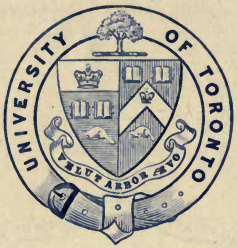

A

TREATISE

ON

WILLS,

BY

THOMAS JARMAN, Esq.

The Third Edition,

BY

E. P. WOLSTENHOLME, M.A.,

AND

S. VINCENT, B.A.,

OF LINCOLN'S INN AND THE INNER TEMPLE, BARRISTERS-AT-LAW.

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TO THE THIRD EDITION.

THE plan adopted by the Editors in the second edition, of distinguishing by brackets the additions and alterations made by them, has been adhered to in this edition. The cases published since the 1st of February, 1861, when this edition first went to press, will be found noticed partly in the text and partly in the Addenda.

2, STONE BUILDINGS, LINCOLN'S INN,
May, 1861.

ADVERTISEMENT

TO THE SECOND EDITION.

In preparing a Second Edition of a work bearing so high a character as Mr. Jarman's Treatise on Wills, it has been one of the principal objects of the Editors to preserve the original text intact, as far as was consistent with the introduction into it of the new matter arising from recent decisions. It was considered that if the new matter were incorporated with the old, and distinguished from it by being included in brackets, in the manner now generally adopted, the book would be in a more convenient form than if all alterations and additions were thrown into the notes; at the same time that the reader would still recognize at a glance those parts which carry the authority of the original Writer.

1, Stone Buildings, Lincoln's Inn,
June, 1855.

PREFACE

TO THE FIRST EDITION.

SIXTEEN years have now elapsed since the writer diffidently presented to the profession his first publication on Testamentary Law, in the form of an edition of Powell on Devises, with a supplementary treatise on the Construction of Devises. The reception given to this work was such as abundantly to compensate for the severe labour which it exacted, and under which the health of its Editor more than once sank. This was followed, after the interval of a few years, by the Tenth Volume of the Precedents in Conveyancing, being the portion of that work which was devoted to the same subject. The materials afforded by these publications have been freely used in the present work; but considering the very large accessions since made to the adjudications on testamentary law, and that it has not escaped the activity of modern legislation, it will be obvious that many of the various subjects embraced by so extensive a range of disquisition, now present themselves under a different aspect, requiring, not only very large additions to the matter which composed the former works, but the rejection of no inconsiderable portion of that matter; and the writer is not ashamed to avow, that another, though certainly a less extensive, head of alteration arises from the changes which experience has wrought in some of the opinions of his earlier days. The result is, that probably more than one-half of the present treatise is entirely original; and the writer therefore feels that he has to subject his performance (as partially new) to the criticism of his professional brethren, whose kind consideration he again bespeaks, convinced that those who are the most competent to detect error, will be the most generous and indulgent in the

appreciation of the difficulties which beset the inquirer into the principles of one of the most intricate branches of the law. To those difficulties have been added the daily interruptions of professional avocation, which have long delayed, and have sometimes threatened wholly to prevent, the present publication. The recent Act has created some additional embarrassment to a writer on Wills, by introducing new principles of construction, partial in their application; for, by drawing a line between wills of an earlier and those of a later date, the legislature has diminished the importance, without permitting the rejection or the neglect of the old law. On these subjects, conciseness and compression have been specially aimed at, and some additional labour has been willingly incurred, in order to avoid incumbering the present work unnecessarily with matter which every passing day tends to render less practically useful.

THOMAS JARMAN.

New Square, Lincoln's Inn,
December, 1843.

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THE LAW

WITH RESPECT TO

WILLS.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

By what local law wills are regulated.

To ascertain by what local law a will is regulated is an inquiry which necessarily precedes all others relating to the instrument, and which seems, therefore, properly to form the commencing subject of the present treatise. After showing to what wills the English law applies, we shall proceed to discuss the nature of such law.

Realty ruled by lex loci rei sitæ.

A will of fixed or immoveable property is generally governed by the lex loci rei sitæ; and hence, the place where such a will happens to be made and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus, a will made in Holland (*a*) and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England (*b*). And, of course, lands in

(*a*) In Holland the Code Napoleon prevails, subject to modifications which have been ingrafted thereon by Dutch legislation. See *Gambier* v. *Gambier*, 7 Sim. 263.

(*b*) *Bovey* v. *Smith*, 1 Vern. 85; see also *Bowaman* v. *Reece*, Pre. Ch. 577; *Drummond* v. *Drummond*, 3 Bro. P. C. Toml. 601; *Brodie* v. *Barry*, 2 V. & B. 131.

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England belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law (*c*).

Moveables by lex domicilii.

In regard to personal, or rather moveable property, the lex domicilii prevails (*d*). If, therefore, a British or foreign subject dies domiciled in England, his personal property in England, in case he were intestate, will be distributed according to the English law of succession; and any will which he may have left, whether made in his native or in his adopted country, or elsewhere, and wherever he may have died, must be construed according to the law of England (*e*); and it is scarcely necessary to observe, that stock in the public funds is undistinguishable in this respect from other personal property (*f*). And the move-

(*c*) See *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & Cr. 438. [As to the converse case, see *Earl Nelson* v. *Earl Bridport*, 8 Beav. 547.]

(*d*) This position respects only the devolution of the property, and not the court of administration, which, by our law, is regulated by the lex loci rei sitæ.

(*e*) *Anstruther* v. *Chalmer*, 2 Sim. 1; *Price* v. *Dewhurst*, 8 Sim. 299, 4 My. & Cr. 76; *Spratt* v. *Harris*, 4 Hagg. 408; [*Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468, 7 Jur. 262, 2 No. Cas. 230; *Croker* v. *Marquis of Hertford*, 4 Moo. P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150; *Reynolds* v. *Kortwright*, 18 Beav. 417; *Robins* v. *Dolphin*, 27 L. J., Prob. 24, (will of feme covert whose husband was a domiciled Englishman.)

Domicil as affecting probate and legacy duty.

(*f*) *In re Ewin*, 1 Cr. & J. 151. In this case the question was, as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicil, alienage, &c., [and the law on this point has only lately acquired any degree of certainty. Where the domicil of the testator is foreign it is now settled beyond question that under no circumstances whatever is legacy duty payable. *Re Bruce*, 2 Cr. & J. 436, 2 Tyr. 475; *Hay* v. *Fairlie*, 1 Russ. 117; *Logan* v. *Fairlie*, 1 My. & Cr. 59, reversing the decision 2 S. & St. 284; *Arnold* v. *Arnold*, 2 My. & Cr. 256; *Commissioners of Charitable Donations* v. *Devereux*, 13 Sim. 14; *Thomson* v. *Adv.-Gen.*, 12 Cl. & Fin. 1, 13 Sim. 153, 9 Jur. 217; *Re Coales*, 7 M. & Wels. 390. The cases of *Att.-Gen.* v. *Cockerell*, 1 Pri. 165, and *Att.-Gen.* v. *Beatson*, 7 Pri. 560, are now clearly overruled. Where the testator is domiciled in this country three cases arise: 1. If neither his personal representative nor his effects ever come within the jurisdiction of the courts of this country, no question as to liability to duty can ever be raised. 2. Where a personal representative is constituted in this country for the purpose of recovering the testator's effects situated here, duty is payable not on that part alone which rendered representation necessary, but on the whole of the testator's effects; *Att.-Gen.* v. *Napier*, 6 Exch. 217; *Re Ewin*, 1 Cr. & J. 151; *In re Coales*, 7 M. & Wels. 390. 3. The third case is where the property is found in this country in the hands of the testator's foreign representative, but no representative has ever been constituted in this country. This was the case in *Jackson* v. *Forbes*, 2 Cr. & J. 382, 2 Tyr. 354; *S. C.* in D. P. *Att.-Gen.* v. *Forbes*, 2 Cl. & Fin. 48, nom. *Att.-Gen.* v. *Jackson*, 8 Bli. 15, 3 Tyr. 982; but the decision seems to have been rested by Lord *Brougham* on the fact that the property was appropriated in India as well as on the fact of the absence of a representative in this country; Lord *Cottenham* (*Logan* v. *Fairlie*, 1 My. & Cr. 59) referred it solely to the former ground; but in the late case of *Att.-Gen.* v. *Napier* it was said appropriation had nothing to do with the question, and that *Att.-Gen.* v. *Jackson* went upon a mistaken notion of the testator's domicil, which was supposed by the House of Lords to have been in India, whereas in fact it was in England; at the same time, if *Att.-Gen.* v. *Jackson*, really proceeded on the question of appropriation, it is equally difficult to reconcile it with the doctrine of *Att.-Gen.* v. *Napier*. The only way of reconciling the cases taken upon their respective facts, is by referring the decision in *Att.-Gen.* v. *Jackson* to the absence of an English representative, though here again we are met by the dictum of Lord *Cottenham* in *Arnold* v. *Arnold*, 2 My. & Cr. 273, to

able property of such a person, which is out of England at the time of his death, will also, it seems, generally speaking, follow the domicil; but this, of course, depends on the laws of the state in which the property is situate, which may not (though the codes of many civilized states do (*g*)) accord with our own in this particular. Sometimes, however, a difficulty occurs in the application of the principle, from the fact, that the foreign state, though it recognises the general doctrine, yet imposes restrictions on the testamentary power unknown to the law of the adopted country, and from which it may not permit its citizens to escape, in regard to property within its jurisdiction, by a mere change of domicil. For instance, the French law does not, like our own, permit a man to bequeath his entire property away from his wife and children (*h*). Now, if a Frenchman dies domiciled in England, is it quite clear that his moveable property in France would be subject to British law, so as to pass by such a will? In such cases the Code Napoleon seems to draw a distinction between the acquisition of a foreign domicil by mere residence, and some other more decided acts of self-expatriation, such as that of becoming the naturalized subject of another state (*i*).

As the law of England adopts, without qualification or reserve, the general rule, which makes the domicil regulate thedestination of the moveable property, it follows that, if any person, whether a British subject or a foreigner, dies while domiciled abroad, the

[the effect that it was impossible that the liability of the legatee to duty could depend on an act of the executor in proving or not proving the will in this country; yet if Lord *Cottenham* be correct it is difficult to see how the law could be enforced. The amount of duty, the fact whether any duty is payable, the person from whom it is to be recovered, in short every thing necessary to found a specific claim on the part of the government, depends on whether the will is valid or invalid, or whether revoked or altered by subsequent codicils; these are matters to be determined by the English law, (the testator's domicil being English,) and they remain undetermined if the will has not been proved in this country.

