAL *estate*, and bequeathed the residue of his said personal estate, except as aforesaid, to his wife, whom, with two other persons, he appointed his executrix and executors: Sir *W. Grant*, M. R., held, that though there was room for conjecture, that the testator did mean to throw his debts primarily upon the real estate, yet that this did not appear with a sufficient degree of certainty to enable him judicially to collect such an intention. He said, that by directing the legacies to be paid out of the personal estate, the testator might merely have intended to distinguish those legacies from the others which were to be paid out of the real estate. His Honor also adverted to the circumstance, that the trustees and executors were not wholly the same persons.

Provision as to the manner in which the charge on the realty is to be borne.

This principle, too, was strongly recognized by the same learned Judge, in the case of *Watson* v. *Brickwood* (*e*), which also establishes, that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real estate, will not have the effect of onerating it primarily; such a clause being considered only as providing for the event, *in case the land does become chargeable*, and not as charging it at all events (*f*). The case was as follows:—A testator devised all his freehold lands to the use of his nephews W. and R. and their sons successively in strict settlement, with remainder to G. for life, and such son as he should by will appoint, with remainder to N. and his first and other sons in tail male; he then gave to several nieces legacies in blank, and proceeded thus: "And I direct the same legacies to be paid at the end of twelve months next after my decease, by my executor hereinafter named. I give and bequeath all and singular *my goods, chattels, personal estate and effects whatsoever and wheresoever, not hereinbefore disposed of*, unto my said nephew W., his executors, administrators and assigns for ever, he paying thereout all and singular legacies, *and all my*

(*e*) 9 Ves. 447; [and see 1 Jo. & Lat. 363.]

(*f*) But see *Anderton* v. *Cooke*, cit. 1 B. C. C. 456; *Williams* v. *Bishop of Llandaff*, 1 Cox, 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient*; and the personal estate was held to be exempt. Such a case seems to fall directly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, *Dawes* v. *Scott*, 5 Russ. 32.

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Personalty held not to be exempt though land charged.

*funeral expenses and* SIMPLE CONTRACT *debts.* And whereas I have, at different times, borrowed, on mortgage and bond, divers sums of money of different persons, to enable me to make purchases of part of the said estates hereinbefore limited; and being minded that the whole should be discharged in equal proportions by the said W., R., G., and such his son so to be appointed as aforesaid, as they respectively shall become entitled to the possession of my said estates: Now I hereby will, order and direct, that all such sum or sums of money as the said W., R., G., or his son so to be appointed as hereinbefore mentioned, or the said N. shall pay off and discharge during the time each of them shall be in possession of my said estates under this my will, and also all such sum or sums of money as any of them shall expend, or be put to in the Court of Chancery, or elsewhere, in protecting or defending my said leasehold estate, and a due proportion of any of the two last fines, to be paid from time to time for the renewal of the leases thereof, shall be a debt and charge against the whole of such estates in favour of the person or persons, his and their executors, administrators and assigns, so paying off and discharging such sum or sums, for so much money as shall be actually so paid and expended; and I direct the next taker of all my said estates under this my will to repay such sum and sums of money as his predecessor from time to time shall have so paid off and expended to such person or persons, and in such manner, as his predecessor shall direct by any deed or will, to be by him duly executed, and for want thereof to the executor or administrator of such predecessor from time to time, deducting from time to time the due share or proportion thereof of such preceding taker, until the whole of such sum or sums of money shall be paid off; and I direct the same course to be used by each of the takers in succession until the full payment thereof, before such next taker or takers can have any benefit under this my will: it being my will and desire, that no part of my estates be sold or parted with, and that all possible care be taken and observed in regard to such leasehold estates, as well with respect to the renewal of leases from time to time as with respect to any dispute that may at any time hereafter arise in consequence thereof." *And the testator appointed W. his executor.* By a codicil, reciting the disposition of his estates to T. (the trustee), he gave the same to J., revoked the former devise, and gave to J. the powers and

authorities given by the will to T.; and he further willed that J. and his heirs should and might, in order to raise money *for the payment of all and singular his debts and legacies*, from time to time *mortgage*, with the approbation of the taker for the time being of the said estates, according to his said will, a competent part of *his said freehold estates* for so much money as should be necessary for the purpose, and he directed his trustees for the time being to keep down the interest. By another codicil, the testator appointed another trustee, and gave other legacies. It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts: but Sir *W. Grant* was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in the Duke of Ancaster* v. *Mayer* (*g*), *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses and simple contract debts, primâ facie there was some appearance of an intention that he did not mean the personal estate to be liable to debts *by specialty*, but that alone upon the authorities was not sufficient; there must be a charge clearly and distinctly upon the real estate (*h*) to make it liable. When he declared his intention as to the real estate, it did not appear he had any fixed and distinct resolution by any act of his own to throw the specialty debts on the real estate; but he seemed to suppose either that the personal estate would not be sufficient both for the simple contract and specialty debts, or that the latter would of course fall upon the real estate, and any act by him to throw them upon the real estate was not necessary; for he had not in direct terms made any charge upon the real estate, but he took it for granted that the real estate would be called upon for bond debts and mortgages, and his object was to secure an equal distribution of the burden among the devisees, who were to take the real estate in succession, and no other object whatsoever. His intention was not to favour the executor taking the personal estate against those taking the real estate, *but to take care that those who were to take the real estate as against each other should*

Sir *W. Grant's* judgment in *Watson* v. *Brickwood.*

(*g*) 1 B. C. C. 454. This case was decided by Lord *Thurlow* principally upon another point (see ante), but the positions laid down by his Lordship on the doctrine in discussion have been much referred to.

(*h*) And that *only*. See the sequel of his Honor's judgment.

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*bear the burden in equal proportions.* It was contended, his Honor said, that the codicil operated as a total exoneration both from debts and legacies; the codicil contained as complete a provision for all debts and legacies as could be; but that was nothing more than there was in *Tait* v. *Northwick* (*i*). This case was hardly so strong in that respect, for in that case there were more circumstances from which it might have been argued that the testator could not have had it in contemplation to burden his real estate merely in aid of the personal. At most this was but the same case, and could not be contended higher than as equivalent to that; and there Lord *Rosslyn*, adhering to Lord *Thurlow's* rule, said expressly that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. His Honor was therefore of opinion that there was no exoneration of the personal estate.

*Watson* v. *Brickwood* approved by Lord *Eldon.*

Of this case Lord *Eldon* has said (*k*), that he thought it was rightly decided, taking the will and codicil together; "but if," said his Lordship, "the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*"

The case of *Watson* v. *Brickwood* is an important authority on the general doctrine, since no case better exemplifies the species of evidence which is necessary to exonerate the personal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to.

Effect where the gift is of *all* the personal estate to person made executor.

Another question which has much divided the opinions of judges is, whether the circumstance of the bequest being of *all* the personal estate (with or without an enumeration of particulars), not a gift of *the residue,* demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to favour the non-exemption, by raising the inference that the legatee was to take the personalty subject to the charges devolving upon him in the character of executor. *French* v. *Chichester* (*l*) has

(*i*) 4 Ves. 816; ante, 615.
(*k*) In *Bootle* v. *Blundell*, 1 Mer. 230.
(*l*) 2 Vern. 568, 1 B. P. C. Toml. 192; but see Cas. t. Talb. 209. [And

generally been treated as a case of this kind. The testator there directed that the trustees of a certain real estate which he had conveyed by deed should out of the trust estate pay his debts, legacies and funerals; and devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper *Wright*, and afterwards Lord *Cowper*, held, that the devise being in the same clause in which she was named executrix, and not said exempt from the payment of debts, she must therefore take it as executrix, and the same must be applied in payment of debts.

Bequest of *all* the personal estate *not otherwise disposed of* to executrix.

But in this case the words "not otherwise disposed of" render it scarcely distinguishable from that of a residuary bequest. A similar remark applies to *Watson* v. *Brickwood* (*m*) and *Bootle* v. *Blundell* (*n*); but as in both these cases there were anterior specific bequests, to which the words "hereinbefore disposed of" might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate that such an argument applies; and it would seem, by parity of reason, that it is then only that even the circumstance of the gift being *residuary* raises any very strong inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favour of* the exemption.

The case of *Brummel* v. *Prothero* (*o*), however, seems more directly to support the doctrine in question; and it is observable that in this case the land was devised in trust to pay *all* the testator's debts. The testator devised all his real estate to A. and his heirs, in trust, in the first place, to pay *all* his just debts, and then to other limitations. Lastly, he gave and bequeathed unto his brother E. all his *monies, goods, chattels, rights, credits, personal estate and effects*, whatsoever and wheresoever, *and appointed him executor*. Sir *R. P. Arden*, M. R., at first expressed an opinion that a direction to pay *all* the debts would, according to the authorities, throw them upon the land only; but he afterwards came to a contrary conclusion, observing that

Trust to pay *all* the debts and bequest of *all* monies, &c., to executor.

[see *Harewood* v. *Child* and *Bromhale* v. *Wilbraham*, cit. Cas. t. Talb. 204.]

(*m*) 9 Ves. 447.

(*n*) 1 Mer. 193.

(*o*) 3 Ves. 111.

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the case was stripped of every circumstance to exonerate the personal estate, except that of a devise to a trustee for payment of debts, and a general bequest of the personal estate to the executor; and that there was no one case since *French* v. *Chichester*, the first upon the subject, in which such words as these had been held alone sufficient to exempt the personal estate (*p*).

Devise subject to debts, &c., and bequest of *all* the personalty to executors upon trust.

So, in *Aldridge* v. *Lord Wallscourt* (*q*), where A. devised all his lands to trustees (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters) to certain limitations, and directed his trustees to raise certain portions for his daughters. He appointed T., his son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord *Manners* thought there was nothing to exempt the personal estate from its primary liability to debts.

Remark on *Aldridge* v. *Lord Wallscourt.*

In this case the legatee herself was not the executrix, but as the subject of gift was to flow to her through the executor as trustee, it might be considered as subject to charges attaching to him in that character, and consequently as falling under the same principle.

Trust to sell realty and pay debts and bequest of all

[But the personal estate has been held not to be exonerated, even where the legatee of all the personalty was not made executor. Thus, in *Collis* v. *Robins* (*r*), the testator devised his

Cases of exemption upon grounds not now deemed satisfactory.

(*p*) This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n, a testator charged his whole estate with the payment of all his debts, legacies, and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same and pay his debts, legacies and funeral expenses; and he gave to his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate (a circumstance which is now immaterial). Lord *Bathurst* determined the personal estate to be exempt.

So, in *Holliday* v. *Bowman*, cit. 1 B. C. C. 145, A. devised a manor to trustees, in trust to sell, and directed the monies to be raised thereby to be paid in discharge of all his debts; and after payment thereof, in the first place to invest the residue, and pay the interest to his wife for life, and the principal after her decease to B.; and after several specific and pecuniary legacies, gave to his wife *all* his goods and chattels, and appointed her executrix. It was held, upon the authority of *Kynaston* v. *Kynaston*, that the personalty was exempt from the debts. *Bamfield* v. *Wyndham*, Pre. Ch. 101, is a case of the same kind, but is much weakened as an authority by the stress that was laid upon the inadequacy of the personalty to pay the debts. How far Lord *Bathurst* was influenced by this circumstance in *Kynaston* v. *Kynaston* does not appear; but it is evident that both this case and *Holliday* v. *Bowman* are overruled by *Brummel* v. *Prothero*. It would have been more satisfactory if they had been noticed in that case.

(*q*) 1 Ba. & Be. 312.

[(*r*) 1 De G. & S. 131.

[real estate to trustees, upon trust to sell and out of the produce to pay the testator's debts, and the costs, charges and expenses of the trustees (who were also executors), and certain legacies; and he bequeathed *all* his ready money and securities for money, and *all* other his personal estate to his godson who was not an executor. Sir *J. K. Bruce*, V. C. (observing that it was admitted that the funeral and testamentary expenses did not come under the description of the trustees' costs, charges and expenses), decided that the personal estate was not exonerated.

personalty to person not executor.

So, in the case of *Ouseley* v. *Anstruther* (*s*), the testator devised his real property to trustees, upon trust, in the first place, subject to the payment of his funeral expenses, of any debts unpaid at his death, of his wife's jointure, and the annuities and legacies bequeathed by him, upon trust for his son for life, with remainders over, and he bequeathed to his son, who was not executor, all his personal property for her absolute use after his (the testator's) wife's death, except a piece of plate which was to be an heirloom. Lord *Langdale*, M. R., held, that the personalty was not exonerated from payment of the debts.]

Charge of debts on realty and bequest of all personalty to person not executor.

But though these cases may seem to authorize the conclusion that, whether the legatee is appointed executor or not (notwithstanding the funeral expenses are thrown upon the land), the personalty is not exempted by the mere circumstance of the bequest being of *all* the personal estate, with or without an enumeration of particular species of property, yet in several instances the distinction between such a bequest and a gift of the *residue* has been treated as having weight.

Conclusion from preceding cases.

Thus, in *Tower* v. *Lord Rous* (*t*), Sir *W. Grant*, M. R., observed that there was nothing except the common residuary clause, not "all my personal estate," not "all which I have not hereinbefore disposed of," or any other of those forms *which in several cases have been held to denote an intention to give the personal estate as a specific bequest.* And Lord *Eldon*, in *Bootle* v. *Blundell* (*u*), observed, in reference to *Duke of Ancaster* v. *Mayer* (*x*), that a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words

Distinction between a residuary bequest and gift of *all* the personalty.

[(*s*) 10 Beav. 453.]
(*t*) 18 Ves. 139.
(*u*) 1 Mer. 228.
(*x*) 1 B. C. C. 454.

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"and personal estate whatsoever," not "and all *the residue of* my personal estate;" though his Lordship admitted that the argument in this case was excluded by a subsequent clause, in which the testator referred to the bequest as a gift of "the residue." It should be observed, too, that in *Duke of Ancaster* v. *Mayer* there were circumstances which operated quite as strongly against the exemption as in *Brummel* v. *Prothero*. The same persons were appointed *trustees* of the term to raise money to pay the debts and funeral charges *and executors* (which has been generally considered to favour the non-exemption (*y*)); and there was even a direction to them as "executors" to pay the funeral charges, debts and legacies; and they were to reimburse themselves the expenses attending the execution of the will out of the personal estate or monies to be raised by the term; and yet, under these circumstances, all tending to oppose the exemption, Lord *Eldon* thought the distinction between a gift of enumerated particulars followed by a bequest of the *residue*, and of *all* the personal estate, entitled to some weight. It is unfortunate that *Brummel* v. *Prothero* was not among the numerous decisions cited by his Lordship in *Bootle* v. *Blundell*.

In several subsequent cases, indeed, one main ground of exemption was, the fact of the personalty being given, not as a residue, but as *all* the personal estate, accompanied by an enumeration of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was onerated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses and costs of proving the will. The first is *Greene* v. *Greene* (*z*), where the testator, in the first place, gave and bequeathed unto his wife all his *ready money, securities for money, goods, chattels and other personal estate and effects whatsoever*, which he should be possessed of or entitled to at the time of his decease, except such part or

Bequest of all the ready money, &c., and personal estate.

(*y*) See Lord *Northington's* judgment in *Stephenson* v. *Heathcote*, 1 Ed. 38; Lord *Thurlow's* in *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454 (see also 1 Mer. 223); Lord *Alvanley's* in *Burton* v. *Knowlton*, 3 Ves. 108. But see Lord *Hardwicke's* judgment in *Walker* v. *Jackson*, 2 Atk. 624; and Lord *Eldon's* judgment in *Bootle* v. *Blundell*, 1 Mer. 227, where, though his Lordship seems to have treated this circumstance as adverse to the exemption, yet he admitted that there might be such a cautious discrimination of the two characters of trustee and executor as not only to render their union in the same person unimportant, but afford an inference in favour of the exemption.

(*z*) 4 Madd. 148.

parts thereof which, by that his will, or by any codicil or codicils thereto, he should dispose of specifically to and for her own sole and absolute use; he also devised his real estate to A., B. and C., upon trust for sale, directing them, out of the monies arising from such sale, to pay *his debts, funeral expenses and the costs of proving his will;* and, after payment thereof, to invest the residue upon certain trusts for his wife for life, and then for his children; and he appointed his wife and A., B. and C. executrix and executors. Sir *John Leach,* V. C., held the personal estate to be exempt, observing that the direction that the trustees, "who formed only a part of the executorship," should, out of the produce by sale of the real estate, pay all debts and expenses, and after payment thereof invest the surplus for the benefit of the wife for life, with remainder to the children, when coupled with the circumstance that the devise to the trustees was expressly made subject to the payment of debts and funeral expenses, and with the gift to the wife for her own sole and absolute use of all the testator's ready money, securities for money, goods, chattels and other personal estate and effects whatsoever, which the testator should be possessed of at the time of his death, did appear to him to convey a clear intimation of intention, not that this real estate should be auxiliary only, to be applied in case the personal estate should prove deficient, but that the real estate should directly and at all events be applied as the primary fund for the payment of the debts, funeral expenses and the expenses of the probate, and that the wife should take the personal estate exempt from those charges. His Honor distinguished the case from the *Duke of Ancaster* v. *Mayer* (*a*), *Stephenson* v. *Heathcote* (*b*), *Inchiquin* v. *O'Brien* (*c*), *Tait* v. *Northwick* (*d*), and *Watson* v. *Brickwood* (*e*), on the ground that, in those cases, the bequest was of a residue; and observed that, in the last, it was given expressly after payment of debts, funeral expenses and legacies. He relied upon *Burton* v. *Knowlton* (*f*), and *Kynaston* v. *Kynaston* (*g*).—But, in

Devise of real estate upon trust to pay debts, funeral and testamentary expenses.

Personalty held to be exempt.

(*a*) 1 B. C. C. 454.
(*b*) 1 Ed. 38.
(*c*) Amb. 33.
(*d*) 4 Ves. 816.
(*e*) 9 Ves. 447.
(*f*) 3 Ves. 107, but this case has been noticed with disapprobation both by Lord *Loughborough* in *Tait* v. *Northwick*, 4 Ves. 803, and by Lord *Eldon* in *Bootle* v. *Blundell*, 1 Mer. 229. Besides, it was a bequest of *the residue*, which increases the surprise that it should be cited by Sir *John Leach*, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue of the personal estate.
(*g*) Cit. 1. B. C. C. 457. The authority

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reference to *Watson* v. *Brickwood*, it is to be observed that the clause expressly subjecting the personalty to the payment of legacies, funeral expenses and debts, referred to simple contract debts only; whereas the only argument in favour of the exemption much insisted on was in relation to specialty debts, the exclusion of which from the clause in question favoured their being thrown exclusively on the real estate.

Remarks upon *Greene* v. *Greene*.

The principal circumstances in which the case of *Greene* v. *Greene* differs from *Brummel* v. *Prothero* (*h*) are, that in the latter case the legatees of the personalty were also the executors, whereas in *Greene* v. *Greene* the legatee was only *one* of the executors, and the land was onerated with *all* the charges which would otherwise have come out of the personal estate, namely, the debts and funeral *and testamentary* expenses (*i*); but in *Brummel* v. *Prothero* with the debts only.

So, in *Michell* v. *Michell* (*k*), where a testator bequeathed to his daughters E. and M. all and singular his *plate, linen, china, household goods and furniture and effects*, which he should die possessed of; and devised his real estate to trustees, upon trust to pay his funeral expenses, costs of proving his will, and in the next place to retain all sum and sums of money then due, or thereafter to grow due, from him to them respectively, on mortgage, bond or memorandum, and the interest thereof, and also to pay all such other debts as should be owing from him at the time of his decease, and divide the residue among his children; Sir *J. Leach*, on the authority of the last case, held that the real estate was made the primary fund for these charges. The executors appear to have been the trustees of the real estate, as they proved the will. It is evident, therefore, that the Vice-Chancellor did not consider the union of the two characters of trustees and executors sufficient to negative the exemption in such a case.

Gift of *all* the personalty and charge extending to funeral and testamentary expenses.

The same remark applies to the case of *Driver* v. *Ferrand* (*l*), decided by the same learned Judge, where a similar construction prevailed; the charge on the real estate extended to debts,

of this case is considerably weakened by the stress laid on the inadequacy of the personal estate to pay the debts. It is clearly irreconcileable with the current of authorities, particularly *French* v. *Chichester*, ante, 622, *Brummel* v. *Prothero*, ante, 623, and *Aldridge* v. *Lord Wallscourt*, ante, 624, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt.

(*h*) Ante, 623.

(*i*) See an observation upon this, ante, 626.

(*k*) 5 Madd. 69.

(*l*) 1 R. & My. 681.

legacies, funeral and testamentary expenses, and the bequest of personalty was not residuary in its terms, but the legatee was one of the executors. A difficulty in the way of the construction was that the legacies were directed to be paid by the executors, but Sir *J. Leach* considered this to be inconclusive, as they were also trustees; and that the testator in such direction had in view the real estate was, he thought, shewn by a clause which immediately followed, authorizing the trustees to deduct their expenses out of the real estate.

So, in the case of *Blount* v. *Hipkins* (*m*), where a testator gave to his wife M. all his household goods, plate, linen, china, pictures, farming stock, ready money, debts, personal estate and effects of every kind which he should happen to die possessed of, except certain articles which he bequeathed to another person. The testator devised certain real estate to his wife M. He then gave all other his real estate to trustees upon trust for sale, and out of the proceeds to pay his funeral expenses, the costs of proving his will, and all his debts (including a mortgage on the estate devised to M.) and certain legacies and the residue of the proceeds to G. Sir *L. Shadwell*, V. C., considered it to be clear that the personal estate bequeathed to the wife was intended to be exonerated from his debts.

Gift of *all* the personalty, and charge of realty with debts, and funeral and testamentary expenses *and exemption of personal estate therefrom*; and gift of legacies without such exemption. Latter held also charged on land primarily.

So, in the case of *Jones* v. *Bruce* (*n*), where a testator gave to his wife absolutely all his goods, chattels and personal estate whatsoever and wheresoever, and charged his real estate in D. and S. with the payment of his funeral and testamentary expenses and debts, and he exempted, so far as he was able, his personal estate from the payment thereof. He then gave certain legacies to children, and charged all his real estate with the payment thereof, and directed that until the legacies were payable the trustees should raise out of the rents any annual sums by way of maintenance not exceeding 4 per cent. The testator then gave his real estate, subject as to such portions thereof as were situate in D. and S. to the charges thereinbefore mentioned, and subject also to such charges as they were then liable to, to his wife for life, with remainders over. Sir *L. Shadwell*, V. C., held the real estate to be the primary fund for payment of the legacies, adverting much to the terms in which the personalty

(*m*) 7 Sim. 43. [See also *Plenty* v. *West*, 16 Beav. 173; where, however, undue weight appears to have been allowed to the phrase "in the first place:" see *Newbegin* v. *Bell*, 23 Beav. 386.]

(*n*) 11 Sim. 221; [and see *Coote* v. *Coote*, 3 Jo. & Lat. 175.

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was bequeathed, and the gift of interest out of the rents of the real estate.

Will creating mixed fund for payment of debts, funeral expenses, &c., and codicil giving *all* personal estate: the latter held exempted.

[And in *Lance* v. *Aglionby* (*o*), the testator gave all his real and the residue of his personal estate to trustees to be converted, and to form a mixed fund for payment of his debts, funeral and testamentary expenses and legacies, and gave the rents of the real estate and the income of the residue of the personal estate to his wife for life, with remainder over. By a codicil the testator gave "all his personal estate whatsoever and wheresoever" to his wife. Sir *J. Romilly*, M. R., held that the wife took the personalty free from the funeral and testamentary expenses, debts and legacies (*p*).]

General conclusion from preceding cases.

These cases, then, seem to authorise the proposition, that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation. In the last two cases the principle was applied to legacies, where the funeral and testamentary charges and debts were thrown on the realty expressly as the primary fund. [But where the personal estate is bequeathed expressly subject to debts, funeral and testamentary expenses, the principle of these cases is of course inapplicable (*q*).]

Non-exemption from mere charging of real estate.

That Sir *John Leach* did not mean by his preceding adjudications to deny the general rule appears from the subsequent case of *Rhodes* v. *Rudge* (*r*), where a testator gave all his real and personal estate to A. and B. upon trust, in the first place, to sell and dispose of the living of C., and the money to arise from the sale thereof to go in discharge of his debts and legacies and the charges of the trusts thereby created, and if such money were not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of 500*l.*, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A. and B. executors of his will. Sir *J. Leach*, V. C., thought that there was nothing in

[(*o*) 27 Beav. 65.

(*p*) A direction to pay debts and costs and charges of proving the will out of the produce of real estate does not include costs of a suit to administer the real and personal estate, *Stringer* v. *Harper*, 26 Beav. 585.

(*q*) *Paterson* v. *Scott*, 1 D. M. & G. 531, 21 L. J. Ch. 346. The bequest was of the personal estate "not thereinbefore otherwise disposed of;" as to which, see ante, 623.]

(*r*) 1 Sim. 79.

this will to change the usual order of application, and therefore that the personalty was primarily to be applied.

Remark on *Rhodes* v. *Rudge*.

No case could well be stronger against the exemption than this; the same persons who were trustees of the real and personal estate were also executors, and there was no other bequest of the personal estate than to these trustees.

Residue of real fund *to be added to personalty*.

The personal estate is of course held to be exempt from debts where real estate is devised to be sold to pay debts, with a direction that the residue shall *be added to the testator's personal estate* (*s*), which is obviously incompatible with the primary application of the personalty. So, where the testator declares that he has charged his lands with the payment of his debts in order that the personal estate may *come clear to the legatee* (*t*): [or where he has directed the proceeds of his real estate to be applied "in part payment" of certain legacies; which is equivalent to "in payment as far as the proceeds will extend" (*u*).]

Personalty to "come clear" to the legatee.

Realty to go "in part payment."

Estate made *secondary* fund in exoneration of personalty.

Again, where the testator charges his debts, funeral and testamentary expenses and legacies, on estate A. "as a primary fund," and in case that should be deficient, he charges estate B. with the deficiency, he thereby conclusively shews that the latter estate is the secondary fund in exoneration of the personal estate (*x*).

Case of *Bootle* v. *Blundell*.

In the much-considered case of *Bootle* v. *Blundell* (*y*), the testator first directed his funeral expenses to be paid. He then gave to his son R., and his daughters S. and J., 3,000*l.* each, with a substitution of their children in a certain event. The testator then directed that his said funeral expenses and legacies should be paid out of such monies as he should have by him, monies due to him from C., and out of rents and fines which should be due to him; and gave the surplus unto his son and daughters. The testator then devised all his manors of Lostock, &c. to A., B. & C., for 500 years, in trust out of the rents *to pay* HIS DEBTS, and also all such annuities or legacies as

(*s*) *Webb* v. *Jones*, 2 B. C. C. 60, 1 Cox, 245. [And see 1 Jo. & Lat. 365, 366; *Shallcross* v. *Wright*, 12 Beav. 505. But see *Wythe* v. *Henniker*, 2 My. & K. 635, ante, 598.]

(*t*) *March* v. *Fowkes*, Finch, 414.

(*u*) *Bunting* v. *Marriott*, 19 Beav. 163. The direction referred to "freehold, copyhold, and leasehold estate, and any other interest in land;" and though there was in fact nothing but leaseholds, yet that circumstance does not appear to make, and was not treated as making, any difference.]

(*x*) *Dawes* v. *Scott*, 5 Russ. 32. [See also *Bateman* v. *Earl of Roden*, 1 Jo. & Lat. 366; *Evans* v. *Evans*, 17 Sim. 106; *Bessant* v. *Noble*, 26 L. J. Ch. 236.]

(*y*) 1 Mer. 193, 19 Ves. 494.

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Case of *Boodle* v. *Blundell.*

were thereinafter mentioned, or which he might thereafter specify in any codicil or instrument in writing. He then bequeathed certain legacies, including one of 300*l.*, to each of his trustees for their trouble, and several annuities, among the rest one to his housekeeper M. The testator then declared that his trustees and executors should not be answerable for any losses, and that if they were called to such account, or sustained any expenses in respect thereof, the same, and also at all events all other their costs and expenses, should stand charged upon his said hereditaments, and be paid out of the rents and profits thereof; and that so soon as the trusts of the term should have been satisfied, and all the expenses incident thereto discharged, the remainder of the term should thenceforth cease; and, subject thereto, he devised his said manors, &c., in undivided moieties to his two daughters, and their issue, in strict settlement. The testator then appointed a certain person to be steward and agent, to have the management of the estates comprised in the said term of 500 years, so long as the same should remain in the hands of his trustees, with particular directions as to his salary and conduct, and afterwards proceeded as follows:—"And it is my will that as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given by my said trustees for the due payment of the said annuities, and all expenses as shall satisfy the said annuitants, and when all expenses incurred in the execution of the said trusts respecting the said term and of this will shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates under and by virtue of the limitations in this my will contained, shall be let into the possession thereof" (*z*). The testator then provided for the appointment of new trustees in certain events, who were to be allowed out of the rents and profits of the estates comprised in the term of 500 years the sum of 300*l.* He also devised one-half of the manor of Lydiate, and all the lands purchased by him in Ince, &c., not thereinbefore disposed of, to the use of his son C. for life, with remainders over; and directed that all his pictures, drawing-books, prints, statues and marbles, should be enjoyed by his son during his life,

(*z*) This clause is very important, for the testator could hardly intend that the devisees should be kept out of possession until the whole personal estate was administered, which would be the consequence of holding it to be not exempt from the debts.

Case of *Bootle* v. *Blundell.*

and after his decease he gave the same to the first son of his body who should attain twenty-one; his intention being that they should go along with the capital messuage called Ince Hall. After devising to J. certain lead-mines, and to M., his housekeeper, several articles of furniture and other things, which he directed should be removed by his executors at the expense of his personal estate, the testator bequeathed to his said son the furniture of his house, his wines, horses, cattle and carriages, plate, *and other his goods, chattels and personal estate not thereinbefore specifically disposed of,* or which might thereafter be disposed of by him; and appointed the said A., B. and C. executors of his will, providing that immediately after his decease his executors should enter into his dwelling-house, and take into their custody all monies and papers there found. By a codicil, the testator, after noticing the devise to his son of his estate at Lydiate, and that attempts might be made to invalidate some of the dispositions of his will or codicil, and the trustees and executors, or other devisees, might incur expenses in supporting the same, which expenses it was his will should be paid out of the said lands, and not be a charge upon any other part of his property, he thereby devised the said hall, manor, &c., unto the said A., B. and C., trustees and executors named in his said will, their executors, administrators and assigns, for the term of 1,000 years, in trust by sale, lease or mortgage, or out of the rents and profits, to raise such monies as should be sufficient to pay all expenses which should be so incurred.

The question was, whether the estates comprised in the term of 500 years were liable, in the first place, to the payment of the testator's debts in exoneration of the personal estate. Lord *Eldon,* after much consideration, and reviewing most of the authorities, held that it was: he adverted to the circumstance, that though the same persons were trustees and executors, the two characters were anxiously kept distinct; the testator never using the word "executors" but with reference to the personal estate, nor the word "trustees" but with reference to the real estate; that the clause charging the expenses on the estates devised, having blended together the costs attending the real and personal estate, made it impossible to say that the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal estate should not be paid in the same manner, except in the

Lord *Eldon's* judgment.

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case of a deficiency of the personal estate; that the testator had directed that his funeral expenses should not be paid out of his general personal estate; that the costs of performing the trusts of his real estate should be paid out of the rents and profits of the estates devised; and that the persons respectively entitled under his will should not be let into possession of the devised estates until payment of all debts and legacies, and security given for payment of the annuities; that the new trustee of the term to be appointed should receive the sum of 300*l.* out of the rents and profits of the estates comprised in the term; that the purpose of keeping together, as objects of public curiosity, the pictures, &c., sufficiently accounted for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition that it was merely to exempt them from the debts and legacies to which the remainder was meant to be liable; that because the testator had charged his personal estate with the costs of removing the specific articles given to Mrs. M., it did not follow (as had been insisted) that it should also be liable to the payment of his debts and legacies; that the words "not hereinbefore specifically disposed of" might be taken to mean, not specifically disposed of *to others*, and not as referring to the application of the personalty to debts, &c.; and, lastly (on which his Lordship laid much stress), that the costs incurred by the litigation of the will were to be paid exclusively out of the real estate; though he doubted whether, if there were no circumstances in the *will* that afforded a ground for saying the personal estate should be exempted, this provision alone in the codicil would have been a sufficient manifestation of the intention to exempt it. He nevertheless thought that it deserved great consideration.

Effect where bequest of exempted personalty lapses.

Here it may be observed that the exemption of the personalty in favour of the *legatee* does not necessarily extend to the *next of kin*, in case of the failure of the bequest thereof by lapse or otherwise.

Thus it was laid down by Sir *R. P. Arden*, in *Waring* v. *Ward* (*a*), that if an estate be given to A. subject to debts, and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., and not as a general exemption of the personal estate.

(*a*) 5 Ves. 676. See also *Hale* v. *Cox*, 3 B. C. C. 322; *Noel* v. *Lord Henley*, 7 Price, 240, Dan. 211; [*Dacre* v. *Patrickson*, 1 Dr. & Sm. 186. Compare *Fisher* v *Fisher*, 2 Keen, 610.]

— where personalty originally undisposed of.

On the other hand, if the testator [without] bequeathing the personal estate, directed that it should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, *they paying out of them the mortgages*, the devisees would take cum onere even as against the next of kin (*b*).

The distinction [between this case and the others is this, that in the latter there was an absolute bequest of the personal estate, while in the former there was none. The principle is this: there being no particular bequest of the personal estate, and yet the testator intending to exonerate the personal estate it was impossible to say that he intended that exoneration for the benefit of any particular person or object, and he must be taken to have intended that the exoneration should enure for the benefit of the persons, whoever they might be, upon whom the personal estate might devolve (*c*).]

Distinction between a general charge of *legacies* and a trust to pay certain sums.

It has been already stated that under a general charge of or a trust to pay *legacies*, the several funds liable to their liquidation are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable (*d*); but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, when, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable (*e*).

Thus where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A. a legacy of 100*l.*, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A. 100*l.*, the sum so given will be considered as a portion of the real estate, and will in no event be payable out of the

(*b*) *Milnes* v. *Slater*, 8 Ves. 305.

[(*c*) Per Sir *R. Kindersley* in *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

(*d*) *Roberts* v. *Roberts*, 13 Sim. 349; *Ouseley* v. *Anstruther*, 10 Beav. 453; *Davies* v. *Ashford*, 15 Sim. 42; *Boughton* v. *Boughton*, 1 H. of L. Ca. 406, reversing 1 Coll. 35; *Whieldon* v. *Spode*, 15 Beav. 537. But see *Falkner* v. *Grace*, 9 Hare, 282.]

(*e*) *Whaley* v. *Cox*, 2 Eq. Ca. Ab. 549, pl. 29; *Amesbury* v. *Brown*, 1 Ves. 482; *Phipps* v. *Annesley*, 2 Atk. 57; *Ward* v. *Dudley*, 2 B. C. C. 316, 1 Cox, 438, 7 B. P. C. Toml. 566; *Reade* v. *Litchfield*, 3 Ves. 475; *Hartley* v. *Hurle*, 5 Ves. 545; *Brydges* v. *Phillips*, 6 Ves. 571; *Spurway* v. *Glynn*, 8 Ves. 483; *Hancox* v. *Abbey*, 11 Ves. 179; *Aldridge* v. *Wallscourt*, 1 Ba. & Be. 312; *Noel* v. *Lord Henley*, 7 Pri. 241, Dan. 211, 322; [*Ricketts* v. *Ladley*, 3 Russ. 418; *Jones* v. *Bruce*, 11 Sim. 22; *Ashby* v. *Ashby*, 1 Coll. 549; *Roberts* v. *Roberts*, 13 Sim. 345; *Evans* v. *Evans*, 17 ib. 102; *Dickin* v. *Edwards*, 4 Hare, 273.] But see *Holford* v. *Wood*, 4 Ves. 78; [*Colvile* v. *Middleton*, 3 Beav. 570.]

personalty; and if the testator sell the estate in his lifetime, the legacy will be adeemed (*f*).

Sums directed to be paid out of specific fund.

And in *Spurway* v. *Glynn* (*g*), Sir *W. Grant* thought that a direction at the end of the will, that the personal estate should be applied in payment of *legacies,* in exoneration of the real estate, did not apply to a sum given out of a particular estate of which there was no other gift than the trust so to pay it.

[So, in *Lamphier* v. *Despard* (*h*), the testator directed timber to be cut to pay his debts and legacies, and bequeathed two legacies, and directed them not to be paid till five years after his decease, as it was his wish that his woods should not be cut till the end of five years. He then bequeathed the money which the timber should produce after payment of the two legacies, and then gave another legacy. Sir *E. Sugden,* C., held, that the first two legacies were payable primarily out of the produce of the timber, observing, that where there is a direction to pay *some* only of several legacies out of a particular fund, that fund must be considered as primarily charged (*i*).]

Legacy duty, out of what fund payable.