The question of probate duty must not be confounded with that of legacy duty; it does not depend on domicil, but (except in the case of personal estate appointed under a general power, which is expressly made subject to probate duty by 23 & 24 Vict. c. 15, s. 4) is payable on so much only of the testator's property as, but for the will, the ordinary would have been entitled to administer. *Att.-Gen.* v. *Dimond*, 1 Cr. & J. 356, 1 Tyr. 243; *Att.-Gen.* v. *Hope*, 1 Cr. M. & R. 530, 4 Tyr. 878, 2 Cl. & Fin. 84, 8 Bli. 44; *Drake* v. *Att.-Gen.*, 10 Cl. & Fin. 257, affirming *Platt* v. *Routh*, 3 Beav. 257, 6 M. & Wels. 756; and overruling *Att.-Gen.* v. *Staff*, 2 Cr. & M. 124, 4 Tyr. 14; and *Palmer* v. *Whitmore*, 5 Sim. 178. Compare *Att.-Gen.* v. *Bouwens*, 4 M. & Wels. 171, as to foreign securities *transferable in this country by delivery*, which were held liable to duty as ordinary chattels; and see *Pearse* v. *Pearse*, 9 Sim. 430; *Vandiest* v. *Fynmore*, 6 Sim. 570. As to certain Indian securities, see 23 & 24 Vict. c. 5.]

(*g*) See *Price* v. *Dewhurst*, 4 My. & Cr. 83.

(*h*) Vide post, p. 6, note (*x*).

(*i*) Liv. 1, tit. 1, chap. 2, sect. 17.

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law of the place which at his death constituted his home, will regulate the distribution of his moveable (*k*) property in England, in case of intestacy, *i. e.* should he happen to have left no instrument which, according to the law of his adopted country, would amount to a testamentary disposition of such property (*l*); and if he left a will, the same law will determine the validity and regulate the construction of such will (*m*), of which, therefore, an English court will not grant probate unless it appear to be an effectual testamentary instrument, according to the law of the domicil (*n*). And, by parity of reasoning, the ecclesiastical courts *will* grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicil, though invalid and incapable of operation as an English will. Thus (*o*), probate was granted by the Prerogative Court of the will of a married lady, who at the time of her death was domiciled in Spain (of which country she was, it seems, also a native), on its being shown that by the Spanish law a feme covert may, under certain limitations, dispose of her property by will as a feme sole.

Principle adopted by ecclesiastical courts in granting probate.

And it is the constant practice of the Ecclesiastical Court here to grant probate of wills of Englishmen domiciled in the British territories in India which have been previously proved there, without inquiring into the grounds of the Indian proceeding, though the bulk of the property of the deceased testator should happen to be in England (*p*).

Are leaseholds governed by the lex loci?

(*k*) The word *moveable* is here used advisedly instead of *personal*, as the distinction between real and personal estate is peculiar to our own policy, and is not known to any foreign system of jurisprudence that is founded on the civil law, in which the only recognized distinction was between moveable and immoveable property. Leaseholds for years, therefore, which obviously belong to the latter denomination, though they are with us transmissible, as personal estate, are governed by the lex loci, and do not follow the person; so that, if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law.

[This conclusion however has not been acquiesced in by later text writers or annotators. It is said (11 Jarm. Byth. Conv. 3rd ed. by Sweet, p. 15) that the lex loci must determine what part is real and what part personal; and that then the lex domicilii comes in and determines the distribution of that part of the property which the lex loci has determined to be personal. See also Deane on the Law of Wills, p. 15, citing *Price* v. *Dewhurst*, 4 My. & Cr. 81; Hayes & Jarm. Conc. Forms of Wills, 4th ed. p. 2, 5th ed. p. 25. The case of *Jerningham* v. *Herbert*, 4 Russ. 388, is in point on the same side; as also is a dictum of Sir *J. Stuart*, in *Pearmain* v. *Twiss*, 2 Giff. 136.]

(*l*) *Balfour* v. *Scott*, 6 B. P. C. Toml. 550; *Bruce* v. *Bruce*, ib. 566; *S. C.* 2 B. & P. 229, n.; *Hogg* v. *Lashley*, 6 B. P. C. Toml. 577; *Bempde* v. *Johnson*, 3 Ves. 198; *Somerville* v. *Lord Somerville*, 5 Ves. 750.

(*m*) *Bernal* v. *Bernal*, 3 My. & Cr. 559, n.; [*Peillon* v. *Brooking*, 25 Beav. 218; *Re Osborne*, 1 Deane, 4, 1 Jur. N. S. 1220.]

(*n*) *Stanley* v. *Bernes*, 3 Hagg. 373; *Moore* v. *Darell*, 4 Hagg. 346.

(*o*) *Re Muraver*, 1 Hagg. 498; [and see *Re Gayner*, 4 No. Cas. 696.] As to the law of Spain, respecting testamentary dispositions, vide *Moore* v. *Budd*, 4 Hagg. 346.

(*p*) *Re Read*, 1 Hagg. 474; [and see *Hare* v. *Nasmyth*, 2 Add. 25.]

[Where a testator, having executed a valid will according to the law of his domicil, afterwards changes his domicil, it does not seem settled whether his will remains good; according to the opinion of an eminent writer the will is void, but on resumption of the domicil becomes valid again (*q*).

Effect of change of domicil upon will.

A will of personalty made under a power forms an exception to the general rule, for if executed as required by the power it will be good without reference to the testamentary law of the testator's foreign domicil; because the appointee takes, not under the instrument exercising, but under the instrument creating the power (*r*); and the latter instrument is to be construed according to the law of the place where it is executed, if it deals with moveables, and according to the lex loci rei sitæ, if with immoveables (*s*). It follows that a power given by an instrument executed in England to appoint moveables, or lands of any tenure situated in England, must be exercised according to the English law and in conformity with the statute 1 Vict. c. 26, s. 10.

Will under a power not governed by the lex domicilii.

It appears that the law of France does not allow of a foreigner acquiring a domicil there so as to affect the succession to property, or the mode of making wills without licence from the government: in other words, that without naturalization a foreigner is to be considered as retaining his original domicil (*t*). It has indeed been made a question whether the clause of the Code Napoleon to which this effect was ascribed only applies to the acquisition by a foreigner of *the rights of French citizenship*, without preventing such civil rights as do not exclusively belong to citizenship from attaching on foreigners, and conferring on them a French domicil according to the ordinary jus gentium. But it appears that this distinction is to be made, if at all, only in some exceptional cases, and that the general rule is as stated above (*u*).

Code Napoleon.

The will of an English subject domiciled abroad will also be determined in this country by the English law, where there is a treaty to that effect between this country and the country of domicil. Thus, subjects of the Ottoman empire cannot dispose of their property by will, but by treaty with this country English

Where there is a treaty affecting the testamentary power.

(*q*) Story, Confl. of Laws, chap. xi. s. 473. See Williams, Exec. p. 305, note (*q*), [25 Beav. 231, 232.

(*r*) *Tatnall* v. *Hankey*, 2 Moo. P.C.C. 342; *Re Alexander*, 1 Sw. & Tr. 454, n., 29 L. J. Prob. 93.

(*s*) Story, Confl. chap. viii; 3 Burge, pt. 2, c. 20.

(*t*) *Collier* v. *Rivaz*, 2 Curt. 855; *Bremer* v. *Freeman*, 1 Deane, 192.

(*u*) See 1 Deane, 236, 249.

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[subjects domiciled there are allowed to do so, and their wills must be executed according to the English law (*v*).]

Effect where probate is granted in error.

Where the Ecclesiastical Court has granted probate of an instrument eventually ascertained not to be testamentary according to the law of the domicil, this proceeding (though it vests the whole personalty which is within the jurisdiction of the court in the executor, as to whose *legal* title the act of the Ecclesiastical Court is conclusive) does not regulate or affect the ultimate destination of the property, which therefore the executor will be bound to distribute according to the law of the domicil (*x*).

Where the construction of the will is to be regulated by foreign law, the opinion of an advocate versed in such law is obtained, for the information and guidance of the English court, on which devolves the task of construing it; but if the point in dispute depend upon principles of construction common to both countries, the court will adjudicate upon the question, according to its own view of the case, without having recourse to the assistance of a foreign jurist (*y*).

As a will, in regard to moveable property, is construed according to the law of the domicil, there is, it will be observed, nothing on the face of it which gives the peruser the slightest clue as to the nature of the laws by which its construction is regulated; it may have been made in England, be written in the English language, the testator may have described himself as an Englishman (*z*), and it may have been proved in an English court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence.

Suggestions as to wills of Englishmen domiciled abroad.

The necessity of conforming in the testamentary act to the law of the ultimate domicil, is an important doctrine to the numerous British residents in foreign countries; and it appears that the

(*v*) *Maltass* v. *Maltass*, 3 Curt. 231, 1 Rob. 67, 7 Jur. 135, 8 Jur. 860, 2 No. Cas. 33, 3 No. Cas. 257.]

(*x*) *Thornton* v. *Curling*, 8 Sim. 310. In this case, an Englishman went to reside in France, where he was domiciled at his death, and left a will providing for an illegitimate child and its mother, to the exclusion of his wife and legitimate child, which the French law does not permit. Donations by a Frenchman (whether testamentary, or by act inter vivos) must not exceed a moiety if he leave at his decease one legitimate child, a third if he leave two, and a fourth if he leave three or more; the descendants of a deceased child being considered as one. Moreover, a Frenchman cannot dispose of the whole of his property, if he leave only ascendants.

(*y*) *Bernal* v. *Bernal*, 3 My. & C. 559. [*Collier* v. *Rivaz*, 2 Curt. 855; *Earl Nelson* v. *Earl Bridport*, 8 Beav. 527, 547; *Yates* v. *Thompson*, 3 Cl. & Fin. 586.]

(*z*) This of course is not conclusive, (as to which see *Nevinson* v. *Stables*, 4 Russ. 210,) though the fact of a testator being described as resident abroad, would produce suspicion and inquiry as to the foreign domicil.

circumstance of the contents of the will, indicating that the testator contemplated returning to England, (but which intention he never executed (*a*),) [or even an express declaration that he intends to retain his domicil of origin (*b*),] is insufficient to exclude the law of his domicil ascertained by the facts of the case (*c*).

If an Englishman, domiciled abroad, has real estate, (including in this definition property held by him for terms of years (*d*),) in his native country, and also personal property there or elsewhere, he ought to make two wills, one devising his English lands, duly framed and executed for that purpose according to the forms of the English law, and the other bequeathing, if permitted, his personal (or rather his moveable) estate conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to avoid some perplexing questions, arising out of the conflict in the laws governing the real and personal property respectively (*e*).

As to Scotland.

Such questions may arise, and indeed have most frequently arisen in regard to the wills of Englishmen domiciled in Scotland, or of Scotchmen domiciled in England; the law of succession and testamentary disposition being, in some respects, different in these two sections of the United Kingdom (*f*). Thus, in the case of *Balfour* v. *Scott* (*g*), where a person domiciled in England died intestate, leaving real estate in Scotland, the heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that, by the law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division (*h*). It was determined, however, that he was entitled to take his share without complying

(*a*) *Stanley* v. *Bernes*, 3 Hagg. 375.

[(*b*) *Re Steer*, 3 H. & N. 594.]

(*c*) As to the animus revertendi, see also *Bruce* v. *Bruce*, 2 B. & P. 229, n.

[(*d*) But see ante, p. 4, n. (*k*.)]

(*e*) See *Brodie* v. *Barry*, 2 V. & B. 130.

(*f*) In Scotland there is no direct power of disposing of real estate by will, "but if there be a conveyance previously executed according to the proper feudal forms, the party may by will declare the use and trust to which it shall enure. Per Sir *W. Grant* in *Brodie* v. *Barry*, 2 V. & B. 132. Where a domiciled Scotchman dies intestate, leaving infant children, and possessed of property in Scotland and England, the Court of Session, it seems, appoints a factor to the children, and to whom the English Court grants administration. (*Re Johnston*, 4 Hagg. 182.)

(*g*) Stated in *Somerville* v. *Lord Somerville*, 5 Ves. 750, and cited 2 V. & B. 131; [and see *Allen* v. *Anderson*, 5 Hare, 163.]

(*h*) Ersk. Inst. Law of Scotland, 701, 5th ed.

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with that obligation, the case being regulated as to the moveable property by the English law.

So, in the case of *Drummond* v. *Drummond* (*i*), where a person domiciled in England had real estate in Scotland, upon which he granted a heritable bond to secure a debt contracted in England. He died intestate; and the question was, by which of the estates this debt was to be borne? It was clear that, by the English law, the personal estate was the primary fund for the payment of debts. It was equally clear that, by the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burdens to which it is by that law subject. On the other hand, it was contended that the real estate must go according to the law of Scotland, and bear all the burdens to which it is by that law subject. It was determined that the law of Scotland should prevail, and that the real estate must bear the burden (*k*).

Speaking of these two cases, Sir *Wm. Grant* has observed (*i*)—"In the first case, the disability of the heir did not follow him to England; and the personal estate was distributed as if both the domicil and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicil and the real estate had been in Scotland."

What constitutes domicil in certain cases.

Where an Englishman or Scotchman divides his time about equally between the two countries, the actual domicil is sometimes difficult to be ascertained, from the absence of preponderating evidence in favour of either. Such was the case of Lord *Somerville* (*l*), a Scotchman by birth and extraction, originally domiciled in Scotland, who took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment: he died at his house in London. Sir *R. P. Arden*, M. R., after an elaborate argument, held that the original domicil remained unchanged, and, consequently the succession to the personal property of the

(*i*) Cit. 2 V. & B. 132.

[(*k*) A heritable bond will not pass by an English will; *Jerningham* v. *Herbert*, 4 Russ. 388; but where there is an English security, and the debt is further secured by a Scotch heritable bond, the debt will pass by an English will, *Buccleugh* v. *Houre*, 4 Mad. 467; *Cust* v. *Goring*, 18 Beav. 383. See further as to the nature of heritable bonds, Bell's Commentaries on the Laws of Scotland, 206; Ersk. Inst. 194.]

(*l*) 5 Ves. 750, [and see *Forbes* v. *Forbes*, Kay, 353. For the purposes of succession a man cannot have more than one domicil, ib.

deceased nobleman (who had died intestate) was to be governed by the law of Scotland. The argument in favour of the English domicil was urged on behalf of the relations of the half-blood, whom the law of Scotland excluded. Had the deceased nobleman had no original domicil in either of the two countries, which, in his later life he alternately made his home, the difficulty of applying the principle adopted by the M. R. as the ground of his decision would have been greatly increased; in such a case, [the domicil of origin (which is the least of all easily put off (*m*)) or other last acquired domicil would, it seems, be let in (*n*).]

"The question of domicil," said Lord *Loughborough*, in the case of *Bempde* v. *Johnson* (*o*), "primâ facie, is much more a question of fact than of law. The actual place where a person is, is primâ facie, to a great many purposes, his domicil. You encounter that, if you show it is either constrained, or from the necessity of his affairs, or transitory, that he is a sojourner, and you take from it all character of permanency. If, on the contrary, you show that the place of his residence is the seat of his fortune, or the place of his birth, upon which I lay the least stress; but, if the place of his education, where he acquired all his early habits, friends and connexions, and all the links that attach him to society are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question."

Another learned Judge has remarked, "domicil is not lost by mere abandonment; it is not to be defeated animo only, but animo et facto, and necessarily remains until a subsequent domicil be acquired, unless the party die in itinere toward an intended domicil (*p*)." A person did not change his domicil by going to British India in the service of the Crown; secus, if he entered into the service of the East India Company (*q*). [And

(*m*) *Re West*, 6 Jur. N.S. 831.

(*n*) *Craigie* v. *Lewin*, 3 Curt. 435, 7 Jur. 519, 2 No. Cas. 185.]

(*o*) 3 Ves. 201.

(*p*) Per Sir *J. Leach*, V. C., in *Munroe* v. *Douglas*, 5 Mad. 379; [*Craigie* v. *Lewin*, 3 Curt. 435, 7 Jur. 519, 2 No. Cas. 185; *Att.-Gen.* v. *Fitzgerald*, 3 Drew. 610; *Lord* v. *Colvin*, 4 Drew. 366]; but on this subject see Story's Conflict of Laws, ss. 46 et seq., where the various distinctions are stated in a series of propositions. [The latter part of Sir *John Leach's* dictum does not, as it should seem, import that being in itinere is a sufficient "factum" for the acquisition of a new domicil, the better opinion being that the act must be commensurate with the intention (that is, that there must be actual residence in the new home); but only that where death occurs under such circumstances the old domicil (if an acquired one) does not remain: the consequence being that the domicil of origin reverts; see per Sir *R. T. Kindersley*, V. C., *Lyall* v. *Paton*, 25 L. J. Ch. 746.]

(*q*) *Bruce* v. *Bruce*, 2 B. & P. 229; [*Forbes* v. *Forbes*, Kay, 356. With a few immaterial differences, the stat. 1 Vict. c. 26, was made law in India by an act of the Legislative Council, No. 25, A. D. 1838, and applies to all wills made on or after the 1st of Feb. 1839. Secus as to Mauritius, *Re Smith*, 14 Jur. 1100.]

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[a practically identical distinction will probably hold under the new constitution of the British Government in India, though in both cases the service will now be that of the Crown (*r*).

Domicil of an ambassador.

An ambassador does not by his residence in a foreign country lose his native domicil (*s*): but it seems that if, after having become domiciled abroad, he receive such an appointment from the government of his native country, his original domicil is not thereby restored (*t*).

Animus manendi necessary to acquire a domicil.

Among the circumstances most material in establishing the intention to acquire a domicil in any place, is the fact of a man's wife always residing there, though he should himself divide his residence between that and another place (*u*). And length of residence is also a most important ingredient from which to infer a like intention (*x*). Per se, however, they have no effect; for as the animus redeundi without the factum is not alone sufficient to change a domicil once acquired; so the factum of residence without the animus manendi is not alone enough for its acquisition. Thus it has been held, that a French refugee, who had been compelled to quit his country by the revolution at the end of the last century, and had resided here till 1815, did not thereby acquire a domicil here, the circumstances under which he came serving to show that he did not intend to remain longer than he was compelled (*y*).]

Domicil, how affected by residence for commercial purposes;

Where a British-born subject, or a person entitled, as the son of an Englishman (*z*), to the privileges of a British subject, takes up a permanent residence abroad for commercial purposes, under the protection of treaties, which, [without making special provision as to testamentary questions (*a*),] secure to British subjects certain immunities and privileges, though he may invariably act, and regard himself as an Englishman, the disposition of his personal property will be governed by the law of the country, which he has, under such circumstances, made his home, if continuing such at the time of his decease (*b*).

[The fact that a British subject resident in India was a mili-

(*r*) In a Scotch case, *Commissioners of Inland Revenue* v. *Gordon's executors*, 12 Cas. Court Sess. 657, residence in Tortola (W. I.) under an appointment from the Crown as stipendiary magistrate and member of council was held to confer a domicil at that place.

[(*s*) Story, Confl. s. 48; contrà as to consuls, ib.

(*t*) *Heath* v. *Samson*, 14 Beav. 441.

(*u*) *Forbes* v. *Forbes*, Kay, 364.

(*x*) *Cockrell* v. *Cockrell*, 25 L. J. Ch. 732.

(*y*) *De Bonneval* v. *De Bonneval*, 1 Curt. 856; and see *Brown* v. *Smith*, 15 Beav. 444.]

(*z*) Vide stat. 4 Geo. 2, c. 21; 13 Geo. 3, c. 21.

[(*a*) *Maltass* v. *Maltass*, 3 Curt. 231, 1 Rob. 67, 7 Jur. 135, 8 Jur. 860, 2 No. Cas. 33, 3 No. Cas. 257.]

(*b*) *Moore* v. *Budd*, 4 Hagg. 346.

[tary or naval officer in the British service (*c*) and was compelled, in order to retain his pay, to obtain, and did obtain and from time to time renew, leave of absence; though not immaterial does not prevent the acquisition of a foreign domicil: it amounts only to this, that it becomes a question with the party whether he will forfeit his half-pay or not. In *Cockrell* v. *Cockrell* (*d*), Sir *R. T. Kindersley*, V. C., relied much on the profitable nature of the business that had been carried on by the deceased up to his death to found a presumption that this question would have been answered by him in the negative.

—for health's sake.