It seems that in these cases, if the sums in question are bequeathed free from the legacy duty, the duty will be payable out of the same fund as the legacy (*k*).

Trust to pay *particular* debts exonerates personalty.

[The principle above stated has been applied to trusts for the payment of *particular debts,* notwithstanding the antecedent liability of the personal estate to discharge them (*l*). Thus, in the case of] *Hancox* v. *Abbey* (*m*), Sir *W. Grant* held, that a devise of real estate to trustees upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given "after payment of debts," but which his Honor thought might

Whether legacy is demonstrative or specific.

(*f*) *Newbold* v. *Roadknight,* 1 R. & My. 677. Whether, if the particular fund fails by an act of the testator in his lifetime, the legacy is payable out of the general assets, in other words, whether the legacy is demonstrative or specific, is often a question of some nicety. As to this, see *Savile* v. *Blacket,* 1 P. W. 778; *Att.-Gen.* v. *Parkin,* Amb. 566; *Cartwright* v. *Cartwright,* 2 B. C. C. 114, (see two last cases cited 3 Beav. 575); *Roberts* v. *Pocock,* 4 Ves. 150; *M'Leland* v. *Shaw,* 2 Sch. & Lef. 538; *Smith* v. *Fitzgerald,* 3 V. & B. 2; *Mann* v. *Copland,* 2 Mad. 223; *Fowler* v. *Willoughby,* 2 S. & St. 354; *Wilcox* v. *Rhodes,* 2 Russ. 452; *Colvile* v. *Middleton,* 3 Beav. 570; [*Sidebotham* v. *Watson,* 11 Hare, 170.]

(*g*) 9 Ves. 483.

[(*h*) 2 D. & War. 59; *Lomax* v. *Lomax,* 12 Beav. 290.

(*i*) The L. C. cited *Hancox* v. *Abbey,* stated infra, as an authority for this proposition.]

(*k*) *Noel* v. *Lord Henley,* 7 Pri. 241, Dan. 211; [*Woodhead* v. *Turner,* 4 De G. & S. 429.

(*l*) But in general the charging of a particular debt or legacy gives it no priority over debts or legacies subsequently charged in general terms, *Clark* v. *Sewell,* 3 Atk. 96.]

(*m*) 11 Ves. 179.

be construed, after payment of debts *not before provided for*. [After adverting to the general rule that a devise to sell for payment of all debts would not exonerate the personal estate, his Honor continued: "but a direction to apply a particular portion of the real estate for the payment of one particular debt affords a very different inference. Why should the testator direct exclusively a particular debt to be paid out of his real estate? It is not generally from an apprehension that the personal estate may not be sufficient for all debts, for no precaution is taken except for this particular debt; and this debt was already a charge upon the real estate; therefore, for the security of the debt, there was no reason to direct a sale. It is no additional security to the mortgagee. For what purpose, then, could he so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt, if he intended that debt to stand just in the same predicament as any other debt, except only that it was to be charged on the real estate as it already was? Putting that aside, nothing is done by all this particularity of expression, for then this debt stands upon the same footing as all other debts" (*n*).

Charge of particular debts exempts personalty.

So, in the case of *Evans* v. *Cockeram* (*o*), where a testator, after devising an estate which he had mortgaged in his lifetime and giving a power to raise thereout two sums of money as legacies for his two daughters, proceeded thus: "And I hereby charge and make liable my said estate for the repayment of the said sums of 200*l.* to each of my said daughters as aforesaid, and also for the payment of any sum or sums of money on the security of my said estate at my death;" Sir *J. K. Bruce*, V. C., held, that the mortgaged estate was primarily charged with the payment of the debt; observing, that in favour of the creditor the testator could not charge the estate, or make it more liable than before.]

Charge of a particular debt with a personal obligation on devisee.

So, in the case of *Welby* v. *Rockcliffe* (*p*), where the testator, after devising an estate at W. to A. in fee, and reciting a marriage annuity bond given by him, charged the estate, and also A., his heirs, executors and administrators with the payment of the annuity, and then disposed of the personal estate, the residuary personal estate was held to be exempt. The

[(*n*) But see *Johnson* v. *Milksop*, 2 Vern. 112.

(*o*) 1 Coll. 428.]

(*p*) 1 R. & My. 571. But see *Quennell* v. *Turner*, 13 Beav. 240.

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ground of the decision is, however, stated to be that the annuity was not merely charged on the estate, but the payment was imposed on A. as a personal obligation.

Remarks on cases.

[Here also the real estate was liable (as assets) for the payment of the debt charged on the estate devised to A.; and where such is not the case (*q*), there is much difficulty in meeting the argument, that the charge must be considered to be merely for the purpose of providing an auxiliary fund for the payment of the particular debt, and not in order to discharge the personalty. However, the case of *Hancox* v. *Abbey* has been treated by Lord *St. Leonards*, on more than one occasion (*r*), as an authority for the general proposition that where real estate is charged with the payment of particular debts the personal estate is exonerated. And the same eminent Judge has declared his opinion, that the decree in the Exchequer in the case of *Noel* v. *Lord Henley* (*s*), maintaining a contrary doctrine, is erroneous (*t*).

Opinion of Lord *St. Leonards.*

Charge of specified legacies on realty, and gift of personalty subject to debts.

Again, in the recent case of *Ion* v. *Ashton* (*u*), the testator charged certain legacies and annuities on each of two estates, and specifically devised the estates subject to these charges, and then gave all his personal estate to trustees on trust to convert and pay debts and funeral and testamentary expenses, and the expenses of proving his will and the costs of converting his personal estate, Sir *J. Romilly*, M. R., considered that the effect was to lay upon the real estate certain charges which were specified, and then to give it subject thereto, and on the personal estate to lay other charges, and then give it subject thereto, and therefore the personal estate was exonerated from the annuities and legacies.

Charge of a particular sum towards payment of debts.

The charging of an estate with a specific sum for the payment of debts seems to be within the reason of a trust for payment of a particular debt. And in *Clutterbuck* v. *Clutterbuck* (*x*), where a testator devised lands upon trust to raise a sum of 2,000*l.* for payment of certain specified debts, and all

[(*q*) The distinction is not altogether immaterial, even since the stat. 3 & 4 Will. 4, c. 104; for, under that act, creditors by simple contract and by specialty in which the heirs are not bound can claim only so much of the debtor's land as is not exhausted by the creditors by specialty in which the heirs are bound.

(*r*) *Coote* v. *Coote*, 3 Jo. & Lat. 178; *Bateman* v. *Earl of Roden*, 1 ib. 369, in which the personalty was exonerated from a debt, on the ground that it was consolidated with another sum which was clearly raiseable out of the real estate only.

(*s*) 7 Pri. 241, Dan. 211.

(*t*) Sug. Law of Prop. p. 366.

(*u*) 6 Jur. N. S. 879.

(*x*) 1 My. & K. 15.]

[such other debts as he should owe at his decease; it was held by Sir *J. Leach*, M. R., that the sum of 2,000*l.* was the primary fund.]

Where *personal* fund is subjected to certain charges.

It should seem, that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

General personalty held to be exempt.

Thus, in the case of *Browne* v. *Groombridge* (*y*), where a testator gave to his executors his Exchequer bills, money at the bankers and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife 200*l.* and then *to pay his debts, funeral and testamentary expenses,* and, after making the said payments, to pay certain legacies, and then to stand possessed of the monies upon certain trusts; it was contended, on the authority of *Waring* v. *Ward,* and *Noel* v. *Lord Henley,* that the specific fund was charged with the debts and legacies only in aid of the personal estate; but Sir *J. Leach,* V. C., held, that the fund was immediately liable, observing that *Waring* v. *Ward* was the case of a devisee of *real* estate, who was entitled to the aid of the personal estate.

So, in *Choat* v. *Yeates* (*z*), where a testatrix gave the residue of her *funded property,* after payment of her *just debts, legacies, funeral and testamentary expenses,* to A., and all the residue of her personal estate upon certain trusts; it was held, that the funded property was primarily liable, though the effect was to leave nothing for the legatee.

Again, in *Bootle* v. *Blundell* (*a*), we have seen that the direction to pay the funeral expenses and certain legacies out of a specified fund, was treated by Lord *Eldon* as tantamount to a declaration, that they should not be paid out of the general personal estate.

The doctrine of these authorities seems upon the whole to be reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no reason why the added fund should be applied before the original one, yet in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the

(*y*) 4 Mad. 495.
(*z*) 1 J. & W. 102; [and see *Evans* v. *Evans,* 17 Sim. 106; *Phillips* v. *Eastwood,* 1 Ll. & G. 294.]
(*a*) 1 Mer. 193, ante, 631.

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creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied.

Different rule where residue not disposed of.

[But the doctrine does not apply where the residue remains undisposed of, in which case it will be primarily liable (*b*).

Charge on a particular fund, and exemption of the others, do not alter liability of others inter se.

Where one particular fund is appropriated for payment of debts and the testator's other property is exempted, such other property still remains liable in its proper order for any deficiency, the exemption not having the effect of altering the liabilities of the several species of exempted property inter se. Thus, in the case of *Lord Brooke* v. *Earl of Warwick* (*c*), the testator bequeathed estates in mortgage and specific parts of his personal estate and also the residue of his personal estate "freed and discharged from debts, &c.," and devised an estate to be sold and the money to be applied to pay his debts, &c. The money arising from the sale proving insufficient for the purpose, it was contended that the gift of the residue was in the nature of a specific gift, and there being the same expressed intention to exonerate the residue as the mortgaged estates from debts, the devisees of the latter ought to take cum onere; but Lord *Cottenham*, C., affirming the decision of Sir *J. K. Bruce*, V. C., held, that the residue was primarily liable; the former Judge observing that the residue was what remained after payment of debts, &c., and the testator could not give it discharged from debts unless he provided for them out of some other fund.

Secus, where part only of the others is exempted.

But where all the personalty is bequeathed in terms expressly exempting it from payment of the usual charges affecting it, this exemption throws those charges on all other property not expressly exempted, so that, for instance, in case of a deficiency in the produce of lands devised to answer such charges, they would fall upon other lands specifically devised (*d*).]

Marshalling of assets.

IV. It remains to consider in what cases assets are marshalled in favour of legatees or creditors.

On this subject it may be stated as a general rule, that, wherever a creditor, having more than one fund, resorts to that

[(*b*) *Holford* v. *Wood*, 4 Ves. 78; *Hewett* v. *Snare*, 1 De G. & S. 333; *Newbegin* v. *Bell*, 23 Beav. 368. And see ante, 635.

(*c*) 2 De G. & S. 425, affirmed, 1 H. & Tw. 142.

(*d*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Beav. 522.]

which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order is entitled to be placed in the same situation as if the assets had been applied in a due course of administration, —in other words, to occupy the position of the creditor in respect of that fund, or those funds which ought to have been applied, to the extent to which his own has been exhausted.

In favour of legatees against the heir.

Thus, if the specialty creditors of a testator who died before the 29th of August, 1833 (*e*), or the simple contract creditors of any other testator, choose to enforce payment from the personal representatives of their debtor, instead of suing (as they may do) the heir in respect of any real estate which may have descended to him, and thereby withdraw the personalty from the claim of specific or pecuniary legatees, the Courts will marshal the assets in favour of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands; such descended assets, according to the order of application before stated, being liable before personalty specifically bequeathed, or even pecuniary legacies (*f*).

And since 1 Vict. in favour of pecuniary legatees against residuary devisees.

But not against specific devisees.

[And since the statute 1 Vict. c. 26, it would seem that pecuniary] legatees are entitled to have the assets marshalled against the *residuary devisees* of real estate (*g*); [but not against] specific devisees (*h*); for to throw the debts upon the [specific] devisees, in such a case, would be to apply specifically devised *real* estate before personal estate [not] specifically bequeathed, and thereby break in upon the established order of application before stated (*i*). It is not correct in such cases to account for the non-interference of the Court, by saying that the parties have *equal equities* (*k*), which would seem to imply that there exists such an equality between them in the consideration of a Court of Equity, as to entitle neither party to its interposition against the other; whereas it is clear that if the *devised* lands had been resorted to by any creditor, having

(*e*) See stat. 3 & 4 Will. 4, c. 104, ante, 553.

(*f*) See ante, 588, 589.

[(*g*) Ibid. Contra before the statute.]

(*h*) *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Forrester* v. *Leigh*, Amb. 171; *Scott* v. *Scott*, Amb. 383, 1 Ed. 458; *Hamly* v. *Fisher*, Dick. 105, [*S. C.* nom. *Hanby* v. *Roberts*, Amb. 127;] *Keeling* v. *Brown*, 5 Ves. 359. Mr. *Roper* has treated this case as if the specialty debts had been charged upon the land by the testator, 1 Treat. on Leg. 463; although Lord *Alvanley* distinctly determined that none of the debts were charged (see ante), and grounded his refusal to marshal the assets on this circumstance.

(*i*) Ante, 589.

(*k*) See 1 Rop. on Leg. 469.

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no specific lien thereon, instead of the personal estate, the devisee would have been entitled to be reimbursed out of [the pecuniary legacies.] The reason, therefore, and the only reason, why assets are not marshalled in the case under consideration is, that the creditor having resorted to the fund *in the proper order*, no ground exists for disturbing it.

Unless lands are charged with debts.

But if the lands devised are *charged with debts*, it is clear, upon the same principle, that the assets will be marshalled in favour of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies (*l*). Thus, in *Foster* v. *Cook* (*m*), (where a testator had charged his real estate with his *debts*, and given legacies not so charged,) the creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate, so far as it had been applied in payment of debts; [and this decision has been recognized in several recent cases (*n*).]

Assets marshalled against devisees, &c., of mortgaged lands.

So, if the mortgagee of a devised or descended estate resort in the first instance (as he clearly may) to the personal estate of the deceased mortgagor, to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, are not liable to exonerate a devised or descended mortgaged estate (*o*),) equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration (*p*).

In the case of *Wythe* v. *Henniker* (*q*), an attempt was made, by impugning the authority of the case of *Forrester* v. *Leigh*, to shake this doctrine, in regard to pecuniary legatees; but Sir *J. Leach*, M. R., adhered to it, observing that, since that case, he had always considered it to be a settled rule of Courts of Equity, that a pecuniary legatee is entitled to stand upon the devised estate in the place of the mortgagee, to the extent to

(*l*) Ante, 588.

(*m*) 3 B. C. C. 347. See also *Bradford* v. *Foley*, Rolls, 14 Aug. 1791, 3 B. C. C. 351, n.; *Webster* v. *Alsop*, Rolls, 12 July, 1791, 3 B. C. C. 352, n.; *Fenhoulett* v. *Passavant*, Dick. 253; Lord *Hardwicke's* judgment in *Arnold* v. *Chapman*, 1 Ves. 110; *Norman* v. *Morrell*, 4 Ves. 769; *Aldrich* v. *Cooper*, 8 Ves. 396; [from which last case it also appears that the rule as to the widow's paraphernalia is the same. The case of *Probert* v. *Clifford*, Amb. 6 Blunt's ed., as corrected in note, is not contra; and see] *Snelson* v. *Corbet*, 3 Atk. 368.

[(*n*) *Paterson* v. *Scott*, 1 D. M. & G. 531. Here was a trust to sell and pay debts; but a mere charge is equally efficacious, *Rickard* v. *Barrett*, 3 Kay & J. 289; *Surtees* v. *Parkin*, 19 Beav. 406.]

(*o*) Vide ante, 599.

(*p*) *Lutkins* v. *Leigh*, Cas. t. Talb. 53; *Forrester* v. *Lord Leigh*, Amb. 171; [*Johnson* v. *Child*, 4 Hare, 87; *Birds* v. *Askey*, 24 Beav. 618.]

(*q*) 2 My. & K. 635.

which the mortgage has been satisfied out of the personal estate. That doctrine proceeded upon the assumption, that the devise of the mortgaged estate is a devise of the equity of redemption only, and that the testator intended that the devisee should take the estate cum onere. That doctrine, his Honor, however, observed, has not been universally approved, because in all other cases the devisee of a mortgaged estate does not take it cum onere, but has a right to have the mortgage satisfied out of the personal estate, even where the devise is made expressly subject to the mortgage.

Rule as to vendor's lien for purchase-money.

It has been much debated whether, where a vendor, who has an equitable lien for his purchase-money on the property, as well as a claim on the personal estate of the deceased purchaser, resorts to the latter, to the prejudice of specific or pecuniary legatees, the legatees are entitled to have the assets marshalled against the heir or devisee of such property.

Question between legatees and heir.

In regard to the heir, it would seem clear upon principle, and by analogy to the case of a descended mortgaged estate, that in such a case the Courts would marshal the assets in favour of the legatees; descended assets being, according to the order before stated, applicable before specific or pecuniary legacies to the payment of all charges affecting them both.

And this view of the case seems to agree with Lord *Eldon's* observation in *Austen* v. *Halsey* (*r*), where, however, the land was devised, and his Lordship's opinion upon another question rendered it unnecessary to decide the point. A contrary determination, indeed, was made in the case of *Coppin* v. *Coppin* (*s*), where a person, who was both heir and executor of his brother, was held to be entitled to retain out of the personal assets the purchase-money of an estate which his brother had purchased from him, against the legatees of the brother. This case has been questioned by Lord *Eldon* (*t*), and seems to have been overturned by the case of *Trimmer* v. *Bayne* (*u*), where Sir *Wm. Grant*, M. R., decided that the heir who had paid the purchase-money for an estate contracted for by his ancestor was not entitled, as against the legatees of such ancestor, to be reimbursed out of his personal estate. It is not distinctly stated, however, whether the legatees, out of whose bequests the heir

(*r*) 6 Ves. 484.
(*s*) Sel. Ch. Cas. 28, 2 P. W. 291.
(*t*) See his Lordship's judgment in *Mackreth* v. *Symmons*, 15 Ves. 339.
(*u*) 9 Ves. 209, 4 Russ. 339, n.

unsuccessfully claimed to be reimbursed, were specific or pecuniary legatees.

The right of a pecuniary legatee to have the assets marshalled, as against the heir of a testator who purchased, but died without having paid for, an estate, is placed beyond all doubt by the recent case of *Sproule* v. *Prior* (*x*).

Question between legatees and devisee of contracted-for estate.

Where the purchased estate is *devised*, the question is somewhat different; but as the established rule is, we have seen, that the devisee of a mortgaged estate is not entitled to exoneration out of personal estate specifically bequeathed, and not expressly made subject to debts, there seemed ground to contend that in the present case the estate must, by parity of reasoning, also bear its own burden against such legatees, and accordingly, that if their funds have been taken by the vendor, they are entitled to have the assets marshalled against the devisee.

And the case of *Pollexfen* v. *Moore* (*y*) was considered to lend some countenance to this doctrine; but it appears to have been decided upon different, though it should seem untenable, grounds. Sir *Wm. Grant*, in *Trimmer* v. *Bayne* (*z*), intimated that the case had greatly perplexed him, and the eminent author of the Treatise of Vendors and Purchasers has taken some pains to shew the inapplicability of the decision to the doctrine which it has been advanced to support, and the unsoundness of that doctrine; and his high authority may have had some weight in procuring its overthrow in the recent case of *Wythe* v. *Henniker* (*a*), where Sir *J. Leach*, M. R., held that a person having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase-money, which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatees had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. His Honor, however, appears to have contented himself with shewing that the case of *Pollexfen* v. *Moore* (which had been cited on behalf of the legatees) was not applicable to the point, and we look in vain throughout his judgment for an explanation of the

Pecuniary legatees not entitled to marshal, as against devisee of contracted-for estate, in respect of unpaid purchase-money.

(*x*) 8 Sim. 189.

(*y*) 3 Atk. 272; *S. C.* stated from the Registrar's book, Sugd. Vend. & Purch. [874, 11th Ed.] Some of the doctrine advanced in this case is at variance with the decision. See 9 Ves. 211; 15 Ves. 339.

(*z*) 9 Ves. 211.

(*a*) 2 My. & K. 635. [But before 3 & 4 Will. 4, c. 104, assets were marshalled against the devisee, in favour of simple contract creditors, *Selby* v. *Selby*, 4 Russ. 336.]

principle of his decision, or an answer to the plausible, if not convincing, arguments founded upon analogical reasoning from the cases by which the claim of the legatees was attempted to be sustained.

Sir *W. Grant* decided that, even where the testator expressly directed his executors to pay the purchase-money of the devised estate, and the personal estate was inadequate to pay both the purchase-money and the pecuniary legacies, the devisee was liable to contribute rateably with the legatees (*b*).

It may be observed that Lord *Eldon*, in *Austen* v. *Halsey* (*c*), thought that a clause, giving the executors "power" to pay the purchase-money out of the personal estate, was not necessarily to be construed as an absolute direction.

Marshalling, where one party has several funds, and another one only.

The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this,—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim; or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself, and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied (*d*).

This principle is applied in favour of both creditors and legatees (*e*).

Effect of stat. 3 & 4 Will. 4, c. 104, upon the doctrine.

In regard to the former, however, it is to be remembered that the statute of 3 & 4 Will. 4, c. 104 (*f*), renders all real estate, including copyholds, liable to the claims of creditors of every class.

But the doctrine may still be called into operation in reference

(*b*) *Headley* v. *Redhead*, Coop. 50, noticed ante, 589, n.

(*c*) 6 Ves. 478.

(*d*) See this doctrine referred to in regard to charities, ante, Vol. I. p. 213.

[(*e*) In *Chapman* v. *Esgar*, 18 Jur. 341, a testator made his will before 1838, charging his real estate with debts, then purchased other real estates and died, and it was held that specialty creditors claiming the benefit of the charge in the will must allow the descended estates to be brought into hotchpot.]

(*f*) Ante, 553.

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even to creditors, as specialty creditors retain their priority under the new law to those by simple contract; and it is also observable, that the recent statute, by widening the range of the claims of creditors, has given greater scope to the application of the doctrine among legatees. Thus, as it was formerly the rule that, where a specialty creditor resorted to the personal estate, and thereby rendered it inadequate to the payment of pecuniary legacies, the legatees might claim to stand in his place in respect of his demand upon the realty, which had descended or was charged with debts; so it is equally clear that, under the existing law, the same consequence would follow in the case of a simple contract creditor taking such a course (*g*).

Marshalling among legatees.

Upon the same principle, it is settled that, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate for those who have no other fund.

Thus, in *Hanby* v. *Roberts* (*h*), where the testator, by his will, gave several legacies (not charging them upon the real estate), and by codicil bequeathed a legacy of 3,000*l.*, *with the payment of which he charged his real estate;* the personal estate having been exhausted in the payment of the 3,000*l.* legacy, Lord *Hardwicke* held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent.

Exception where legacy, as a charge upon the land, failed.

But in *Prowse* v. *Abingdon* (*i*), Lord *Hardwicke* refused to marshal assets in favour of a legatee whose legacy had been originally charged upon the land, but had failed in respect of the real estate, by his death before the time of payment (*k*); his Lordship observing, that the rule as to marshalling would hold only where it was proper to be done at the time the legacy first

[(*g*) Where there was delay in payment of the simple contract creditors, they were held not entitled to stand in the place of the specialty creditors to the extent of the interest which would have accrued due on the specialty debts, but only to the extent of the principal, *Cradock* v. *Piper*, 15 Sim. 301.]

(*h*) Amb. 127, 2 Coll. 512, Dick. 104. See also *Masters* v. *Masters*, 1 P. W. 421; *Bligh* v. *Earl of Darnley*, 2 P. W. 620; *Norman* v. *Morrell*, 4 Ves. 769; *Bonner* v. *Bonner*, 13 Ves. 383; [*Scales* v. *Collins*, 9 Hare, 656.]

(*i*) 1 Atk. 482.

(*k*) As to this doctrine, see ante, Vol. I. Chap. XXV. sect. 5; but see also *Pearce* v. *Loman*, 3 Ves. 135, where Lord *Loughborough* doubted whether in such a case the legacy was payable even out of the personal estate. It is not easy, however, to perceive upon what sound principle the circumstance of its having been charged upon the real estate as the auxiliary fund, and having failed as to that, should vary the construction of it as a personal legacy.

took place, and not where it was owing to a fact which happened subsequently to the death of the testator (*l*); and this has been since followed in the case of *Pearce* v. *Loman* (*m*).

(*l*) But is it not always the fact of some legatee or creditor resorting to a particular fund *after the death of the testator* that occasions the requisition to marshal?

(*m*) 3 Ves. 135.

# CHAPTER XLVII.

## LIMITATIONS TO SURVIVORS.

I. *On construing* Survivor *as synonymous with* other.
II. *Whether accruing Shares are subject to Clause of Accruer.—Whether Qualifications affecting original Shares extend to accruing Shares.*
III. *Words of Survivorship, to what Period referable.*

"Survivor" when construed *other*.

I. WHETHER the word "survivor" is to receive a construction accordant with its strict and proper acceptation, or is, by a liberal interpretation, to be changed into *other*, is a point which has been often discussed, and variously decided. On more than one occasion expressions have fallen from eminent judges calculated to create an impression that the term "survivor" might by its own inherent force, and without one single ray of light from the surrounding context, be read as synonymous with *other*. In particular, Sir *Wm. Grant*, in the case of *Barlow* v. *Salter* (*a*), seems to have assumed this point; and the construction recommends itself so forcibly, as carrying into effect the probable intention of testators, and as supplying a defect or inaccuracy of expression very commonly to be found in testamentary instruments, that it appears to have obtained too ready an acceptance in the profession; for we are now taught by a series of decisions, which outweigh any opposing dicta or opinions, that the word "survivor," like every other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning.

Word "survivors" construed strictly, not as synonymous with *other*.

Thus, in the case of *Ferguson* v. *Dunbar* (*b*), where a testator gave to his executor so much of his personal estate as would purchase an annuity of 550*l*., which he gave to his wife for life, and he directed the principal after her decease to be paid to his children, that is to say, one-half to his son G., and one-half to his daughters E. and C., if living at the death of their mother, and if any of them should die in the lifetime of their mother, leaving issue, he gave that share to the issue of such child or

(*a*) 17 Ves. 479. (*b*) 3 B. C. C. 468, n.

children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years without issue, he gave that share to the *survivors;* and if all of them should die without leaving children, the same was to fall into the residue. C. died leaving children. E. afterwards died under twenty-one, and without issue. The question was, whether the children of C. were entitled to any part of the share of *E.* Lord *Thurlow* said that this was one of those cases in which he had the mortification to see that what was most probably the testator's intention could not be executed, for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare G., as the only surviving child, entitled to the whole of E.'s share, and decreed accordingly.

Gift to *survivors and survivor* confined to persons in existence.

So, in the case of *Milsom* v. *Awdry* (*c*), where a testator bequeathed the residue of his personal estate to trustees, upon trust to pay and apply the same to and among his nephews and nieces (the sons and daughters of his late brothers and sister M., D. & H.) equally between them for their lives, the children of such of them his said brothers and sister to have only their father's or mother's share; and after the death of either of the testator's said nephews and nieces, in trust to call in the share of the principal money out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his (the testator's) said nephews and nieces should die without leaving any child or children, then the share or shares of him, her or them so dying should go to and among *the survivors and survivor* of them in manner aforesaid. One nephew died without leaving issue; then another died leaving issue; a third then died without issue, leaving a sole survivor. Sir *R. P. Arden*, M. R., after much hesitation, decided that the share of the third belonged exclusively to the survivor, and was not divisible (as had been contended by the issue of the second) between him and such issue.

Again, in the case of *Davidson* v. *Dallas* (*d*), where a testator

(*c*) 5 Ves. 465. See also *Wollen* v. *Andrews*, 9 J. B. Moo. 248, 2 Bing. 126.
(*d*) 14 Ves. 576.

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bequeathed to the children of his brother R. D. 3,000*l.*, to be equally divided among them, and if either of them should die before the age of twenty-one years their shares to go to the *survivors*. Lord *Eldon*, after referring to the rule for construing "survivors" as importing *others*, observed that there was nothing in this will indicating a general intention upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

Remark on *Davidson* v. *Dallas*.

[The point in this case was in some respects different from that involved in the former cases, the argument being that "survivors" should be read "others," in order to include—not such as having attained twenty-one died before a child whose death under that age called into action the gift over, but—those children who might be born after the testator's decease and before the event upon which the gift over was to take effect (*e*).]

"Survivor" construed strictly, not as importing *other*.

So, in the case of *Crowder* v. *Stone* (*f*), where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor to be divided equally between his nephew and four nieces; and in case of the death of his said nephew or of any or either of his said nieces, without lawful issue, before their respective parts or shares should become due and payable to them, then the part or share of him, her or them so dying without issue as aforesaid, should go and be equally divided between them and amongst the *survivor and survivors* of them, share and share alike. Lord *Lyndhurst* said, "It was contended that the words 'survivor and survivors of them' were to be construed 'other and others.' That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord *Eldon*, in *Davidson* v. *Dallas* (*g*), calls a 'forced construction of the term survivor,' and he contrasts it with what he calls its 'natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot* v. *Wilmot* it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity: and it seems to me, that the words 'survivor and survivors' are here to

Lord *Lyndhurst's* judgment in *Crowder* v. *Stone*.

[(*e*) See also *Mann* v. *Thompson*, Kay, 644, 645.]

(*f*) 3 Russ. 217.
(*g*) 14 Ves. 578.

be taken in their natural meaning. The shares which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively."

Recent authorities for construing "survivors" strictly.

Again, in the case of *Ranelagh* v. *Ranelagh* (*h*), where a testator, after bequeathing certain pecuniary legacies to his children for life, added, "in case of the demise of any of the above parties without legitimate issue, their, his or her proportions to be divided among the *survivors*." Lord *Brougham*, C., treated it as clear (though it was not necessary to decide the point) that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die.

And lastly, the same construction prevailed in the case of *Cromek* v. *Lumb* (*i*), as to a clause providing that, in case any of the testator's grandchildren (who were the objects of a prior gift) should die, being a son, under the age of twenty-three and without lawful issue, or, being a daughter, under that age and unmarried, then the share or shares of him, her or them so dying should go to the *survivor and survivors*, and the lawful issue of such as might be dead.

Effect of "other" being elsewhere associated with "survivor."

And the mere circumstance, that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous (*j*), is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it.

Words "survivors or survivor" construed strictly.

Thus, in the case of *Winterton* v. *Crawfurd* (*k*), where a testator devised the residue of his real estate to trustees, upon trust as to one-third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her or their share or shares, in trust for the survivors or survivor *and others or other of them*; and

(*h*) 2 My. & K. 441.

(*i*) 3 Y. & C. 565.

[(*j*) The joint use of these words will, of course, forbid confining the bequest to those who literally survive. And the same effect was given to the words "survivors and survivor and others and *other*" in *Slade* v. *Parr*, 7 Jur. 102.]

(*k*) 1 R. & My. 407.

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after giving the other two-thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that, in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child and children *of the survivors or survivor* of his said daughters per stirpes, and the heirs of the bodies of such child and children; and in case any one or more of such children should die without issue, then as to the shares of him, her or them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny. Sir *J. Leach*, M. R., said,—"In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters: and this intention would be defeated, if, upon the death of Lady Winterton (*l*) without issue, which is stated to

(*l*) This lady was the survivor of the three daughters.

be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare, that Lady Winterton is entitled for life, to her separate use, to the one-third share of the real estate, which by the will was given to her sister Louisa."

Remarks upon *Winterton* v. *Crawfurd.*

Sir *J. Leach's* observation, in regard to the inconsistency of the devise *for life* to the survivors with the supposition that the children of the deceased devisees were to stand in their place, is inconclusive, because, though the estate for life could not take effect as to any deceased child, the devise in remainder to the issue of such child might. Indeed, if his Honor was right in the opinion expressed by him, that after the death of the last surviving daughter the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there seems to be great difficulty in maintaining the soundness of his decision, as it has the effect of reading words occurring in different parts of the same will in various senses. The case too would then be in direct opposition to *Doe* v. *Wainewright* (*m*), where, *even in a deed,* the limitation of cross-remainders in tail to *surviving* children was held to take effect in favour of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate limitation, that the estate was not to go over, unless the issue of *all* the children failed.

Effect where gift over is combined with a collateral event.

In a recent case, however, it was considered that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event,* the rule of construction adopted in the preceding cases did not apply, but that the word "survivor" might be construed *other,* on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

Word "survivor" construed *other.*

The case here referred to is *Aiton* v. *Brooks* (*n*), where a testator bequeathed 1,500*l.* stock to A. and B. during their lives, in equal shares, and immediately on the death of either he directed his trustees to pay the share of such deceasing legatee to her children who should be living at their mother's decease, and

(*m*) 5 T. R. 427. Stated post, 656. (*n*) 7 Sim. 204.

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who should attain the age of twenty-one years, the interest in the mean time to be applied for maintenance; *but in case any of such children should die before they should attain the age of twenty-one years,* the testator gave the share of such deceasing child to the *survivor;* provided always, that *in case either of them the said A. or B. should leave any child living at their respective deceases but which should all die before they attained the age of twenty-one years,* then the trustees were to assign the share of such legatee so dying unto the *survivor* of them the said A. and B., her executors or administrators (*o*). A. died in the lifetime of B., leaving a child who attained twenty-one; B. afterwards died without issue. Sir *L. Shadwell,* V. C., held A. to be entitled to B.'s moiety, observing, "the word 'survivor' must of necessity be taken to mean 'other,' for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless.*"

Remark on doctrine advanced in *Aiton* v. *Brooks.*

There appears to be much good sense in the distinction here suggested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word "survivor" has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In *Ferguson* v. *Dunbar, Milsom* v. *Awdry, Davidson* v. *Dallas,* and lastly in *Crowder* v. *Stone* (which is a recent and leading case), the gift over was to take effect on any of the objects dying, either without issue or under age, and yet it was held to apply only to the persons actually living at the period in question. Seeing, therefore, that the case of *Aiton* v. *Brooks* was professedly grounded on a circumstance which is common to nearly all the authorities, and that some of those authorities were not cited to or present to the mind of the learned and able Judge who decided it, the case can hardly be relied on as a general authority. In fact a different rule prevailed in the subsequent case of *Leeming* v. *Sherratt* (*p*), which may be added to the authorities for giving to the word "survivor" a strict con-

[(*o*) If the words "executors or administrators" are to be taken (as it is conceived they must here be taken) as words of limitation, and not of substitution, they have no power to vary the construction, *Taylor* v. *Beverley,* 1 Coll. 108.]

(*p*) 2 Hare, 14. [See also *Willetts* v. *Willetts,* 7 Hare, 38; *Moate* v. *Moate,* 16 Jur. 1010.]

Word "survivors" construed strictly.

struction. A testator bequeathed 1,000*l.* to each of his six children, to be paid at twenty-one, except as to girls, one half of whose shares was to be invested and the interest to be paid to them for life, and the principal to be disposed of in such manner as they should direct, among their issue; and in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then gave his freehold property and the residue of his personalty to trustees, the proceeds to be divided among his children when the youngest should attain twenty-one, one half of the daughters' shares to be invested, the interest to be paid to such daughters, and the principal to be disposed of in such manner as they should direct, among their children: but if there were no children, then such share to be divided equally among the *survivors* of the testator's children: and in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share the parent so dying would have been entitled to have. One question was, whether the words "survivors of my children" were to be construed *others*. Sir *James Wigram* held, that the strict construction must prevail. He said, "In *Davidson* v. *Dallas* (*q*), Lord *Eldon's* language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shews that it was used by the testator in a different sense; and *Crowder* v. *Stone* (*r*) is to the same effect. In *Barlow* v. *Salter* (*s*) the dictum of the Court tends rather to treat the word as having a technical meaning (that of 'others') impressed upon it in practice. According to *Davidson* v. *Dallas*, one reason for construing 'survivors' to mean 'others' has been to take in all persons who should be born before the period of distribution. In other cases the object suggested has been to prevent a family losing the provision intended for it by the death of a parent, leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will which, in certain cases, substitutes the issue for the parents, I think the testator has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think that, in the residuary

Sir *J. Wigram's* judgment in *Leeming* v. *Sherratt*.

(*q*) 14 Ves. 576.
(*r*) 3 Russ. 217.
(*s*) 17 Ves. 479.

clause, the word 'survivor' must be construed in its natural sense, and that this construction of the word, in one part of the will, must, in this will, determine its construction in the other part also."

[And, in the case of *Lee* v. *Stone* (*t*), where a testator devised a distinct estate to each of his three daughters for life, with remainder to her children as tenants in common in fee; and provided, that if either of his daughters should happen to die without having issue, the estate devised to her should go to the survivors or survivor of the daughters, and their or her heirs as tenants in common; and if all the daughters but one should die without issue, their shares should go to the survivor in fee: it was held, that the word "survivor" must be construed according to its natural import.

Effect of gift over on death of *all* in a given manner.