Residence in any place for health's sake is of dubious import: and further manifestation of intention is requisite before such residence can be assumed to be permanent (*e*).]

Domicil of children.

It has been made a question, whether infant children, who, after the death of the father, remain under the care of their mother, follow the domicil which she may from time to time acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority in such cases seems to be in favour of the mother's domicil; and, therefore, where an Englishman domiciled in Guernsey, died there, and the widow came to, and took up her residence in, England, bringing her children with her; it was held, that the succession to the personal property of two of her children, who died there at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention (*f*).

[(*c*) Persons entering the military service of any state acquire the domicil of that state, Phillim. on Domicil, pp. 72, 76. Where, as in the United Kingdom, different laws prevail in its several parts, a domicil in one part, as *Jersey* (*Re Patten*, 6 Jur. N. S. 151) is not altered by entering the military or naval service of the kingdom. See also *Yelverton* v. *Yelverton*, 29 L. J. Matr. 34.

(*d*) 25 L. J. Ch. 730. See also *Forbes* v. *Forbes*, Kay, 341, 356; *Commissioners of Inland Revenue* v. *Gordon's executors*, 12 Cas. Court Sess. (Scotch), 657.

(*e*) See *Hoskins* v. *Matthews*, 2 Jur. N. S. 196, 25 L. J. Ch. 689; and per *Wood*, V. C., Kay, 367. See further on Domicil, *Att.-Gen.* v. *Dunn*, 6 M. & Wels. 511; *Whicker* v. *Hume*, 13 Beav. 366; *Laneuville* v. *Anderson*, 17 Jur. 511.]

(*f*) *Pottinger* v. *Wightman*, 3 Mer. 67; but see Story, s. 46. [The general rule is well known that infants and married women cannot change their domicil by their own acts. See Kay, 353, *Robins* v. *Dolphin*, 1 Sw. & Tr. 37, in D. P. 29 L. J. Prob. 11; *Re Daly's Settlement*, 25 Beav. 456; *Yelverton* v. *Yelverton*, 29 L. J. Matr. 34. But the scope of this treatise does not admit of a full exposition of the law of domicil; this will be found in books specially devoted to the subject.]

CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

Ambulatory nature of wills.

A WILL is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A., in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation.

Contingent wills.

[A will may it seems be made so as to take effect only on a contingency, and if the contingency does not happen the will ought not to be admitted to probate (*a*).

But a will, intended to take effect as an exercise of a power, is not necessarily conditional on the existence of the power, if the testator has an interest independent of the power sufficient to support the disposition: for if an intention appears to dispose of the property, it matters not that the testator mistook the origin or nature of his dispositive power (*b*).

And even where the will is in terms clearly contingent, the Court is very cautious how it refuses probate on that ground.

[(*a*) *Parsons* v. *Lanoe*, 1 Ves. 190, 1 Wils. 243; *Sinclair v. Hone*, 6 Ves. 607.

(*b*) *Southall* v. *Jones*, 1 Sw. & Tr. 298, 28 L. J. Prob. 112.

[If, after the event contemplated has become impossible, the testator still carefully preserve the instrument, or do any act whereby he recognizes it as his will, it will be admitted to probate (*c*). And it seems that when on the death of the testator the event is still in suspense, general probate will be granted at once (*d*). Of course the question still remains open what effect the will is to have.

Joint will.

Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon the death of each as if he had made a separate will (*e*). But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either (*f*).

Will in pencil or with blanks valid.

A will may be written in pencil (*g*), and its validity is not affected by reason of blank spaces having been left in it (*h*).]

Form of wills.

The law has not made requisite, to the validity of a will, that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.

Instruments in the form of deeds, agreements, &c., held to be testamentary.

Thus (*i*), a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation. As, in the case of *Hixon* v. *Wytham* (*k*), where A. by indenture made between him on the one part, and B. and C. of the other part, in consideration of 5*l*., bargained and sold to them certain lands in trust to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the rest thereof, and all his personal estate, he gave and bequeathed (for

Instrument commencing as an indenture, but ending as a will.

[(*c*) *Burton* v. *Collingwood*, 4 Hagg. 176; *Strauss* v. *Schmidt*, 3 Phillim. 209; *Re Tylden*, 18 Jur. 136; and see *Sinclair* v. *Hone*, 6 Ves. 607.

(*d*) *Re Cooper*, 1 Deane, Eccl. R. 9. It is presumed, though it is not so stated in the report, that the children were minors.

(*e*) *Re Stracey*, 1 Deane, Eccl. R. 6, 1 Jur. N. S. 1177.

(*f*) *Re Raine*, 1 Sw. & Tr. 144.

(*g*) *Bateman* v. *Pennington*, 3 Moo. P. C. C. 223; *Kell* v. *Charmer*, 23 Beav. 195; and see *Lucas* v. *James*, 7 Hare, 419.

(*h*) *Corneby* v. *Gibbons*, 1 Rob. 705, 6 No. Cas. 679; *Re Kirby*, 1 Rob. 709, 6 No. Cas. 693.]

(*i*) *West's case*, Mo. 177, pl. 314; *Manly* v. *Lakin*, 1 Hagg. 130; *Re Dunn*, ib. 488; *Henderson* v. *Farbridge*, 1 Russ. 479.

(*k*) 1 Ch. Cas. 248; *S. C.* Finch, 195.

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the language was here changed to the first person) in favour of certain persons. A. made B. and C. executors of *his will;* and signed, sealed, published and declared the instrument as his will in the presence of several witnesses. The court declared this to be a good will.

Instrument entitled "Articles of Agreement."

So, in the case of *Green* v. *Proude* (*l*), where, by instrument, entitled "Articles of Agreement," made between A. of the one part, and B. of the other part: it was agreed between them that A., being sick in body, gives, &c.; in consideration whereof B. promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i. e.* "in witness whereof the parties have hereunto interchangeably set their hands and seals." This instrument was delivered as a deed; but it was held to be testamentary, and as such revocable, and the court seems to have been influenced by the circumstance, that the person who prepared it was instructed to make a will.

Contemporaneous deed and will both held to be testamentary.

Again, in the case of *Peacock* v. *Monk* (*m*), where A., being about to settle his affairs, upon the same day made two instruments; one he called a deed, by way of agreement between him and B., and the other he called a will. By the deed, he put 4,000*l.* into the hands of B., to pay to A. himself an annuity for life of 160*l.*, and afterwards to pay 1,000*l.* a-piece to C. and D. if they survived him, and an annuity of 100*l.* to E. for life if she survived him, the residue to B. There was a proviso, that if the 160*l.* annuity was in arrear, B. should repay the 4,000*l.* to A., to be placed out in the joint names of A. and B. (*n*). By the will B. was appointed executor and made residuary legatee. Lord *Hardwicke* said, "B. being both executor in the will and contractor in the deed, and both instruments being executed at the same instant, (as it must be taken, being on the same day,) it speaks the whole to be a testamentary act. In several cases, the nearness of one act to another makes the court take them as one; so that it is a testamentary act, though not strictly so, because not revocable (*o*)." The case of *Tomkyns* v. *Ladbroke* (*p*),

(*l*) 3 Keb. 310; *S. C.* 1 Mod. 117.

(*m*) 1 Ves. 127; Belt's Suppl. 82.

(*n*) This clause showed that the instrument was designed to operate in the donor's lifetime. In a much earlier case (*Audley's case*, 4 Leon. 166), it appears to have been considered as conclusive against the construing of an instrument as a will, that by it an estate was to be taken by the maker, "who could not take by his own will."

(*o*) By this observation it should seem, that his Lordship thought that the instrument might be testamentary, for some purposes, but not for others; [as to which, see *Doe* v. *Cross*, 8 Q. B. 714, stated post.]

(*p*) 2 Ves. 591.

before the same Judge, was very similar in its circumstances. A., a freeman of London, two days before his death, executed a will and a deed, by the last of which he assigned 5,000*l.*, part of his personal estate, to trustees, to the separate use of his daughter. Lord *Hardwicke* held that this was a testamentary act, and, as such, a fraud on the custom, which allows a freeman to give away his personal estate by act *in extremis*, provided he divest himself of all property in it; but not if he reserve to himself a power over it. The case of *Hogg* v. *Lashley*, decided by the House of Lords (*q*), is confirmatory of the same principle; an instrument, executed in the form of a Scotch settlement, (for lands in Scotland are not disposable by will,) but containing dispositions intended for the most part to take effect after the decease of the maker, having been by the House adjudged to be testamentary.

Instrument in form of deed-poll, held testamentary.

Again, in the case of *Habergham* v. *Vincent* (*r*), where A., by his will duly executed and attested, devised his freehold and copyhold estates to certain uses, with remainder to such persons and for such estates as he by any deed or instrument in writing, to be executed by him and attested by two witnesses, should appoint. By an instrument executed on the following day, under the hand and seal of the testator, stamped and concluded like a deed, the testator recited this power in his will, and then proceeded thus:—"Now know ye, that, by this my deed-poll, I do direct and appoint that my trustees [*naming them*] shall immediately after," &c., convey to certain uses, &c. It was held by Lord *Loughborough*, assisted by Mr. Justice *Wilson* and Mr. Justice *Buller*, that the second instrument was testamentary. Mr. Justice *Buller* said, that the cases had established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after his death, it was considered as a will.

Remark upon *Habergham* v. *Vincent*.

The consequence in this case of holding the instrument to be a codicil to the will was, that it operated on the copyholds, but not on the freeholds, for want of an adequate attestation; the

(*q*) 7th of May, 1792, stated 3 Hagg. 415, n.

(*r*) 2 Ves. jun. 204; *S. C.* 4 B. C. C. 355.

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court being decidedly of opinion that a testator could not, by a will attested by three witnesses, reserve to himself a power to dispose of freehold estates by an unattested codicil.

Att.-Gen. v. *Jones.* Property professedly settled by deed, held liable to legacy duty.

The question, whether an instrument in the form of a deed operated as a will, was much discussed in the case of *Att.-Gen.* v. *Jones* (*s*), where A., by indenture dated March 25, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C. and D.; also certain stock in the funds, with the dividends which should be due thereon at his decease, the arrears of any pension that might be due to him at his death, and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life, and after his decease, for B. (an illegitimate daughter). The instrument reserved to A. a power of revocation by deed or will. By will, dated April 16, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons, as were trustees in the deed, executors. A. did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed, which he retained in his own custody. The question was, whether the property assigned by it was liable to the legacy duty; and three of the Barons of the Exchequer decided in the affirmative, adverting, in the course of very long judgments, to the circumstance that the consideration was nominal; that the trust for the grantor was not to receive the dividends merely, but implied a power in him to dispose of the property as he should think proper (*t*); that he kept the deed in his own possession; never transferred the stock to the trustees, nor invested them with the control of the property, or even informed them of it; that, *though the legal estate was in the trustees* (for this with singular inconsistency was admitted), the actual ownership remained with the grantor; that the deed professed to grant the property of which the maker should be possessed at the time of his decease, which, otherwise than as a will, it could not do; that it contained a power of revocation by the most informal instruments; and, lastly (on which great stress was laid), that the will, by referring to and confirming the deed, "threw a testamentary character over the whole." *Wood*, B., in support of

(*s*) 3 Price, 368.
(*t*) It was merely for the use and benefit of A. for life.

his contrary opinion, relied not only on the form of the instrument, which was perfect as a deed, but on its effect; which, he said, was to vest the legal estate in the leasehold property in the trustees *instanter; and was there*, he asked, *a case where the estate passed by a will in the lifetime of the testator?* He argued, that the confirmation of it in the subsequent will made no difference. "Suppose," said the learned Judge, "there had been no power of revocation, would it not have been valid as a deed? and suppose, in that case, the party had made a will, disposing of the property differently, that will would not avail against a deed; but the deed, notwithstanding the alteration of the will, if he had not reserved the power, would prevail against the will. That shows it as a deed. If, on the other hand, he had made a will, and then another, the second would have been a revocation of the first."

Remarks upon *Attorney-General* v. *Jones*.

The principle of this decision has been generally condemned: indeed, the reasoning of some of the learned barons seems very inconclusive and unsatisfactory. The reliance placed on the power of revocation was especially unfortunate; for the insertion of such a clause, so far from indicating an intention to make a will, imparts quite a contrary colour to the transaction, as a will wants not an express power to render it revocable. The fact, too, of the assignment being extended to all the property of which the grantor should happen to be possessed at his decease, shows only that he attempted to include what he could not, and not that he meant to resort to a different species of disposition. Nor do the arguments founded on the retention of the custody of the deed (*u*) and the possession of the property appear to be more convincing; for, though these circumstances are often very important when the claims of *creditors* and *purchasers* are under consideration, yet it has never been ruled that in order to render a settlement binding on the settlor's own representatives the deed must be disclosed, and the possession of the property relinquished by him; on the contrary, dispositions of property by a deed taking effect inter vivos, have often been supported under such circumstances. Still more difficult is it to accede to the position, that the reference to the settlement in the subsequent will "threw a testamentary character over the whole." Testators frequently refer to, for the purpose of confirming, some antecedent disposition of property by deed; and it has never been surmised that

(*u*) See *Alexander* v. *Brame*, 7 D. M. & G. 530.

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such confirmation rendered the instrument referred to testamentary. If testamentary for one purpose, it must be so for every purpose; and hence we are forced to conclude that if B., the cestui que trust, had died in her putative father's lifetime, the property in question would have gone, not to *her* representatives (which if she had died intestate and unmarried would have let in the title of the crown), but to those of the settlor, who would necessarily have been entitled, under the doctrine of lapse, if the instrument were to be construed as a will!

Case of *Tompson* v. *Browne.*

A question of a similar nature came under consideration in the subsequent case of *Tompson* v. *Browne* (*x*), which was as follows:—By an indenture of settlement dated August 19, 1823, made between A. of the first part, B. of the second part, C. and D. (natural daughters of A. and B.) of the third part, and E. and F. of the fourth part. After reciting that A. was desirous of making some provision for their children C. and D., and had therefore lately transferred into the joint names of E. and F., the sum of 6,090*l.* new 4 per cent. Bank Annuities; it was then witnessed, that E. and F. and the survivor, &c., should stand possessed of the said stock, upon trust, to permit A. or his assigns to receive the dividends during his life; and after his decease, upon trust, to appropriate so much of the stock as would produce 80*l.* per annum, and pay the dividends thereof, to B. for her life; and as to the residue of the stock, and also, after the decease B., as to the appropriated fund, upon trust, to transfer the same to C. and D., in equal shares, at the age of twenty-five or marriage. The settlement contained a power to A. to revoke the trusts and appoint any others in lieu thereof. A. and B. being both dead, the cestuis que trust claimed a transfer of the fund; and the question raised by the trustees was, whether the instrument was not testamentary, and the fund accordingly subject to legacy duty? The affirmative was attempted to be maintained on the authority of the case of *Attorney-General* v. *Jones;* but Sir *C. C. Pepys*, M. R., decided that the legacy-duty did not attach. "The decision in the *Attorney-General* v. *Jones*," said his Honor, "seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument, so as to entitle any other person to interfere with his property in his lifetime. *If there be anything in that decision to support the*

Settlement reserving life interest to settlor, with power of revocation, held that the property was not liable to legacy duty.

(*x*) 3 My. & K. 32.

notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that if this were law, a great number of transactions, of which the validity has never been doubted, would be liable to be impeached."

Although the remarks of the Master of the Rolls are expressed with great caution, they leave no doubt that the doctrine of the case of the *Attorney-General* v. *Jones* will not be carried beyond the particular circumstances of the case, a coincidence with which should be avoided as much as possible in the preparation of such instruments.

Instrument sealed, stamped, and registered, not testamentary.

[In the case of *Majoribanks* v. *Hovenden* (*y*), an instrument commencing with a recital, and having an attestation clause like a deed poll, and sealed, stamped, and registered, was held by Sir *E. Sugden* not to be testamentary merely from the nature of the power (a power to appoint by will, misrecited as a power to appoint by deed or will) under which it purported to be made, the learned Judge seemed to consider the fact of registration as a deed almost conclusive against its testamentary character.]

Rule in ecclesiastical courts as to instruments testamentary in substance but not in form.

The Ecclesiastical Judges (before whom, of course, questions of this kind are most frequently agitated) act fully up to the principle which regards as testamentary any instrument that is designed not to take effect until the maker's decease, though assuming the form of a disposition inter vivos; and more especially if it be incapable of operation in the intended form; and accordingly, in repeated instances, the Prerogative Court has granted probate of such irregular documents, as the assignment of a bond by indorsement (*z*), receipts for stock and bills indorsed (*a*), a letter (*b*), marriage articles (*c*), and promissory notes, and notes payable by executors, in order to avoid the legacy duty (*d*), [and cheques on a banker (*e*), even though the testator made a subsequent will containing a clause revoking any former will or

[(*y*) 1 Dru. 11.]

(*z*) *Musgrave* v. *Down*, T. T. 1784; cit. 2 Hagg. 247.

(*a*) *Sabine* v. *Goate and Church*, 1782; cit. 2 Hagg. 247.

(*b*) *Drybutter* v. *Hodges*, E. T. 1793; cit. 2 Hagg. 247; [and see *Passmore* v. *Passmore*, 1 Phillim. 218, and cases cited ante, p. 13, n. (*i*).]

(*c*) *Marnell* v. *Walton*, T. T. 1796; cit. 2 Hagg. 247.

(*d*) *Maxee* v. *Shute*, H. T. 1799; cit. 2 Hagg. 247; [and see 4 Ves. 565.

(*e*) *Bartholomew* v. *Henley*, 3 Phillim. 317.

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[codicil (*f*).] On the same principle, Sir *J. Nicholl* admitted to probate, as testamentary, the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him, to the trustees of the marriage settlement of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death (*g*).

Instruments professing to be deeds of settlement held testamentary.

In another case, the facts shortly were, that, in 1819, A., and B. his wife, executed a deed, conveying property to trustees for the use of A. and B., and upon the death of the survivor, *to pay over* the property (*h*) to different persons. A. survived his wife, and died without having exercised a power reserved to him of revoking the trusts. Probate to the trustees was prayed, on the ground that the deed was, in its whole purport and effect, testamentary, not being to operate until after the death of A., and the Court decreed accordingly (*i*).

In a subsequent case (*k*), probate was, [with the consent of the parties interested in opposing it,] granted of an instrument under hand and seal, entitled an indenture, and made between A. of the first part, and other persons of the second and third parts, by which A., in consideration of natural love and affection, assigned his household goods and farming stock, and other personal estate which he then was, or should at his decease be, possessed of, to B., his executors or administrators, upon trust to permit him to enjoy the same for life, and after his decease to convert the property and divide the proceeds among certain relatives of A.; the Court considering that the fact of the beneficial interest in the property being reserved to A. until his death, gave the deed a testamentary character. It is to be remembered, however, that these several adjudications occurred before the case of *Tompson* v. *Browne* (*l*) already stated, which will probably exert some influence upon the future decisions even of the ecclesiastical courts in regard to the testamentary quality of an instrument intended to operate as a deed; and now that a will made since the year 1837 requires, with respect to property of any description, an attestation by two witnesses, its validity as

[(*f*) *Gladstone* v. *Tempest*, 2 Curt. 650. But the Court of Chancery declared the cheques to be in effect revoked. *Walsh* v. *Gladstone*, 1 Phil. 294.]

(*g*) *Masterman* v. *Maberley*, 2 Hagg. 235.

(*h*) Such are the loose terms of the report.

(*i*) *In re Knight*, 2 Hagg. 554.

(*k*) *Shingler* v. *Pemberton*, 4 Hagg. 356.

(*l*) 3 My. & K. 32, ante, 18.

an actual disposition of property would, if not so attested, depend upon the maintenance of its non-testamentary character.

Paper containing words of present gift held to be not testamentary;

But it should seem that, if the instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to show that it was intended as a will (for the ecclesiastical courts admit evidence of this nature), probate will not be granted of it as a testamentary document. Thus, where a minor aged nineteen (at a period when minors of such an age were capable of making wills of personal estate), wrote a paper in these words: —"I, A. B., of &c., in the presence of the two under-mentioned witnesses, C. D. of &c., and E. F. of &c. do give all my goods and chattels to M. D. of ——, spinster." This paper was dated, and witnessed by the two persons referred to in the body of it. The Court was of opinion that, as the paper bore upon the face of it no evidence of its being intended to be testamentary, but it rather appeared, both from its contents and the evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted (*m*).

—so as to other papers in form of letters.