Where a gift to the "survivors" of several legatees, limited to take place on a certain event (as the death of any of them under age or without issue), is followed by a gift over to third parties, not if there should be no survivor at the time the event happens, but if that event happens to every one of the legatees; there is evidence in the testator's own hand that, what in *Aiton* v. *Brooks* Sir *L. Shadwell* conjectured to be, is, in fact, the testator's true meaning; and, upon such evidence, the Courts will act by construing "survivors" as *others*. For, whereas by the strict construction, the former limitation might obviously fail before the event happened upon which the ulterior gift was to take effect, by the more liberal interpretation the whole will becomes coherent, and the final disposition takes effect upon failure of the prior gift in continuation, as it were, of the testator's general scheme.

"Survivors" construed "others" by force of gift over.

Thus, in the case of *Doe* d. *Watts* v. *Wainewright* (*u*), (which, being a decision on a deed, is an authority, à fortiori, for a similar construction in the case of a will,) lands were limited, after previous life estates, to the use of the child or children of A. as tenants in common, and the heirs of their several bodies; and in case any such child or children should die without issue, then the shares of such as so died should remain to the use of the *surviving* child or children of A., and the heirs of their respective bodies; *and in case all the said children should die*

[(*t*) 1 Exch. 674. See also *Stead* v. *Platt*, 18 Beav. 50; *Parsons* v. *Coke*, 4 Drew. 296; *Greenwood* v. *Percy*, 26 Beav. 472; *Re Corbett's Trusts*, 1 Johns 591.

(*u*) 5 T. R. 427.

[*without issue*, or if A. should have no issue, then over; it was held, on the strength of the last clause, that the remainder to the *surviving* child or children, and the heirs of their bodies, carried a proportion of the share of a child who died without issue to the heirs of the body of a child who had previously died leaving issue.

So, in the case of *Wilmot* v. *Wilmot* (*v*), where a testator bequeathed one third part of his property to each of his three children, payable at a certain age, and if either of them died before that age his share to be divided between the two surviving children; and in case of two dying before attaining the said age respectively, then the whole to go to the *surviving* child; but if all his children should die before they should attain their said respective ages, then over; Lord *Eldon* held, that the word "surviving" meant the same as "other." "In the clause in which the gift over is made," said his Lordship, "it was never meant that any portion should be taken; it was to be either the whole or none."

"Survivors" construed "others" by force of gift over.

It is probable that in this case further evidence of the testator's intention to use "survivors" as *others*, was found in the gift in case of the death of *one* to the *two* surviving children, and, in case of the death of *two*, to the *one* surviving child.

And, in *Cursham* v. *Newland* (*x*), where a testator gave the residue of his real and personal estate to his son A., and daughters B., C., and D., for their respective lives, remainder to their issue per stirpes in tail, "with benefit of survivorship" among their issue respectively; "and in case his son and daughters, or any or either of them, should die without leaving lawful issue, the share of them, him or her so dying to be for the benefit of the *survivors*, and their issue in the same manner" as the original shares, the word "survivors" was construed as "others." The point seems scarcely to have been discussed, but the decision is referable to the words introducing the ultimate gift, which shewed that, in the preceding clause, the word "survivorship" did not require the claimants under it actually to outlive those who should die without issue; and the corresponding word in the last clause must, according to a well-known rule of construction, be construed in the same manner.

Again, in the case of *Lowe* v. *Land* (*y*), where a testator

[(*v*) 8 Ves. 10. M. & Wel. 101, 2 Beav. 145.
(*x*) 2 Bing. N. C. 58, 2 Scott, 105, 4 (*y*) 1 Jur. 377.

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[bequeathed a sum of money in trust for his daughters A., B., C., and D., for their respective lives, and, if they should leave issue, then to such issue; but if any should die without issue, her share to go to the survivor or survivors for life, and then absolutely among the children of such survivor or survivors; *and if all his daughters should die without issue,* the legacy to sink into the residue. Lord *Langdale,* M. R., held "survivors" to mean others.

Lastly, in the case of *Cole* v. *Sewell* (*z*), where immediately after the limitations (in a settlement) to the daughters of the survivors or survivor of the settlor's daughters A., B., and C., there followed a limitation to the settlor's nephew, "in case the said A., B., and C. should happen to die without issue," it was held by Lord *St. Leonards,* that in favour of the evident intention, and on the authority of *Doe* v. *Wainewright,* the word "survivors" was to be construed as "others." And the decision was affirmed by the House of Lords (*a*).

*Ferguson* v. *Dunbar* contra, sed quære.

To this current of authority the case of *Ferguson* v. *Dunbar* (*b*) alone stands opposed; and it may be observed that Lord *Alvanley* said of it, that he could not find the decree in the register's book; that there was only an adjournment of the cause; and that the decree did not appear to have been entered (*c*).

Readiness of Courts to read "survivors" as "others."

The testator's intention to use the word "survivor" as "other" may, of course, appear in many other ways besides that already indicated; and although] the result of the cases would seem to be that when unexplained by the context it must be interpreted according to its literal import, yet the conviction that this construction most commonly defeats the intention of testators, seems to have induced a readiness in the Courts to listen to any arguments drawn from the context to read "survivor" as synonymous with *other.*

As, where the gift is to survivors, or (by substitution) to their children.

[Thus, in the case of *Eyre* v. *Marsden* (*d*), where a testator gave his real and personal estate to trustees, upon trust to sell and out of the income of his estate to pay certain life annuities to his children. And the testator then directed his trustees to accumulate the income of his realty and personalty for the benefit of his grandchildren, and after the decease of his sur-

[(*z*) 4 D. & War. 1.
(*a*) 2 H of L. Ca. 186, 12 Jur. 927. And see *Smith* v. *Osborne,* 6 H. of L. Ca. 375.
(*b*) Stated ante, 648.
(*c*) *Milsom* v. *Awdry,* 5 Ves. 469.
(*d*) 2 Kee. 564, 4 My. & C. 231.

[viving child, if not sold before, to sell and distribute the proceeds among his grandchildren then living, in equal shares, except the share of F., the son of a deceased daughter, half of whose share in the testator's estate and effects, in consideration of the benefit taken by F. under his uncle's will, the testator gave to his brother G.; and if any of his grandchildren should die before his share became payable leaving issue, such issue to be entitled to the share which his, her, or their deceased parent would be entitled to if then living; but in case of the death of any grandchild without leaving issue, before he or she should become entitled to receive his or her share in manner aforesaid, then his or her *share* was given among his surviving grandchildren, *to be paid at the same time, and in the same manner, as before mentioned, touching the original share or shares of his said grandchildren.* It was held by Lord *Cottenham,* affirming the decision of the M. R., that it was not necessary to construe the word "surviving" as meaning "living at the time of the accruer taking place." "If it were," said the L. C., "the grandchildren then living would take absolute interests, unless the words 'in the same manner,' &c., introduce into this gift the provision for the children, and the gift over upon death without children; and if it do so, why is it not also to introduce into this gift the provision for children, in the event of the parent's death before the happening of the accruer?"

So, in the case of *Hawkins* v. *Hamerton* (*e*), where a testator bequeathed a leasehold estate to his son; but in case he should die without issue, to fall into the residue, and be divided amongst the children of his (testator's) three daughters as thereinafter mentioned. And he bequeathed the residue to his said son and three daughters, or such of them as should be living at his wife's death, for life, remainder to the children of his said son and daughters in equal shares; and if any of his said son and daughters should die without leaving issue, his or her share to go amongst the survivor or survivors of his said children, and their issue in the like equal shares; Sir *L. Shadwell,* V. C., thought that when the testator used the words "survivors or survivor," the order in which his children might die, successively, was not present to his mind; but, taking that clause in connection with the gift over of the leasehold, his opinion was that he meant others or other.

[(*e*) 16 Sim. 410, 13 Jur. 2. See further *Peacock* v. *Stockford,* 7 D. M. & G. 129.

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Devise to *two* in tail with gift over on death of either without issue to the "survivor" in tail.

[Again, in the case of *Harman* v. *Dickenson* (*f*), where a bequest was made to the testator's two daughters, and if one should die without issue, then to the *surviving* daughter and her issue; one of the daughters married, and died leaving issue, and then the unmarried daughter died; and Lord *Thurlow* held, that the money went to the issue of the married daughter, although she did not survive her sister.

And this agrees with the observations of Lord *Cranworth* in *Smith* v. *Osborne* (*g*), in which, after expressing his approval of the rule "now generally acted on of giving the word survivor its ordinary and natural meaning," he proceeded to say of the case before the House, "This is not a gift to a class, and on the death of one or more to the survivors or survivor, but a gift to two designated devisees (his daughters) as tenants in common in tail, and if either should die without issue then to the 'surviving' daughter and the heirs of her body. Unless the word 'surviving' is to be taken to mean 'other' the intention cannot be carried into effect; for he means his gift over to come into operation if either of his daughters die without issue—that is, the daughter who dies first, or the daughter who dies last; and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be applicable to the predeceasing daughter."

"Survivors" not read "others" if the gift thereby becomes too remote.

But a strong argument against reading the word as "other," is supplied by the fact that by so doing the will would become ineffectual; as in the case of *Turner* v. *Frampton* (*h*), where a testator bequeathed his residuary estate between his children A. and B., and if either died without issue, to the *survivor*; by allowing the word its proper sense, the failure of issue was confined to failure at the death of the prior legatee, whereas by reading it as "other," such failure would have been indefinite; Sir *J. Knight Bruce*, V. C., therefore refused to adopt the latter construction.]

The writer cannot dismiss the subject without the cautionary remark, that the present state of the authorities, by cutting off the hope of any considerable aid from liberality of construction

[(*f*) 1 B. C. C. 91. The case, however (as reported), seems not to be a very reliable authority; for by construing "surviving" to mean *other*, the failure of issue became indefinite, and the gift therefore void; see next case.

(*g*) 5 H. of L. Ca. 375, 3 Jur. N. S. 1183. There was an ultimate gift over bringing the case within the authorities stated, ante, pp. 656, 657.

(*h*) 2 Coll. 331.]

in correcting this often-occurring slip, should teach to framers of wills the necessity of increased attention to its avoidance.

Whether clauses of accruer extend to accruing shares.

II. It has long been an established rule, that clauses disposing of the shares of devisees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. "As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares, that if one (qu. any) of them die before twenty-one or marriage, it shall survive to the others. If one dies, and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship" (*i*).

Thus, in *Ex parte West* (*j*), where a testator bequeathed to A., B., and C., the three sons of S., 1,000*l.* each, the interest to be added to the principal yearly, until they should respectively attain the age of twenty-one years; *and in case any of them should die before that age, then to the survivors.* A. and B. died under twenty-one; and the question (which was raised upon petition) was, whether that part of the share of B., which accrued to him on the death of A., went over to C. on the death of B. Lord *Thurlow* thought [that he was bound by the authorities (which he hesitated to overrule upon petition) to decide that] it did not survive again; but [gave the parties leave to file a bill, which was done,] and the cause came to a hearing before Sir *Lloyd Kenyon*, M. R., who decided against the survivorship of such accrued share.

This doctrine, though it has been much disapproved of, is now well established; but the question sometimes arises as to the effect of particular expressions to carry the accrued as well as the original share.

(*i*) Per Lord *Hardwicke* in *Pain* v. *Benson*, 3 Atk. 80. See also *Perkins* v. *Micklethwaite*, 2 Ch. Rep. 171, 1 P. W. 274; *Rudge* v. *Barker*, Cas. t. Talb. 124; *Barnes* v. *Ballard*, before Lord *King*, cit. 2 Atk. 78.

(*j*) 1 B. C. C. 575. See also *Crowder* v. *Stone*, 3 Russ. 217. [It is remarkable that in *Perkins* v. *Micklethwaite*, *Barnes* v. *Ballard*, and *Ex parte West*, although the clause of survivorship was in terms which created a joint-tenancy between the survivors in the share of the deceased legatee (see *Jones* v. *Hall*, 16 Sim. 500, *Leigh* v. *Mosley*, 14 Beav. 605), this fact was not mentioned in support of the argument for survivorship of accrued shares. The same consideration would have rendered much of the argument against the decision in *Worlidge* v. *Churchill* (stated post) unnecessary.]

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Word "*share*" does not carry accruing share.

The word *share* from an early period (*k*) has been held *not* to have this operation, though the contrary was decided by Lord *Hardwicke* in the case of *Pain* v. *Benson* (*l*); but the authority of this case has been repeatedly denied (*m*), and the point has long ceased to be the subject of controversy. One example of the construction, therefore, will suffice. In the case of *Rickett* v. *Gillermard* (*n*), a testator bequeathed 300*l.* to four persons, to be divided into equal shares, to be paid at twenty-one; and in case of the death of either before twenty-one, *such share* to survive to the others. Two of the legatees died during minority in the testator's lifetime. Sir *L. Shadwell*, V. C., held, that on the death of the first his fourth devolved to the other three; on the death of the second his original fourth devolved to the two survivors; but the third of the first-mentioned fourth, which he would have been entitled to absolutely if he had survived the testator, lapsed.

Word "*portion*" does not carry accruing share;

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share.

Thus, in the case of *Bright* v. *Rowe* (*o*), where a testatrix, by virtue of a power, appointed the reversion of a sum of 2,000*l.* in which herself and her husband had life interests to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them; but it was her will, that in case the 2,000*l.* should become payable before M. should attain twenty-one or day of marriage, or before any other of her children being a son should attain twenty-one, or being a daughter the same age or marry, then the trustees were to invest the same and apply the interest of each child's share for maintenance, and when any such children being sons should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest. And in case her said daughter M., or any other child she might have by her husband, should happen to die before his, her or their *portion* or *portions* of the said sum of 2,000*l.* should become

(*k*) *Woodward* v. *Glassbrook*, 2 Vern. 388; [*Crowder* v. *Stone*, 3 Russ. 217; *Jones* v. *Hall*, 16 Sim. 500; *Goodwin* v. *Finlayson*, 25 Beav. 65; *Evans* v. *Evans*, ib. 81; *Maddison* v. *Chapman*, 4 Kay & J. 716; *Cambridge* v. *Rous*, 25 Beav. 416.]

(*l*) 3 Atk. 78.

(*m*) See 1 B. C. C. 575; 2 Ves. jun. 534.

[(*n*) 12 Sim. 88.]

(*o*) 3 My. & K. 316; [*Perkins* v. *Micklethwaite*, 1 P. W. 274.]

payable, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, one of whom died in 1826, and another in 1829, before the period of payment. It was held by Sir *J. Leach*, M. R., that the share which accrued to the latter on the decease of the former did not pass with the original share to the surviving child.

unless aided by the context.

But although the word "share" and "portion" will not proprio vigore carry the accruing share, yet if the testator manifest an intention that the entire property, which is the subject of disposition, shall pass over to the ultimate objects of distribution in one mass, and that all the shares, original and accruing, shall be distributed among one and the same class of objects, the accruing shares will be carried over together with the original shares to those objects. Thus, in the case of *Worlidge* v. *Churchill* (*p*), where a testator devised his real and personal estate to trustees, upon trust to sell, and gave the monies arising therefrom in trust for his four children, R., E., W. and J., to be equally divided among them on their attaining twenty-one; *but if any of them died under that age, then such deceased child's* SHARE *to go to the survivors or survivor;* and he directed the trustees to apply the interest of such trust money during their minority for their maintenance and education; but if the interest should be more than sufficient for such purpose, he directed the trustees to lay out the same for the children's mutual benefit; but if *all* the four children should happen to die before twenty-one, and leave M. living, then he directed the trustees to pay M. the interest of such *trust money* from time to time, as it should grow due; and after the decease of *all*, he bequeathed the said *trust money* to the children of his late uncle F. J. died in the testator's lifetime. R. and W. survived the testator, but afterwards died under twenty-one. The question was, whether E., the last survivor, was entitled to the accrued shares of the two deceased survivors. Mr. Justice *Buller*, sitting for Lord *Thurlow*, said, "If this were res nova, and there

Accrued shares held to pass under the denomination of "share" by force of context.

(*p*) 3 B. C. C. 465. See also *Barker* v. *Lea*, T. & R. 413, where Sir *T. Plumer*, M. R., also reasoned upon the intention apparent in the will, that the fund should go over among the legatees in one mass, as excluding the doctrine in the text; but the point did not arise, as the deceased person (whose alleged share was the subject of dispute) had not attained the vesting age, and therefore had no share upon which the limitation over could operate. This, indeed, was admitted by his Honor in his judgment, but the terms of the decree are contrary. The case abounds in inaccuracies.

was a limitation to survivors and survivor, no one could collect the intent to be otherwise than that the survivor should take the whole: but if the case had rested there, I should have thought it difficult to get over the objections. But the strong part of the present case is the testator's intention to keep it as an aggregate fund: he has made use in two different parts of the will of the words '*trust money*;' that expression does not apply to the share of each child, but to the whole fund in the trustees' hands, and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression '*trust money*,' is in the gift over to the children of his uncle; and though the expressions, 'the whole,' or 'all,' are not used, the words 'trust money' are tantamount to them."

Word "share" held to comprise accrued as well as original share.

So, in the case of *Eyre* v. *Marsden* (*q*), one question was, whether that portion of the shares of grandchildren dying without issue, which had previously accrued to them by the predecease of other objects, passed over with the original shares to the survivors, or belonged to their representatives. Lord *Langdale*, M. R., while he admitted the general rule, considered that here the testator had manifested an intention that the accrued and original shares should, at the decease of his surviving child, be distributed together among one and the same class of objects. He observed that the testator meant that an aggregate and previously undivided fund should be then, for the first time, divided among a class in whom the fund vested from the time of the testator's death, subject to a provision for divestment, which was meant to be applied to every interest—to the interests which accrued in the grandchildren, and to the interests which accrued in the children of grandchildren.

Accrued shares held to pass under gift of "the whole."

Again, in the case of *Sillick* v. *Booth* (*r*), where a testator devised and bequeathed all his real estate and his convertible personal estate to trustees, upon trust to convert the same into money, and thereout to pay his debts, funeral expenses, and a weekly sum to his wife, and to divide the residue of his said estate and effects equally between and among his children J., M. and C., and his grandson R., share and share alike, the

(*q*) 2 Kee. 564, [affirmed, 4 My. & C. 231, stated ante, 658. See also *Milsom* v. *Awdry*, 5 Ves. 465, post, 668, which turned on the words "in manner aforesaid." *Cursham* v. *Newland*, 2 Beav. 145.]

(*r*) 1 Y. & C. C. C. 121, 739. See also *Leeming* v. *Sherratt*, 2 Hare, 14, stated ante, 654, where the words "the *part or share* the parent so dying would have been entitled to have" were held to comprise accruing shares.

share of M. to be paid her as soon after his decease as conveniently might be; the share of C. to be paid him at the age of twenty-two, and the share of R. at the age of twenty-one; and in case any of his children or grandchildren should die before his or her said share should become so *vested* (which was construed to mean *payable*) as aforesaid, then the share or shares of him, her or them so dying should go and be equally divided among the survivors and survivor of them in equal shares and proportions if more than one, and if but one, then *the whole to and for the use and benefit of such survivor.* J. and C. died in the testator's lifetime, the latter being under twenty-two. R. survived the testator, but died under twenty-one. Sir *J. K. Bruce,* V. C., held that the word "whole" meant the entire residue, not the whole share merely, and consequently that the accrued as well as the original shares devolved to M. as the sole survivor of the four residuary legatees.

Effect of ultimate gift over extends to intermediate accruer.

[An ultimate gift over of the whole fund upon the death of *all* the legatees without leaving issue, following after limitations to survivors of the share of *any* dying without leaving issue, not only divests the accruing as well as the original shares of all, on the happening of the prescribed event, but also implies that the accruing shares of each shall be carried over from time to time upon the several intermediate deaths.

Thus, in *Doe* d. *Clift* v. *Birkhead* (*s*), where lands were limited to the use of husband and wife successively for their lives, remainder to their children as tenants in common in tail; "and in case one or more of such children should die without issue, then as to the *share or shares* of him, her or them so dying without issue, to the use of the survivors or others of them," as tenants in common in tail; "and in case all such children but one should die without issue, or if there should be but one such child, then to the use of such surviving or only child" in tail, "*and for default of such issue, then*" *over.* Of eight children three died without issue; and it was held that the word "share" must have been meant to include every interest accruing as well as original. This case has overruled that of *Edwards* v.

[(*s*) 4 Exch. 110. This case is certainly not the less an authority for being a case upon a deed. It will also be observed, that the point under consideration being one upon the construction of express words, and not upon implying limitations, the rule that estates cannot be raised by implication in a deed is not impugned.

[*Alliston* (*t*), in which Sir *J. Leach*, upon precisely similar circumstances, came to a contrary conclusion.

And in the case of *Douglas* v. *Andrews* (*u*), where a testator gave all the residue of his real and personal estate equally among the children of his daughter R.; and in case any of them should die in her lifetime leaving issue, then he gave "the part and parts, share and shares, and *interest* of him, her or them so dying," to his, her or their issue equally. But in case any or either of the children of R. should die in her lifetime, or after her decease, under twenty-one, without issue, then he gave "the part and parts, share and shares, and *interest* of him, her or them so dying, to the survivors," and the children of such of them as should be dead, as tenants in common per stirpes. And in case all R.'s children should die under twenty-one without leaving issue, or in case R. should die childless, then "he disposed of all his said real and personal estate" to the persons in the will mentioned. R. had nine children, four of whom died in her lifetime, leaving no issue. Sir *J. Romilly*, M. R., held, that the accrued as well as the original shares went over to the survivors. He thought this might have resulted from the word "interest" alone, but that the ultimate gift over was quite conclusive, and was inconsistent with any part of the aggregate fund devolving temporarily to the representatives of a deceased child.

Sense of the word "share" in clause of accruer enlarged by sense of same word in another clause.

Again, the testator may have furnished a construction for the word share, as used in a clause of survivorship, by the use of the same word in another part of the will where there is less doubt of its meaning. Thus, in the case of *Goodman* v. *Goodman* (*v*), where a testator bequeathed his residue to trustees in trust, to pay one-seventh of the interest to each of his seven children; and upon the death of each, in trust to pay the capital of such deceased child's share to his or her children; and, in case any of the testator's said children should die without leaving issue, to pay and divide the capital of such child's share equally amongst the survivors or survivor, and the children of such as had died, "*in such manner as was thereinbefore directed concerning the original shares;*" and the testator declared, that if any of his said children should endeavour to dispose of his, her or their *interest*, then he revoked the bequest

[(*t*) 4 Russ. 78. (*u*) 14 Beav. 347.
(*v*) 1 De G. & S. 695.

[to such child or children, and directed the *share and interest* of such child or children to go over to the others or other of his said children. Upon the weight due to the presumption against intestacy (which would have otherwise ensued), to the clause against alienation, and to the cases of *Milsom* v. *Awdry*, *Eyre* v. *Marsden*, and *Leeming* v. *Sherratt*, Sir *J. K. Bruce*, V. C., held, that the gift over to the survivors comprised accrued shares.

Remark on *Goodman* v. *Goodman*.

It will not fail to be observed, that the gift over expressly referred to the prior gift by the words "in such manner," &c.; which words might have been thought entitled to some weight in the decision. But the learned Judge does not seem to have attached any importance to them (*x*), unless he is to be supposed so to have done by his allusion to the case of *Milsom* v. *Awdry*, where similar words were much relied on.

"Shares" held to include original and accrued shares consolidated by previous provisions.

Where funds are settled in trust for certain persons and their children, and in case either of such persons should die without leaving children, his share is given to the survivors and their children, with a declaration that accruing shares shall be subject to the same trusts as original shares; and the instrument then proceeds to make further provision with regard to the "share" of either of the same persons (e. g. to give power to each of them, in case he should leave no children, to appoint a portion of his "share" by deed or will); the instrument may be considered as having, in the first place, so consolidated the accruing and original shares as to render it unnecessary to carry on separate accounts of them; and the word "share," used in the subsequent provision, may thus be held to include the whole fund which, under the previous trusts, belonged to either of the beneficiaries and his children (*y*).

"Benefit of survivorship" held to carry accrued shares.

And there is a difference between a gift over of the shares of any prior legatees to the survivors, and a gift to them "with benefit of survivorship." The latter expression is very general, and may without impropriety be held to pervade the whole fund, so as to carry accrued as well as original shares (*z*).

A peculiar argument was raised in a case where a testatrix bequeathed an exchequer annuity to each of her three children, A., B. and C., for life; and in case of the death of any of them

[(*x*) See particularly *S. C.* 12 Jur. 258, the first argument, and the V. C.'s observation after it.

(*y*) See *In re Hutchinson*, 5 De G & S. 681.

(*z*) See *In re Crawhall's trusts*, 2 Jur. N. S. 892. See however *Vorley* v. *Richardson*, Ib. 362, 25 L. J. Ch. 335.

[leaving children, the annuity of him or her so dying to be equally divided between such children; but in case of the death of either of them without issue, then the annuity of him or her so dying to go to the survivors or survivor equally; and in case of the death of all without issue, as aforesaid, then over. A. died without leaving children, and then B. died *leaving children;* and it was contended, that, although, as B. left children, his original share could not go over, yet that his portion of the share which accrued to him on the death of A. went over to C., the last survivor: but Sir *R. P. Arden,* M. R., decided that such portion belonged to B.'s administrator (*a*).]

Accruing shares not necessarily subject as the original.

It may be observed, that upon a principle very similar to that which governs the preceding cases, if original shares are given expressly for life, and accruing shares indefinitely (which of course carries the absolute interest), the latter are not considered as impliedly subject to the restriction in point of interest imposed on the original shares (*b*); for although it is highly probable that the testator had the same intention in regard to the accruing and the original shares, yet this is not so clear as to amount to what the law deems a necessary implication (*c*). [But in the case of *Milsom* v. *Awdry* (*d*), the gift to the survivors, being expressly "in manner aforesaid," was held to be thereby made subject to the same terms, restrictions and limitations over as the original shares.]

So, where a testator limits an estate to three or more objects, subject to many provisions, with a devise over of the whole in case of the death of any one to the survivors, expressly *subject to the provisions contained in the original gift,* and goes on to limit the property in case of the death of any of such survivors to the remaining survivors or survivor, *but does not repeat the qualifying words,* it has been held that a similarity of intention is not to be implied in regard to the last limitation.

Express provision in one limitation to

Thus, in the case of *Georges* v. *Georges* (*e*), where the testator gave the residue of his estate, both real and personal, to trustees,

[(*a*) *Vandergucht* v. *Blake,* 2 Ves. jun. 534.]

(*b*) *Vandergucht* v. *Blake,* 2 Ves. jun. 534; [*Ranelagh* v. *Ranelagh,* 4 Beav. 419; *Ware* v. *Watson,* 7 D. M. & G. 248. See also *Milsom* v. *Awdry,* 5 Ves. 465.] But in *Doe* d. *Gigg* v. *Bradley,* 16 East, 399, Lord *Ellenborough* cut down the gift of a leasehold house to survivors indefinitely to an interest for life, on no other ground, it would seem, than that words of limitation were used in the original gift, not in the gift to survivors, which has not in general been considered as affording more than conjecture. The will certainly was very obscure.

(*c*) As to what is and is not such, see also, ante, Vol. I. p. 490.

[(*d*) 5 Ves. 465, stated ante, 649.]

(*e*) Hayes's Inquiry, 52.

survivors not extended by implication to an ulterior similar limitation of the same subject to part of the former objects.

in trust to keep the same together till the 1st day of January, 1804, and till that period to dispose of the profits for the benefit of his daughter and granddaughters as therein directed; and then as to the final disposition of the rest and residue of the estate, he declared that all such parts thereof as consisted of real estates, slaves, &c., should be upon further trust, that his said trustees should immediately after the arrival of the period aforementioned divide the same into three equal parts or shares, to and for the separate use and benefit of his daughter F., his granddaughter R., and his granddaughter S., whom he thereby willed and ordained to be his residuary devisees and legatees in manner and form following (that is to say), &c. The testator then proceeded to declare the trusts of the respective thirds in favour of his daughter and granddaughters respectively, and their respective children, with a proviso that if one of his three residuary devisees should die before the period should arrive for making the division without issue, or leaving issue and such issue should die before that period, then the division should be made between the survivors of his said residuary devisees aforenamed, agreeable to the same directions, and *subject to the same terms, limitations and restrictions as were thereinbefore expressed and declared,* and that in the same manner as if all three of his said residuary legatees and devisees were then alive; and if two of them should depart this life before the arrival of such period without issue then living as aforesaid, then he declared it to be his further will and desire that the whole should be *in trust, and to and for the use of the survivor or her issue living at the period aforesaid.* F. and S. died before the 1st of January, 1804, without issue then living; but R. was living at that period. The question was, whether the will was to be read as if the qualifying words, "agreeable to the same directions, and subject to the same terms, limitations," &c., which occurred after the gift to the *two* surviving, had also been inserted after the gift to the *one* surviving. It was contended that necessary implication does not mean only what arises from force of language or plain logical conclusion, but that in a moral sense, and not in a grammatical sense, it is when there exists so strong a probability of intent that it would be irrational to draw a contrary inference. But Lord *Eldon,* after great consideration, held that the words of the will did not raise a necessary inference, that the gift of the whole to the one surviving was intended to be

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subject to the same limitations as the share which that survivor would have taken on a division between the three, or the two, would, by the express words of the will, have been subject to, and that such a construction would be mainly founded on conjecture.

Qualifications expressly applied to original shares not extended by implication to accruing shares.

The principle that restrictions or qualifications applied to original shares are not, by necessary inference, to be extended to accruing shares, is further illustrated by the case of *Gibbons* v. *Langdon* (*f*), where a testator bequeathed 2,800*l.* stock, in trust for his wife for life, and at her decease to be equally divided between his three sons and daughter, the interest of his daughter's share to be paid to her for life, and at her decease the said share to be equally divided among her children living at the testator's decease at the ages therein mentioned. If his daughter had no children living at her decease, her share to be equally divided among such of his sons who were then living, or their issue; *but if any of his said sons and daughter should die before his said wife and without leaving any issue, such share or shares to be equally divided among his other children;* but if all his children should die without issue before his said wife, then to his next of kin. One of the sons died in the lifetime of the wife and without issue, and the question was, whether the share of the daughter, in her deceased brother's share, was subject to the trusts affecting her original share. Sir *L. Shadwell,* V. C., decided in the negative, his Honor observing, that it would be nothing but conjecture if he were to say that the testator meant his daughter to take her accruing share with the same limitations over to her children as her original share was subject to.

Upon the same principle it is clear that, where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions (*g*). [Neither will words creating a tenancy in common in a gift of original shares be extended by implication to accrued shares (*h*). But in *Eyre* v. *Marsden* (*i*), it followed from the construction put on the will by Lord *Lang-*

(*f*) 6 Sim. 260.

(*g*) *Walker* v. *Main,* 1 J. & W. 1, stated post.

[(*h*) *Jones* v. *Hall,* 16 Sim. 500; *Leigh* v. *Mosley,* 14 Beav. 605.

(*i*) 2 Kee. 564, ante, 658; not appealed from on this point, 4 My. & C. 231.]

[*dale*, M. R., that the interest of F. M. in the accrued shares should be in proportion to his interest in the original shares.]

Effect where qualification is necessary to validity of gift of accruing shares.

But here it is proper to observe, that though a departure from the ordinary rules of construction, for the purpose of bringing a devise or bequest within due limits, is not an acknowledged principle of construction, indeed is always professedly discarded; yet it is impossible to deny that, where the bequest of the accruing shares would be void for remoteness, unless the qualifications applied in terms to the original shares are extended to such accruing shares, the Courts have lent a more willing ear to such construction than the preceding cases prepare us to expect. An example of this occurs in the case of *Trickey* v. *Trickey* (*j*), where a testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the mean time; and in case any of the said children should die under twenty-one, and leave one or more child or children *who should survive the testator's daughter* and live to attain twenty-one, such child or children to be entitled to his or their parent's share; provided also, that in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or, there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age.*

Gift of accrued shares supported by engrafting thereon a qualification expressly applied to original shares.

By a codicil the testator willed that, on failure of children and grandchildren of his daughter, as in his will was expressed, his bank stock, &c., should be transferred to certain relations. It was contended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren, was too remote; but Sir *J. Leach*, M. R., observed, that it was

(*j*) 3 My. & K. 560.

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reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter*. If the prior gifts were only in favour of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts.

Survivorship amongst a more extensive class than the original donees.

[It should also be observed that if there be a gift to several (but not all) of a class (as children) with a gift over in case of the death of any to "the surviving children," all the children will be included in the latter gift and not those only who partake of the original gift; and that too, although those who do not so partake are otherwise provided for (*k*).]

To what period survivorship referable.

III. Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some specific point of time. Where the objects are tenants in common, it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is obviously inconclusive; for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors (*l*). The testator's intention that the property shall devolve to the survivors is better effected by an express gift to them than by a joint tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy.

Where the gift is *immediate*.

In seeking for a period to which the words of survivorship could be referred, the obvious rule where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no

[(*k*) *Carver* v. *Burgess*, 18 Beav. 541.]

(*l*) See judgment in *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428. Sometimes a gift to survivors, accompanying a joint tenancy, is considered as merely expressive of the jus accrescendi which is incident to such a devise. See *Doe* v. *Sotheron*, 2 B. & Ad. 628.

other point of time to which they could be referred; accordingly we find this to be the established construction.

Survivorship referred to *death of testator.*

Thus, in the case of *Lord Bindon* v. *Earl of Suffolk* (*m*), where a testator bequeathed 20,000*l.* (due to him from the crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, to the survivors and survivor of them;* Lord *Cowper* said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator.*

This decree, however, was reversed in the House of Lords, on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the crown of rather a desperate nature; but the principle of Lord *Cowper's* decision has since been repeatedly recognized (*n*).

The more recent case of *Smith* v. *Horlock* (*o*) presents an instance of a similar construction in reference to real estate. A testator gave all his real and personal property to be equally divided between his two children *and to the longest liver,* in fee-simple (there were some intervening words, which are immaterial to the point in question); and it was held, that one child who alone survived the testator took the whole.

Notwithstanding prior gifts of annuities.

[And the charging of a general fund with the payment of certain life annuities, subject to which the fund is bequeathed to the "surviving" children of A., would probably be held not to vary the construction: and the fund would vest in possession in such children as survived the testator, subject only to the particular charges (*p*)].

Where gift *not immediate.*

Where, however, the gift was not immediate (i. e. in possession), there being a prior life or other particular interest carved out, so that there *was* another period to which the words in question could be referred, the point was one of greater difficulty.

(*m*) 1 P. W. 96. But see *Hawes* v. *Hawes,* 1 Wils. 165, 3 Atk. 523, where the testator devised an estate to his four younger children in fee as tenants in common, and not as joint tenants, *with benefit of survivorship;* and Lord *Hardwicke* held, that inasmuch as personal estate was bequeathed to them, with a limitation to the survivor, if any of them died *under age and unmarried,* the devise of the real estate was to receive the same construction.

(*n*) See *Roebuck* v. *Dean,* 2 Ves. jun. 267; *Russell* v. *Long,* 4 Ves. 553; [*Bass* v. *Russell,* Taml. 18; *Clark* v. *Lubbock,* 1 Y. & C. C. C. 492; *Ashford* v. *Haines,* 21 L. J. Ch. 496.]

(*o*) 7 Taunt. 129; but see *Barker* v. *Gilcs,* 2 P. W. 280, post; *Blisset* v. *Cranwell,* 1 Salk. 226; *Doe* d. *Borwell* v. *Abey,* 1 M. & Sel. 428, post.

[(*p*) See *Lill* v. *Lill,* 23 Beav. 446; and an analogous point, ante, pp. 144, 145.]

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In *these* cases, indeed, as well as in those of the other class, the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if *indefinite* survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors *at a given period;* nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease.

Survivorship referred to the death of the testator;

One of the first of these cases is *Stringer* v. *Phillips* (*q*), where 100*l.* was bequeathed to five persons at the decease of testator's sisters L. and C. (*r*), equally to be divided between them, *and the survivors and survivor of them;* and if A., one of the five, died before marriage, her share to go over to another; and it was decreed that they took this 100*l.* as tenants in common, and that the limitation to the survivors must be construed to be inserted to give it to such as were the survivors *at the death of the testator*, and to prevent a lapse.

—— to the death of the testator;

So, in *Rose* d. *Vere* v. *Hill* (*s*), where the testator devised his lands to his wife for life, and after her decease to his five children (naming them), *and the survivors and survivor of them,* and the executors and administrators of such survivor, *share and share alike, as tenants in common, and not as joint tenants;* Lord *Mansfield,* and the other Judges of the King's Bench, held that these words were inserted to carry the property to the survivors, in case of the death of any of the devisees in the devisor's lifetime, and that they took as tenants in common.

—— to the death of the testator;

Again, in *Wilson* v. *Bayly* (*t*), where a testator bequeathed certain leasehold estates, in the event of his two sons dying unmarried, and in case neither of them should have issue, to his three daughters, *and the survivors and survivor of them,* and their assigns, as tenants in common, and not as joint tenants.

(*q*) 1 Eq. Ca. Ab. 293; but see 1 Cox's P. W. 97, n.

(*r*) It is probable these persons were legatees for life, but it does not appear in the note extracted by Mr. *Cox*. In Eq. Ca. Ab. the legacy is inaccurately stated as given immediately to the five legatees.