So probate was refused of a letter addressed by the deceased to a friend, directing the sale of stock in the public funds, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale (*n*). And in another case, a paper addressed by a testator to his executors was held not to be testamentary, the same not being dispositive in terms, nor shown by extrinsic evidence to have been so intended (*o*). In this case Sir *Herbert Jenner* observed that there was this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character, that the first will be entitled to probate, unless, as in the case of *Nicholls* v. *Nicholls* (*p*), they proved not to have been written animo testandi; whilst, in the latter, the animus must be proved by the party claiming under it.

[The questions which arose in these cases, though less likely to arise with respect to wills coming within the operation of the recent act, are not altogether precluded by it. Thus, in *Jones* v. *Nicolay* (*q*), a person on his death-bed executed, with all the

Paper in the form of a bill of exchange;

(*m*) *King's Proctor* v. *Daines*, 3 Hagg. 218: [and see *Langley* v. *Thomas*, 26 L. J. Ch. 609.]

(*n*) *Glynn* v *Oglander*, 2 Hagg. 428.

(*o*) *Griffin* v. *Ferard*, 1 Curt. 97.

(*p*) 2 Phillim. 180.

[(*q*) 2 Rob. 288, 14 Jur. 675. See also *Re Marsden*, 1 Sw. & Tr. 542. So of a letter, *Re Mundy*, 7 Jur. N. S. 52.

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formalities necessary to a proper will, a paper in the form of a bill of exchange, and it was held that such paper was entitled to probate as a codicil to his will.

—and in the form of a power of attorney, held to be testamentary.

Again, in the case of *Doe* d. *Cross* v. *Cross* (*r*), an instrument in the form of a power of attorney, given by a person abroad, appointing his mother to receive the rent of his lands, and disposing of his lands in case of his death before his return to England, being properly executed as a will, was held to be a good will of the lands in question. The Court seemed to think that there was no objection to an instrument operating partly *in præsenti* as a deed, and partly *in futuro* as a will.]

Probate, how far conclusive.

The granting of probate is conclusive as to the testamentary character of the instrument in reference to personalty (*s*). [Everything included in the probate copy must be assumed by the Court of Construction to be part of the will, and the original will cannot be appealed to for the purpose of showing that such copy is erroneous. Thus where probate was granted, with cross lines drawn over the bequests of certain legacies, Lord *Cranworth* held that it was to be taken as conclusively settled by the Ecclesiastical Court, that the will was at its execution in the state in which it was then found; *i. e.* that the testator had executed the instrument with the cross lines drawn over it (*t*). That being so, the only question for him to determine was, what did the instrument mean? and he thought the meaning was, that the testator's original intention to give the legacies had ceased, and that he had placed the lines there to show this. The result was that the legacies were struck out (*u*). Neither is it competent for the Court of Chancery, on the ground that legacies given by a codicil were fraudulently obtained, to declare the legatee a trustee for the person who would otherwise have taken. The objection on the ground of fraud should be taken in the Ecclesiastical Court, which, on being satisfied of the fraud, would direct probate to issue, omitting that part containing the bequest

(*r*) 8 Q. B. 714.]

(*s*) See *Douglas* v. *Cooper*, 3 My. & K. 378. The executors are considered as representing the legatees, in regard to the litigation respecting the validity of the will; and unless a case of fraud and collusion can be made out against them, the legatees are bound by the adjudication in the suit to which the executors are parties; *Colvin* v. *Fraser*, 2 Hagg. 292; *Medley* v. *Wood*, 1 Hagg. 645; *Newell* v. *Weeks*, 2 Phillim. 224; and that, too, though the same persons are executors under two conflicting testamentary instruments. *Hayle* v. *Hasted*, 1 Curt. 236. The Court, however, sometimes directs the parties interested to be brought before it. *Reynolds* v. *Thrupp*, 1 Curt. 570.

[(*t*) The general presumption is that alterations in a will were made *after* its execution; see post, Chap. VII. s. 2, ad fin.: but that was for the consideration of the Ecclesiastical Court.

(*u*) *Gann* v. *Gregory*, 3 D. M. & G. 777.

[complained of (*x*).] But the granting of probate has no bearing upon the validity of the will, so far as it affects to deal with real estate, either freehold or copyhold; for as to all persons, other than those who claim the personalty, the proceeding of the Ecclesiastical Court in this matter is res inter alios acta (*y*). And, even with respect to personal estate, the granting probate of any paper has no other effect than to establish generally its claim to be received as testamentary; and it remains for the temporal Courts (or the Spiritual Court, in the exercise of a distinct, though now little used branch of its jurisdiction) to determine the construction and effect of the instrument thus stamped with a testamentary character (*z*). The adjudication of these Courts may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property (*a*); or to be in substance the same as [or in substitution for] another paper of which probate has been granted (*b*); or that its provisions are invalid according to the law of a foreign country, which constituted the domicil of the maker at the time of his decease (*c*); in all which cases the instrument so proved operates merely as an appointment of an executor, who distributes the property as under an intestacy.

Original will may be examined by Court of Construction.

[And to *determine the construction*, the original will, both of real and personal property, may be looked at. It was said, indeed, by an eminent Judge (*d*), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the con-

[(*x*) *Allen* v. *Macpherson*, 1 H. of L. Ca. 191, 11 Jur. 785, affirming 1 Phil. 133, and reversing 5 Beav. 469; *Hindson* v. *Weatherill*, 5 D. M. & G. 301.

(*y*) *Hume* v. *Rundell*, 6 Madd. 331. [See also *Bonser* v. *Bradshaw*, 5 Jur. N. S. 86. Appointment of executors entitles a will to probate, although it disposes of real estate only; unless it be made in execution of a power, in which case the executors take nothing jure representationis, *Tugman* v. *Hopkins*, 4 M. & Gr. 389; *O'Dwyer* v. *Geare*, 29 L. J. Prob. 47.]

(*z*) That a Court of Equity has no jurisdiction to determine on the validity of a will, see 7 B. & Cr. 437; 13 Ves. 297; 3 Mer. 161; Jacob, 467; 4 Hagg. 41; but see 4 Y. & C. 382.

(*a*) See *Gawler* v. *Standerwick*, 2 Cox, 16; [*Mayor, &c. of Gloucester* v. *Wood*, 3 Hare, 131; 1 H. of L. Ca. 272.]

(*b*) See *Hemming* v. *Clutterbuck*, 1 Bli. N. S. 479; [S. C. nom. *Hemming* v. *Gurrey*, 1 D. & Cl. 35; *Walsh* v. *Gladstone*, 1 Phil. 290, 13 Sim. 261; *Campbell* v. *Radnor*, 1 B. C. C. 271.]

(*c*) *Thornton* v. *Curling*, 8 Sim. 310.

[(*d*) Sir *W. Grant*, *Sandford* v. *Raikes*, 1 Mer. 651.

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[struction (*e*). But it seems a little unreasonable to refuse all effect to "grammatical skill," when employed in fixing a position for parenthetical characters, when that same skill is the foundation of all testamentary construction. Certainly, in recent times, no hesitation has been felt by the Courts, in following what is stated to have been Lord *Eldon's* practice, viz. in examining original wills "with a view to see whether anything there appearing,—as, for instance, the mode in which it was written, how 'dashed and stopped,'—could guide them in the true construction to be put upon it" (*f*). It is true that Lord *Cranworth* expressed an opinion, that it was not competent for the Court of Chancery (*i. e.* the Court of Construction) on every occasion to look at the original will. But that was in a case where the object proposed was by looking at an original will of personal property, virtually to procure a reversal of the decision come to by the Ecclesiastical Court with respect to the form of the probate copy in question (*g*).]

As to probate of testamentary appointments.

Where a paper professes to be an appointment under a power, the Ecclesiastical Court applies to it the ordinary principles of testamentary law, without attempting, in that proceeding, to pronounce on its sufficiency as a due execution of the power under which it purports to be made (*h*). [This practice was indeed temporarily departed from, but was ultimately restored by the decision in *Barnes* v. *Vincent* (*i*), in which it was held that the Ecclesiastical Courts ought to grant probate of every paper *professing* to be executed under a power, if in other respects its testamentary character was established; and further, that, if the power was alleged, the probate should be granted without production of the power, and without reference to the question whether the power existed or not (*k*). This, it was said, restored the ancient and laudable practice of those Courts.]

The granting of probate precludes the secular Court from questioning the testamentary character of the paper, and it only

(*e*) See per Sir *E. Sugden*, *Heron* v. *Stokes*, 2 Dr. & War. 98.

(*f*) Per Lord Justice *Knight Bruce* in *Manning* v. *Purcell*, 24 L. J. Ch. 523, n.; also reported 7 D. M. & G. 55. See also *Compton* v. *Bloxham*, 2 Coll. 201; *Child* v. *Elsworth*, 2 D. M. & G. 683; *Oppenheim* v. *Henry*, 9 Hare, 802, n.; *Gauntlett* v. *Carter*, 17 Beav. 590; *Milsome* v. *Long*, 3 Jur. N. S. 1073.

(*g*) *Gann* v. *Gregory*, 3 D. M. & G. 780, already referred to.

(*h*) *Draper* v. *Hitch*, 1 Hagg. 674. See, also, *Stevens* v. *Bagwell*, 15 Ves. 139.

[(*i*) 5 Moo. P. C. C. 201, 10 Jur. 233, 4 No. Cas. Supp. xxxi; *Tatnall* v. *Hankey*, 2 Moo. P. C. C. 342; *De Chatelain* v. *De Pontigny*, 1 Sw. & Tr. 411, 29 L. J. Prob. 147.

(*k*) The case of *Re Monday*, 1 Curt. 590, seems therefore overruled.]

remains for that Court to determine whether the formalities prescribed by the power have been complied with (*l*). [If no special formalities are prescribed, the decree of the Ecclesiastical Court granting probate is of course final (*m*).]

Probate of wills of married women.

Where there is a question, whether any particular fund formed part of the separate estate of the testatrix, a feme covert, under a settlement, the Court will grant probate to the executors, limited to the settled property, and all accumulations over which the deceased had a disposing power, and which she has disposed of; that being the most convenient mode of affording the parties an opportunity of obtaining in the proper forum an adjudication on the disputed point (*n*). If no executor is appointed, the Court commonly grants a general administration to the husband, and not a limited administration to the legatees under the appointment (*o*), the effect of which would be, that if the deceased left other property, a further administration, *i. e.*, a general administration to the husband, would be requisite.

Effect of recent statute in checking informal and irregular testamentary papers.

The facility with which loose papers are proved in the Ecclesiastical Courts has been sometimes complained of by the Judges of other Courts, on whom has fallen the duty of expounding the jargon thus pronounced to be testamentary (*p*). It has been, doubtless, induced by the consideration, that a leaning on this side is less injurious than the opposite excess; the effect of rejection often being to debar parties from the further litigation of their rights under the contested instrument (*q*). The exclusion, however, by the recent statute, of all testamentary papers which are not attested by two witnesses, will, of course, tend materially to check the evil which has been the subject of complaint; for it rarely happens that these informal and irregular papers are attested; and hence the Ecclesiastical as well as the secular Courts will eventually be relieved in some degree from a most perplexing branch of their duty; and testators will, it is hoped, be taught the vanity of intrusting the expression of their

(*l*) *Douglas* v. *Cooper*, 3 My. & K. 378.

[(*m*) *Ward* v. *Ward*, 11 Beav. 377. In *Gullan* v. *Grove*, 26 Beav. 64, the question whether the third and fourth sheets of a will constituted a "will," or whether they were "in the nature of or purporting to be a will" were held to be identical.]

(*n*) *Ledgard* v. *Garland*, 1 Curt. 286.

(*o*) *Salmon* v. *Hayes*, 4 Hagg. 386.

(*p*) See *Matthews* v. *Warner*, 4 Ves. 208, 210.

(*q*) As to the admissibility in evidence of paper writings, not proved as testamentary, vide Doug. 707, 1 Cox, 1, 15 Ves. 153, 2 East, 552; *Smith* v. *Attersoll*, 1 Russ. 266. [This case shows that there is a distinction where a paper declaring trusts is signed by the *legatees* in trust, and not by the testator only. *Johnson* v. *Ball*, 5 De G. &. S. 89; *Consett* v. *Bell*, 1 Y. & C. C. C. 577.

testamentary wishes to such imperfect vehicles. The occurrence will also be prevented of the question whether the execution of a testamentary appointment conforms to the requisitions of the power, for which will be substituted the more simple inquiry, whether or not the donee has complied with the requisitions of the statute; so that, instead of the partial entertainment of the question, as heretofore, by the Ecclesiastical Courts, the whole matter relating to the sufficiency of the execution will, (so far at least as the personal estate is concerned,) indisputably be brought within the jurisdiction of those Courts (*r*).

[(*r*) A power to appoint by "writing" with certain stated solemnities, though exercisable according to the general law by will *executed in conformity with the requirements of the power*, is not within the terms of the statute 1 Vict. c. 26, s. 10, which speaks of a power to be executed "by will," *West* v. *Ray*, Kay, 385, following the doubt expressed in *Collard* v. *Sampson*, 4 D. M. & G. 224, and overruling *Buckell* v. *Blenkhorn*, 5 Hare, 131. See also *Moss* v. *Harter*, 18 Jur. 973, 976.]

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PERSONAL DISABILITIES OF TESTATORS (*a*).

THE general testamentary power over freehold lands of inheritance was originally conferred by the statute of 32 Hen. 8, c. 1, into the precise import of which it is now unnecessary to inquire, as it was quickly followed by the explanatory act of 34 & 35 Hen. 8, c. 5 (*b*), which, after reciting the former statute, enacted, "That all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, [or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements, or hereditaments, holden of the king, his heirs or successors, or of any other person or persons by knight's service (*c*),] shall have full and free liberty, power and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents, hereditaments, or any of them, or any rents, commons, or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own freewill and pleasure." [The statute then proceeds to empower persons holding by knight's service to devise two parts of their lands.]

Persons having sole estate in fee enabled to devise.

Sect. 14 provides that wills or testaments made of any manors, &c., by any woman coverte, or person within the age of twenty-one years, idiot, or by any person of non-sane memory, shall not be taken to be good or effectual in law. This clause did not create any disability that was unknown, or, indeed, comprise all

Exception as to femes covertes, infants, lunatics, and idiots.

[(*a*) The subject of this chapter, especially with reference to the decisions in the Ecclesiastical Courts, is very fully treated of in *Williams on Executors*, p. 11 et seq.

(*b*) Ir. Parl. 10 Car. 1, sess. 2, c. 2.

[(*c*) The statute 12 Car. 2, c. 24, by changing tenure by knight's service into free and common socage tenure, in effect abolished this exception.]

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that were known to the common law; but seems to have been dictated by an apprehension that the general terms of the prior act of the 32nd year of the same reign might possibly have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary Statute of Jointures (*d*). That the disqualifications in question were not the creation of the statute, is evident from the fact that they all extended equally to the bequeathing of personal estate, except that infants of a certain age, namely, males of fourteen and females of twelve, were, at the period now under consideration, competent to dispose by will of personalty (*e*); and such a will was valid, although the testator or testatrix afterwards lived to attain majority without confirming it (*f*). On the other hand, infants of every age were (as they still are) incompetent to alien any portion of their property, real or personal, by deed. In some places a custom exists, or rather did exist (for it is to be remembered we are now speaking of the old law), enabling infants to devise even real estate; but it was essential to the validity of such a custom, that it prescribed some definite and reasonable age; for a custom authorizing the making of a will by persons too young to be capable of exercising a discretion would be no less absurd than one which should empower lunatics or idiots to devise their property (*g*).

As to wills of infants.

As to testamentary appointment of guardians by infants.

The disability of infancy was expressly taken away, in regard to the paternal appointment of testamentary guardians, by the statute of 12 Car. 2, c. 24, s. 8, which enabled any father, *within the age of twenty-one, or of full age*, who should leave any child under twenty-one, and not married, *by deed or will*, executed in the presence of two witnesses, to dispose of the custody of such child or children during such time as he or they should continue under twenty-one, or any less time, to any person or persons other than Popish recusants; and it gave to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising directly (*h*); and it is observable, that though the authority of guardians, appointed under the statute of Charles, does not ex-

(*d*) 27 Hen. 8, c. 10.

(*e*) *Bishop* v. *Sharpe*, 2 Vern. 469; *Whitmore* v. *Weld*, 2 Ch. Rep. 383; *Hyde* v. *Hyde*, Pre. Ch. 316; [Co. Lit. 89*b*, n. (6).]

(*f*) *Hinckley* v. *Simmons*, 4 Ves. 160.

(*g*) 2 Anders. 12. Fourteen, it seems, would be considered a proper age.

(*h*) *Bedell* v. *Constable*, Vaugh. 178.

tend to infant children who are married at the father's death, yet as to children who are then unmarried, the guardianship is not determined by subsequent marriage (*i*). The statute has been held not to interfere with the lord's right [by special custom] to the guardianship of his infant copyhold tenant (*k*).

Wills of idiots.

The will of an idiot is of course void (*l*). Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power (*m*).

Of persons deaf and blind.

A person who has been from his nativity blind, deaf and dumb, is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind (*n*). Blindness or deafness alone, however, produces no such incapacity. [It seems, however, that a person born deaf and dumb, but not blind, though primâ facie incapable (*o*), may be shown to have capacity, and to understand what is written down (*p*); and this of course applies more strongly to a person deaf and dumb from accident (*q*).] Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, [provided there be proof aliunde of a clear knowledge of the contents of the instrument (*r*); but] it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised. This remark especially applies to wills executed by the inmates of lunatic asylums (*s*), or

Lunatics.

) *Earl of Shaftesbury's case*, cit. 3 Atk. 625, [2 P. W. 102; but see *contra* as to daughters, 1 Ves. 91, per Lord *Hardwicke*.]

(*k*) *Clench* v. *Cudmore*, 3 Lev. 395.

(*l*) Dyer, 143 b.

(*m*) See Swinb. P. II. ss. 5, 6. [And as to the difference in proof of lucid intervals in case of imbecility from drinking and ordinary imbecility, see *Ayrey* v. *Hill*, 2 Add. 206. In *Foot* v. *Stanton*, 1 Deane, 19, the will of a person subject to epileptic fits was admitted to probate, although there was no evidence that the testatrix knew its contents, the memory of the attesting witnesses failed, and a third person declared she was unfit to make a will.

(*n*) See Co. Lit. 42 b.

(*o*) Swinb. P. II. s. 10.

(*p*) *Dickenson* v. *Blissett*, 1 Dick. 268; *In re Harper*, 6 M. & Gr. 731, 7 Scott, N. R. 431.

(*q*) Swinb. P. II. s. 10.]

(*r*) *Longchamp* d. *Goodfellow* v. *Fish*, 2 B. & P. N. R. 415; [*Edwards* v. *Fincham*, 3 Curt. 63, 7 Jur. 25; and see *Mitchell* v. *Thomas*, 6 Moo. P. C. C. 137, 12 Jur. 967.]

(*s*) Lord *Eldon* once mentioned his having been concerned in a cause, in which a gentleman who had been some time insane, and was confined at Richmond, had made a will. It was, his Lordship observed, of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he declared before his malady he intended to have done; and it was held that he was of sound mind at the time. See 1 Dow, 179; [*Martin* v. *Johnston*, 1 Fost. & Finl. 122; *Nichols* v. *Binns*, 1 Sw. & Tr. 239.]

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any other persons habitually or occasionally afflicted with insanity.

A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods; but if, during a lucid interval, he make a testament, it will be good (*t*). Lord *Hardwicke* has observed that fraud and imposition upon weakness may be a sufficient ground to set aside a will of real, much more a will of personal estate, (sed quære as to this distinction?) although such weakness is not a sufficient ground for a commission of lunacy (*u*). And in the case of *Mountain* v. *Bennett* (*x*), Lord C. B. *Eyre* laid it down, that although a man may have a mind of sufficient soundness and discretion to manage his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making his will, he cannot be considered as having such a disposing mind as will give it effect. In this case, the will was attempted to be invalidated on the ground that it was obtained by the undue influence of the testator's wife, whom he had married from an inferior station; but the will was finally supported, amidst much conflicting testimony as to the state of the testator's mind, principally on the evidence of the attesting witnesses, who were persons of high character and respectability, and were unanimous as to the testator's sanity and freedom from control.

Fraud.

Undue influence over a weak mind.