(*s*) 3 Burr. 1881.

(*t*) 3 B. P. C. Toml. 195.

It was contended, on the one hand, that the words of survivorship were intended to give estates to such of them as should be living when the contingency happened, who were then to take as tenants in common; but the House of Lords, reversing a decree of the Irish Chancery, adjudged, that each of the daughters surviving the testator took a vested interest in one-third share, which on her death before the contingency happened was transmissible to her representatives. It is evident, therefore, that the House considered the words of survivorship to refer to the death of the testator.

—— to the death of the testatrix;

So, in *Roebuck* v. *Dean* (*u*), where a testatrix bequeathed certain stock in the funds in trust for her niece for life, and, after her decease, directed that it should be equally divided among her (testatrix's) brother and four sisters, and in like manner *to the survivors or survivor of them;* Lord *Loughborough* held that these words referred to survivors *at the death of the testatrix* (being introduced to prevent a lapse), and not to the death of the niece.

Survivorship, to what period referable;

Down to this period the decisions are uniform in referring survivorship to the death of the testator. In the interval, however, between the last and the next case, a doctrine was broached in *Brograve* v. *Winder* (*v*), also decided by Lord *Loughborough,* which made a considerable inroad upon this rule of construction; but as it will be more convenient to reserve these cases for future consideration as a separate class, we now proceed with the decisions on the general rule.

—— to the death of the testator;

Of these cases, the next is *Perry* v. *Woods* (*w*), where a testator gave 1,500*l.* Old South Sea Annuities, upon trust to pay the interest or dividends to A. for life, and after her decease to B. for life, and after his decease to transfer the principal to C., D. and E., in equal shares and proportions, and to the survivor or survivors of them who should be living at their decease. He gave another sum of stock to a different person for life, with a similar ulterior gift among these persons and the survivors. He then gave another sum of 1,500*l.* Old South Sea Annuities to E. for life, and after her decease to and among her children, to be paid them at twenty-one; and in case E. should die, and leave no child or children, he directed his

(*u*) 2 Ves. jun. 265. As to this case, see Sir *W. Grant's* judgment in *Halifax* v. *Wilson,* 16 Ves. 171; and Sir *J. Leach's* in *Cripps* v. *Wolcott,* 4 Mad. 15, post, p. 675.

(*v*) 2 Ves. jun. 634.

(*w*) 3 Ves. 204.

executors to pay the principal unto C. and D., *share and share alike, or to the survivor of them.* Sir *R. P. Arden,* M. R., held, that C. and D. *surviving the testator* were entitled to the 1,500*l.* as tenants in common. He thought that he was precluded from adopting any other construction by the case of *Stringer* v. *Phillips* (*x*), there being no single circumstance of distinction, except that in some particular cases, as to other legacies, the testator had referred survivorship to the time of division.

Circumstance of there being an *express* bequest to survivors at the division.

Sir *W. Grant,* however, seems to have considered that this circumstance favoured the construction adopted; for (*y*), in allusion to *Perry* v. *Woods,* he said, "Where the testator meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances, and the omission of that reference in another instance *is an indication of a different intention*" (*z*).

"With benefit of survivorship," referred to death of testator.

Again, in *Maberly* v. *Strode* (*a*), the words, "with benefit of survivorship," were held to contemplate the death of any of the objects in the lifetime of the testator. A testator devised his real estate to trustees, to sell and invest the produce with his personal estate, in trust for his son S. for life, and after his decease for his children. But in case his son should die unmarried and without issue, or they should die, being sons, before twenty-one, or being daughters, before twenty-one or marriage, then in trust to transfer such funds unto his (testator's) nephews W. and J., and unto his niece C., in equal proportions, share and share alike, his, her and their issue, or the issue of either of them, to take their parent's share, *with benefit of survivorship* to his nephews and niece. The question was, whether these words referred to survivorship at the death of the testator or of the son. Sir *R. P. Arden,* M. R., held, that they referred to survivorship at the death of the testator, being introduced to prevent a lapse (*b*).

It is remarkable, however, that the same learned Judge, in

(*x*) Ante, 674. [But as neither C. nor D. survived E., there was no necessity to resort to the authority of the dictum (for all the legatees having survived the testator's sisters, it was only a dictum) in *Stringer* v. *Phillips;* for upon the principle of *Harrison* v. *Foreman,* and cases of that class, stated ante, Vol. I. p. 785, the decision must have been the same, although the survivorship had been referred to the time of E.'s death. Sir *R. P. Arden's* remarks, addressed to this state of circumstances in *Maberly* v. *Strode,* viz. that on the latter construction a total intestacy would be occasioned, are inconsistent with those cases.]

(*y*) See *Newton* v. *Ayscough,* 19 Ves. 537.

(*z*) But see *Daniell* v. *Daniell,* 6 Ves. 297, post.

(*a*) 3 Ves. 450.

(*b*) But see *Gibbs* v. *Tait,* 8 Sim. 132, post, where a different construction was given to a similar expression.

*Russell* v. *Long* (*c*), inclined to hold words of survivorship to refer to the death of the tenant for life, not to that of the testator, observing that the latter construction was unnatural, and was not to be adopted if any other could be,—a doctrine which it is difficult to reconcile with *Perry* v. *Woods*.

Survivorship referred to death of testator.

The next case in the series is *Brown* v. *Bigg* (*d*), where a testator bequeathed the interest of his stock in the funds to his wife for life, provided, that if she married again she should be entitled to one moiety only of the interest, the other moiety to be applied to the use of the testator's nephews and nieces "after mentioned, in manner and proportions therein expressed;" and, as to the residue of his personal estate, and the produce of some real, he gave the interest to his wife for life, under the like restrictions as before in case of a second marriage, and after the decease of his said wife without issue by him, the testator left the whole of his personal estate to his several nephews and nieces after named, viz. A., B. and C., and the four children of D., *to be divided amongst them and the survivors of them, share and share alike.* A. having died in the lifetime of the widow, her personal representatives claimed her share as vested at the decease of the testator; and Sir *W. Grant* so decreed, though during the argument he observed, that the general leaning of the Court is against construing the words of survivorship to relate to the death of the testator, if any other period can be fixed upon, the testator generally supposing the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was, that he meant the time of division.

Sir *W. Grant's* remark on *Brown* v. *Bigg*.

In explanation of the seeming inconsistency between his remarks during the argument and his decree, his Honor observed, on a subsequent occasion (*e*), that he "found the result of the authorities, *contrary to what had fallen from the Court during the argument*, founded upon what Lord *Alvanley* had said in one of the cases; *and that in a great majority of them survivorship had been referred to the period of the testator's death.*"

Survivorship referred to death of testator.

This seems to be the latest case in which the construction, which reads words of survivorship as referring to the period of the testator's death, has been applied to bequests of personal

(*c*) 4 Ves. 551. (*d*) 7 Ves. 279.
(*e*) *Shergold* v. *Boone*, 13 Ves. 375.

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estate. Examples, however, of its application to devises of real estate occur in several subsequent cases: as in *Garland* v. *Thomas* (*f*), where the devise was to R. C. for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to the testator's niece S., and his two nieces E. and A., *and the survivor and survivors of them*, and the heirs of the body of such survivor or survivors, as tenants in common, and not as joint tenants: and for want of such issue over: and Sir *James Mansfield* and the Court of Common Pleas, on the authority of *Bindon* v. *Suffolk* (*g*), *Stringer* v. *Phillips* (*h*), and *Rose* v. *Hill* (*i*), held, that the limitation to the survivors was intended to provide for the event of the death of any of the devisees *in the testator's lifetime*, and that all surviving the testator took as tenants in common. [It is observable, however, that the only point really decided was, that the testator did not intend an indefinite survivorship; for all the three nieces survived R. C., who died without issue; so that whether the death of the testator, or of R. C. so dying, were the period to which survivorship was referable, was immaterial to the determination of the case.]

—— to the death of the testator.

So, in *Edwards* v. *Symons* (*j*), where a testator devised certain lands, which he was entitled to on the death of his mother, to trustees, upon trust to receive and apply the rents for the maintenance, education and advancement of his six children (naming them), and immediately on E. (the youngest of the children) attaining twenty-one years, then he devised the said premises to his said six children, *and the survivors and survivor of them*, their heirs and assigns, for ever, to hold as tenants in common, and not as joint tenants. By a codicil the testator extended the devise to another child. Five of the children survived the testator, of whom one died before E. attained twenty-one; and it was held that one-fifth share descended to his heir-at-law, the Court being of opinion that the words of survivorship referred to *the death of the testator*, and not to the period of E.'s attainment to twenty-one.

Applicability of the rule to a devise to a class.

In both the preceding cases it will be observed, the devise was to individuals nominatim. But in the more recent case of *Doe* d. *Long* v. *Prigg* (*k*), the applicability of the construction

(*f*) 1 B. & P. N. R. 82.
(*g*) Ante, 673.
(*h*) Ante, 674.
(*i*) Ante, 674.
(*j*) 6 Taunt. 213.
(*k*) 8 B. & Cr. 231.

to a devise *to a class* came under consideration. The testator devised real estate to his mother *for life*, and after her death to his wife for life, and from and after the decease of his mother and wife, he gave and bequeathed all the above-mentioned premises unto the *surviving* children of J. and W., and to their heirs for ever; the rents and profits to be divided between them in equal proportions. The question was, to what period the words "surviving children" referred; Mr. Justice *Bayley* (who delivered the judgment of the Court) said,—"The testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder immediately upon the testator's death, in the then children of J. and W."

Remarks upon the preceding cases.

This case closes the long series of authorities in favour of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects as tenants in common, and the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivorship being referable to that period. The sequel will serve to shew that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle; for to the inadequacy of the grounds upon which the rule was established may, it is conceived, be ascribed, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping, and, as we shall see sometimes, groundless exceptions ingrafted upon it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion, in reference at least to personal estate. For the reader, on a perusal of the cases which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life or any other limited interest, and after the determination of such interest to certain persons nominatim, or to a class of persons as tenants in common, *and the survivors of them*, these words are construed as intended to carry the subject of gift *to the objects who are living at the period of distribution*. This result, however, was not attained until after many gradations. In the first instance

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Survivorship referred to *period of distribution.*

survivorship was held to relate to the period of distribution and not to the death of the testator, on the ground that the subject of gift (being the produce of lands devised to be sold) was not in esse until this period.

Thus, in the case of *Brograve* v. *Winder* (*l*), where a testator devised his real estates to A. for life, with remainder to his first and other sons in tail male, and in default of sons of A., gave his estates to trustees to sell, and willed that the money arising by such sale or sales should be equally distributed among the three sons and daughters of W., *or the survivors or survivor of them,* and that such fourth or other part as the daughter should become entitled to, should be settled in a certain manner: Lord *Loughborough* admitted, that in general it was perfectly true that these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a very different effect. "In this will," observed his Lordship, "the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, 'or the survivors or survivor;' that excludes the possibility of taking in, as objects of the distribution, persons who are dead."

Subject of gift being the produce of a future sale.

Survivorship referred to the period of distribution.

So, in *Newton* v. *Ayscough* (*m*), where a testator gave to A. 400*l.* four per cent. Consolidated Annuities, for her to receive the interest during her life, and after her decease the 400*l.* to be sold and divided among his residuary legatees, *or the survivor of them, share and share alike;* and he appointed B., C. and D. residuary legatees of his will, share and share alike. On a question, whether one of the legatees, dying in the lifetime of A., was entitled, Sir *W. Grant* said, "To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will."—"Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, 'or the survivor of them, share and share alike.' That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings

Sir *W. Grant's* judgment in *Newton* v. *Ayscough.*

(*l*) 2 Ves. jun. 634. (*m*) 19 Ves. 534.

this case much nearer *Brograve* v. *Winder* (*n*), than *Perry* v. *Woods* (*o*). In *Brograve* v. *Winder*, Lord *Loughborough's* opinion was, that the survivor at the time of the sale, not at the death of the testator, was intended. In *Perry* v. *Woods*, the testator had by his will furnished evidence of his own intention with regard to the meaning of the word 'survivor.'" —"The case of *Russell* v. *Long* (*p*), decided by Lord *Alvanley* soon afterwards, shews that he did not conceive there was any rule requiring survivorship to be generally referable to the death of the testator, but thought it might refer either to that period or the death of the tenant for life, according to the apparent intention of the testator."

The inconsistency between the expressions of Lord *Alvanley*, in *Russell* v. *Long*, and his decisions in *Perry* v. *Woods* (*q*), and *Maberly* v. *Strode* (*r*), has been already pointed out. The latter shew that he *did* consider survivorship in these cases to be generally referable to the death of the testator, as the only mode of reconciling it with the tenancy in common; and even Sir *W. Grant* himself, in *Shergold* v. *Boone* (*s*), stated this to be the result of the authorities; which opinion accords with his Honor's decision in *Brown* v. *Bigg*.

It is a circumstance worthy of remark, that, down to this period, in all the cases where survivorship had been referred to the time of division, the expression was "*or* the survivor," although no attempt was made to found a distinction on this particular phraseology.

Survivorship referred to the period of distribution on special grounds.

Another instance, in which the case of *Brograve* v. *Winder* has been followed, is *Hoghton* v. *Whitgreave* (*t*), where a testator gave his real, and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them*, viz. A. M. &c.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. The question was, whether the nephews and nieces

(*n*) Ante, 680.
(*o*) Ante, 675.
(*p*) Ante, 677.
(*q*) Ante, 675.
(*r*) Ante, 676.
(*s*) 13 Ves. 375.
(*t*) 1 J. & W. 146. [See also *Williams* v. *Tartt*, 2 Coll. 85.]

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surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir *T. Plumer*, V. C., held, that the former *were* entitled, considering the case as not distinguishable from *Brograve* v. *Winder* (*u*). "The subject-matter," said his Honor, "is not to be converted into money till after the death of the tenant for life; it is then that for the first time anything is given to the trustees. It is given upon trust to be converted into money, and then to be divided. Thus, not only was there no bequest till the widow's death, but the subject-matter did not until then exist in the shape and form in which it is given. It is given to those persons and the survivors or survivor of them, and seems to fall under the general rule, that legacies given to a class of persons vest in those who are capable of taking at the time of distribution (*x*). Here he mentions them nominatim, but he then takes off the effect of that by adding the words, 'and to the survivors or survivor.' He cannot mean such as survive him, for the governing clause, that containing the gift, refers to the death of his wife as the period when it is to operate." And his Honor afterwards adverted to the subsequent gift, "in manner aforesaid," as precluding the argument that it was to go to those who survived him after the death of his wife.

As to there being another bequest *expressly* to survivors *at distribution.*

Another ground upon which a gift to survivors has been held to refer to survivors at the period of distribution, and not at the death of the testator, is that some other subject-matter given to the same objects is *expressly* limited in that manner.

Thus, in *Daniell* v. *Daniell* (*y*), where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then as to 1,000*l.*, part thereof, to pay the interest to his sister J. D. during her life, and at her decease the 1,000*l.* to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will another sum of 1,000*l.* was given to trustees, in trust, after the decease of his wife without issue by him, to pay his said sister the interest for life, and after her decease the principal to be paid to the said J. and F., share and share alike, in *case they should be living at their mother's death;* but in case either of them should die before her, then the whole to be paid to the

(*u*) Ante, 680.

(*x*) This is a mistake; see ante, 143.

(*y*) 6 Ves. 297.

survivor. F. died in the lifetime of the testator's widow; at her death, the testator's sister J. D. being also dead, a bill was filed by J. for the first-mentioned 1,000*l.*, as the survivor at the death of the last surviving tenant for life, which was resisted by the representatives of F., claiming as one of the survivors at the death of the testator. Sir *W. Grant* said, "It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (i. e. J. D.) were dead; he conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms, instead of opposing, this construction,* shewing that the period of division was the period at which he intended it to vest. *He had the same meaning as to this fund:* he who is alive when the division takes place takes the whole of the capital."

Remarks upon *Daniell* v. *Daniell.*

The reasoning of this case agrees with that of Lord *Hardwicke* in *Hawes* v. *Hawes* (*z*), and it would seem with Lord *Alvanley's* in *Perry* v. *Woods* (*a*); but stands singularly contrasted with Sir *W. Grant's* own observations upon the latter case in *Newton* v. *Ayscough* already noticed, where he considered that survivorship being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favour of a *different* construction in the bequest in question, where such expressions were omitted (*b*). The only circumstance of distinction is, that in *Perry* v. *Woods* the other bequest was to different objects.

Survivorship referred to period of distribution, there being another gift *expressly* to survivors at that period.

The doctrine of the case of *Daniell* v. *Daniell* was referred to with approbation, and adopted in the recent case of *Wordsworth* v. *Wood* (*c*), where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently of the rental of his said estates, which he gave to *his surviving female children.* Lord *Langdale,* M. R., held, that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to

(*z*) Ante, 673, n.

(*a*) See ante, 675. See also *Sheppard* v. *Lessingham,* Amb. 122, ante, Vol. I. p. 457.

(*b*) See also *Campbell* v. *Campbell,* 4 B. C. C. 15.

(*c*) 2 Beav. 25, 4 My. & Cr. 641.

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introduce a new class of daughters. His Lordship, in the course of his judgment, said, "The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place." Upon appeal, Lord *Cottenham* also considered that, independently of the general rule, there was sufficient ground for holding the deceased daughters to be excluded, according to the cases of *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v. *Daniell*; his Lordship more particularly expressing his concurrence in the line of argument pursued by Sir *William Grant* in the last-mentioned case; [and the House of Lords affirmed the decision on the same grounds (*d*).]

Remarks upon *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v. *Daniell*.

The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds; and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist.

History of the present doctrine.

It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord *Loughborough*, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of its authority (*e*). Sir *W. Grant*, in *Daniell* v. *Daniell* (*f*), probably disapproving of the reasoning which led to the adoption of the rule, as well as of the distinction which had been engrafted on it, applied the principle of the exception to a case not warranted by the terms of the former decision; and although he did not treat the established rule with the same professions of reverence and submission as Lord *Loughborough*, yet, by placing his own case upon special grounds, impliedly bowed to its authority. In *Newton* v. *Ayscough* (*g*), however, the same learned Judge went a step further, and, while he

[(*d*) 1 H. of L. Ca. 129, 11 Jur. 593.
(*e*) See *Brograve* v. *Winder*, ante, 680.
(*f*) Ante, 682.
(*g*) Ante, 680.

applied Lord *Loughborough's* construction in *Brograve* v. *Winder* to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which another learned Judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

Survivorship referred to the time of distribution.

The case here referred to is *Cripps* v. *Wolcott* (*h*), where the testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons A. and B., and C. her daughter, *and the survivors or survivor of them, share and share alike.* A. died in the lifetime of the husband; B. and C., as the survivors at his death, claimed the whole. Sir *J. Leach* said, "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer* v. *Phillips* (*i*). *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.* This is the principle of the cited cases of *Russell* v. *Long* (*k*), *Daniell* v. *Daniell* (*l*), and *Jenour* v. *Jenour* (*m*). In *Bindon* v. *Lord Suffolk* (*n*), the House of Lords found a special intent in the will, that the period of division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. The two cases of *Roebuck* v. *Dean* and *Perry* v. *Woods,* before Lord *Rosslyn* (*o*), do not square with the other authorities. *Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous estate for life.*"

General rule as stated by Sir *J. Leach.*

(*h*) 4 Mad. 11. See also *Browne* v. *Lord Kenyon,* 3 Mad. 410.
(*i*) This is not correct; see ante, 674.
(*k*) Ante, 677.
(*l*) Ante, 682.
(*m*) Post, 692.
(*n*) Ante, 673.
(*o*) *Perry* v. *Woods* was decided by Lord *Alvanley.*

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Remarks on *Cripps* v. *Wolcott.*

Although this seems to have been at the time a very bold decision, involving as it did direct opposition to no less than nine cases (one decided by the House of Lords (*p*) ), and although it is to be regretted, that the actual state of the authorities was not brought to the attention of the learned Judge, yet the rule of construction which he propounded seems to be so reasonable and convenient for general application, that it is not surprising that subsequent Judges have been favourably disposed to its adoption, as will appear by the cases about to be stated.

Survivorship referred to period of distribution.

Thus, in the case of *Gibbs* v. *Tait* (*q*), where a testator gave the residue of his personal estate to his wife for life, and after her decease or marriage again, he gave *what should be remaining of such residuary monies*, in manner thereafter mentioned; that is to say, one moiety to J., son of T., the other moiety unto and equally between all the daughters of T., and their issue, *with benefit of survivorship and accruer.* Sir *L. Shadwell*, V. C., held, that the daughters who were living at the death of the widow were entitled, to the exclusion of the representatives of one who survived the testator, and died without issue in the lifetime of the widow. His Honor observed, that the testator speaks of the residue as if it would be uncertain at the death or marriage again of the widow what the residue would consist of; and therefore he meant that those only should take who should be in existence when the property which they were to take was to be distributed.

Remark on *Gibbs* v. *Tait.*

It is observable that the Vice-Chancellor does not in terms recognize the general rule laid down in *Cripps* v. *Wolcott*, but cautiously pursues a narrower line of reasoning, by which his decision is brought into consistency with and under the shelter of *Brograve* v. *Winder*, and that class of cases.

Survivorship referred to period of distribution.

The same learned Judge, however, seems to have unhesitatingly adopted this construction, without it should seem the same limited grounds of argument, in the subsequent case of *Blewitt* v. *Roberts* (*r*), where a testator gave an annuity to his wife for life, and directed that after her death the annuity should be equally divided between his children (naming six) *and the survivors or survivor.* Sir *L. Shadwell* held, that such of the legatees as survived the widow were entitled in equal

(*p*) *Wilson* v. *Bayly*, 3 B. P. C. Toml. 195.

(*q*) 8 Sim. 32. See also *Wordsworth* v. *Wood*, ante, 683.

(*r*) 10 Sim. 491, 4 Jur. 501, 9 L. J. Ch. 209.

shares: [and upon appeal Lord *Cottenham* affirmed his decision (*s*).]

The construction adopted in this case seems to agree with and to be supported in its full extent by the earlier case of *Pope* v. *Whitcombe* (*t*), which is another important authority for the general rule, which refers survivorship to the period of distribution. The testatrix gave the interest of the residue to her brother, during his life, and after his death she gave the residue to her executors, in trust for four persons by name, *and the survivors and survivor of them*, share and share alike, to be paid to them respectively when they should attain twenty-one, with interest in the mean time. Of these four persons, two died during the life of the brother: Lord *Eldon* held, that they did not take vested interests in any part of the residue, but that the whole belonged to the two survivors; such being, his Lordship considered, the intention of the testatrix.

Survivorship referred to period of distribution.

[This line of cases may be closed with a statement of two of the most recent as well as of the most important and direct of the numerous authorities in favour of the construction adopted in *Cripps* v. *Wolcott*. The first is that of *Neathway* v. *Reed* (*u*), where a testator bequeathed the interest of his funded property to his sister for her life, and after her decease such property to be equally divided between her *surviving* children: in another part of his will he had, amongst other legacies, made an immediate bequest to his sister's surviving children of 30*l.* each. Lord *Cranworth*, assisted by the Lords Justices, decided that the word "surviving" in the former bequest referred to the sister's death. Sir *G. J. Turner*, L. J., observed conclusively that if the gift had been to the sister for life and after her decease to "her children" without the word "surviving," the children living at the testatrix's death would have taken: that some effect must be given to the word "surviving," and that it must mean surviving the sister (*x*). The Court also thought their decision could not be influenced by the fact that in the immediate bequest the same word must have a different meaning; for in that place there was no other meaning which it could have (*y*).

[(*s*) Cr. & Ph. 274, 5 Jur. 979, 10 L. J. Ch. 342.]

(*t*) 3 Russ. 124.

[(*u*) 3 D. M. & G. 18.

(*x*) See also *In re Crawhall's Trusts*, 2 Jur. N. S. 892. This remark however is applicable only where the gift is to a class or to individuals as joint tenants.

(*y*) See also *Salisbury* v. *Petty*, 3 Hare, 86.

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[It was remarked by Sir *J. Knight Bruce*, V. C. (*z*), that in *Cripps* v. *Wolcott* there was no gift to the children except in the direction to divide. And the same remark may be made on the case last stated. But the fact seems to be immaterial (*a*); it was not relied on by Lord *Cranworth*, nor was the absence of it considered by Sir *J. Romilly*, M. R., as any objection to an application of Sir *J. Leach's* rule to the case of *Macdonald* v. *Bryce* (*b*), where a testator bequeathed the residue of his personal estate to A. the son of B., upon his coming of age; failing him, to the next male child of A. who should attain the age of twenty-one; failing the male children of A., to the seven daughters of C. and *the survivors and survivor of them* in equal proportions, namely (naming them); and the M. R. held, that the case of *Cripps* v. *Wolcott* was binding upon him and governed the case before him: the result being that, as the gift was necessarily contingent until it could be ascertained that B. had died without male issue (which could not be before his death), those only of the seven legatees who survived B. could take (*c*).

So where the income of personal property is bequeathed to several persons for life, and after the death of all to their surviving children, those children alone take who are living at the death of the last surviving tenant for life (*e*).

If testator survives tenant for life, death of the *former* is the period referred to.

But as between the death of the testator and of the tenant for life, words of survivorship will generally be referable to whichever of the two events happens last. The rule which refers these words to the death of the tenant for life, must

[(*z*) *Taylor* v. *Beverley*, 1 Coll. 111.

(*a*) 4 Hare, 398; ante, Chap. XXV. sect. 6.

(*b*) 16 Beav. 581; see also *Eaton* v. *Barker*, 2 Coll. 124; *Hearn* v. *Baker*, 2 Kay & J. 383.

(*c*) See also *Taylor* v. *Beverley*, 1 Coll. 108; *Buckle* v. *Fawcett*, 4 Hare, 536; *Whitton* v. *Field*, 9 Beav. 368; *Davies* v. *Thorns*, 3 De G. & S. 347; *Pritchard's Trust*, 3 Drew. 163; *Gooch* v. *Slater*, 3 Jur. N. S. 881; *Cambridge* v. *Rous*, 25 Beav. 409; *Hesketh* v. *Magennis*, 27 ib. 395; *Watson* v. *England*, 15 Sim. 1; *Antrobus* v. *Hodgson*, 16 Sim. 450. (See as to the last two cases, ante, Vol. I. p. 786.

(*e*) *Stevenson* v. *Gullan*, 18 Beav. 615. The case of *Gummoe* v. *Howes*, 23 Beav. 184, 192, is not inconsistent with the rule. There the gift was to A. and B. for their lives as tenants in common; with a gift, in case of the death of either without issue, to the survivor; but if either should die leaving issue, her share was given to her children: and *after the death of both* the whole was to be conveyed, transferred, or paid to the heirs of their bodies (construed children) share and share alike, or to the survivors or survivor of them: but if A. and B. should die without children, then over. It was held that a child of A. which survived its parent but died before B. was entitled to a share. In fact, the gift over after the death of both which, standing alone, might have given B. a life interest in the share of A. after her death, and have pointed out the death of B. as the period of survivorship for all the children, was explained by the previous gift over, on the death of each

[therefore be understood as qualified by the condition that the tenant for life survives the testator. Otherwise the death of the testator, as the period of actual distribution, must also be regarded as the period of survivorship (*f*).

The same principle is clearly applicable where there is no prior particular bequest, but the gift to the legatees among whom the survivorship is to take place includes all of the prescribed class who may come into existence before a stated period. Thus, if a testator make a bequest to all the children of A. who shall be born in their father's lifetime or within nine months after his death, as tenants in common, with benefit of survivorship; those only who survive their father or the nine months named are entitled to a share (*g*).]

Result of the cases as to personalty.

In this state of the recent authorities one scarcely need hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favour of those who survive the period of distribution, and of those only.

Distinction in regard to real estate.

It must be remembered, however, that the cases of *Garland* v. *Thomas*, *Edwards* v. *Symons*, and *Doe* v. *Prigg* (the last decided after *Cripps* v. *Wolcott*, [and though often disapproved of (*h*), yet never actually overruled]), forbid the application of this rule to devises of real estate; although it is difficult to discover any ground for making them the subject of a different rule, unless a reason can be found in the greater tendency in devises of real estate towards a vesting of the interests of the devisees. The reader, however, cannot be recommended to rely implicitly on any such distinction: and it must be left for future decisions to tell us what is the actual rule of construction on this perplexing point in reference to real estate.

Exceptions to

[And whether the subject be real or personal estate, it must

parent, of her share to her children; so that survivorship in the several families was referred to a different period for each family.

(*f*) *Spurrell* v. *Spurrell*, 11 Hare, 154.

(*g*) *Hodson* v. *Micklethwaite*, 2 Drew. 294.

(*h*) *Wordsworth* v. *Wood*, 1 H. of L. Ca. 129; *Buckle* v. *Fawcett*, 4 Hare, 536; *Taylor* v. *Beverley*, 1 Coll. 108. [In *Littlejohns* v. *Household*, 21 Beav. 29, Sir *J. Romilly*, decided a case of real estate in conformity with *Cripps* v. *Wolcott*; but the cases at law were not cited, and in a subsequent case of *Haddelsey* v. *Adams*, 22 Beav. 271, 272, the M. R. guarded himself against any determination of the question, whether *Cripps* v. *Wolcott*, was applicable to real estate.]

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the general rule in *Cripps* v. *Wolcott*.

[be remembered that the rule, as laid down by Sir *J. Leach*, in *Cripps* v. *Wolcott*, admitted an exception in favour of a special intent to the contrary to be found in the will. It is to be considered, therefore, in what cases such an intent will be deemed so clearly manifested as to exclude the application of the general rule.]

Special gift to survivors explanatory of prior general one.

It sometimes happens that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors, to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As in the case of *Weedon* v. *Fell* (*i*), where A. bequeathed a sum of money in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage: for his intent was, that *if any of his four children should die before twenty-one or days of marriage*, then his, her or their share so dying should go and be equally divided *among the survivors*. It was held that a child attaining twenty-one was entitled, though she died in the lifetime of her mother.

[This was a simple case. But less conclusive evidence of the testator's intention has been held sufficient to authorize a departure from the general rule. Thus, in the case of *Salisbury* v. *Lambe* (*j*), where a testator bequeathed a sum of money in trust for his five daughters, equally among them and their respective children, and directed that if any of the five should die her share should be in trust for her daughters and younger sons and the *survivors and survivor* of them: and in case there should be no such daughter or younger son, *or all should die before twenty-one or marriage*, then over; Lord *Northington* held, that the words "survivors and survivor" could only mean to give cross-remainders to the children before the devise over took place, i. e. before they attained the age of twenty-one, and that after that age their shares were not divested by death in the mother's lifetime.

So in the case of *Rogers* v. *Towsey* (*k*), where a testator bequeathed to each of his two sisters the interest of 5,000*l.* stock for her life, and as each died the said stock to be equally

(*i*) 2 Atk. 123. [(*j*) 1 Ed. 465, Amb. 383.
(*k*) 9 Jur. 575; cf. *Bouverie* v. *Bouverie*, 2 Phill. 349.

[divided between the testator's nieces A., B., C., D. and E., *or the survivors of them:* he bequeathed one moiety of the residue to A., and the other moiety equally between B. and C. "In case his niece C. should not *survive him*, her children" to stand in her place, "and the same of any other of his nieces who might marry and leave children." Sir *J. Wigram*, V.C., assuming the general rule to be as stated in *Cripps* v. *Wolcott*, held that the last clause shewed a special intent on the testator's part to refer the word "survivors" to his own death.

Substitution of issue for such of the "survivors" (parents) as may die.

Again, in the case of *Shailer* v. *Groves* (*l*), where a testator bequeathed 1,000*l.* stock to his wife for her life, at her decease, one-half of the produce to be received and divided amongst his *surviving* brothers and sister and *their* issue, share and share alike, the same learned Judge decided that it was not necessary to come to any conclusion on the general rule, because there were circumstances in the case which made it clear to him the survivorship there intended had reference to the testator's death. The V. C. read the gift as one to a certain class, and if any of that class should die before the period of distribution, the issue of the one so dying to be *substituted* in the parent's place. Now, as substitution implies a primary object to whom there is a prior gift, the objects of such prior gift in this case could not be confined to such as survived the period of distribution; for then the time for ascertaining the class, and within which substitution was to take place, would be identical, and therefore substitution would be altogether excluded (*m*).

Survivorship referred to testator's death on the context.

And in the case of *Evans* v. *Evans* (*n*), where a testator bequeathed a fund to his wife for her life, and after her decease to and equally amongst the *surviving* children of his brothers A. and B., except the youngest son of A., whose share he increased by 30*l.*, and then provided that if either of the said children should die leaving no issue, his or her share should be divided among *the survivors*. Sir *J. Romilly*, M. R., held, that the gift

[(*l*) 6 Hare, 162. But there is a remarkable discrepancy between this report and those in 11 Jur. 485, and in 16 L. J. Ch. 367, which represent the decision to have been, that the word "surviving" referred to the period of distribution; and the decree is drawn up in accordance with this latter view. But the report adopted in the text seems to be correct, the word "their" being of equal force with the word "them" in *Tytherleigh* v. *Harbin*, 6 Sim. 329; and *Gray* v. *Garman*, 2 Hare, 268. See also Sir *J. K. Bruce's* judgment in *Kidd* v. *North*, 3 D. M. & G. 951, 2nd paragraph.

(*m*) See also *Forbes* v. *Peacock*, 11 Sim. 159, per *Shadwell*, V. C.

(*n*) 25 Beav. 81. See also *Bird* v. *Swales*, 2 Jur. N. S. 273, post. And see and consider *Blackmore* v. *Snee*, 1 De G. & J. 455.

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[was to those children who survived the testator. Referring to the gift over, the learned Judge observed that unless he struck it out of the will he could give it no meaning that would not repel the application of *Cripps* v. *Wolcott*. It was necessarily admitted that it could not refer to death without issue happening *after* the death of the tenant for life (*o*): and taking it therefore to mean (as it must) death without issue before that period, the unavoidable conclusion was, that a child who survived the testator, though he died before the tenant for life, leaving children, took a share which did not pass away from him.]

Rule where gift to survivors is contingent.

It is to be observed, that where the gift to survivors is to take effect *upon a contingency*, none of the reasoning (infirm as that reasoning is) upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tenancy in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely (i. e. whenever the contingency should happen), or is restricted to survivorship within a given period after the testator's decease.

Survivorship confined to the death of the tenant for life.

Thus, in *Jenour* v. *Jenour* (*p*), where a testator bequeathed 400*l.* Long Annuities to his sister for life, and declared that 200*l.* should be his brother's for life if he survived his sister, and after his decease should be equally divided between his two nephews J. and M., *and go to the survivor of them in case his brother should leave no lawful issue;* if he should, such issue should be in place of their father with regard to the said annuities. The sister and brother having both died in the lifetime of J. and M., M. claimed to be absolutely entitled to a moiety. The question seems to have been whether survivorship was indefinite, or referable to the death of the surviving legatee for life. Sir *W. Grant*, observing that he was always indisposed to indefinite survivorship, adopted the latter construction; that is, that the legatees should take absolutely, if living at the death of the tenant for life; if then dead, leaving issue, then the issue to be entitled in the place of their parent. On appeal, Lord *Eldon* was of the same opinion.

Executory devise to A., B.

In *Roe* d. *Sheers* v. *Jeffery* (*q*), it seems to have been taken for granted that an executory limitation for life, to certain persons

[(*o*) See *Jenour* v. *Jenour*, stated infra.]

(*p*) 10 Ves. 562.
(*q*) 7 T. R. 589.

and C., *or the survivors.*

or the survivors, was not confined to survivors at the happening of the contingency; but, as the devise had not at the death of the object fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period. The devise was to A. for life, remainder to B. in fee; but in case B. should depart this life and leave no issue, then that the premises should return unto E., M. and S., *or the survivors or survivor of them, equally to be divided between them.* E., M. and S. survived the testator, but one of them died in the lifetime of A., but *after* the contingency had happened by the death of B. without issue.

The two surviving tenants for life recovered the property, on a different point of construction (*r*); and no objection seems to have been made to their claim to the entirety, on the ground that the limitation to survivors was restricted to survivors at the death of the testator, or at the happening of the contingency. [Indeed, considering that the estates in the first instance devised to E., M. and S. were for life only, it is probable even if the question had been raised, that the survivorship would have been held indefinite, so that whenever either of them died the survivors would take his share as a *remainder* (*s*).]

Executory devise to survivor referred to death of testator.

But in the case of *Doe* d. *Lifford* v. *Sparrow* (*t*), an executory limitation to survivors was held to refer to the death of the testator (the devise being to A. and B. in fee as tenants in common, and in case of the death of either without children to the survivor); but this construction was aided by the context, particularly by a gift over of the entire property, in case *both* the devisees were dead *at the time of the decease of the testator* without children, from which the Court inferred, that in the clause in question, he contemplated death at the same period.

Survivorship referred to the death of the tenant for life.

[Again, in the case of *Bird* v. *Swales* (*u*), where a testator devised all his real and personal estate to A. and B. for their lives, and after their deaths he devised the whole of his estate unto the seven children (naming them) of A., to be equally

(*r*) Ante, 488.

[(*s*) See *Nevill* v. *Boddam*, 29 L. J. Ch. 738, 6 Jur. N. S. 573: and *Haddelsey* v. *Adams*, 22 Beav. 266, where the M. R. relied much on the phrase "with benefit of survivorship" as taking the case out of the authority of *Cripps* v. *Wolcott*, on the ground that this phrase described, not the persons to take, but the manner of their taking. But was not the circumstance of the devisees having life estates only an essential ingredient? See *Smart* v. *Clark*, 3 Russ. 365; *Tilson* v. *Jones*, 1 R. & My. 553; *Bowen* v. *Scowcroft*, 2 Y. & C. 640; all stated post, Chap. XLVIII.]

(*t*) 13 East, 359.

[(*u*) 2 Jur. N. S. 273.

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[divided amongst the survivors or survivor of them, share and share alike; and should any of the said children die leaving issue, the testator gave the share of the one so dying to such issue. The seven children survived the tenants for life, and it was held by Sir *J. Stuart*, V. C., that the gift over referred to the case of the death of any one of the seven within the lifetime of the tenant for life, and that, in the event which had happened, the seven children had acquired indefeasible interests.

Survivorship confined to death of tenant for life.

So, in *Evans* v. *Evans* (*x*), where a testator bequeathed a fund to his wife for her life, and after her death to the surviving children of his two brothers, except X., who was to have a stated sum more than his brothers: and should either of the said children die leaving no issue, his or her share to be then equally divided among the survivors: the question was to what period the word "surviving" related, and for the determination of that question Sir *J. Romilly*, M. R., took as his main ground that the gift over of the share of any one on his death leaving no issue meant death in the lifetime of the tenant for life, at whose death the shares, according to settled rules and principles, were indefeasibly vested.

Distinction where prior gift is contingent on event corresponding to gift over.

But where the original gift is not vested, but contingent upon the happening of the event the non-occurrence of which is the occasion of the alternative gift over, survivorship is, almost necessarily, referable to that event, whensoever it may happen (*y*).

Whether survivorship relates to the death of tenant for life or to the contingent event upon which the gift depends.

Assuming, however, the proposition to be established, that a gift to survivors limited to take effect upon an express contingency, indefinite in point of time, is by construction to be confined in its operation to the case where the contingency happens within a limited period, the question still remains, to what point of time within the limits of that period does the survivorship refer? The event may happen at any moment before the expiration of the period, and if it does, the question to be determined is this, whether to answer the description of a "survivor" a person need only be living at the time when the contingency happens, or whether he must also outlive the space intervening between that time and the expiration of the period. The answer to this question supplied by the authorities affirms the former of these alternatives; the cases being reducible to this proposition, that where

[(*x*) 25 Beav. 81.
(*y*) *Carver* v. *Burgess*, 18 Beav. 541, 7 D. M. & G. 97.

[a bequest is made to several as tenants in common, and in the event of the death of any of them, coupled with a contingency, the "shares" of the deceased legatees are given over to the "survivors," under the latter gift, those are entitled who are living at the time when the contingency happens, and not such only as survive the tenant for life.

Survivorship held to refer to the event where the gift is of the "share" of deceased legatee.

Thus, in the case of *Crowder* v. *Stone* (*z*), already stated, Lord *Lyndhurst* decided that the shares which became subject to the operation of the bequest to the survivor and survivors were divisible among such of the legatees as were living at the time *when the events happened* on which the shares were to go over respectively.

So, in the case of *Bright* v. *Rowe* (*a*), also stated above, it must have been assumed that the survivorship intended was a survivorship at the time when the several contingencies happened; since otherwise the M. R. could not have decided (as he did) that the personal representative of the child who died without issue in 1829, before the shares became payable, was entitled under the gift to "survivors" to an interest in the share of the child who died in 1826.

Again, in the case of *Ive* v. *King* (*b*), where a testator devised and bequeathed property to his wife for life, remainder to trustees in trust to sell, and gave one moiety of the proceeds to his wife's sister and brothers (naming them), as tenants in common; "and in case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike." A., one of the brothers, died a bachelor before the testator in the wife's lifetime; and it was held by Sir *J. Romilly*, M. R., that another brother, B., who survived A. and the testator, though he afterwards died in the wife's lifetime, was entitled under the gift to survivors to participate in the share of A.

Whether the "survivor" must survive the testator.

It seems, however, that the M. R. thought that a person claiming in such a case under the description of a "survivor" must be alive when the latter of the two events (i. e. the death of the testator, and the death under the stated circumstances of the prior legatee) should happen (*c*). In other words, he read the gift to "survivors" as a gift to a class; not as a bequest to

[(*z*) 3 Russ. 217, ante, 650.

(*a*) 3 My. & K. 316, ante, 662. See also *Ranelagh* v. *Ranelagh*, 2 My. & K. 441, ante, 651.

(*b*) 16 Beav. 46.

(*c*) See report in 16 Jur. 491. But see *Willetts* v. *Willetts*, 7 Hare, 38.

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[the *individuals* who might survive the death of any one of their number. The latter construction would lead to lapse and partial intestacy.

Distinction between gift over of "share" of deceased legatee and gift over of whole fund.

In all the foregoing cases the disputed gift has been of the "share" of the primary legatee dying in the way mentioned: and it cannot with certainty be affirmed, that the same constuction would be applicable where, in case of one dying under certain circumstances, the *whole* fund is given to the survivors. The distinction appears to be this: in the former case the testator is clearly contemplating the event of one legatee surviving another, and not of any one of them outliving the tenant for life; for, by speaking of the deceased legatee's "share," he shews that he is looking to the series of events as they occur in their order,—the order, that is, in which they are mentioned in his will. Having brought up the thread of his provisions to the period of the legatee's death, he continues it from that point, and thereby denotes succession, not to the tenant for life, but to the deceased legatee. But in the latter case he returns to a former point of departure, and commences de novo an entire redistribution of the whole fund, by which means he indicates a succession to the tenant for life, and an intention to consider the period of that person's decease as the point to which survivorship is to be referred.

By means of this distinction, the case of *Watson* v. *England* (*d*) may perhaps be reconciled with the preceding authorities. In that case a testatrix having a power to appoint a sum of 1,500*l.* appointed it to her husband for life, and after his death to be equally divided among the five daughters of her sister: if any of the said daughters should die in the husband's lifetime leaving issue, such issue to take their mother's share; but in case any of them should die during the husband's lifetime without issue, then "the said sum of 1,500*l.* shall be divided, share and share alike, amongst the *surviving* said daughters." It was held by Sir *L. Shadwell*, V. C., that the husband's death was the time to which the survivorship here intended was to be referred.

And apart from this distinction, if there be a final gift over of the whole in case all the intermediate legatees (amongst whom the survivorship is to take place) should die before the tenant for life, those only who survive the tenant for life will take, since the testator will be held to have explained by the

[(*d*) 15 Sim. 1. But see as to this case, ante, Vol. I. p. 786, n.

[final gift what he meant by the indefinite terms of survivorship previously used (*e*).]

Where the time of distribution depends upon the happening of two events, one of which is personal, and the other is not personal, to the legatees (as where the gift is to children attaining twenty-one, and the distribution is postponed until the youngest object attains that age [or until the death of a previous legatee for life,)] the Courts strongly incline to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

Survivorship referred to majority in preference to another event.

Thus, where (*f*) a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus:—"And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the Three per Cent. Consolidated Bank Annuities for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike." The question was, at what time the interest of the children vested. Sir *J. Leach*, M. R., observed, that the Court would not, unless forced by the plainest words, adopt a construction by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one: that here the word "survivor" admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children who died before attaining twenty-one took, during their lives, a vested interest in

[(*e*) *Daniel* v. *Gosset*, 19 Beav. 478. 349.]
Compare *Bouverie* v. *Bouverie*, 2 Phill.

(*f*) *Crozier* v. *Fisher*, 4 Russ. 398.

that proportion of the rents and profits which corresponded to their presumptive shares; but that such interest determined on their deaths.

Survivorship referred to majority in preference to death of tenant for life.

[And in the case of *Tribe* v. *Newland* (*g*), where a testator gave the interest of a sum of 3,000*l.* to his daughter for her life, and after her decease he gave the said sum to trustees in trust for the children of his said daughter, share and share alike, to be paid to such of them as should be sons at their ages of twenty-one years, and to such of them as should be daughters at their ages of twenty-one years, or respective days of marriage, with interest in the meantime for their maintenance, and with benefit of survivorship in the event of any of the said children dying without issue: it was held by Sir *J. Parker*, V. C., that the words of survivorship referred to the time of payment mentioned just before. He thought they formed part of a sentence providing for what was to be done *in the meantime*, until the shares became payable; and that the Court would not, without a much more clear indication of intention than was to be found in that will, adopt a construction which made the provision for children depend on the contingency of their surviving their parent; more especially where the testator had pointed out a period when the shares were to be paid.

Indeed, the case of *Crozier* v. *Fisher* included a decision upon the question between those two periods; since it was there held that the children who survived the tenant for life were not entitled unless they attained the age of twenty-one; a decision which, as it goes to exclude some of the class, may be considered a pointed one.

The case is yet clearer, where, after a previous life interest, the gift in remainder is in the first instance to such children as shall attain a given age; and there then follows a direction to pay at that age "with benefit of survivorship:" since the prior words being clear are not to be cut down by an ambiguity in the subsequent expressions (*h*).

Secus, where there is a final gift over of all referring to death of tenant for life.

But this construction is evidently excluded when the prior bequest is followed by a gift over on the death of all the previous legatees (among whom the survivorship is to take place) in the

[(*g*) 5 De G. & S. 236; see also *Bouverie* v. *Bouverie*, 2 Phill. 359; *Knight* v. *Knight*, 25 Beav. 111. See also *Hodson* v. *Micklethwaite*, 2 Drew. 294; *Carver* v. *Burgess*, 18 Beav. 541.

(*h*) *Reid* v. *Worsley*, 14 Jur. 325.

[lifetime of the tenant for life. The death of the tenant for life is here clearly the period to which survivorship is to be referred (*i*). And in some other cases where the wills to be construed have not distinctly indicated the majority of the several legatees as the period to be regarded, the words of survivorship have been referred to the death of the tenant for life, or the time when the youngest child attained majority, as the case required.

Or under a gift to A. for life, and at her decease to her surviving children at twenty-one.

Thus, in the case of *Huffam* v. *Hubbard* (*k*), where the gift was "to A. for life, and at her decease, to her surviving children when they should have attained their twenty-one years, share and share alike." Sir *J. Romilly*, M. R., said, that *Crozier* v. *Fisher* was a peculiar case, and different from the one before him; and he held that only the children surviving A. took, according to the rule in *Cripps* v. *Wolcott* (*l*), that survivorship has reference to the period of distribution.

Again, in the case of *Turing* v. *Turing* (*m*), where a testator gave a sum of money to trustees for his wife for life, and after her death, in trust, as to one-fifth of that sum, for his daughter for life, and upon her demise the interest to be appropriated for the use of any her child or children until they reached the age of twenty-one, and then the principal sum to be paid to the survivor or survivors of the children, share and share alike: it was held by Sir *L. Shadwell*, V. C., that the time of the daughter's death, and not of the children's majority, was the period to which the word "survivors" related. He said, the case of *Crozier* v. *Fisher* was totally different from that before him; which, it may be added, seems to be distinguishable from the case of *Tribe* v. *Newland* only by reason of the more unequivocal direction in the latter case to pay the children their shares at their ages of twenty-one years.]

To several as tenants in common *for life*, and to survivor, with gift over *after death of survivor*.

Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death.

[(*i*) *Daniel* v. *Gosset*, 19 Beav. 478; *Fisher* v. *Moore*, 1 Jur. N. S. 1011.
(*k*) 16 Beav. 579.
(*l*) Ante, 685.
(*m*) 15 Sim. 139; see also *Dorville* v. *Wolff*, ib. 510; *Hind* v. *Selby*, 22 Beav. 373; *Vorley* v. *Richardson*, 25 L. J. Ch. 335, 2 Jur. N. S. 362.]

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Thus, in *Doe* d. *Borwell* v. *Abey* (*n*), where the testator devised to his three sisters, for and during their joint natural lives, *and the natural life of the survivor of them, to take as tenants in common, and not as joint tenants;* and after the determination of their respective estates, then to trustees during the lives of his said sisters, and the life of the survivor of them, to preserve contingent estates; and after the respective deceases of his said three sisters, *and the decease of the survivor* of them, then over; Lord *Ellenborough* observed, that, to take as tenants in common, is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to take it as tenants in common, which they might do with benefit of survivorship, then the only repugnance seemed to be in the words "and not as joint tenants" (*o*). "I would," said his Lordship, "preserve the words 'to take as tenants in common.' The words tenants in common are of a flexible meaning, and may be understood, that although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor." And Mr. Justice *Bayley* observed with great truth, "A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy."

Survivorship held to be indefinite.

It is evident, that, by "benefit of survivorship," the learned Judge meant *a gift to the survivor;* and his observation goes to this: that, although survivorship is not an *incident* to a tenancy in common, yet an express gift to survivors is consistent with it. It is observable, however, that there was no express gift to the survivor; but the Court seems to have implied one (*p*). The principle, however, is the same.

Remarks on *Doe* v. *Abey*.

It remains to be observed, that, in devises of estates of inheritance, for the avowed purpose of reconciling words of

Words of severance con-

(*n*) 1 M. & Sel. 428.

(*o*) But are not these words susceptible of the same explanation? They were not to enjoy as joint tenants, with a right of accruer, but as tenants in common, with an *express* or implied limitation to survivors.

(*p*) This case may therefore be added to those cited ante, Vol. I. p. 507.

division or severance with a gift to the survivor, the devisees have been held to be joint tenants for life, and tenants in common of the inheritance in remainder.

fined to the inheritance.

Thus, in *Barker* v. *Giles* (*q*), where the testator devised his real estate to be sold to pay debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, to be settled to the use of J. and R., *and the survivor of them,* their heirs and assigns for ever, *equally to be divided between them, share and share alike:* it was held, that they were joint tenants for life, with several inheritances, so that by the death of J. in the lifetime of the testator, R. took the whole for his life, and the devise of the moiety of the inheritance lapsed.

But in *Blissett* v. *Cranwell* (*r*), where the testator devised to his two sons and their heirs, *and the longest liver of them, equally to be divided between them and their heirs,* after the death of his wife; it was held, that though it was given to them and the survivor, yet that the last words (namely, the words of division) explained what the testator meant by the word "survivor," that the survivor should have an equal division with the heirs of him who should die first.

Limitation to survivor disregarded.

In *Stones* v. *Heurtley* (*s*), Lord *Hardwicke* recognized the authority of this case, and applied the same construction to a devise of the residue of the testator's estate, "to be equally divided among his three younger children, D., F. and M., *and the survivor of them,* and their heirs for ever."

The objection to the construction adopted in the two last cases is, that it renders the gift to the survivor wholly inoperative. It is probable that the Courts at this day would incline to construe such gift as intended to provide for the event of any of the objects dying in the lifetime of the testator, as in *Smith* v. *Horlock* (*t*); at any rate, in such a case as *Stones* v. *Heurtley,* where there was no other period to which it could be referred. The other case, *Blissett* v. *Cranwell,* would raise the question (to which so considerable a portion of the present chapter has been devoted) whether it meant survivorship at that time or the

Observations on the two last cases.

(*q*) 2 P. W. 280, 9 Mod. 157, 14 Vin. 487, 2 Eq. Ca. Ab. 536; affirmed on appeal, 3 B. P. C. Toml. 104. See also *Folkes* v. *Western,* 9 Ves. 456; [*Haddelsey* v. *Adams,* 22 Beav. 266.]

(*r*) Salk. 226, 3 Lev. 373.

(*s*) 1 Ves. 165.

(*t*) 7 Taunt. 129.

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period of division. *Barker* v. *Giles* (*u*) is distinguishable, inasmuch as the words of severance were not, as in the other cases, *necessarily* applied to the estate for life. The authority of this case was recognized in the recent case of *Doe* d. *Littlewood* v. *Green* (*x*).

(*u*) Ante, 701.

(*x*) 4 M. & Wels. 229.

# CHAPTER XLVIII.

## WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

"*In case of the death,*" &c., to what period referred.

WHERE a bequest is made to a person, with a gift over *in case of his death,* a question arises whether the testator uses the words "in case of," in the sense of *at* or *from,* and thereby as restrictive of the prior bequest to a life interest, i. e. as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeazance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance, in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate (i. e. in possession), necessarily is the death of the testator, there being no other period to which the words can be referred.

Where the bequest is *immediate.*

Hence it has become an established rule, that where the bequest is simply to A., and *in case of his death,* or *if he die,* to B., A. surviving the testator takes absolutely (*a*).

The case of *Trotter* v. *Williams* (*b*) appears to have carried this construction to a great length. J. S. bequeathed to A. 500*l.*, to B. 500*l.*, and in like manner gave 500*l.* a piece to five others, and *if any died,* then her legacy, and also the residue of

"*If any die,*

(*a*) *Lowfield* v. *Stoneham,* 2 Stra. 1261; [*Northey* v. *Burbage,* Pre. Ch. 471;] *Hinckley* v. *Simmons,* 4 Ves. 160; *King* v. *Taylor,* 5 Ves. 806; [*Turner* v. *Moor,* 6 Ves. 556;] *Cambridge* v. *Rous,* 8 Ves. 12; *Webster* v. *Hale,* ib. 410; *Ommaney* v. *Bevan,* 18 Ves. 291; *Wright* v. *Stephens,* 4 B. & Ald. 574. But see *Billings* v. *Sandom,* 1 B. C. C. 393; *Nowlan* v. *Nelligan,* ib. 489; *Lord Douglas* v. *Chalmer,* 2 Ves. jun. 501; also *Chalmers* v. *Storil,* 2 V. & B. 222. As to a similar question arising on the word *or,* as in a gift to A. "or his children," see post, 710; also 1 Russ. 165.

(*b*) Pre. Ch. 78, 2 Eq. Ca. Ab. 344, pl. 2. [See also *Taylor* v. *Stainton,* 2 Jur. N. S. 634.

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held to mean *in the lifetime of the testator.*

his personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The Court held, that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors.

The word "then" seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatees, and might with great plausibility have been held to refer to that event whenever it should happen; for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in question has been carried.

"In case of the death of either before the other."

[The rule has been held to apply where, after a gift to several there was a bequest over "in case of the death of either *in the lifetime of the others or other*;" on the ground that the additional words did not make the event of death more contingent: it being a certainty that one must die in the lifetime of the other (*c*).]

Cases of contrary construction.

There are, however, a few cases of immediate bequests in which the words under consideration have been construed to refer to death at *any* time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance, evincing an intention to use the words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to the same person, to be "at her own disposal," has been considered to indicate that the testator had a different intention in the instance in question.

"*In case of* her demise," construed *at* her death.

In *Billings* v. *Sandom* (*d*), the testator being at Gibraltar, bequeathed to his sister A. (who was in England) 1,000*l.*, and *in case of her demise* he gave to B. 800*l.*, and to C. 200*l.* And he bequeathed unto A., whom he left executrix, whatever goods, chattels and money should be due to him at the time of his decease, "*to be disposed of as she should think proper.*" Lord *Thurlow* said, the testator intended to give a share of his bounty to his sister, and also to the others. The word "and" implied this; therefore she should take it for life, and then they should

[(*c*) *Howard* v. *Howard*, 21 Beav. 550. But see *Underwood* v. *Wing*, 4 D. M. & G. 659.]

(*d*) 1 B. C. C. 393.

take it. As to the residuary devise, he meant that she should take that unfettered, at her own disposal, *but the other fettered by the gift over*. This case has been referred to by Sir *W. Grant* (*e*), as decided upon the contrast afforded by the residuary clause.

In *Nowlan* v. *Nelligan* (*f*), the bequest was in these words: —"I give and devise unto my beloved wife H. N. all my real and personal estate: I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; *but in case of death happening to my said wife,* in that case I hereby request my friends S. and H. to take care of and manage to the best advantage for my daughter H. all and whatsoever I may die possessed of." Lord *Thurlow* said, it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine, that, in case of death happening, meant dying in the husband's (i. e. the testator's) lifetime; that therefore the meaning must be supposed to be in the event of her death *whenever it should happen.*

"In case of death happening," &c., not confined to death *in lifetime of the testator.*

Of this case Sir *W. Grant* (*g*) has said, "It was evident that some benefit was intended for the daughter, but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will (*quære* wife?). Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life."

Sir *W. Grant's* remark on *Nowlan* v. *Nelligan.*

These cases shew, that, in the opinion of Lord *Thurlow*, very slight circumstances suffice to make the words under consideration refer to death at any period; but no case has perhaps gone so far in adopting this construction as *Lord Douglas* v. *Chalmer* (*h*), where a testatrix bequeathed her residuary personal estate for and to the use and behoof of her daughter Frances Lady D., and *in case of her decease* to the use and behoof of her (Lady D.'s) children, share and share alike, to whom her said trustees and executors were to account for and pay over and assign the said residue. By a codicil, the testatrix gave a ring to her daughter Lady D., [and her wearing apparel to A., *or if A. should be dead before her,* then over.] Lord *Loughborough* treated the notion, that the testatrix intended to provide for the event

"*In case of,*" construed *at,* death.

(*e*) 8 Ves. 22.
(*f*) 1 B. C. C. 489.
(*g*) 8 Ves. 22.
(*h*) 2 Ves. jun. 501.

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of Lady D. dying in her lifetime as contrary to the natural import of the words, and the distinction between the expression used, and *at* or *from* her decease, as too subtle. He also relied upon the bequest of the ring in the codicil, which he observed was inconsistent with the supposition of her taking the whole interest in the residue; but, if she took it for life only, was very natural. And his Lordship observed, that, under the circumstances which had happened, there was no other way by which the testatrix's bounty could reach the children but by giving to Lady D. for life, and the capital to the children.

Remark on *Lord Douglas* v. *Chalmer*.

The reliance which was placed on these circumstances shews that Lord *Loughborough* did not intend to controvert the general rule, which is still more apparent from his subsequent decision in *Hinckley* v. *Simmons* (*i*), where a bequest of all the testatrix's "fortune" to A., and "*in case of* her death" to B., was held to confer an absolute interest on A. surviving the testatrix. And this has been followed by several other decisions (*k*).

No distinction in gifts to children.

It might seem, perhaps, that *Lord Douglas* v. *Chalmer* goes to establish an exception to the construction in question, where the first gift is to the parent and the second to the children; but this hypothesis is not only unsound in principle, but is contradicted by subsequent authority.

"But should she happen to die," held *not* to be restrictive.

Thus, in *Webster* v. *Hale* (*l*), where the testator bequeathed certain stock for the use, exclusive right, and property of his sister C., *but should she happen to die*, then to her children; and the testator also bequeathed to his sister H. certain stock, *and in case of her death* to be divided among her children. Sir *W. Grant*, held, that C. surviving the testator was entitled to her legacy absolutely: he remarked that the word "but" strengthened this construction, being disjunctive, and implying that the children were to take in an event different from that on which the parent was to take. The other bequest to H., his Honor observed, was in the very terms of *Lord Douglas* v. *Chalmer*, and, if that stood alone, he should be bound to the same construction; but he thought it sufficiently clear, that C. was to take absolutely, and he could not, from the very slight variation, collect a different intention as to the other sister. It seems, therefore, that the M. R. did not think the gift of the ring in *Lord Douglas* v. *Chalmer* as making any real difference.

(*i*) 4 Ves. 160.

(*k*) See cases cited ante, p. 703.

(*l*) 8 Ves. 411.

The absence of any distinction where the respective bequests are to parent and children, is still further evident from the case of *Slade* v. *Milner* (*m*), where, under a bequest to A., "*and in case of her death*" to be equally divided between her children, Sir *J. Leach* held, that A., having survived the testatrix, took an absolute interest.

"In case of her death" applied to testator's lifetime.

And it is of course equally immaterial that the substituted gift confers a life interest only on the first taker, and the ulterior interest on a third person (*n*).

The most recent case exemplifying the construction now under consideration is *Clarke* v. *Lubbock* (*o*), where a testator bequeathed the residue of his property to A. and B., the interest to be paid for their support; *but in the event of the death of either*, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, then over: Sir *J. K. Bruce* held, that both A. and B. having survived the testator and left children, each were entitled to one moiety, the words in question being construed to refer to death in the testator's lifetime.

"In the event of the death of either" similarly construed.

[Where, however, a testator left all his property to his son charged with an annuity to his widow; "but should the hand of death fall on my widow and son," then over, Lord *Cranworth* held that the gift over could not have been intended to take effect on an event which was to happen in the testator's lifetime, the expression being "should the hand of death fall on my *widow*," which could not be in his lifetime (*p*).]

Secus, where testator referred to the death of his *widow*.

But although in the case of an *immediate* gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as

Rule where bequest is *future*.

(*m*) 4 Mad. 144; [and *Schenk* v. *Agnew*, 4 Kay & J. 405.]

(*n*) *Crigan* v. *Baines*, 7 Sim. 40.

(*o*) 1 Y. & C. C. C. 492. [See also *Arthur* v. *Hughes*, 4 Beav. 506; *Duhamel* v. *Ardovin*, 2 Ves. 163.

(*p*) *Randfield* v. *Randfield*, 2 De G. & Jo. 57. Compare *Taylor* v. *Stainton*, 2 Jur. N. S. 634, 635.]

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extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession.

Thus, in *Hervey* v. *M'Lauchlin* (*q*), where a testatrix bequeathed two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E. and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the persons so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life; and it was contended that the words "in case of the death" of the legatees, referred to a dying in the lifetime of the testatrix, and therefore that the children were not entitled. But the Court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the *legatee for life* in the place of their parent, and that therefore the parents took vested interests on the death of the testator, subject to be divested in the event specified.

"In case of the death" referred to period *of possession.*

On this principle, too, it should seem, that, in the case of a bequest to A. at the age of twenty-one years, *and in the event of his death* then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time (*r*).

[And where payment only, and not vesting, is postponed to a stated period, a gift over in these terms is referable to a death happening at any time before the period of payment. Thus, in the case of *James* v. *Baker* (*s*), where a testator bequeathed his residue to E., and to her children then living, the children to receive their several portions on their attaining the age of twenty-one years; and in case of the death of any of the children then living, such child's portion to go to any other child the said E. might have; Sir *J. K. Bruce*, V. C., held, that the expression "in case of death" meant death under twenty-one whenever happening.

Same words referable to different periods when

And where, in the same will, an immediate legacy is given to a person, or, *in case of his death*, to his issue, and another legacy is bequeathed *in the same terms*, but subject to a previous life-

(*q*) 1 Pri. 264. See also *Moon* d. *Fagge* v. *Heaseman*, Willes, 138; *Galland* v. *Leonard*, 1 Swanst. 161; *Girdlestone*, v. *Doe*, 2 Sim. 225.

(*r*) See *Home* v. *Pillans*, 2 My. & K. 24.

[(*s*) 8 Jur. 750. And see *Monteith* v. *Nicholson*, 2 Kee. 719, post.

they relate to more than one bequest.

[interest, the words "in case of his death" will be differently construed, according as they are to be construed with reference to one legacy or the other, and will be referred in the one case to the death of the testator, and, in the other, to that of the tenant for life (*t*).

"In case of death" refers to death in testator's lifetime.

But such words are not confined to the event of death happening in the interval between the testator's decease and the period of vesting in possession; they apply also to the case of death happening before the testator's decease; to which construction, indeed, as such a death literally happens before the period of distribution, there can be no objection. Accordingly, in *Ive* v. *King* (*u*), where a testator bequeathed his residuary estate to A. for life, and after the death of A. gave one moiety thereof to five persons as tenants in common; and in case of the death of any or either of them, then their respective shares to go over. One of the legatees was dead at the date of the will; but Sir *J. Romilly*, M. R., held, that the gift over took effect.

"In case of death" held not referable to time of distribution by force of reason assigned for bequest.

In a case (*x*) where a testator gave a sum of money in trust for one for life, and after his decease bequeathed part of it to A. and B. (whom the testator appointed his executors), share and share alike, "for the trouble they may have in execution of this my will. But in case of either of their death, I give to the survivor." Sir *W. P. Wood*, V. C., thought, that if the will had stopped there, death in the lifetime of the testator would have been the better construction, on account of the reason expressly given for the bequest being the trouble of executing the will, which the executor would incur immediately upon the testator's death. But the will went on, "and in case of both their deaths to the heirs, executors and administrators of such survivor;" and the V. C. held, that the testator must be taken to refer to the same time when he spoke of the death of both as when he spoke of the death of either; and if the words were referred to death in the lifetime of the testator, the effect would be that the testator gave a legacy to the representative of the survivor, though that survivor died in his lifetime; and the reason assigned for the gift altogether failed. He, therefore, held,

[(*t*) *Salisbury* v. *Petty*, 3 Hare, 86. See also *Neathway* v. *Read*, 3 D. M. & G. 18, ante, p. 687; *More's Trust*, 10 Hare, 178; *Malcolm* v. *Taylor*, 2 R. & My. 416.

(*u*) 16 Beav. 46. See *Le Jeune* v. *Le Jeune*, 2 Kee. 701; *Ashling* v. *Knowles*, 3 Drew. 593; *Cambridge* v. *Rous*, 25 Beav. 417, 418.

(*x*) *Green* v. *Barrow*, 10 Hare, 459.]

[though with some hesitation, that on the death of one in the interval between the death of the testator and the death of the tenant for life, the survivor became entitled.]

"Or" used synonymously with *in case of.*

And here it may be observed, that those cases in which the word "or" has been construed as introductory to a substitutional bequest (in which sense it seems to be tantamount to the words "in case of the death") present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A. or to his children, or to A. or his heirs, is construed as letting in the children or next of kin ("heirs" being in reference to [such a gift of] personal estate construed as synonymous with *next of kin*), in the event of A. dying in the lifetime of the testator; while, on the other hand, a bequest to A. for life, and after his decease to B. or his children, is held to create a substitutional gift in favour of the children of B., in the event of B. dying in the lifetime of A. (*y*).

Distinction where prior gift is expressly for life.

It should be noticed, that the construction of the words "in case of the death," which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator bequeaths the interest of a sum of money to A. expressly for life, "and in case of his death" to B., the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B. is meant to be, not a substituted but an ulterior gift, to take effect on the death of A. *whenever that event may happen.*

Thus, in the case of *Smart* v. *Clark* (*z*), where a testator gave to his son E., who was then at sea, the interest of 500*l.* stock in the Five per Cents. during his natural life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A., with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A. filed a bill to obtain a

(*y*) Vide cases cited Vol. I. pp. 480, 481; [also *Burrell* v. *Baskerfield*, 11 Beav. 525, which was brought within the rule by reading "and" as "or."]

(*z*) 3 Russ. 365. [See also *Haddelsey* v. *Adams*, 22 Beav. 266.]

transfer; and Sir *J. S. Copley*, M. R., on the authority of *Billings* v. *Sandom* (*a*), held that they were entitled.

Remarks on *Smart* v. *Clark*.

It is singular that the Master of the Rolls did not advert to the circumstance of the prior bequest being expressly for life, which distinguished the case before him from all that had been cited, including *Billings* v. *Sandom*; which case stands upon its special circumstances, and is only to be reconciled with subsequent authorities, on the ground that the context warranted the construing the words "and in case of her demise" to mean *at* her demise.

Where prior gift comprises the income only.

Where the prior gift, though not expressly for life, comprises the annual income only of the fund, which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

Thus, in the case of *Tilson* v. *Jones* (*b*), where a testatrix directed the interest of certain stock and a canal share to be equally divided between her son and daughter, exclusive of any husband; *and in case of the death of either*, then the whole of the interest to the survivor; and if her son should not be in England at the time of her decease, then the execution of the trusts, so far as they related to him, should be postponed until his return; *but in case of his death*, then the trustees should pay the whole of such interest to her daughter; *and in case of her death*, the testatrix gave the whole of such principal and interest between her niece and nephew; and in case of their death before her son and daughter, then she gave the principal and interest at the deaths of the son and daughter to C. M. The daughter survived the son, and claimed to be absolutely entitled; but Sir *J. Leach*, M. R., said, that the testatrix must be understood as if she had expressed herself thus: "I give the principal and interest to my niece and nephew, if they shall survive my son and daughter; and if they shall not survive them, then to C. M." She could not refer here to the death of her son and daughter in her lifetime; the daughter therefore took for life only. *Besides this, the testatrix in her gift to her son and daughter spoke of the interest only, but in the gift over she spoke of the principal and interest.*

Words following an indefinite devise of land.

Consistently with the principle of the two cases just stated, it has been held, that the words under consideration succeeding

(*a*) But as to which, vide ante, p. 704. (*b*) 1 R. & My. 553.

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an indefinite devise of *land*, would (as such a devise, if contained in a will which is subject to the old law, confer only an estate for life) be held to be synonymous with "*after* the death," and accordingly the estate to which they are prefixed is a vested remainder, expectant on such life estate (*c*).

Thus, in the case of *Bowen* v. *Scowcroft* (*d*), where an undivided share in lands was devised to W. and B., and in case of their demise the testator devised their respective shares to be equally divided among their children or their lawful heirs, Mr. Baron *Alderson* was of opinion, that, as this was the case of a devise of land, the authorities relating to personal estate did not apply, and that the words were to be construed "*after* their decease."

—— Estate tail.

It seems that, where a testator devises an estate *tail* to a person, and "if he die," then over to another, the words "without issue" are supplied to render it consistent with that estate (*e*).

(*c*) *Fortescue* v. *Abbott*, Pollex. 479, T. Jones, 79.

(*d*) 2 Y. & C. 640. This overrules Lord *Kenyon's* suggestion in *Goodtitle* v. *Edmonds*, 7 T. R. 635.

(*e*) *Anon.*, 1 And. 33, ante, Vol. p. 456.

## CHAPTER XLIX.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.—TO WHAT PERIOD THEY RELATE.—CLASSIFICATION OF THE CASES.

THE distinction between the cases, which form the subject of the present inquiry, and those discussed in the last chapter, is obvious. There it was necessary either to do violence to the testator's language, by reading the words providing against the event of death as applying to the occurrence of death at any time (in which sense death is not a contingent event), or else to give effect to the words of contingency, by construing them as intended to provide against death within a given period. Distinction between the cases discussed in the last and in the present chapter.

In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at *any* period. Cases of this kind, however, will be found to present many distinctions which require particular attention. The cases are divisible into two classes: 1st. Where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2ndly. Where the question is, whether the substituted gift takes effect in the event of the prior legatee surviving the testator, and *afterwards* dying under the circumstances described; and if so, whether at *any* time subsequently. Classification of the cases.

I. It may be stated as a general rule, that where the gift is to a designated individual, with a gift over in the event of his Death of object of prior gift in

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testator's lifetime.

dying without having attained a certain age, or under any other prescribed circumstances (*a*), and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift.

Ulterior legatees held to be entitled.

In the early case of *Darrel* v. *Molesworth* (*b*), where a legacy of 50*l.* was given to D. T. at twenty-one or marriage, and at the close of his will (which contained several pecuniary bequests), the testator added, that *if any legatee died before his legacy was made payable*, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under twenty-one, though the fact is not stated), and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee.

So, in the case of *Willing* v. *Baine* (*c*), where a testator bequeathed 200*l.* apiece to his children [naming them], payable at their respective ages of twenty-one, *and if any of them died before their age of twenty-one*, then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime (a minor, it is presumed, though the fact is not stated), and it was held, that the children living at the death of the testator were entitled to his legacy.

So, in the case of *Walker* v. *Main* (*d*), where a testator devised real estate to his wife for life, remainder to a trustee in trust for sale, and to pay the produce among his children and grandchildren in manner following: he then gave 20*l.* each to several of his grandchildren, payable at twenty-one or marriage; and to his four children A., B., C. and D., all the residue to be divided amongst them equally at the age of twenty-one or marriage; *but if any of his children or grandchildren should happen to die before the time of such legacy becoming due and payable*, then he bequeathed the *part or share* of the child or children or grandchildren so dying unto and amongst those that should be then living, share and share alike. B. and C. died in the testator's lifetime, and it was held, that their shares devolved to the survivors.

[(*a*) A bequest to A., but in case A. dies *intestate* over, lapses if A. dies in testator's lifetime, the words being applicable only to a legatee who survives the testator, and thus acquires the power to leave the property by will, *Hughes* v. *Ellis*, 19 Jur. 316; and see Vol. I., p. 336 n. (*k*).]

(*b*) 2 Vern. 378. See also [*Ledsome* v. *Hickman*, ib. 611; *Bretton* v. *Lethulier*, ib. 653; but see *Miller* v. *Warren*, ib. 207, n., Raithby's Ed.

(*c*) Kel. 12, 2 Eq. Ca. Ab. 545, pl. 22. The report, 3 P. W. 113, omits to state that the children were named.]

(*d*) 1 J. & W. 1.

Again, in the more recent case of *Humphreys* v. *Howes* (*e*), where a testator bequeathed the residue of his personal estate to trustees upon trust for A., B. and C., for their lives, and to the survivor for life, and after their decease upon trust to transfer and pay the same to E. (son of B.) and F. (son of C.), share and share alike; *and in case E. or F. should happen to die before his share of the trust-money should become payable without leaving issue of his body*, then his *share* to go to the survivor; and in case both should die before their shares should become payable without leaving issue, then over. E. died in the testator's lifetime without issue. It was contended that the event intended to be provided against was the death of the legatees after the testator's decease, until which event they could not with propriety be said to have any "shares" in the property; but Sir *J. Leach*, M. R., held, that the case of *Willing* v. *Baine* was applicable, and accordingly that the ulterior bequest took effect notwithstanding the death of the legatee in the testator's lifetime.

And this construction prevailed (in spite of some apparently opposing expressions) in the case of *Rheeder* v. *Ower* (*f*), where a testator bequeathed the interest of the residue of his property to his five sisters for life, *and in case any of them should die leaving issue*, then the trustees were to pay and transfer the share *to which his sister so deceasing was entitled at or before the time of her decease to receive the interest and dividends thereon*, unto and amongst all and every such child or children of such deceased sister equally between them, share and share alike, at their respective ages of twenty-one years. One of the sisters died in the testator's lifetime leaving children, and it was objected to the claim of such children that the trust was confined to the children of those sisters who had become entitled to receive the interest; but Lord *Thurlow* decided in favour of their claim, observing, that in a will so loosely drawn, it was more probable that that was the testator's intent than the contrary.

Legatee dying before legacy vested,

[Greater weight, however, was attributed to the same argument in the case of *Bastin* v. *Watts* (*g*), where a testator gave

(*e*) 1 R. & My. 639. See also *Mackinnon* v. *Peach*, 2 Kee. 555; [*Willetts* v. *Willetts*, 7 Hare, 38; *Benn* v. *Dixon*, 16 Sim. 21; *Ive* v. *King*, 16 Beav. 54; *Domvile's Trusts*, 22 L. J. Ch. 947; *Hues* v. *Jackson*, 23 L. J. Ch. 51; *Ashling* v. *Knowles*, 3 Drew. 593; *Varley* v. *Winn*, 2 Kay & J. 700.]

(*f*) 3 B. C. C. 240.

[(*g*) 3 Beav. 97. See also *Wordsworth*

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ulterior gift over of his "share" held not to carry the legacy.

[all his property to trustees upon trust to pay the income to his wife until his youngest child should attain twenty-one; "and when and as soon as that event should happen," he directed his trustees to divide the property into five equal shares, and stand possessed of one such share upon trust for his daughter A. for life, with remainder to her children absolutely: and he gave another share in similar terms to each of his three other daughters and their children; provided that "in case any or either of his said children should die without issue, *the share or shares of her or them so dying*, should go to the children of such of his said daughters as should leave issue absolutely as tenants in common. One of the daughters died an infant without issue, and it was held by Lord *Langdale*, M. R., that only such shares as had been previously vested in the children (which he thought did not take place till majority), passed by the gift over; and the consequence was, that the share intended for one of the daughters who died in infancy, and who therefore did not acquire a vested interest, was not disposed of.

Sir *R. Kindersley's* observation on *Bastin* v. *Watts*.

Contrary construction in *Green's estate*.

But of this case, and of *Smith* v. *Oliver* (*h*), Sir *R. Kindersley* said in *Re Green's estate* (*i*), that he did not see the force of the reasoning upon which the M. R. came to that conclusion; and that none of the cases upon the question seem to have been referred to in them. In the case last named a testator bequeathed the residue of his estate to trustees upon trust to transfer one moiety thereof to his sister A., and the other moiety to his brothers B., C. and D., provided always that should not his brother B., who was supposed to be then alive and resident in Australia, make any claim to the shares and interests to which he might become entitled under the will within three years from the testator's death, then the trustees were to transfer "the said shares and interest of the said B." to A., C. and D. equally. B. died in the lifetime of the tes-

[v. *Wood*, 4 My. & C. 641; *Smith* v. *Oliver*, 11 Beav. 494; *Rider* v. *Wager*, 2 P. W. 331. In the last case, a testator bequeathed part of a sum due to him from A. to the second son of A., and the rest of the money to the other younger children of A.,] the same to remain in A.'s hands until the children should be capable of receiving it, *and the legacy or share of any of them dying before such time* to go to the survivors and survivor of them; A.'s second son died in the testator's lifetime, but the other younger children survived the testator, and claimed the second son's share; but it was considered that the gift to survivors must be intended if the legatee should have survived the testator; but that where the legatee died in the lifetime of the testator, as nothing could ever vest in the legatee, so neither could it survive from him.

(*h*) 11 Beav. 495.

(*i*) 1 Dr. & Sm. 63.

[tator; and the V. C., without relying on the passage "supposed to be now alive and resident in Australia," which removed all doubt on the question, held that it was unnecessary in order that the gift over might take effect, for B. to survive the testator and omit to make his claim within the three years.]

Distinction where gift is to class;

Where, however, the gift is to a class, the objects of which are not, according to the general rules of construction, ascertainable until the decease of the testator (as in the case of a gift to children generally), the application of the words providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question, if that clause is to be construed strictly as a clause of substitution.

[It does not appear that the Courts have ever been called upon to decide this precise question, though there are several cases and dicta more or less nearly bearing upon it. The question in the cause of *Rider* v. *Wager* (*k*), arose upon the share of the second son of A., to whom it was in the first instance given as an individual; and there seems to be no reason why the terms of the gift over, which it is true applied as well to the remaining younger children of A. (who took as a class) as to the second son, should not be read distributively (*l*), as had been done in some analagous cases (*m*). Sir *J. Romilly*, M. R., however, would seem to be of opinion that a different rule ought to prevail in the several cases of a class and of individuals: such at least would be the consequence of a passage in his Honor's judgment in the case of *Ive* v. *King* (*n*), relating to a substitution of issue for their parents; and the construction would probably be at least as favourable to the claimant under the substituted gift in the case of issue as in the case of a stranger. It will appear, indeed, in the sequel, that so far as regards a substitution of issue, his Honor's dictum is not in accordance with a previous decision of Sir *L. Shadwell* (*o*); and it may well be doubted whether a difference in the person who

[(*k*) 2 P. W. 331, stated ante, p. 716, n.

(*l*) I. e. assuming that in the case of a class the construction would be different from that established in the case of individuals.

(*m*) *Salisbury* v. *Petty*, and other cases cited ante, p. 79, n. (*t*).

(*n*) 16 Beav. 53, 54; and see *Domvile's Trust*, 22 L. J. Ch. 947.

(*o*) *Smith* v. *Smith*, 8 Sim. 353, post.

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[is the object of the gift ought to be regarded as having any influence on the construction.

—— where gift is *expressly* to children living at testator's death;

If the original gift be, not to the class generally, but to such of them only as survive the testator, a contingent gift engrafted thereon in case of the death of any of them cannot of course take effect if the event happen in the testator's lifetime. Thus in *Shergold* v. *Boone* (*p*), where a bequest was made to the children of S. who should be living at the time of the testator's decease; and in case any of them should die without leaving issue, his share to go to the survivors or survivor of them; but in case they should leave issue, such issue to be entitled to the share of their deceased parent. The M. R. held, that the case provided for was the death of any of the children who were the objects of the former bequest, and no children who died before the testator were objects. "The bequest," said his Honor, "is not to all the children generally, but to such only who shall be living at the testator's decease."

The general question is therefore not affected by that decision. Neither is it concluded by the case of *Stewart* v. *Jones* (*q*), where the testator bequeathed his residuary estate in trust for all and every his children and child then born and thereafter to be born, who being sons should attain twenty-one, &c., as tenants in common; "provided always that the share in the trust monies to which each of his daughters on attaining twenty-one or marrying under that age should become entitled under the trusts aforesaid, should be held" by the trustees for the daughters for life, and afterwards for their children. It was held by Lord *Chelmsford* that the children of a daughter who died before the testator were not entitled to a share. Reading the will, and stopping at the proviso, there could have been no share but those of children living at the testator's death; and the proviso, added his Lordship, "merely settled the shares of daughters who would take under the preceding gift. For what did the testator dispose of in this proviso? Why the shares to which his daughters should become entitled to under the trusts aforesaid." The case was therefore not at all one of substitution or quasi-substitution, but of a series of limitations for life and in remainder of the same subject.

[(*p*) 13 Ves. 370. See also *Doe* v. *Prigg*, ante, p. 678; *Martineau* v. *Rogers*, 25 L. J. Ch. 378, 401, *Crook* v. *Whitley*, 7 D. M. & G. 490; *Miller* v. *Chapman*, 24 L. J. Ch. 409.

(*q*) 3 De G. & J. 532.

— where possession is immediate.

[If the gift to the class is immediate, and neither the vesting nor the distribution is postponed, a gift over, in an event having reference to the time of payment, is necessarily confined to the case of a child dying in the testator's lifetime. Thus, in the case of *Cort* v. *Winder* (*r*), where a testator bequeathed his residue, subject to various legacies and annuities, in trust for all and every of his first cousins german, share and share alike; and in case any of his said cousins should die *before their respective shares should become due or payable*, leaving issue him or them surviving, the testator directed that such issue should have the same share or shares as his or their parent or parents would have been entitled to if living (*s*). One of the cousins died before the testator, leaving issue, and it was held by Sir *J. K. Bruce*, V. C., that the issue took the share intended for the deceased cousin; "although it had been said to be difficult or apparently difficult to reconcile with that construction the sort of interpretation adopted in *Viner* v. *Francis* (*t*), and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death."

It may be observed, that the case does not appear to have been treated as stronger in favour of the construction adopted by reason of the claimants under the gift over being issue of the deceased legatee.]

Gift over in case of death to executors or administrators, or personal representatives.

It seems that where the objects of gift in the clause in question are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely shewing that the legacy is to be vested immediately on the testator's decease, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.

Thus, in the case of *Bone* v. *Cook* (*u*), where a testator bequeathed the residue of his estate, at the death of his wife, equally between four persons, and then provided, that in case of the death of any of the legatees before their legacies should

[(*r*) 1 Coll. 320.

(*s*) It does not appear that the decision depended on this clause referring to the shares to which the parents would have been entitled *if living*. Such a clause is generally understood to be inserted with no other object than to regulate the shares of the various stirpes of children, *Tytherleigh* v. *Harbin*, 6 Sim. 329, post.

(*t*) Ante, 143.]

(*u*) M'Clel. 168, 13 Pri. 332.

become payable, then that the legacy of each so dying should go to his, her or their children; and *in case of such decease of any of the said legatees without having a child or children,* the legacy of him or her so dying *should go to his or her executors or administrators, as part of his, her or their personal estate.* It was held, that the share of one of the legatees who died in the testator's lifetime unmarried, lapsed, though it was admitted, that if she had left a child, such child would have been entitled under the previous clause.

Gift to personal representatives not substitutional.

[And the same rule holds where there is no express contingency coupled with the event of death. Thus,] in the case of *Corbyn* v. *French* (*x*), where a testator bequeathed the residue of his estate to his wife for life, and at her decease gave (among other legacies) one to each of the children of E., *or their representatives or representative;* Sir *R. P. Arden,* M. R., was of opinion, that by the death of one of the children in the testator's lifetime the legacy lapsed, on the ground that a testator must be supposed to contemplate that his legatees will survive him.

Again, in the case of *Tidwell* v. *Ariel* (*y*), where a testator, after bequeathing several legacies, directed that they should be paid "in one whole year after his decease, *or to their several and respective heirs,*" Sir *J. Leach,* V.C., held that one of the legacies failed by the death of the legatee in the testator's lifetime, the intention being that the legacies should be paid to the representatives if they died within the year.

It is proper to remind the reader, in connexion with the three last cases, that in several instances the words "representatives" and "heirs," when applied to personalty, have been held to be synonymous with *next of kin* (*z*); but perhaps this does not much weaken the special ground to which these cases have been referred.

Unless the prior gift be immediate.

[In each of these cases there was a period subsequent to the death of the testator, during which substitution might have taken place by the death of the primary legatee; but where the gift to the primary legatee or his representatives is immediate upon the testator's death, substitution must take place, if at all,

(*x*) 4 Ves. 418.

(*y*) 3 Mad. 403. And see *Tate* v. *Clarke,* 1 Beav. 100; [*Thompson* v. *Whitelock,* 4 De G. & J. 490.]

(*z*) Ante, 98, 72. [And see *In re Porter's Trust,* 4 Kay & J. 188, (where the word "heirs" was construed next of kin, and *Tidwell* v. *Ariel* observed upon,) *King* v. *Cleaveland,* 26 Beav. 26, 166, De G. & J. 477.

[in the event of death in the testator's lifetime; and accordingly it has been held, that such a gift will not in that event lapse, but devolve to the representatives of the legatee (*a*).

Gift over of interest of married woman, in case of death, to her next of kin.

It has been elsewhere noticed, that if property be given by will to one for life with remainder over, and the tenant for life dies in the lifetime of the testator, the remainder takes effect on his death as an immediate gift. But it was made a question, where the tenant for life was a married woman, and the remainder was limited to her next of kin, in the event of her dying in the lifetime of her husband, whether the latter gift was not to be] viewed in the same light as a bequest to heirs or executors and administrators; namely, as being intended merely to apply to the event of the legatee dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

Thus, where (*b*) a testator bequeathed to trustees 10,000*l*., to be invested in stock, in trust for A., a married woman, during the joint lives of herself and her husband, and in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and in default of appointment, to her next of kin, exclusive of her husband: A. died in the lifetime of her husband and of the testator; and it was held, [by Sir *J. Leach*, V. C., and on appeal by Lord *Lyndhurst*,] that the legacy lapsed.

[But in the subsequent case of *Hardwick* v. *Thurston* (*c*), where a testatrix bequeathed a sum of money in trust for such person as her daughter A. (who was at that time unmarried) should appoint, and in default of appointment for A. for her separate use for her life; and after her death for her next of kin, according to the statute, exclusive of her husband; A. having married and died in her mother's lifetime, Sir *J. Leach*, V. C., held, that her next of kin were entitled.

And in the late case of *Edwards* v. *Saloway* (*d*), where a testator gave the residue of his estate in trust for his wife for life, for her separate use, and after her death in trust for such persons as she should by deed or will appoint, and in default of appointment for her next of kin: the testator's wife died before

[(*a*) *Gittings* v. *M'Dermott*, 2 My. & K. 69.]

(*b*) *Baker* v. *Hanbury*, 3 Russ. 340.

[(*c*) 4 Russ. 380.

(*d*) 2 De G. & S. 248, 2 Phill. 625; and see *Nichols* v. *Haviland*, 1 Kay & J. 504.]

[him, and the case of *Baker* v. *Hanbury* was relied on in support of the proposition, that the next of kin took nothing under the will; but Sir *J. K. Bruce*, V. C., held otherwise, and his decision was affirmed by Lord *Cottenham*. The V. C. referred Lord *Lyndhurst's* decision to the circumstance that his Lordship inferred an intention that the bequest should be absolute, and that the words used were only to protect the absolute interest; and he distinguished his own case on that ground; but Lord *Cottenham* considered the two cases stated above to be conflicting, and had no hesitation in preferring the latter: so that the former must be considered as overruled.]

Whether children of objects dead at date of will can have the benefit of clause of substitution.

Where there is a devise or bequest to a class of objects who are to be ascertained at the testator's death, or at some period subsequent to it, with a substitution of the children of objects who should happen to be deceased at the period of distribution, and it happens that some individual of the class was dead when the will was made, it is not too readily to be concluded from the preceding authorities that the clause in question lets in the children of such predeceased person; for in several such cases it has been construed strictly as a clause of substitution, and therefore as not comprehending the children of any who could not in any possible event have been objects of the original gift.

Thus, in the case of *Christopherson* v. *Naylor* (*e*), where a testator bequeathed to "each and every of the child and children of my brother and sisters A., B., C. and D., which shall be living at the time of my decease, except my nephew F." (for whom he had already provided); "*but if any child or children of my said brother and sisters, or any of them* (besides the said F. my nephew), *shall happen to die in my lifetime" and leave issue living at his or their decease,* "then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to, his, her or their issue, such issue taking only the legacy or legacies, which his, her or their parents or parent would have been entitled to if living at my decease." It was contended, that the expression "*shall* die in my lifetime," though literally applicable only to *future* death, might be held to embrace the children who were dead at the time of making the will, by analogy to those cases in which a gift to children "*to be* begotten" had been held to include children previously born (*f*); but Sir *W.*

Children of objects dead at date of will excluded.

(*e*) 1 Mer. 320. (*f*) Ante, 168.

*Grant*, M. R., observed, that the question did not depend upon these words, which, though according to strict construction importing futurity, might have been understood as speaking of the event at whatever time it might happen (*g*). "The nephews and nieces," said his Honor, "are, here, the primary legatees; nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently shew no object of substitution; and to give them original legacies would be, in effect, to make a new will for the testator."

So, in the case of *Butter* v. *Ommaney* (*h*), where a testator bequeathed the residue of his estate after the death of his wife and brother Joseph, to be equally divided between the children of his said brother and his late sister Betty and late brother Jacob, who should be then living, in equal shares; *and as to such of them as should be then dead*, leaving a child or children, such child or children were to be and stand in the place or places of his, her or their parent or parents; Sir *L. Shadwell*, V. C., held, that the children of such children of the testator's brother Jacob who died in the testator's lifetime (*and who were also dead at the date of the will*) were not entitled to any share of the residue.

So, in the case of *Peel* v. *Catlow* (*i*), where a testator bequeathed one-sixth of his residuary estate to the children of his late sister Jane equally, and in case any such child or children should die under twenty-one leaving issue, their shares to be paid to such issue; and if any such child or children should die under twenty-one and leave no issue, then the share of him or her so dying to go to the survivors, and the issue of such of the deceased children as should have died so leaving issue as aforesaid (such issue to take no greater share than his, her or their parent, or respective parents would have been entitled to if living); and as to one other sixth, in trust for the testator's sister Mary C. for life, and after her decease, in trust for her *issue*, to be payable at the like times and with the like benefit of

Children of objects dead at date of will excluded.

[(*g*) See also *Hannam* v. *Sims*, 2 De G. & Jo. 151.]

(*h*) 4 Russ. 73.

(*i*) 9 Sim. 372.

survivorship, and in like manner as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of the testator's sister Jane; and in case the testator's sister Mary should depart this life without leaving issue of her body, or leaving any they should die under twenty-one and should leave no issue, then over. A child of Mary C. was dead at the date of the will (*k*), leaving a child; and Sir *L. Shadwell*, V. C., held, that this grandchild of Mary C. was not entitled; for that, under the trusts declared of the share of the testator's sister Jane (to which reference was here made), no grandchild could take except by way of substitution for its parent, and as the grandchild's mother never could have become entitled to take, her claim could not be sustained.

So, in the case of *Gray* v. *Garman* (*l*), where the testator gave the residue of his real and personal estate to his wife E. for life, and at her decease to be equally divided between the brothers and sisters of his wife E.; and in case any or either of them should be dead at the time of the decease of E., leaving issue, then such issue to stand in the place of their respective parent or parents. The question was, whether the issue of a brother of E., who was dead at the date of the will, were entitled. Sir *J. Wigram*, V. C., after a full examination of the cases, held, that they were not; his Honor considering that the word "them" in the second clause referred to the brothers and sisters described in the first, which clearly did not extend to a brother or sister previously dead (*m*).

Suggested distinction where decease is after will.

It will be observed, that, in the five preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the will, and could not possibly have been an object of the primary bequest; and it does not follow that the same construction would have obtained, if such person had been then living, and had *subsequently* died in the testator's lifetime. There is, however, not wanting a case even of this kind. Thus, in *Thornhill* v. *Thornhill* (*n*), where a testator directed that a certain estate, which by his marriage settlement he had settled on his wife for life,

(*k*) It does not appear whether the deceased child had attained majority.

(*l*) 2 Hare, 268. [See also *Congreve* v. *Palmer*, 16 Beav. 435; *Lewis* v. *Lewis*, 17 ib. 221; *Smith* v. *Pepper*, 27 ib. 86.]

(*m*) It was also held that the children of such of the brothers and sisters of E. as survived the testator, and afterwards died in the lifetime of E., were entitled; as to which indeed there could be no doubt.

(*n*) 4 Mad. 377. Whether the nephews and nieces were in existence at the date of the will is not stated.

and another estate, which he had devised to her for her life, should be sold at her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir *J. Leach*, V. C., decided in the negative; his Honor being of opinion, that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

Case of *Thornhill* v. *Thornhill* overruled.

The case of *Thornhill* v. *Thornhill*, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its authority was unequivocally denied in the subsequent case of *Smith* v. *Smith* (*o*), where a testator gave his residuary estate to trustees, in trust for his wife for life, and after her death to divide it amongst all his children who might be *then* living: the shares of such of them as should then have attained twenty-one, to be paid to them within three months after his wife's death, and the shares of others, on their attaining twenty-one, or to the survivors of them, in case of the death of any of them in his wife's lifetime, and without leaving issue. *Provided, that if any of his children who should die in his wife's lifetime should have left issue,* such issue should have such share or shares as his, her or their parent or parents would have been entitled to if living, The testator's wife survived him. One of his children who was living at the date of his will died in his lifetime, leaving issue,

(*o*) 8 Sim. 353. The case of *Thornhill* v. *Thornhill* is said to have been overruled by Sir *C. C. Pepys*, M. R., in the previous case of *Collins* v. *Johnson*, 8 Sim. 356, n.; but as the bequest in that case was to the nephews and nieces nominatim, and not as a class, its authority on the point is much less conclusive than the case of *Smith* v. *Smith*, stated in the text. The writer, however, distrusts his own impressions on this point; as, since the preceding remark was written, he finds the case referred to by Sir *L. Shadwell*, 9 Sim. 550, as one which presented much greater difficulty than the case then before the Court (*Jarvis* v. *Pond*, post, 728); though on what ground his Honor arrived at this conclusion does not appear. [*Olney* v. *Bates*, 3 Drew. 319, is not inconsistent with *Smith* v. *Smith*: for though the child, whose issue claimed (and failed in their claim), survived the making of the will, yet as she also survived the widow (who predeceased the testator), the event on which the substitutionary gift was expressly limited did not happen. The case was also influenced by a codicil, whereby the testator had himself put an interpretation on the substitutionary clause. Sir *J. Romilly*, however, has stated the rule in terms inconsistent with *Smith* v. *Smith*, see *Ive* v. *King*, 16 Beav. 53, 54; *In re Domvile's trust*, 22 L. J. Ch. 947; *In re Faulding's trust*, 26 Beav. 263. But in none of these cases was it necessary to decide accordingly, there being an independent gift to the issue; and it is scarcely probable that, when the occasion arises, the case of *Smith* v. *Smith* will be overruled.]

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who survived the testator and his widow; and it was held, that such issue were entitled to a share of the residue. Sir *L. Shadwell*, V. C., said, "I think that the decision in *Thornhill* v. *Thornhill* is wrong."

Distinction where children of deceased claim under original gift.

Where, however, the children of the deceased person found their claim not on a mere clause of substitution, but on a substantive, independent, original gift, comprehending them concurrently with another class of objects, the doctrine of the preceding cases does not apply, and the gift will extend to the children of persons who were dead when the will was made.

Thus, in the case of *Tytherleigh* v. *Harbin* (*p*), where a testator devised a certain estate to trustees in trust for Robert Tytherleigh for life, and after his decease in trust to convey the same "unto or amongst all and every and such one or more of the child or children of the said Robert Tytherleigh who shall be living at the time of his decease, *and the issue of such of them as shall be then dead leaving issue*, such issue to take equally between them the share only which their parent would have been entitled to if then living." The question was, whether the issue of a child of Robert Tytherleigh, who was dead at the date of the will, were included in the devise. It was contended, on the authority of *Christopherson* v. *Naylor*, *Thornhill* v. *Thornhill*, and *Waugh* v. *Waugh* (*q*), that they were not entitled; but Sir *L. Shadwell*, V. C., decided that the gift included these objects. "In this case," said his Honor, "there is an original substantive gift to the child or children of Robert Tytherleigh living at the time of his decease, and the issue of such of them as should be then dead leaving issue; and I think that the word 'them' means nothing more than 'child or children.' This case, therefore, differs from the first three cases cited for the plaintiffs. The testator then says: 'Such issue to take, between or amongst them, the share only which their parent or parents would have been entitled to, if then living.' These words were necessary in order to shew what share the issue of a deceased child were to take amongst them; for, if there had been two surviving children, and ten children of a deceased child, and those words

Children of deceased objects allowed to participate.

(*p*) 6 Sim. 329.

[(*q*) 2 My. & K. 41. This case, however, though professedly decided on the same principle as *Christopherson* v. *Naylor*, must be considered as overruled by the cases now under consideration; unless it be supported on the distinct ground noticed by Sir *L. Shadwell* in *Tytherleigh* v. *Harbin*.]

had not been used, there might have been a question whether each of the ten grandchildren was not entitled to an equal share with the two surviving children."

So, in the case of *Clay* v. *Pennington* (*r*), where a testator in a certain event bequeathed a residuary fund unto the children of his brother B. *and their lawful issue,* in equal shares and proportions, or unto such of them as should prove their right, to the satisfaction of the trustees, within two years after notice thereof, to be inserted in the London Gazette. Some of the children of B. were dead at the date of the will; and it was held, that the issue of such children were entitled to participate with the other children and their issue, it being considered that the gift included all the descendants of the brother, without distinction, who were living at the period in question.

Children of deceased objects let in.

Again, in the case of *Rust* v. *Baker* (*s*), where a testator gave one-fifth part of his residuary personal estate to A., B. and C., and all and every other the children of D., and *the issue of such of his children as should have departed this life.* Long before the date of the will, D. had had a child, who went abroad, and had not been heard of for twenty years. It was held, that he must be presumed to have been dead at the date of the will; but nevertheless that his children were entitled under the bequest.

So, in the case of *Bebb* v. *Beckwith* (*t*), where the trust was for all and every the children of J. B., deceased, to be divided equally amongst them, and the *issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of his, her, or their deceased parents* equally amongst them; Lord *Langdale,* M. R., held, that the bequest included a grandchild of J. B., whose parent was dead when the will was made; his Lordship considering that the effect of the latter words was merely to limit the amount of the share to which the issue was entitled, not to shew that they were to take only by way of substitution.

Disinclination of Courts to exclude children of deceased.

And even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the Courts anxiously lay hold of slight ex-

(*r*) 7 Sim. 370.
(*s*) 8 Sim. 443.
(*t*) 2 Beav. 308. [See also *Gaskell* v. *Holmes,* 3 Hare, 438; *Coulthurst* v. *Carter,* 15 Beav. 421; *Etches* v. *Etches,* 3 Drew. 447; *King* v. *Cleaveland,* 26 Beav. 26; *Shand* v. *Kidd,* 19 Beav. 310 (in the two last cases the word "or," connecting the children and issue, was read as "and"); *In re Faulding's trust,* 26 Beav. 263. But see *In re Thompson's trust,* 5 D. M. & G. 280.]

pressions as a ground for avoiding a construction, which in all probability defeats the actual intention, by excluding the issue of a deceased child from participation in a general family provision.

Thus, in the case of *Giles* v. *Giles* (*u*), where a testator bequeathed the general residue to trustees, in trust for all his children living at the decease of his wife (to whom a life interest had been given) as tenants in common; and *if any such children or child should be deceased before his wife, and should leave issue*, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, upon their attaining the age of twenty-one years; with a proviso, that, until the portions thereby provided for any of the said children of his said *sons or daughters* who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator at the date of his will had four sons and one daughter, and he had had another daughter, who was then dead, leaving children, who survived the testator.

Children of deceased objects let in.

The question was, whether these children were objects of the bequest; and Sir *L. Shadwell*, V. C., decided that they were, considering that the special language of the will authorized this conclusion, without infringing the authority of the general cases before stated, which had been pressed upon him. The V. C. relied particularly on the expression "sons and *daughters*," which he considered to indicate that the testator had the issue of the deceased daughter in his view, he having but one daughter living at the date of the will; the learned Judge deeming it more probable that the plural word was used in remembrance of the child that had been born and died, than in anticipation of a future child to be born, and be a daughter.

So, in the case of *Jarvis* v. *Pond* (*x*), where the testatrix bequeathed the residue of her property to her daughter M. during her life, and after her decease to be divided among such of her sons and daughters as should be living at the time of the decease of M.; *and in case of the decease of any of the testatrix's sons and daughters, the surviving children of any of her sons and*

(*u*) 8 Sim. 360. (*x*) 9 Sim. 549.

*daughters to have their father's or mother's part,* to be equally divided among them. At the date of the will a daughter (B.) and two sons of the testatrix were dead, B. and one of the sons leaving issue; and there was only one daughter besides M. living. The testatrix gave legacies to the surviving husband and widow of two of her deceased children, but not to the children of those who left issue. Sir *L. Shadwell* held, that they were entitled to participate in the residue. The words "in case of the decease" meant only this:—"In case any child or children shall be then alive who are the issue of any of my children who are then dead;" though his Honor admitted that there was some violence in assigning a share to the father or mother, when they never would have taken any.

Children of persona designata dead at date of will entitled under clause of substitution.

[The rule by which the clause of substitution is held not to include children of objects dead at the date of the will was stated of cases in which the original gift was to a *class.* And in no case does it apply where the original gift is to designated *individuals.* The distinction is clear: the latter case comes within the principle of *Darrel* v. *Molesworth;* for there can be no difference between the case of a gift to a person known by the testator to be alive, and in the event of his death to his children, and a gift to a person whom the testator may suppose or believe to be living, but who is in fact dead, with a gift over to his children in case of his death (*y*). The case of a gift to a class, in which the testator must, in the absence of express direction, be supposed to include only living objects, needs only to be stated to be distinguished.

Distinction when primary gift is to such as are living at the date of the will.

Where, however, the bequest to the primary legatees is expressly limited to those living at the date of the will, the substitutionary clause of course cannot operate in favour of children of such of the legatees as were then dead (*z*)].

General conclusion from preceding cases.

These cases, it is conceived, fully warrant the position that, in the absence of an explanatory context, a gift over, to take effect in the event of the prior devisee or legatee dying under certain circumstances, applies to the event happening in the lifetime of

[(*y*) *Ive* v. *King*, 16 Beav. 46; *Hannam* v. *Sims*, 2 De G. & Jo. 151; *In re Sheppard's trust*, 1 Kay & J. 269.

(*z*) See *Crook* v. *Whitley*, 26 L. J. Ch. 350 (the report in 7 D. M. & G. 490, omits this point, except in the marginal note); *Miller* v. *Chapman*, 24 L. J. Ch. 409. In both these cases the primary gift was to a class, though a limited one, see ante, p. 142. But the argument is equally applicable to the case of a bequest to individuals.]

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the testator; the prevention of lapse being, it is considered, one of the purposes of such substituted gift.

Whether gift over takes effect on happening of event subsequent to death of testator.

II. We now proceed to examine the second class of cases before referred to, namely, those in which the question has been —whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease,* under the circumstances prescribed; and if so, then, whether at any time subsequently.

It is somewhat hazardous, in the state of the authorities, to lay down any general rule on the subject; but it will commonly be found, it is conceived, that where the context is silent, the words referring to the death of the prior legatee, in connexion with some collateral event, apply to the contingency happening as well *after* as before the death of the testator.

Case of *Allen* v. *Farthing.*

Thus, in the case of *Allen* v. *Farthing* (*a*), where a testator, after directing that a sum of 200*l.*, recently paid to his daughter, should be deducted from the amount of any monies, or any share of his personal estate thereinafter bequeathed to her, or to which she should be entitled under and by virtue of that his will, proceeded to devise all his real estate to trustees upon trust for sale, and to apply the monies to arise therefrom upon the trusts thereinafter declared concerning his personal estate. The testator then bequeathed his personalty to the same persons, upon trust to get in and recover the same, and to pay and divide the same monies, estate and effects unto and between his son *John Allen* and his daughter *Ann Smith,* in equal moieties, share and share alike, the share of the daughter to be for her separate use; *and, in case of the death of either of them, the said John Allen and Ann Smith leaving any child or children him or her surviving,* upon trust that the said trustees should stand possessed of the said moiety of the said estate so given to him or her the said *J. Allen* and *A. Smith* as aforesaid, in trust for such child or children, as and when they should attain twenty-one, and in the mean time, to apply the income for maintenance; and in case of the *death of either of them, the said John Allen and Ann Smith leaving no issue lawfully begotten,* then upon

(*a*) MS., 12th Nov. 1816. This case and the decree thereon are stated 2 Mad. 310, but without the arguments and judgment, which are necessary to elucidate the principle of the decision; the author has, however, been favoured with a note of them by a friend.

trust, as to the moiety of him or her so dying, for the survivor of them. The son and daughter having survived the testator, claimed absolute interests in the residue, contending that the several gifts in favour of the children and the survivor respectively were intended to provide only for the event of the legatee's dying in the testator's lifetime; and that the terms in which the testator had directed the 200*l.* to be deducted out of his daughter's share aided this construction. Sir *J. Leach*, V. C., however, held, that the testator's children took life-interests only. He observed, that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to "pay" and "divide" the property between the son and daughter, yet these words were to be taken in connexion with the subsequent limitations, which cut down and qualified them; and his Honor thought that the argument founded on the manner in which the advance of 200*l.* was directed to be deducted out of the daughter's share was too weak and inconclusive to control the words.

The event of death, leaving children, held to apply to period after testator's death.

So, in the case of *Child* v. *Giblett* (*b*), where a testator bequeathed the residue of his estate to trustees, upon trust, after payment of his debts, to divide the same between his two daughters, A. and B., share and share alike, to whom he bequeathed the same; and in case of the death of either, the testator gave the whole to the survivor *and in the event of their marrying and having children*, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not, then among the children of C., share and share alike; and if only one child, then the whole thereof to that one child. A. and B. both survived the testator; and the question was, whether they were entitled to the property absolutely, or for life only. Sir *J. Leach*, M. R., held, that they took life interests only. "The rule is," said the learned Judge,

Gift over, on A. marrying and having children, extended to event *after* death of testator.

(*b*) 3 My. & K. 71.

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"that where there is a bequest to two persons, and, in case of the death of one of them, to the survivor, the words 'in case of the death' are to be restricted to the life of the testator: but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of C. should take, in the event of a marriage of his daughters, and their death without children in his lifetime, and that they should not take in the event of a marriage of his daughters, and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator, and that in the event of A. dying without children, or if she should have children and none of them live to attain the age of twenty-one, the children of C. will be entitled to the residuary property of the testator."

[Again, in the case of *Smith* v. *Stewart* (*c*), where a testator devised and bequeathed the residue of his real and personal estate, in different shares, amongst several persons, and directed that the whole of the said legatees should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue: the question was, whether the legatees acquired an indefeasible interest by surviving the testator; and Sir *J. K. Bruce*, V. C., decided that they did not.]

Gifts over, comprising every possible event, confined to testator's lifetime.

Sometimes, however, it happens, that a devise in fee simple is followed by alternative limitations over, which collectively provide for the event of the death of the devisee, under all possible circumstances. In such a case, the words of contingency are read as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devisee in fee to an estate for life. Thus, in the case of *Clayton* v. *Lowe* (*d*), where a testator gave his residuary real and personal estate to be equally divided between his three grandchildren, A. B. and C.,

[(*c*) 4 De G. & S. 252. See also *Gawler* v. *Cadby*, Jac. 346; *Gosling* v. *Townshend*, 17 Beav. 245; *Johnston* v. *Antrobus*, 21 Beav. 566 (as to the pecuniary legacy); *Varley* v. *Winn*, 2 Kay & J. 705.]

(*d*) 5 B. & Ald. 636.

share and share alike, *for ever; and if either of them should happen to die without child or children lawfully begotten,* then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten,* that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and it was held, by the Court of King's Bench, on a case from Chancery, that in the events which had happened they took estates in fee simple as tenants in common.

Remarks on *Clayton* v. *Lowe.*

The reasons for the conclusion at which the Court arrived do not appear, but we may presume them to be in consistency with the argument (already noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life(*e*); [and on this ground the case was followed with express approbation of the doctrine contained in it, in the case of *Gee* v. *Mayor of Manchester* (*f*), where a testator gave his freehold, leasehold and personal property among his children in manner following: to his son A. one-seventh share of his property, to *his heirs, executors and administrators.* And he gave one-seventh share to each of his other six children in similar terms; and provided, that in case any of his sons or daughters died without issue, that their share returned to his sons and daughters equally; and in case any of his sons and daughters died and leaving issue, that they should take their deceased parent's share. On a case from Chancery, the Court of Q. B. certified that each child who survived the testator took an indefeasible estate in fee in the real estate and an absolute interest in the leaseholds.

*Clayton* v. *Lowe* confirmed.

So, in the case of *Woodburne* v. *Woodburne* (*g*), where a testator gave all his real and personal estate upon trust for his brothers and sisters (naming them), their heirs, executors,

(*e*) However the devise in *Clayton* v. *Lowe*, of the shares of grandchildren who should die without children, would not apply to, and would therefore leave the fee in, the last survivor, who might die without children; and this makes a solid difference between such a devise and a mere estate for life.

[(*f*) 17 Q. B. 737. Sir *J. K. Bruce*, V. C., expressed a different opinion upon the same case, 19 L. J. Ch. 151, 14 Jur. 825.

[(*g*) 23 L. J. Ch., 336; *Johnston* v. *Antrobus*, 21 Beav. 556 (as to the share of residue).]

[administrators and assigns; and declared that if any of his said brothers and sisters should die without leaving issue, his or her share should go to the survivors, and that if any of his brothers and sisters should have left issue, such issue should be entitled to their parents' shares: it was held by Sir *J. Stuart*, V. C., that the brothers and sisters, having survived the testator, were absolutely entitled to the estate.]

Distinction where prior gift may be regarded as a mere life interest.

Where, however, the gift, which precedes the alternative gifts over, is not (as in the last case) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

As where (*h*) a testatrix bequeathed to A. the sum of 400*l.*, to be vested in the public funds, the interest whereof she should receive when she attained twenty-one. *In the event of her decease at, before or after the said period,* the sum so bequeathed to be divided between B. and C. Lord *Langdale*, M. R., said that the words "at, before or after" involved all time present, past and future, and that the only construction to be put on these words therefore was, "in the event of her decease, whenever that event might happen."

[It was scarcely possible, indeed, to put any other construction on this will. The reference was expressly to the age of twenty-one years; and therefore no room was left to imply a reference to any other or additional period, as the death of the testator. The case differs, therefore, from the two preceding, in which the manner and not the period of death was the circumstance to which express reference was made.

A clearer illustration of the distinction is afforded by the case of *Cooper* v. *Cooper* (*i*), in which a testator bequeathed the residue of his personal estate equally between his four children (naming them), and in case of the death of either of them leaving issue then the issue of such child to take the parent's share; but in the event of their dying without leaving issue

(*h*) *Miles* v. *Clark*, 1 Kee. 92; [see *Tilson* v. *Jones*, 1 R. & My. 553, ante, 711.

(*i*) 1 Kay & J. 658. But see *Rogers* v. *Waterhouse*, 4 Drew. 329; and *Rogers* v. *Rogers* (special case on same will), 7 W. R. 541.

[then the share of the one so dying to become part of the residue of his personal estate. There being no words in the primary bequest expressly giving an absolute interest (as there were in *Clayton* v. *Lowe* and *Gee* v. *Mayor of Manchester*), there was no danger of imputing two inconsistent intentions to the testator in refusing to hold the bequest absolute upon the testator's death: and it was therefore held by Sir *W. P. Wood*, V. C., that the children took life interests only.

The event restricted to the testator's death by the context.

But although the general rule may be to allow the gift over to take effect upon the happening of the contingency *after* the testator's death, yet it is no longer applicable when the testator has used expressions which denote a different intention; and there are many cases of this description. Thus in the case of *Re Anstice* (*k*), where a testatrix bequeathed the residue of her personal estate in trust for her two cousins, A. and B. as tenants in common: and "in case either of them should be married *at the time of her said legacy becoming payable*, *then* the same shall be paid or disposed of for her separate use, *and her receipt alone for the same shall be a sufficient discharge.*" And in case either of them should die without leaving issue, then her share to go to her sister; and in case both should die without leaving issue, then over; it was held by Sir *J. Romilly*, M. R., that the event here contemplated was death in the testatrix's lifetime, for the legatees were to be compelled to give a full discharge for their legacies, if they were married, when they became payable, which was inconsistent with a gift over upon an event to happen at any time during their lives.

Tendency to confine the contingency to a limited period.

This and other cases in which the Court has departed from the general rule, shew that it is only where there is a total absence of any expression in the will by which the event can be referred to another and earlier period that it will be held to be suspended during the whole life of the primary legatee. The Court is always anxious to find expressions to set the legacy free from a continuing possibility of defeasance (*l*).]

Rule where there is a prior life or other interest.

In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, i.e. to take effect in possession; so that the Court was placed in the alternative of

[(*k*) 23 Beav. 135.

(*l*) See *Ware* v. *Watson*, 7 D. M. & G. 248; and the somewhat analogous cases of *Lloyd* v. *Davies*, 15 C. B. 76; *Smith* v. *Colman*, 25 Beav. 216.]

construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the original legatee, surviving that period, becomes absolutely entitled. An example of this construction is afforded by the case of *Da Costa* v. *Keir* (*m*), where a testator gave the residue of his estate to trustees, upon trust to pay the interest to his wife for life, and after her decease, *he gave the principal to A. for her own use and benefit;* but if the said A. should die, leaving any child or children living at her decease, then he gave the residue to her children; but if she should die without any child living at her decease, then he gave the same to B. and C. equally; but if either of them should die before they should become entitled to receive the said residue, then he gave the whole to the survivor; *and if both should die in the lifetime of his wife,* then he gave the said residue to his wife. A. survived the testator and his widow, and therefore claimed to be entitled absolutely. The legatees over resisted this claim on the ground that the residue was given to them in the event of A. dying without leaving a child, *whenever that event should happen.* Sir *J. Leach,* M. R., considered this construction objectionable, as it simply revoked the prior gift to A. (*n*), since, by parity of reasoning, the children, if any, living at her decease, would also have been entitled, without regard to the period of death; whereas, the testator intended the subsequent gift to operate only by way of qualification or exception in particular events; and he thought that the ultimate gift to the wife in the event of B. and C. dying in her lifetime, plainly indicated that the life of the widow was to be the period to which the event of A. dying with or without children was to be referred, and consequently that A. having survived the widow, was absolutely entitled.

Contingency restricted to period of distribution.

A question of this nature arose in the case of *Galland* v. *Leonard* (*o*), where a testator gave the residue of his personal estate

(*m*) 3 Russ. 360. (*n*) I. e. Ultra the life interest.
(*o*) 1 Swanst. 161.

to trustees, upon trust to place the same out at interest during the life of his wife, and pay her a certain annuity, and upon her death to pay and divide the said trust monies unto and equally between his two daughters, H. and A. *And in case of the death of them his said daughters, or either of them, leaving a child or children living*, upon trust for the children in manner therein mentioned; and the testator declared that the children of each of his daughters should be entitled to the same share his, her or their mother would be entitled to, if then living. Sir *T. Plumer*, M. R., held, that the testator intended only to substitute the children for the mother, in the event of the decease of the latter *during the widow's life*, and that the daughters who survived her (the widow) became absolutely entitled. In this case the frame and terms of the bequest shewed that the testator contemplated the death of the widow as the period of distribution, and any doubt which his previous expressions may have left on this point is dispelled by the clause entitling the children to the shares which their parents, *if living*, would have taken.

Remark on *Galland* v. *Leonard*.

[So, in the case of *Barker* v. *Cocks* (*p*), where a testator bequeathed a fund after the decease of his wife (who had a life interest therein) to A., B. and C., as tenants in common, but in case of the death of C. without leaving lawful issue, he gave her third part to A. and B. equally; it was held by Lord *Langdale*, M. R., that, having survived the wife, C. had acquired an absolute interest. "If," said his Lordship, "you make the dying without leaving lawful issue refer to the period anterior to the death of the tenant for life, you carry into effect the primary intention of the testator to divide the fund amongst the three, share and share alike."]

A similar construction prevailed, partly on the authority of *Galland* v. *Leonard* in the more doubtful case of *Home* v. *Pillans* (*q*), where a testator bequeathed to his nieces, C. and M., the sum of 2,000*l.* each, when and if they should attain their ages of twenty-one years; and which said legacies he gave to them for their sole and separate use, free from the debts or control of their or either of their husbands: *and in case of the*

[(*p*) 6 Beav. 82. See also *Garey* v. *Whittingham*, 5 Beav. 268; *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 463; *Edwards* v. *Edwards*, 15 Beav. 357; *Walker's Trust*, 16 Jur. 702; *Johnson* v. *Cope*, 17 Beav. 561; *Re Allen's Estate*, 3 *Drew.* 380; *Randfield* v. *Randfield*, 30 L. J. Ch. 182, per Lord *Kingsdown*; *Andrew* v. *Lord*, 6 Jur. N. S. 865. But see *Benn* v. *Dixon*, 16 Sim. 21; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Smith* v. *Spencer*, 6 D. M. & G. 631.]

(*q*) 2 My. & K. 15.

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Contingency restricted to period of distribution.

*death of his said nieces, or either of them, leaving children or a child*, the testator bequeathed the share or shares of each of his said nieces so dying, unto their or her respective children or child. Sir *J. Leach*, M. R., held, that the nieces did not take absolute interests at majority; but that the bequest to them continued to be liable to the executory gift, on their dying, leaving children. Lord *Brougham*, C., reversed the decree, on the ground that the construction adopted by the Court below was irreconcileable with the authorities, especially those cases in which words, referring to death generally, had been held to be restricted to death occurring in the lifetime of the prior legatee for life (*r*); and he adduced the case of *Galland* v. *Leonard*, as an authority precisely in point. His Lordship also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court could never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

Remark on Lord *Brougham's* judgment in *Home* v. *Pillans*.

It is observable, that Lord *Brougham*, in his remarks on *Hervey* v. *M'Lauchlin* (*s*), and that class of cases, but very faintly adverts to the fact, that, in them, the gift over was in case of death simpliciter, and in the will before him, it was in case of death *in connexion with a collateral event* (*i. e.* leaving children), which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by his Lordship, from the cited authorities. The point which he had to decide was certainly one of great difficulty (*t*).

Contingency restricted to period of distribution.

[Again, in the case of *Monteith* v. *Nicholson* (*u*), where a testator gave his personal estate to his brothers and sisters living at his decease, their executors, administrators and assigns, as tenants in common, and declared that, *if any of them should die in his lifetime or afterwards, without leaving lawful issue*, the share or shares of him, her or them so dying should go to and be equally divided amongst the survivor or survivors of them; *and if any of them should die in his lifetime or afterwards leaving issue*, the share or shares of him, her or them so dying should

(*r*) Vide ante, 707.

(*s*) 1 Pri. 264.

[(*t*) See, however, per Sir *J. Romilly*, *Edwards* v. *Edwards*, 15 Beav. 357.

(*u*) 2 Kee. 719. But see *Cotton* v. *Cotton*, 23 L. J. Ch. 489, a case on a specially-worded will.

[go to and be equally divided amongst such issue, such child or children taking their parent's share. "And, moreover, I declare it to be my will, that none of the legatees, under this my will, shall be entitled to any bequest until they severally attain the age of twenty-one years." It was contended that the brothers and sisters took only life-interests, which was equivalent to saying that the property would go over at whatever time either of the contemplated contingencies might happen: but it was held by Lord *Langdale*, M. R., that the interest of the legatees became indefeasible on their attaining the age of twenty-one years.

Foregoing rules applicable as well to real as to personal estate.

The same rule of construction is applicable to the case of a devise of real estate (*x*); and the inference to be drawn from the authorities is, that the contingency is always referable to the period of payment or distribution.]

Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.

And here it will be convenient to notice the frequently occurring point of construction arising on the word "payable," in such a case as the following:—A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares become *payable*. In such cases it becomes a question whether the word "payable" is to be considered as referring to the age or marriage (or any other such circumstance affecting the personal situation of the legatee), on the arrival or happening of which the shares are made "payable," or to the actual period of distribution; in other words, whether the shares vest absolutely at the majority or marriage of the legatees, in the lifetime of the legatee for life; or whether the vesting is postponed to the period of such majority or marriage, *and the death of the legatee for life*. As the latter construction exposes the legatees to the risk of losing the testator's provision in the event of their dying in the lifetime of the legatee for life, although they may have reached adult or even advanced age, and may have left descendants, however numerous, the Courts have strongly inclined to hold the word "payable" to refer to the majority or marriage of the legatees, especially if the testator stood towards the legatees in the parental relation.

And where (as often happens) the question has arisen under

[(*x*) *Edwards* v. *Edwards*, 15 Beav. 357.]

marriage settlements (*y*), the leaning to this construction is strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be), in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction.

Word "payable" referred to majority, not to period of distribution.

[Thus, in the case of *Salisbury* v. *Lambe* (*z*), where a testator by his will appointed 2,000*l.*, in trust for the separate use of his daughter S., and afterwards in trust for her daughters and younger sons as she should appoint; in default of appointment, in trust for her daughters and younger sons equally, to be paid at twenty-one or marriage; in case any of them should die or become heir male of S., before his, her or their share became *payable*, such share to go to the survivor; if all should die before their shares became *payable*, then to S.; S. survived all her children; but Lord *Northington* held, that they took transmissible interests on attaining twenty-one or marriage.]

So, in the case of *Hallifax* v. *Wilson* (*a*), where a testator gave to trustees all his estate and effects, upon trust to lay out the proceeds thereof, after payment of debts, upon security, and pay the interest to his mother, R. M., for life; and, after her decease, upon trust to pay and transfer the said trust monies unto and among his nephew and nieces; their respective shares, with the accumulated interest, to be paid or transferred to them at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die before his, her or their share or shares in the said trust monies and pre-

(*y*) *Emperor* v. *Rolfe*, 1 Ves. 208; *Woodcock* v. *Duke of Dorset*, 3 B. C. C. 569; *Hope* v. *Lord Clifden*, 6 Ves. 499; *Schenck* v. *Legh* (which is a leading case), 9 Ves. 300; *Powis* v. *Burdett*, ib. 428; *Howgrave* v. *Cartier*, 3 V. & B. 79; *Perfect* v. *Lord Curzon*, 5 Mad. 442; [*Evans* v. *Scott*, 1 H. of L. Ca. 43, 11 Jur. 291; *Re Williams*, 12 Beav. 317; *Mount* v. *Mount*, 13 ib. 333; *Bailie* v. *Jackson*, 1 Sm. & Gif. 175; *Swallow* v. *Binns*, 1 Kay & J. 417; *Walker* v. *Simpson*, ib. 713; *Moor* v. *Abbott*, 26 L. J. Ch. 787, 3 Jur. N. S. 551; *Remnant* v. *Hood*, 27 Beav. 74. But see *Whatford* v. *Moore*, 7 Sim. 574, 3 My. & C. 289; *Lloyd* v. *Cocker*, 19 Beav. 140; per Sir *G. J. Turner*, L. J., *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004, stated post, 749.

(*z*) 1 Ed. 465.]

(*a*) 16 Ves. 168.

mises should become *payable*, then the testator directed that the share or shares of him, her or them so dying, should go or be paid to the survivors or survivor; and in case of the death of all his said nephew and nieces before the said trust monies should become *payable*, the testator gave the same to his trustees, share and share alike. The question was, as to the destination of the share of the nephew, who attained twenty-one, and died in the lifetime of the testator's mother. Sir *William Grant*, M. R., held, that the share in question vested absolutely at majority. "The testator," he observed, "has used the word 'payable,' a word of ambiguous import; in one sense, and with reference to the capacity of the person to take, he had just before declared, that the age of twenty-one was the period at which their shares were to be payable: in another sense, with reference to the interest of the tenant for life, they would not be payable until her death; but then it is with the direction to pay at the age of twenty-one, that the bequest over is immediately connected; and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration, that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those who should not live to attain that age; and there he adds the direction, that the shares should go over. I think it is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment."

So, in the case of *Walker* v. *Main* (*b*), where a testator devised real estate to his wife for life, and, after her decease, to a trustee upon trust for sale, and directed the produce to be distributed among his children and grandchildren in the following manner: —He first gave to several of his grandchildren 20*l.* each, to be paid on their attaining the age of twenty-one years, or marrying; and, after bequeathing other legacies, gave to his four children the residue of the money arising from the sale, to be equally divided between them by his trustee, as soon as each of them should attain to their respective age or ages of twenty-one years; but upon marriage, whether of age or not, each of their receipts should be a sufficient discharge. But if any or either of his said children or grandchildren should happen to

Word "payable" referred to majority, not to period of distribution.

(*b*) 1 J. & W. 1.

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die before the time of such legacy becoming *due and payable*, then the testator gave the share of such child or children or grandchildren, so dying, unto and among those that should be then living. Two of the grandchildren attained twenty-one, and married, and died in the lifetime of the widow; and Sir *T. Plumer*, M. R., on the authority of the cited cases, and especially of Sir *W. Grant's* decision in *Schenck* v. *Legh* (*c*), held, that the shares vested absolutely at twenty-one or marriage, in the lifetime of the prior cestui que trust.

Word "payable" referred to period of majority.

Again, in the case of *Jones* v. *Jones* (*d*), where a testator bequeathed 10,000*l.* to trustees, upon trust for A. for life, and from and after his decease, then to pay it to the children of A., when and as they should severally attain the age of twenty-one years; and in case any of the said children should die before his, her or their share or shares should become *payable*, leaving no issue, then the share or shares of him or them so dying to go to and amongst the survivors or survivor: Sir *L. Shadwell*, V. C., held, that a son of A., who attained twenty-one, but died in A.'s lifetime, took a vested interest in the legacy, and that his personal representative was entitled; his Honor being of opinion, that the word "payable" meant *attain twenty-one*.

Words "entitled in possession" similarly construed.

[And in the recent case of *Re Yate's Trust* (*e*), where a testator bequeathed a sum of money in trust for A. for life, and after her death for her children on their respectively attaining the age of twenty-one, or in case of daughters, on marriage, and in case any of the children of A. should die before being *entitled in possession* to his, her or their share or shares, then over; the foregoing cases were not disputed, the argument being chiefly directed to prove that the phrase "entitled in possession" was less capable of a liberal construction than the word "payable;" but Sir *J. Parker*, V. C., held that there was no difference between them, and that consequently the death of a child in the lifetime of A. did not defeat the interest which he had acquired on attaining the age of twenty-one.]

Result of the cases.

In this state of the authorities, it seems not to be too much to say that the word "payable," or the like, occurring in the executory bequests under consideration, is held to apply to the age or marriage of the legatee, and not to the period of the

(*c*) 9 Ves. 300. (*d*) 13 Sim. 561.
[(*e*) 16 Jur. 78, 21 L. J. Ch. 281.

death of the legatee for life, unless the latter is shewn by the context to be intended by the testator.

Same rule though legatee for life die before majority of legatee over.

[And the construction would not be varied by the accident of the legatee for life, dying before the majority or marriage of the legatee in remainder; whose interest, therefore, would remain liable to defeasance during minority or until marriage (*f*).

Where no time fixed for payment, word "payable" referred to period of distribution.

But if the gift in remainder after the death of the tenant for life be absolute, and not at a time fixed with reference to the age or marriage of the legatee in remainder, as happened in the cases previously noticed, then the word "payable" will be held to refer to the death of the tenant for life whom the legatee in remainder must survive in order to take (*g*). The only other alternative would be to consider that it was intended to prevent a lapse, a construction which, as we have seen, the Courts do not readily adopt.

So under gift to such as survive tenant for life, notwithstanding time fixed for payment.

Again, if the original bequest be to such children only as survive the tenant for life, or be liable to defeasance by death in his lifetime, a gift over in the event of the legatees dying before their shares become payable, will take effect if none of the legatees survive the tenant for life, although the will expressly directs payment at the age of twenty-one, and the legatees have attained that age. There is then no room to doubt; and no construction which may be put upon the word "payable" can enlarge the prior bequest. And this was decided in a case (*h*) where in another part of the will the word "payable" clearly referred to the age of the legatees, it being provided in a clause following immediately after the direction to pay at twenty-one or marriage, that the interest of the respective shares should be applied towards the maintenance of the legatees until their respective shares became *payable*.

Word "payable" explained by context to refer to period of distribution.

And the testator may have removed all doubt of his having used the word in its ordinary sense, by associating it with a context which precludes the construction which refers it to the personal qualification of the legatee. Thus,] in the case of

[(*f*) See *Williams* v. *Clark*, 4 De G. & S. 475.

(*g*) *Creswick* v. *Gaskell*, 16 Beav. 577. See also *Crowder* v. *Stone*, 3 Russ. 217, ante, 650, where the point seems to have been assumed. Compare *Jopp* v. *Wood*, 29 L. J. Ch. 406 (on a settlement), where the expression was "entitled," as to which see post, 746.

(*h*) *Bielefield* v. *Record*, 2 Sim. 354. See *Jeffery* v. *Jeffery*, 17 Sim. 26; *Farrer* v. *Barker*, 9 Hare, 737; *Hind* v. *Selby*, 22 Beav. 373.]

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*Bright* v. *Rowe* (*i*), where a testatrix by virtue of a power appointed the reversion of a sum of 2,000*l.*, in which she and her husband had life interests, to trustees, upon trust for her daughter M., or any other children she might thereafter have by her husband J., to be equally divided between them: but it was her will that, in case the 2,000*l.* should become *payable before M. should attain twenty-one* or day of marriage, or before any other of her children, being a son, should attain twenty-one, or being a daughter, the same age, or marry, then the trustees to invest the same, and apply the interest of each child's share for maintenance; and when any such children, being sons, should attain twenty-one, or being daughters the like age or day of marriage, upon trust to pay them their respective shares of the principal with the unapplied interest: and in case her said daughter M., or any other child she might have by her husband should happen to die before his, her, or their portion or portions of the said sum of 2,000*l.* should become *payable*, then the same should respectively go and belong to the survivors or survivor of them. The testatrix left three children, two of whom died in the lifetime of her husband (who, it will be remembered, had a life interest under the settlement) after having attained twenty-one. Sir *J. Leach*, M. R., while he admitted the presumption in favour of the vesting of children's shares where the will was ambiguously expressed, yet considered that there was no ambiguity here; and that, by dying before the portions became payable, the testatrix meant dying in the lifetime of her husband, and consequently that the shares of the deceased children had devolved to the survivors.

Where no prior life interest,

[Of course where there is no previous life interest and the legacy is made payable at a particular time, with a gift over in case of death before the legacy becomes *payable*, the word "payable" is held to refer to the time specified and not to the death of the testator (*k*). But if no such time is specified and the gift be immediate (*i. e.* in possession) the word can only have reference to the death of the testator (*l*).

—— nor time fixed for payment.

Words "entitled to receipt" have same effect as "payable."

The words "entitled to the receipt" correspond exactly with the word "payable," the one expression regarding the right of the legatee, the other the duty of the executor or trustee. A

(*i*) 3 My. & K. 316.

[(*k*) *Woodburne* v. *Woodburne*, 3 De G. & S. 643; *Jenkins* v. *Jenkins*, Belt's Supp. to Ves. 264.

(*l*) *Cort* v. *Winder*, 1 Coll. 320.

[corresponding construction must therefore be made of those words (*m*).

But a gift over in case the legatee should die "before *receiving* his legacy" is more difficult to deal with; though in this case also the Courts exhibit a reluctance to suppose that the testator meant to require an actual receipt of the legacy, and thereby postpone indefinitely its absolute vesting. Thus, in the case of *Rammell* v. *Gillow* (*n*), where a testator bequeathed his property to trustees in trust to pay an annuity of 200*l.* to his wife during widowhood; and as to the residue during her life, and after her decease as to the whole, in trust to pay and divide the same equally amongst his children as and when they should respectively attain twenty-one; but he directed the shares of such of his children as had already attained that age to be paid to them twelve months after his wife's decease, or so soon after as there were assets; but, in the event of the decease of any of his said children before they should have *received or become possessed* of their divisional share aforesaid leaving issue, their share was to go over: Sir *James Wigram*, V. C., held, that the shares of those children who had not attained twenty-one at the date of the will became indefeasible on their attaining that age; thus showing that he did not consider actual receipt necessary: indeed, he referred to the gift as being vested, but given over in case the legatees died before it became *receivable*. But with respect to such of the children as had attained twenty-one at the date of the will, he held their shares liable to be divested in case they should die at some period thereafter to be determined upon the construction of the words "before they received their shares." "What that time is," said the learned Judge, "I need not decide."

Words "received or become possessed" similarly construed.

More than three years had elapsed since the death of the testator when this decision was made, and all the children were living. His Honor, therefore, did not think that the word "received" could be referred to the end of one year from the testator's death as being the time usually allowed to executors to get in and distribute their testators' estates. Such, however, was the construction adopted by Sir *R. Kindersley*, V. C., in *Re Arrowsmith's Trusts* (*o*), where a fund was given by the tes-

"Die before receiving," whether referable to end of

[(*m*) *Hayward* v. *James*, 29 L. J. Ch. 822, 6 Jur. N. S. 689.

(*n*) 9 Jur. 704. See also *Hutcheon* v. *Mannington*, 1 Ves. jun. 366; *Dodgson's Trust*, 1 Drew. 440; *Girdlestone* v. *Creed*, 10 Hare, 487.

(*o*) 29 L. J. Ch. 775, 30 ib. 148, 6 Jur. N. S. 1232, 7 ib. 9.

first year from testator's death,

[tator to his nephews and nieces with a gift over, in case of the death of any of them "before receiving their respective shares," to the surviving nephews and nieces. And although upon appeal to the Lords Justices, the Court expressly declined to decide the point (a decision upon it having become unnecessary) the doubt which occurred to their Lordships was not whether the words could be referred to so early a period, but whether they ought not even to be restricted to the testator's death. The V. C. had deemed such a restriction inadmissible, not only because it would reduce the clause to silence (the original gift being to a class to be ascertained at the testator's death), but also because in another part of the will he had in terms made one of its provisions dependent on a certain person being alive at the time of his (testator's) decease.

—— or to the testator's death.

Word "entitled" referred to time of vesting.

A legatee may often be said to be "entitled" to a legacy which is not yet "payable:" and therefore a gift over in case the legatee should die before he is "entitled," may not deprive him of the legacy where a gift over, in case of his death before it became "payable," would do so. Thus, in a case (*p*) where a testator, in exercise of a power, appointed the subject of it, after the decease of his wife among his younger sons, and directed that the same should go to them immediately after the decease of his said wife; and in case of the death of any of his said sons *before he should be entitled* thereto, then over: Sir *E. Sugden*, C., held that the death here provided for was a death in the lifetime of the testator, and not of the tenant for life, the wife, and that the gift over was only to take effect in such event.

So, in the case of *Henderson* v. *Kennicot* (*q*), where a testator bequeathed his personal estate to his wife for her life, and after her death to his brothers and sisters, share and share alike; but in case any of his said brothers and sisters should die before they *become entitled* to their respective shares, he gave their shares to their children. Upon the authority of the last case Sir *J. K. Bruce*, V. C., decided (*r*) that one of the brothers who

[(*p*) *Commissioners of Charitable Donations* v. *Cotter*, 2 D. & Wal. 615, 1 D. & War. 498.

(*q*) 2 De G. & S. 492. See also *Jopp* v. *Wood*, 29 L. J. Ch. 406.

(*r*) *Fry* v. *Lord Sherborne*, 3 Sim. 243, was also cited. But the decision there was that daughters became absolutely entitled to portions under a settlement on attaining twenty-one, the portions being expressly made payable at that time or within six months after the death of their father, the tenant for life of the lands charged (whichever event should last happen); and that such portions were not divested by death after majority in the father's lifetime, under a clause directing that if the daughters should die before their portions were payable they should not be raised.

[died in the widow's lifetime did not thereby lose his legacy. The learned Judge, however, seemed to doubt the soundness of the doctrine: and it is to be observed that Sir *E. Sugden* rested his decision on the case of *Doe* v. *Prigg* (*s*), where the terms of the devise were different.

Gift over indefinitely referred to majority.

And even where the gift over is not thus expressly connected with the former bequest, but limited to take effect indefinitely on the death without issue of the prior legatee, the inclination of the Courts is still to confine the operation of the gift over to the period previous to such legatee's majority, and any other clause in the will aiding this construction is eagerly laid hold of. Thus, in the case of *Bouverie* v. *Bouverie* (*t*), where a testator gave to his daughter the interest of his stock for her sole use, and at her death the stock to her children equally, together with the interest to be laid out for their use, in case their mother died before they arrived at the age of twenty-one; *in case one died*, then the others to have share and share alike: *should they all die before the age of twenty-one*, then over; upon the principle mentioned above, aided by the last clause, it was held that the words "in case one died" indicated death under the age of twenty-one.

So, in the case of *Woodburne* v. *Woodburne* (*u*), where a testatrix bequeathed a sum of money in trust for A. to be paid to him at twenty-one, with maintenance in the mean time; and directed that if he should die before his legacy became payable leaving issue, such issue should be entitled to the deceased parent's legacy: and as to the residue, the testatrix bequeathed the same in trust for B. for life, and after her death the principal to be paid to A. at the time when his other legacy became due and payable; and in case of his death without leaving issue, then over; A. having died without issue in the lifetime of B. after attaining the age of twenty-one, the question was whether his interest in the residue was divested by the gift over; and it was held by Sir *J. K. Bruce*, V. C., that the legatee having attained his majority did not lose the residue.

In these cases the Courts have confined themselves to con-

[(*s*) 8 B. & Cr. 231, vide ante, 678.

(*t*) 2 Phill. 349. See also *Vulliamy* v. *Huskisson*, 3 Y. & C. 80; *Wheable* v. *Withers*, 16 Sim. 505.

(*u*) 3 De G. & S. 643. See also *Tribe* v. *Newland*, 5 De G. & S. 236, ante, 698; *Brotherton* v. *Bury*, 18 Beav. 65; *Glyn* v. *Glyn*, 26 L. J. Ch. 409, 3 Jur. N. S. 179. But compare *Beckton* v. *Barton*, 27 Beav. 99; *Vorley* v. *Richardson*, 29 L. J. Ch. 335.

[struing the will, though construing it in a large sense. But there exist cases in which it may seem that in the eagerness to carry out the testator's supposed intention, too little weight has been allowed to the actual words he has made use of. Thus, in *Maitland* v. *Chalie* (*x*), where a testator bequeathed a sum of money in trust for S. for life, and after her death, as to a moiety thereof, for her children equally to be divided between them at their respective ages of twenty-one, with maintenance during minority; and if any of such children should die before attaining twenty-one, his share to go to the survivors; but in case S. should die without *leaving* any child or children, or leaving such and they should die before attaining twenty-one, then over. S. had issue two daughters who both attained twenty-one, but died in their mother's lifetime; Sir *J. Leach*, V. C., however, thought himself bound by the authorities to hold that the word "leaving" must be read as "having;" and that the legacies were not divested.

Gift over in case parent dies "leaving" no issue read "having," so as not to divest previous gift.

Now, these authorities are cases upon settlements (*y*); and unless the testator is the parent of the legatees or stands towards them in loco parentis, the analogy between the cases of wills and settlements is imperfect (*z*). However, the case of *Maitland* v. *Chalie* was recognised and followed by *L. Shadwell*, V. C., in the recent case of *Casamajor* v. *Strode* (*a*), where a testator bequeathed one-sixth part of a fund in trust for six persons (whom he named) for their respective lives; and upon the death of each his children to take his share, the shares of such children to be paid them at their respective ages of twenty-one: and he directed that in case any of the said six persons *should die without leaving any children or child*, the shares of those so dying should go to the survivors or survivor for life, and the children of such of them as should be then dead leaving issue, and the capital of the shares of such survivors should upon their death be divisible among their children in the same manner as their original shares. It was held, that a child of one of the six persons having attained twenty-one took an indefeasible interest, not subject to be divested by the event of his parent dying without leaving a child living at

[(*x*) 6 Mad. 243.
(*y*) Ante, 740, n. (*y*).
(*z*) See *Farrer* v. *Barker*, 9 Hare, 744.
(*a*) 8 Jur. 14. See also *Gibbons* v. *Langdon*, 6 Sim. 260; *Lord Sonde's Will*, 2 Sm. & Gif. 416.

[his death. The learned Judge thought the case was not distinguishable from *Maitland* v. *Chalie*, and that it required very strong words to take away the effect of a prior vested gift. And more recently similar decisions have been made by Sir *J. Parker*, V. C. (*b*), and Sir *W. P. Wood*, V. C. (*c*).

Secus, where nothing vests till the parent's death.

In all the foregoing cases, however, the interests of the children became vested during the life of the parent, the question being only whether they had also become indefeasible, or whether they might not be subsequently divested in case the parent left no child at his decease. But, by the case of *Bythesea* v. *Bythesea* (*d*), it seems that a distinction is to be taken where the interests of the children are not to vest till the death of the parent. The testatrix bequeathed her residue upon trust for her grandson for life, and after his decease, "*in case he should leave any child or children*, then in trust for all and every the child and children of her said grandson lawfully begotten, equally between them if more than one, share and share alike, as tenants in common; and if there should be one such child, then in trust for such only child, to be paid and payable to such child or children at his or their age or respective ages of twenty-one years;" and the testatrix declared, "that the part or share of each such child or children should be considered as a vested interest or vested interests in him, her or them respectively;" and there was a gift over after the decease of the grandson, "in case he should not *leave* any such child or children." The grandson had one child only, who attained twenty-one, and died in his lifetime; and it was contended that the child's representative was entitled; but Lord *Cranworth*, C., and Sir *G. J. Turner*, L. J., affirming the decision of Sir *W. P. Wood*, V. C. (*e*), held, that the gift over took effect. Lord *Cranworth* thought the direction as to vesting might be referred to the time of the father's death. The Lord Justice said, that assuming the case to be one of a settlement, he did not think the argument of the appellant (the representative of the child) would be much advanced; for the authorities justified him in saying that the cases on settlements had been carried as far as they should be.

[(*b*) *Re Thompson's Trusts*, 5 De G. & S. 667.

(*c*) *Kennedy* v. *Sedgwick*, 3 Kay & J. 540. But see *Hedges* v. *Blick*, 3 De G. & J. 139.

(*d*) 23 L. J. Ch. 1004. See also *Sheffield* v. *Kennett*, 27 Beav. 207, 4 De G. & J. 593; *Wilson* v. *Mount*, 19 Beav. 292; *Heath's Settlement*, 23 ib. 193.

(*e*) 17 Jur. 645.

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[The learned Judge further observed, that in all the cases (on settlements) the question had arisen between the eldest son and the other children, or between the surviving children and the representatives of deceased children; and in none of the cases that he was aware of had there been a limitation over in favour of third persons; the existence of this went far to destroy the argument. Another class of cases were those in which the question had been, whether a clear vested interest was to be cut down by words importing contingency. These cases had no application to a case where the whole disposition was introduced by words importing contingency.

But if one survives, all may take.

But if in such a case *any* children survive the parent, the interest of all will be preserved, and the legacy will not be confined to those only who are living at the death of the parent (*f*).]

[(*f*) *Boulton* v. *Beard*, 3 D. M. & G. 608.]

## CHAPTER L.

### EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO THE CONVERSE CASE.

Effect upon executory gift of failure of prior gift.

WHERE real or personal estate is given to a person for life, with an ulterior gift to B., as the gift to B. is absolutely vested, and takes effect in possession whenever the prior gift ceases or fails, (in whatever manner), the question discussed in the present chapter cannot arise thereon.

Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i. e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails ab initio, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person in esse) dying in the testator's lifetime, [without performing the required condition.] It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of *Jones* v. *Westcomb* (*a*), where a testator bequeathed a term of years to his wife for life, and after her death to the child she was then (*i.e.*, at the making of the will) enceinte with; and if such child should die before the age of twenty-one, then one-third part to his wife, and the other two-third parts to other persons. The wife was not enciente; nevertheless Lord *Harcourt* held, that the bequests over took effect; and the Court of King's Bench (*b*), on two several occa-

(*a*) Pre. Ch. 316, 1 Eq. Ca. Ab. 245, pl. 10.

(*b*) *Andrews* v. *Fulham*, 2 Stra. 1092; *Gulliver* v. *Wickett*, 1 Wils. 105; [*Doe*

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sions (in opposition to a contrary determination of the Common Pleas [c]), came to a similar conclusion on the same will.

Failure of prior gift held to let in ulterior gift.

So, in *Statham* v. *Bell* (*d*), where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time,* then both shares to his wife and her heirs. The wife was not enceinte; and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then enceinte (*e*).

So, in the case of *Meadows* v. *Parry* (*f*), where a testator bequeathed the residue of his estate to trustees, upon trust to apply the dividends and interest for the maintenance of all such children as he should happen to leave at his death, and born in due time after, equally, until the age of twenty-one, and then to transfer the funds to them; and in case any of the children should die before twenty-one, such deceased child's share to go to the survivors; and if there should be only one child who should attain that age, upon trust to pay the residue to such child: *and in case all of the children should die before attaining that age,* then he bequeathed the residue to his wife. The testator died without leaving, or ever having had, any issue; but Sir *W. Grant,* M. R., held, that the bequest to the wife took effect.

Gift over, in case there be but one child, extended by implication to event of there not being any.

And, upon the same principle, a bequest over, in the event of the prior legatee having but one child, has been held to extend, by implication, to the event of her not having any child. Thus, in the case of *Murray* v. *Jones* (*g*), where a testatrix, after bequeathing the residue of her personal property to her daughters

[v. *Challis,* 18 Q. B. 224; affirmed in D. P. nom. *Evers* v. *Challis,* 7 H. of L. Ca. 555; and see as to this last case, ante, Vol. I., p. 268. But the one event cannot be construed as included in the other, where the will elsewhere expressly provides for it, *Swayne* v. *Smith,* 1 S. & St. 56.]

(*c*) See *Roe* v. *Fulham,* Willes, 303, 311.

(*d*) Cowp. 40.

(*e*) *Foster* v. *Cook,* 3 B. C. C. 347.

(*f*) 1 V. & B. 124. See also *Fonnereau* v. *Fonnereau,* 3 Atk, 315, and *Earl of Newburgh* v. *Eyre,* 4 Russ. 454, where a question of this nature arose under a special will and was much discussed.

(*g*) 2 V. & B. 313. See also *Aiton* v. *Brooks,* 7 Sim. 204, ante, p. 653.

and younger sons, provided, that in case she should have but one child living at the time of her decease, or in case she should have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter under that age and unmarried, then she bequeathed the property to another family. The testatrix died without having had a child; but Sir *W. Grant*, M. R., held, that the ulterior gift nevertheless arose; his opinion being, that the case put by the testatrix, namely, that of her having but one child, did not contain a condition that she should have one child living at that time. His reasoning well deserves a particular statement. "At first sight," said the M. R., "a proposition relative to having but one child may seem to include in it and to imply the having one. That is true, if the proposition be affirmative; but by no means so, if the proposition be hypothetical or conditional. The proposition that A. has but one child, is as much an assertion that he has one as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child. As, if I say that, in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion; but if I say, that, in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition on which the supposed consequence is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

Sir *William Grant's* reasoning in *Murray* v. *Jones*.

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Gift over extended by implication to event not falling within terms of will.

Again, in the case of *Mackinnon* v. *Sewell* (*h*), where the testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive such mother and attain twenty-one, then in trust for such other child or children of the testatrix's daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all such other children of the testatrix's daughter *should die before attaining twenty-one*, then in trust for M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive her mother: afterwards the daughter died. Sir *L. Shadwell*, V. C., on the authority of the preceding cases, held, that the bequest over to M. took effect; his Honor considering that the bequest over, in the event of the children that might survive the mother not attaining the age of twenty-one, was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one.

Gift over on prior devisee's refusal to do a certain act.

Effect of prior devisee not coming into existence, on gift over if he refuse to do a certain act.

On the principle of the preceding cases, it could not be doubted that an executory gift made to take effect on the prior devisee's neglect or refusal to accept the devise (*i*) or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happens to come into existence, such a contingency being implied and virtually contained in the event described. For (to proceed to the second class of cases before referred to), it has been decided that where a testator gives real or personal property to A., and in case of his neglect or failure to perform a prescribed act within a definite period after his (the testator's) decease, then to B., and it happens that the prior devisee or legatee dies *in the testator's lifetime*, the gift over to B. takes effect.

Death of prior devisee held to let in ulterior devisee.

Thus, in the case of *Avelyn* v. *Ward* (*k*), where a testator devised his real estate to his brother A. and his heirs on this express condition, that he should, within three months after the testator's decease, execute and deliver to his trustee a general release of all demands on his estate; *but if A. should neglect to*

(*h*) 5 Sim. 78; [affirmed 2 My. & K. 202. See also *Wilson* v. *Mount*, 2 Beav. 397; *Tennant* v. *Heathfield*, 21 Beav. 255.]

(*i*) See *Scatterwood* v. *Edge*, 1 Salk. 229.

(*k*) 1 Ves. 420. See also *Doe* d. *Wells* v. *Scott*, 3 M. & Sel. 300, ante, Vol. I. p. 613, and p. 761 n. (*i*).

*give such release,* the devise to him to be null and void, and in such case the testator devised to W., his heirs and assigns, for ever. A. died in the testator's lifetime. Lord *Hardwicke* held, that the gift over took effect; observing, that he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, *but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place.*

Prior devise failing under the Mortmain Act.

[And this doctrine has been held applicable to the case of a devise to a charity, which cannot take by reason of the Statutes of Mortmain, followed by a devise over in the event of the charity omitting to perform a certain act: whether the act be performed or not being held to be immaterial. This point was determined by Sir *W. P. Wood,* V. C., in the case of *Warren* v. *Rudall* (*l*). He had been embarrassed by the opposite decisions, one of the late V. C. of England (*m*), and the other of Sir *J. Romilly,* M. R. (*n*); but he could not conscientiously bring his mind to the conclusion that, the first limitation failing by operation of law, the limitation over ought not to take effect in the same way as if the first limitation had been to a nonentity (*e.g.,* an unborn child), or to a person dying in the lifetime of the testator under the same circumstances as in *Avelyn* v. *Ward.*]

Remarks on *Avelyn* v. *Ward.*

Lord *Hardwicke's* observation, however, is not to be taken in too extensive a sense; for it is clear, according to subsequent cases, that if the event upon which the prior gift is made defeasible, and the subsequent gift to take effect, is one which may happen as well in the lifetime of the testator as afterwards (in which respect such case obviously stands distinguished from those just stated), and the events which happen are such as would, if the first devisee had survived the testator, have vested the property absolutely in him, the lapse of such prior devise by the death of the devisee in the testator's lifetime, *though it removes the prior gift out of the way,* does not let in the substituted or executory devise, which was to take effect on the happening of the alternative or opposite event.

Thus, in *Calthorpe* v. *Gough* (*o*), where a legacy of 10,000*l.*

[(*l*) 4 Kay & J. 603.
(*m*) *Att.-Gen.* v. *Hodgson,* 15 Sim. 46.
(*n*) *Philpott* v. *St. George's Hospital,* 21 Beav. 134.]
(*o*) Cit. 3 B. C. C. 395.

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Effect where prior gift fails by lapse.

was given to trustees, in trust for Lady Gough for life: and, in case she should die in the lifetime of her husband, as she should appoint; and, in default of appointment, to her children; *but if Lady G. should survive her husband, then for her absolutely.* Lady Gough survived her husband, but died in the lifetime of the testator. The M. R. held the legacy to be lapsed, and that the children were not entitled.

So, in *Doo* v. *Brabant* (*p*), a legacy was bequeathed in trust for A. until she attained twenty-one, and then to transfer it to A., her executors and administrators; and in case A. should die *under the age of twenty-one years*, leaving any child or children of her body lawfully begotten, then in trust for such child or children; but in case A. should die under twenty-one without leaving any child or children, then over. A. attained twenty-one, and died in the lifetime of the testator, leaving children; [and Lord *Thurlow* was strongly inclined to decide in their favour but for the case of *Calthorpe* v. *Gough*. However, on a case stated for the Court of King's Bench, that Court certified that the legacy lapsed, and the Lords Commissioners affirmed their certificate.]

Again, in the case of *Williams* v. *Chitty* (*q*), where the testator devised in trust for and to the use of his daughter Sarah, her heirs and assigns; *but in case of her decease under twenty-one and unmarried,* in trust, and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the testator under age, but having been married. One question was, whether, in the event which had happened, the devise over to Elizabeth was good. Her counsel considered her claim to be so obviously untenable, that he gave up the point; and Lord *Loughborough* seems to have entertained a similar opinion.

In the three preceding cases, it will be observed, the devise or bequest which lapsed was in favour of a designated individual; but, in the next case (*r*), we have an example of the application of the principle to a case of more doubtful complexion, the gift being in favour of *a class.*

(*p*) 3 B. C. C. 393, 4 T. R. 706; [and see *Lomas* v. *Wright*, 2 My. & K. 775.]

(*q*) 3 Ves. 549. See also *Miller* v. *Faure*, 1 Ves. 85; *Humberstone* v. *Stanton*, 1 V. & B. 385; [*Williams* v. *Jones*, 1 Russ. 517; *Underwood* v. *Wing*, 4 D. M. & G. 661; *Cox* v. *Parker*, 25 L. J. Ch. 873, reported also 22 Beav. 169; but the latter report omits the important statement that William Michael Parker attained 21.]

(*r*) *Tarbuck* v. *Tarbuck*, 4 L. J. (N.S.) Ch. 129, stated more fully ante, 437.

Effect where prior devise fails by lapse.

The devise, in substance, was to A. for life, remainder to his children in fee; and, if he should die without leaving issue, then over. A. died in the testator's lifetime, leaving a son, who also died in the testator's lifetime: and Sir *C. C. Pepys,* M. R., held, that, under these circumstances, the devise over failed; observing, that it was clear that, if A.'s son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator.

Remark on *Tarbuck* v. *Tarbuck.*

This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favour of such of them only as are living at the testator's decease, there might seem to be ground to contend, that, in effect, the case was one in which the failure of the gift was owing to the fact of no object having come into existence rather than to lapse. It is presumed, however, that, if the gift had been *in terms* to such children as should be living at the testator's decease, the result would have been different, as the failure of the devise would then clearly have been the consequence, not of lapse merely, but of the non-happening of the contingency on which the gift was made contingent, and therefore the gift over would take effect (*s*).

Remark on preceding cases.

It is proper to apprize the reader, that the distinction which has been suggested as reconciling the construction adopted in the last four cases with that which prevailed in *Jones* v. *Westcomb* and *Avelyn* v. *Ward,* was not adopted or recognized as the ground of decision in those cases. On the contrary, Lord *Thurlow,* in *Doo* v. *Brabant,* treated *Calthorpe* v. *Gough* as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that the cases of *Calthorpe* v. *Gough* and *Doo* v. *Brabant* have been since followed as well in *Williams* v. *Chitty* (*t*), already stated, as in the subsequent case of *Humberstone* v. *Stanton* (*u*), without any denial of the authority of *Jones* v. *Westcomb* and *Avelyn* v. *Ward,* while, on the other hand, the principle of *Jones* v. *Westcomb,* and more especially that of *Avelyn* v. *Ward,* has been fully recognized in the cases

(*s*) [See *Shergold* v. *Boone,* 13 Ves. 370, ante, 718.]

(*t*) 3 Ves. 549, ante, 756.

(*u*) 1 V. & B. 385.

of *Doe* d. *Wells* v. *Scott* (*x*), [and *Tarbuck* v. *Tarbuck*,] already stated.

There is, it is submitted, a solid difference between sustaining a devise which is to take effect in the event of a person not in esse dying under a certain age, though such person never come into existence, and holding it to take effect in the event of his being born and dying *above* that age in the lifetime of the testator. In the former case, the contingency of no such person coming in esse may be considered as included and implied in the contingency expressed; but, in the latter, the event to which it would be applied is the exact opposite or alternative of that on which the substituted gift is dependent. To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift.

Effect upon prior gift, of failure of executory gift.

The same principles which determine the effect upon a posterior or executory gift, of the failure of a prior gift, apply also to the converse case, namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift. According to these principles, if lands are devised to A. and his heirs, and in case he shall die without issue living at his decease, then to B. and his heirs, and B. dies in the testator's lifetime, and afterwards A. dies accordingly without issue, having survived the testator; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in; or (if the will be regulated by the new law) then the title of the residuary devisee, the effect being precisely the same, in the events which have happened, as if the ulterior devise had been a simple absolute devise in fee. On the other hand, if the devise were to A. and his heirs, and if he should die without leaving issue at his decease, then to B. for life, with remainder to his children in fee, and A., having survived the testator, dies without leaving issue, and B. also dies without having had a child (whether such event happens in the testator's lifetime or after his decease), the devise to A.

(*x*) 3 M. & Sel. 300, ante, Vol. I., p. 613.

When prior gift made absolute by failure of executory gift.

becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent (*y*). If B. had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of *Tarbuck* v. *Tarbuck* (*z*), have become assimilated to the case first stated.

The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit.

(*y*) *Jackson* v. *Noble*, 2 Keen, 590. (*z*) Ante, 757.

# CHAPTER LI.

## GENERAL RULES OF CONSTRUCTION.

General rules of construction.

THERE are certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.

It has been a subject of regret with eminent Judges (*a*), that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules introduced so much uncertainty and litigation; and was, indeed, at an early period, productive of so much embarrassment, as to draw from Lord *Coke* (*b*) the observation, that "wills, and the construction of them, do more perplex a man than any other learning; and, to make a certain construction of them, this *excedit jurisprudentum artem*. But," he adds, "I have learned this good rule, always to judge in such cases, as near as may be and according to the rules of law."

This quotation will serve to introduce the observation, that though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have

(*a*) See Lord *Kenyon's* judgment in *Doe* v. *Allen*, 8 ib. 502. See also Wilm. *Denn* d. *Moor* v. *Mellor*, 5 T. R. 561; 398.

(*b*) 2 Bulst. 130.

been conveyed; yet the courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptation. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation (*c*), and consequently to use expressions in their legal sense,—i.e. in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances: a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a licence of construction which set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. In such a state of things, the most elaborate treatise on the construction of wills, though it might, perhaps, like other curious researches, prove interesting to some inquirers into the wisdom and sagacity of our ancestors, could contribute little or nothing towards placing the law of property, as it regards testamentary dispositions, on a secure and solid foundation. It is, therefore, necessary to remind the reader, that the language of courts, when they speak of the intention as the governing principle, sometimes calling it "the law" of the instrument (*d*), sometimes the "pole star" (*e*), sometimes the "sovereign guide" (*f*), must always be understood with this important limitation—that here, as in other instances, the Judges submit to be bound by precedents and authorities in point; and endeavour, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture.

The result, upon the whole, has been satisfactory; for, by

(*c*) See *Doe* d. *Lyde* v. *Lyde*, 1 T. R. 596; *Langham* v. *Sanford*, 2 Mer. 22. But see Lord *Thurlow's* judgment in *Jones* v. *Morgan*, 1 B. C. C. 221; and Lord *Alvanley's* observations in *Seale* v. *Barter*, 2 B. & P. 594.

(*d*) Per Lord *Hale*, in *King* v. *Melling*, 1 Vent. 231.

(*e*) Per *Wilmot*, C. J., in *Doe* d. *Long* v. *Laming*, 2 Burr. 1112.

(*f*) Per *Wilmot*, C. J., in *Roe* d. *Dodson* v. *Grew*, 2 Wils. 322.

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the application of established rules of construction, with due attention to particular circumstances, a degree of certainty has been attained, which must have been looked for in vain, if less regard had been paid to the principles of anterior decisions. And, though the cases on the construction of wills have become, by the accumulation of more than three centuries, immensely numerous; yet when we consider the vast augmentation which, during this period, and the last century in particular, has taken place in the wealth and population of the country; the several new species of property, which the ever varying exigencies of a commercial nation have from time to time called into existence, and to which the rules of construction were to be applied; the complexity which a more refined and artificial state of society has introduced into dispositions of property; and lastly, the more extensive use of the art of writing, leading to increased facility in the exercise of the testamentary power—we are prepared to expect an incessantly growing accession to questions of this nature. But it will be found, I apprehend, that, so far from having increased in a corresponding ratio, they have, and particularly at a recent period, numerically diminished.

This must be attributed partly to the more frequent practice of resorting to, and the increased facility of obtaining, professional assistance in the preparation of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons, conversant with the subject, in most cases, to predicate, with a considerable approach to certainty, what would be the decision of a court of judicature in any given case; and, consequently, to render an appeal to its authority unnecessary.

Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subjects of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

Summary of the rules of construction.

It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.

I. That a will of real estate, wheresoever made, and in what-

ever language written, is construed according to the law of England, in which the property is situate (*g*), but a will of personalty is governed by the lex domicilii (*h*).

II. That technical words are not necessary to give effect to any species of disposition in a will (*i*).

III. That the construction of a will is the same at law and in equity (*k*), the jurisdiction of each being governed by the nature of the subject (*l*); though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period (*m*).

V. That the heir is not to be disinherited without an express devise, or necessary implication (*n*); such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed (*o*).

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin (*p*). There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcileable, the latter must prevail (*q*).

VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will (*r*), (though it may be used to rebut a resulting trust attaching to a legal title created by it (*s*), or to remove a latent ambiguity [arising from

(*g*) Pre. Ch. 577; ante, Vol. I. p. 1.

(*h*) Ante, Vol. I. p. 2.

(*i*) 3 T. R. 86; 11 East, 246; 16 ib. 222.

(*k*) 3 P. W. 259; 2 Ves. 74; [4 Jur. N. S. 625, 27 L. J. Ch. 726].

(*l*) 1 Ves. jun. 16; 2 ib. 417; 4 Ves. 329.

(*m*) Vide ante, Chap. X. Vol. I. p. 298.

(*n*) Br. Devise, 52; Dyer, 330 b; 2 Stra. 969; Ca. t. Hardw. 142; 1 Wils. 105; Willes, 309; 2 T. R. 209; 2 M. & Sel. 448. See also 3 B. P. C. Toml. 45; [vide Vol. I. pp. 315, 497, 590.]

(*o*) 1 V. & B. 466; 5 T. R. 558; 7 East, 97; 1 B. & P. N. R. 118; 18 Ves. 40; [ante, Vol. I. p. 497, n. (*y*).]

(*p*) Ante, Vol. I. p. 278; 4 Beav. 318; [6 Hare, 145.]

(*q*) 9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 6 Ves. 100, 129; 16 Ves. 314; 3 M. & Sel. 158; 1 Swanst. 28; 2 Atk. 372; 6 T. R. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214; [6 Hare, 492; ante, Vol. I. p. 442]. But see Barnard. C. C. 261.

(*r*) See judgment in 16 Ves. 486; 5 Rep. 68; Cas. t. Talb. 240; 3 B. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; [ante Vol. I. p. 379].

(*s*) Cas. t. Talb. 78; ante, Vol. I. p. 385.

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words equally descriptive of two or more subjects or objects of gift (*t*)]).

IX. Nor to vary the meaning of words (*u*); and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible (*x*); but the

X. Courts will look at the circumstances under which the devisor makes his will—as the state of his property (*y*), of his family (*z*), and the like (*a*).

XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition (*b*).

XII. That an express and positive devise cannot be controlled by the reason assigned (*c*), or by subsequent ambiguous words (*d*), or by inference and argument from other parts of the will (*e*); and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents (*f*); though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt (*g*).

XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are un-ambiguous (*h*); nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying it (*i*); but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose (*k*).

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law (*l*); but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid (*m*); and therefore the Court,

[(*t*) Ante, Vol. I. p. 385.]

(*u*) 4 Taunt. 176; 4 Dow, 65; 3 M. & Sel. 171. But see 2 P. W. 135.

(*x*) 11 East, 441; [ante, Vol. I. p. 386.]

(*y*) 1 Mer. 646; 7 Taunt. 105; 1 B. & Ald. 550; 3 B. & Cr. 870; 1 B. C. C. 472. [But see ante, Vol. I. p. 394.]

(*z*) 3 B. P. C. Toml. 257; 4 Burr. 2165; 4 B. C. C. 441; 3 B. & Ald. 657; 3 Dow, 72; 3 B. & Ald. 632; 2 Moore, 302.

[(*a*) See 5 M. & Wel. 367, 368.

(*b*) Dyer, 330 b;] 8 Rep. 94; 2 Vern. 60; 1 P. W. 54; [ante, Vol. I. p. 515.]

(*c*) 16 Ves. 46; [ante, Vol. I. p. 453.]

(*d*) 2 Cl. & Fin. 22, 8 Bligh, N. S. 83; [4 De G. & J. 30; ante, Vol. I. p. 454.]

(*e*) 1 Ves. jun. 268; 8 Ves. 42; Cowp. 99.

(*f*) Moore, 13, pl. 50; 1 And. 8; [ante, Vol. I. pp. 454, 495.

(*g*) Ante, Vol. I. pp. 453, 497.]

(*h*) 1 Mer. 417; 2 S. & Stu. 295.

(*i*) 3 M. & Sel. 37; 1 Mer. 358.

(*k*) 4 Mad. 67. See also 3 B. C. C. 401; [1 De G. & J. 32; 3 Drew. 724.]

(*l*) 1 Cox, 324; 2 Mer. 339; 1 J. & W. 21; [8 Hare, 48, 186.] But see [12 Sim. 276; and see] 2 R. & My. 306; 2 Kee. 756; 2 Beav. 352.

(*m*) 2 Coll. 336.]

in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void (*n*).

XV. That favour or disfavour to the object ought not to influence the construction (*o*).

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected (*p*), and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative (*q*); and of two modes of construction, that is to be preferred which will prevent a total intestacy (*r*).

XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense (*s*), unless the context clearly indicates the contrary (*t*).

XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense (*u*), unless a contrary intention appear by the context (*x*), or unless the words be applied to a different subject (*y*). And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning (*z*).

XIX. That words and limitations may be transposed (*a*), supplied (*b*), or rejected (*c*), where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however

(*n*) 3 Burr. 1626; 3 B. P. C. Toml. 209.

(*o*) See 4 Ves. 574. But see 2 V. & B. 269; [and ante, Vol. I. p. 534.]

(*p*) 18 Ves. 466; [4 C. B. N.S. 790.]

(*q*) 3 Ves. 450; 7 ib. 458; 7 East, 272; 2 B. & Ald. 441; [and ante, 128.]

(*r*) Cas. t. Talb. 161; [4 Ves. 406;] 2 Mer. 386.

(*s*) Doug. 340; 6 T. R. 352; 4 Ves. 329; 5 Ves. 401; [and see ante, Chap. XXXVII.]

(*t*) Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Ba. & Be. 204; 3 Dow, 71.

(*u*) 2 Ch. Cas. 169; [Doug. 268; 3 Drew. 472.

(*x*) Ante, 92, n. (*t*).]

(*y*) 1 P. W. 663; 2 Ves. 616; 5 M. & Sel. 126; 1 V. & B. 260. But see 14 Ves. 488.

(*z*) 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. The writer has heard Lord *Eldon* lay down the rule in these words. But see Amb. 122; 6 Ves. 300; 10 Ves. 166; 13 East, 359; 13 Ves. 476; 19 Ves. 545; 1 Mer. 20; 3 Mer. 316; —where the argument that the testator, notwithstanding some variation of expression, had the same intention in several instances, prevailed.

(*a*) 2 Ch. Ca. 10; Hob. 75; 2 Ves. 32; Amb. 374; 8 East, 149; 15 East, 309; 1 B. & Ald. 137; [ante, Vol. I. p. 466.] But see 2 Ves. 248.

(*b*) Cro. Car. 185; 7 T. R. 437; 6 East, 486; 2 D. & Ry. 398. See also 2 Bl. 1014; [and ante, Vol. I. p. 456.]

(*c*) 2 Ves. 277; 3 T. R. 87, n.; 3 ib. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East, 515; 9 Ves. 566; [and ante, Vol. I. p. 449.]

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reasonable, in opposition to the plain and obvious sense of the language of the instrument (*d*).

XX. That words which it is obvious are mis-written (as dying *with* issue, for dying *without* issue), may be corrected (*e*).

XXI. That the construction is not to be varied by events subsequent to the execution (*f*); but the Courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them (*g*).

XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both (*h*). There must be an apparent design to connect them (*i*).

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible (*k*).

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction (*l*).

(*d*) 18 Ves. 368; 19 ib. 652, 2 Mer. 25.

(*e*) 8 Mod. 59; 5 B. & Ad. 621; 3 Ad. & El. 340; [2 D. M. & G. 300.]

(*f*) Cas. t. Talb. 21; 3 P. W. 259; 11 East, 558, n.; 1 Cox, 324; 1 Ves. jun. 475. [But see ante, Vol. I. p. 256.]

(*g*) 11 Ves. 457; [6 Ves. 133.]

(*h*) Cro. Car. 368; Doug. 759; 8 T. R. 64; 1 B. & P. N. R. 335; 9 East, 267; 11 ib. 220; 14 Ves. 364; 4 M. & Sel. 58; 1 Pri. 353; 4 B. & Cr. 667. See also Godb. 146.

(*i*) Leon. 57; Cas. t. Hardw. 143; 10 East, 503. This and the former class of cases chiefly relate to a question of frequent occurrence: whether words of limitation, preceded by several devises, relate to more than one of those devises.

(*k*) Finch, 139. See also 4 Ves. 325; 13 Ves. 486.

(*l*) 2 Atk. 375; 4 Ves. 418; 4 Ves. 554; 7 Ves. 286; 1 V. & B. 422; 1 Pri. 264. See also 1 Swanst. 161; 2 Ves. jun. 501; and M'Clel. 168.

# APPENDIX.

## SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS.

Few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens, that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending), testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment, in the selection of one of these modes, is necessarily influenced by, if not wholly dependent on, professional recommendation. To a want of complete and accurate information as to the consequences of their proposed schemes, must be ascribed many of the absurd and inconvenient provisions introduced into testamentary gifts; to say nothing of the obscurities and inconsistencies which frequently throw an impenetrable cloud over the testator's real intentions. It may be useful to mention some particulars on which information should be obtained in taking instructions for a will, most of the inquiries being suggested by the various classes of cases discussed at large in this work, and being framed with a view to prevent such questions as those cases present. It will be obvious, that the nature of the inquiries in

every case must be greatly regulated by the situation in life and other circumstances of the testator. They may be distributed into those that relate—*first*, to the subject, and *secondly*, to the objects of testamentary disposition, including in the former some general points.

Description of lands.

1. Where lands specifically devised are described by their local situation and occupancy (though a reference to occupancy is in general better omitted, unless it form a necessary discriminating feature in the description), it should be carefully ascertained, that the whole of the land answering to the locality, answers also to the occupancy, or, in other words, that both parts of the description are co-extensive, to avoid any question as to the less comprehensive term being restrictive.

Immediate profits.

2. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A., who may then have no children, it should be ascertained what, in this event, is to become of the intermediate profits. In the absence of any provision of this nature, they will go to the residuary devisee or heir-at-law.

Mortgaged lands.

3. Where the subject of devise is a mortgaged estate, inquiry should be made, whether the devisee is to take it [freed from] the mortgage; and, if so, words should be used [distinctly conferring on him the] right to have it exonerated out of the testator's other property (*a*).

Payment of debts, legacies, &c.

4. Another question which may be proper, under some circumstances, is, whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated, is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it.

Provision for wife and children.

II. In relation to the *objects* of gift.—When a testator proposes to make a disposition of his property in favour of his wife and children (naturally the first objects of his regard), several modes of disposition present themselves. One is, to give the income to the wife for life, clothed or not with a trust for the maintenance of the children, and to give the inheritance or capital to the children equally, subject or not to a power in the wife of fixing their shares, or limiting the

[(*a*) See 17 & 18 Vict. c. 113, ante, 610.]

property to some in exclusion of others, as she may think proper. Another mode is, to give the wife and children immediate absolute interest in the property in certain proportions, according to the nature of the distribution of personal property under the statute in case of intestacy; but this mode of disposition is less frequently adopted than the former. To empower the widow to regulate the shares, is often found convenient, not only as it preserves her influence over her children, but because it enables her to adapt the disposition of the property to their various exigencies at the period of her death, and it has, moreover, a salutary effect in restraining the children from disposing of their reversionary interests. Where the children do not take absolutely vested interests until their majority or marriage, it is useful to confer a power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at half or one-third) of their presumptive shares, in order to place out the sons as apprentices, &c., or for other such purposes. Even where the children take vested (*i. e.* absolutely vested) interests at their birth, a power of advancement may be requisite where the prior legatee for life is a married womam restrained from alienation, and, therefore, incompetent to accelerate the payment of the shares by relinquishing her life interest. In no other case can the power be wanted under such circumstances.

In regard to children, &c.

1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are—at what ages their shares are to vest;—whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? whether, if any child die in the testator's lifetime, or subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

Daughters' or other females' shares.

2. If any of the objects of the gift (whether of real or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it

should be suggested, whether their shares are not to be placed out of the power of husbands; *i.e.* limited to trustees for their separate use for life, subject or not to a restriction on alienation (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence), with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retraction, it should be confined to dispositions *by will*, which being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property.

Uses to prevent dower.

3. If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions) whether they are to be limited to uses to bar the dower of any wife to whom he was married on or before the 1st of January, 1834.

Survivorship.

4. If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, where survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint tenancy, which may be severed.

To what period referable.

5. In all cases of limitations to survivors, it should be most clearly and explicitly stated *to what period survivorship is to be referred;* that is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees or legatees among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There can be little doubt that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects, that they should be living at a prescribed period posterior to the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

Suggestion as to clauses of survivorship.

As to vesting.

6. It may be observed, that where interests not in possession are created, which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, gene-

rally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

Words of recommendation, &c.

7. Where a testator proposes to recommend any person to the favourable regard of another, whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favour of such person or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words negativing such a construction of the testator's expressions should be used. Equivocal language in these cases has given rise to much litigation.

Making will conditional on testator's leaving no issue.

*Lastly.* It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened, that a testator has left a child *en ventre*, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life-interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

As to the persons through whom instructions are received.

To the preceding suggestions, it may not be useless to add, that it is in general desirable, that professional gentlemen taking instructions for wills should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court (*b*), Sir *J. Nicholl* "admonished professional gentlemen generally, that where

(*b*) *Rogers* v. *Pittis*, 1 Add. 46.

instructions for a will are given by a party not being the proposed testator, *à fortiori*, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all."

# THE STATUTE OF WILLS.

## 7 WILL. IV. AND 1 VICT. CAP. 26.

*An Act for the Amendment of the Laws with respect to Wills.*

[3rd July, 1837.]

EXPLANATION OF TERMS.

BE it enacted by the Queen's most Excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing, in the nature of a will in exercise of a power; and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or

Meaning of certain words in this Act;

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate."

"Personal estate."

Number.

Gender.

things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

REPEAL CLAUSE.

Repeal of the statutes of wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, sess. 2, c. 2, (I.)

Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.)

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sect. 9 of 14 G. 2, c. 20.

25 G. 2, c. 6, (except as to colonies).

25 G. 2, c. 11, (I.)

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins," whereby a man may devise two parts of his lands; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate, pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America;" and also an Act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second,

intituled "An Act for the avoiding and putting an end to certain doubts and questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates pur autre vie to which this Act does not extend. 55 G. 3, c. 192.

GENERAL ENABLING CLAUSE.

III. (*a*) And be it further enacted, That it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate (*b*) which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made (*c*); and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament (*d*); and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will (*e*); and also to all rights of entry for conditions broken,

All property may be disposed of by will;

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised.

Estates pur autre vie;

contingent interests;

(*a*) Vol. I. pp. 55, 56, 307, 616, 633; *O'Toole* v. *Brown*, 3 Ell. & Bl. 572.
(*b*) Page 44.
(*c*) Pages 54, 632.
(*d*) Page 55.
(*e*) Page 41.

rights of entry; and property acquired after execution of the will.

and other rights of entry (*f*); and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same, subsequently to the execution of his will (*g*).

FEES ON COPYHOLDS.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. (*h*) Provided always, and be it further enacted, That where any real estate of the nature of customary freehold, or tenant right or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money, as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLD.

Wills, or extracts of wills of customary freeholds and copyholds to be entered

V. And be it further enacted, That when any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition

(*f*) Page 43.
(*g*) Page 44.
(*h*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90.

shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of descent.

on the court rolls;

and the lord to be entitled to the same fine, &c., when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

VI. (*i*) And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates pur autre vie.

AGE OF TESTATOR.

VII. (*k*) And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

No will of a person under age valid;

MARRIED WOMEN.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made (*l*) by a married woman before the passing of this Act.

nor of a feme covert, except such as might have been previously made.

EXECUTION OF WILLS.

IX. (*m*) And be it further enacted, That no will shall be valid

Will to be in

(*i*) Page 56.
(*k*) Page 39.
(*l*) Page 33.
(*m*) Page 99.

writing, and signed or acknowledged in the presence of two witnesses at one time, who attest.

unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed (*n*) at the foot or end (*o*) thereof by the testator, or by some other person (*p*) in his presence (*q*) and by his direction; and such signature shall be made or acknowledged (*r*) by the testator in the presence of two or more witnesses, present at the same time (*s*), and such witnesses shall attest and shall subscribe (*t*) the will in the presence (*u*) of the testator, but no form of attestation (*x*) shall be necessary.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

X. (*y*) And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

WILLS OF SOLDIERS AND SEAMEN.

Soldiers' and mariners' wills excepted.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

PETTY OFFICERS, SEAMEN AND MARINES.

Act not to affect certain provisions of 11 G. 4 & 1 W. 4, c. 20, with respect to wills of petty officers, and seamen and marines.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled, "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the Wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money and Allowances, or other Monies payable in respect of Services in her Majesty's Navy."

PUBLICATION.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

(*n*) Pages 72, 104.
(*o*) Pages 99, 100.
(*p*) Page 73.
(*q*) Page 80.
(*r*) Page 101.
(*s*) Page 103.
(*t*) Page 76.
(*u*) Pages 79, 103.
(*x*) Page 103.
(*y*) Page 26, n.

ATTESTING WITNESSES' COMPETENCY.

XIV. (*z*) And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. Will not to be void on account of incompetency of attesting witness.

GIFT TO ATTESTING WITNESSES.

XV. (*a*) And be it further enacted, That if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. Gifts to an attesting witness to be void.

CREDITOR ATTESTING WITNESS.

XVI. (*b*) And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

EXECUTOR ATTESTING WITNESS.

XVII. (*c*) And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. Executor to be admitted a witness.

REVOCATION BY MARRIAGE.

XVIII. (*d*) And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or admi- Will to be revoked by marriage.

(*z*) Page 104.
(*a*) Page 68.
(*b*) Ib.
(*c*) Page 69.
(*d*) Page 120; Vol. II. p. 217.

nistrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

REVOCATION BY PRESUMPTION.

No will to be revoked by presumption.

XIX. (*e*) And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

REVOCATION BY SUBSEQUENT WILL OR CODICIL, OR DESTRUCTION OF INSTRUMENT.

No will to be revoked but by another will or codicil, or writing, or by destruction.

XX. (*f*) And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

OBLITERATIONS AND INTERLINEATIONS.

No alteration except in certain cases, in a will, shall have any effect, unless executed as a will.

XXI. (*g*) And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

REVIVAL OF REVOKED WILL.

No will revoked to be revived otherwise than by re-execution, or a codicil.

XXII. (*h*) And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

(*e*) Page 120.
(*f*) Pages 131, 157.
(*g*) Pages 106, 131, 135.
(*h*) Pages 131, 135, 176.

REVOCATION—SUBSEQUENT CONVEYANCE.

XXIII. (*i*) And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A devise not to be rendered inoperative by any subsequent conveyance or act.

WILL SPEAKS, FROM WHAT PERIOD.

XXIV. (*k*) And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A will shall be construed to speak from the death of the testator.

LAPSED AND VOID DEVISES.

XXV. (*l*) And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A residuary devise shall include estates comprised in lapsed and void devises.

GENERAL DEVISE—COPYHOLDS AND LEASEHOLDS.

XXVI. (*m*) And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

GENERAL DEVISE—APPOINTMENT.

XXVII. (*n*) And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in

A general gift shall include

(*i*) Pages 151, 154.
(*k*) Pages 187, 307, 313, 396, 615, 644, 650, 671; *O'Toole* v. *Brown*, 3 Ell. & Bl. 572.
(*l*) Pages 187, 326, 609, 615.
(*m*) Page 644.
(*n*) Pages 312, 650.

estates over which the testator has a general power of appointment.

any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

FEE-SIMPLE WITHOUT WORDS OF LIMITATION.

A devise without any words of limitation to pass the fee.

XXVIII. (*o*) And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

WORDS IMPORTING FAILURE OF ISSUE.

Words importing failure of issue to mean issue living at the death.

XXIX. (*p*) And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words, which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise:

Proviso.

Provided, that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

ESTATE OF TRUSTEES.

No devise to trustees or

XXX. (*q*) And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised

(*o*) Page 523; Vol. II. pp. 91, 266, 417.

(*p*) Page 523; Vol. II. pp. 468, 507, 527, n.

(*q*) Vol. II. p. 295.

to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

executors, except for a term or a presentation to a church, shall pass a chattel interest.

ESTATE OF TRUSTEES.

XXXI. (*r*) And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

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XXXII. (*s*) And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

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LAPSE—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

XXXIII. (*t*) And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

WHEN ACT OPERATES.

XXXIV. (*u*) And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or

Act not to extend to wills made before 1838, nor to

(*r*) Vol. II. p. 295.
(*s*) Page 327; Vol. II. p. 331.
(*t*) Ibid.
(*u*) Page 187.

estates pur autre vie of persons who die before 1838.

republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and that this Act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

SCOTLAND.

Act not to extend to Scotland.

XXXV. And be it further enacted, That this Act shall not extend to Scotland.

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effect when younger child becomes elder without taking the estate, ib., n.
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time for ascertaining, fixed by exclusion of, or gift to, the elder at a stated period, ii. 195, 196.
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a son de facto eldest (as to the estate), not entitled to share in younger children's portions though liable to be superseded, ii. 200.
but becomes entitled on an elder coming into esse, ib.
*See* CHILDREN.

"YOUNGEST CHILD,"
gift to, held to apply to an only child, ii. 192.
means youngest at time of distribution, semb., ii. 197, n.

THE END.

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