[In cases of weakness of mind arising from the near approach of death, strong proof is required that the contents of the will were known to the testator (*y*), and that it was his spontaneous act (*z*). A suspicion is justly entertained of a will conferring large benefits on the person by whom or by whose agent it was prepared (*a*), or of a will in favour of a medical attendant in whose house the testator resided (*b*); but it seems that such suspicion goes no further than to necessitate somewhat stricter proof as to the testator's *capacity*, though not as to his *knowledge* of the contents of the will (*c*); where the capacity of the testator

In case of weakness of mind, strong proof required as to knowledge of contents of will.

Suspicions entertained as to wills prepared by legatees, or medical attendant.

In such cases *capacity* of testator must be shown clearly.

(*t*) Swinb. P. II. s. 3, pl. 1, 4; *Beverley's case*, 4 Rep. 123 b; *Kemble* v. *Church*, 3 Hagg. 273.

(*u*) Vide 2 Ves. 408.

(*x*) 1 Cox, 355.

[(*y*) *Mitchell* v. *Thomas*, 6 Moo. P. C. C. 137, 12 Jur. 967; *Durnell* v. *Corfield*, 1 Rob. 51, 8 Jur. 915. But see *Reece* v. *Pressey*, 2 Jur. N. S. 380.

(*z*) *Tribe* v. *Tribe*, 1 Rob. 775, 13 Jur. 793; and see *Dufaur* v. *Croft*, 3 Moo. P. C. C. 136; *Harwood* v. *Baker*, ib. 282; *Re Field*, 3 Curt. 752.

(*a*) *Paske* v. *Ollatt*, 2 Phillim. 323; *Durling* v. *Loveland*, 2 Curt. 225; *Baker* v. *Batt*, 2 Moo. P. C. C. 317.

(*b*) *Jones* v. *Godrich*, 5 Moo. P. C. C. 16, and see *Major* v. *Knight*, 4 No. Cas. 661; *Cockcroft* v. *Rawles*, ib. 237.

(*c*) *Barry* v. *Butlin*, 2 Moo. P. C. C. 480, 1 Curt. 614, 637. If a will rational on the face of it is shown to have been

[is duly proved, he will be presumed cognizant of the contents (*d*).

Where undue influence is supposed to have been exercised in obtaining a will, it seems that the whole will is not necessarily void, but it will be left to a jury in the case of real estate (*e*), and to the Judge of the Court of Probate in the case of personalty (*f*), to determine what gifts were obtained by undue influence, and such gifts only will be declared void.]

Part of a will may be void and the rest valid.

It appears, that though an inquisition finding a man a lunatic is primâ facie evidence of lunacy during the whole period covered by such inquisition, yet it does not preclude proof that the execution of a will, or any other act, occurred during a lucid interval (*g*).

Inquisition primâ facie evidence of testamentary incapacity.

The principle is very ably stated by Sir *W. Wynn* in his judgment in *Cartwright* v. *Cartwright* (*h*): "If you can establish," said the learned Judge, "that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this—it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, then the party who would take advantage of the fact of an interval of reason, must prove it."

[It has been laid down that the test of a person being of unsound mind in a legal sense is the existence of a delusion (*i*),

In what unsoundness of mind consists.

[duly executed, it is presumed in the absence of any evidence to the contrary that it was made by a person of competent understanding. But if there are circumstances not merely opposed to, (*Foot* v. *Stanton*, 1 Deane, 19,) but sufficient to counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish *affirmatively* that the testator was of sound mind when he executed it; *Sutton* v. *Sadler*, 3 C. B. (N. S.) 87; *Symes* v. *Green*, 1 Sw. & Tr. 401, 5 Jur. N. S. 742, 26 L. J. Prob. 83.

(*d*) *Browning* v. *Budd*. 6 Moo. P. C. C. 435. As to the nature of *fraud necessary* to invalidate a will, see 5 Moo. P. C. C. 40. As to the nature of *undue influence* necessary for that purpose, see *Stulz* v. *Schæfle*, 16 Jur. 909. And on both points *Boyse* v. *Rossborough*, 6 H. of L. Ca. 1, 3 Jur. N. S. 373.

(*e*) *Trimleston* v. *D'Alton*, 1 D. & Cl. 85; *Hippesley* v. *Homer*, T. & R. 48, n.; *Lord Guillamore* v. *O'Grady*, 2 J. & Lat. 210; *Haddock* v. *Trotman*, 1 Fost. & Finl. 31. See post, Chap. XIII.

(*f*) See *Allen* v. *Macpherson*, 1 H. of L. Ca. 191, 11 Jur. 785.]

(*g*) *Hall* v. *Warren*, 9 Ves. 605; *Re Watts*, 1 Curt. 594; [and see *Creagh* v. *Blood*, 2 J. & Lat. 509; *Snook* v. *Watts*, 11 Beav. 105; *Cooke* v. *Cholmondely*, 2 Mac. & G. 22; *Bannatyne* v. *Bannatyne*, 16 Jur. 864.]

(*h*) 1 Phillim. 100; [and see 2 ib. 465, 2 Add. 209; *Steed* v. *Calley*, 1 Keen, 620; *Tatham* v. *Wright*, 2 R. & My. 1; *Borlase* v. *Borlase*, 4 No. Cas. 106.

(*i*) But see *Nichols* v. *Binns*, 1 Sw. & Tr. 239.

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[or a belief in facts which an ordinary person would not credit, and therefore that mere eccentricity of habits, or perversion of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity (*j*); but the mere absence of any apparent delusion must not be mistaken for a lucid interval; the disease may nevertheless exist wanting only circumstances to make it apparent; and a person so situated is incompetent to make a will, though ordinarily, but incorrectly, considered as only *partially* insane. To constitute a lucid interval absence of the disease itself, not of the delusion only, must be shown (*k*).]

What is a lucid interval.

Of Mr. Greenwood, whose case excited much attention from the peculiarity of its circumstances, Lord *Eldon* has given the following account (*l*):—He was bred to the bar, and acted as chairman at the quarter sessions; but becoming diseased, and receiving, in a fever, a draught from the hands of his brother, the delirium taking its ground then, connected itself with that idea: and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed; and that idea appeared connected with the will, by which he disinherited his brother; nevertheless, it was considered so necessary to have some precise rule, that though a verdict was obtained in the Common Pleas against the will, the Judge strongly advised the jury, on a second trial, to find the other way; and they did accordingly find in favour of the will. A question of a somewhat similar nature was much discussed in the more recent case of *Dew* v. *Clarke* (*m*), where the Prerogative Court was called upon to decide as to the testamentary capacity of a gentleman named Stott, an eminent electrician, who had an only child, against whom he had conceived a strong and groundless aversion, exhibited in a series of absurd acts of harshness and severity, and which he followed up by making a will in favour of some collateral relations, to the almost total exclusion of such only child. Sir *John Nicholl* and the Court of Delegates, successively pronounced against the validity of the will, after the

[(*j*) *Frere* v. *Peacocke*, 1 Rob. 442, 11 Jur. 247; see S. C. in a previous stage, 3 Curt. 664, 7 Jur. 998, where a plea of hereditary insanity was disallowed. See also *Grimani* v. *Draper*, 12 Jur. 925; *Mudway* v. *Croft*, 3 Curt. 671, 7 Jur. 979; *Ditchbourn* v. *Fearn*, 6 Jur. 201; *Goldie* v. *Murray*, ib. 608; *Austen* v. *Graham*, 8 Moo. P. C. C. 493.

(*k*) *Waring* v. *Waring*, 6 Moo. P. C. C. 341, 12 Jur. 947; *Creagh* v. *Blood*, 2 J. & Lat. 509; *Dyce Sombre* v. *Troup*, 1 Deane, 22.]

(*l*) Vide *White* v. *Wilson*, 13 Ves. 89.

(*m*) 3 Add. 79, [5 Russ. 163; and see *Fowlis* v. *Davidson*, 6 No. Cas. 461.]

delivery of very able and elaborate judgments, which should be perused by all inquirers into this interesting subject.

Lord *Thurlow* is said to have intimated an opinion, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; but Lord *Eldon* has expressed his dissent from this notion; suggesting the case of the strongest mind reduced by the delirium of a fever, or some other cause, to a very inferior degree of capacity; and he observed that the conclusion was not just, that, as that person was not what he had been, he should not be allowed to make a will of personal [qu., or real?] estate (*n*).

Disability of coverture, whence arising;

The disability of coverture differs materially from that of infancy, idiocy, or lunacy. It does not arise from natural infirmity, but is the creature of civil policy, and may be dispensed with at the pleasure of the contracting or disposing parties through whom the property is derived, so far, at least, as the jus disponendi is concerned; while the contrary has been decided with respect to infancy, which alone of the other enumerated disabilities could admit of any question being raised on the subject (*o*): as, of course, any attempt to give a power of disposition to an idiot or lunatic would be abortive.

—cannot be dispensed with as to estates at common law;

[No contract can enable a married woman to pass the legal interest in her lands at common law by an ordinary will; since being excepted out of the statute 34 & 35 Hen. 8, c. 5 (which exception is preserved by the 1 Vict. c. 26, s. 8), she was, as we have seen, left subject to her pre-existing disabilities.

—but may as to estates limited by way of use;

Every will of a married woman passing a legal estate must operate as an appointment of an use; but a mere contract before marriage, as to specified lands, will be sufficient to give the wife an equitable power (*p*) to devise, and the legal estate must be obtained by conveyance from the heir.

—or as to equitable interests;

—or as to personal property;

In the case of personal estate, the wife can, during coverture, either under contract before marriage, or by the assent of her husband given after marriage, and provided he survives her, make a will, conferring on

(*n*) *Ex parte Holyland*, 11 Ves. 10. See further as to lunatics and their acts, Lord *Ely's* case in D. P. in Ireland, 1784; 1 Ridg. P. C. 16; and the six appendixes; Lord *Thurlow's* celebrated judgment in *Attorney-General* v. *Parnther*, 3 B. C. C. 441; particularly the case of Mr. *Greenwood*, cited p. 444; 1 Fonbl. Eq. 46; see also *Niell* v. *Morley*, 9 Ves. 478; *Hall* v. *Warren*, id. 605; [*Chambers* v. *Yatman*, 2 Curt. 415; and see 2 De G. & S. 620.]

(*o*) *Hearle* v. *Greenbank*, 3 Atk. 897, 2 Ves. 298. [Contrà of a power simply collateral, *Grange* v. *Tiving*, Bridg. by Ban. 107, 2 Sug. Pow. App. 7th Ed.]

[(*p*) *Wright* v. *Lord Cadogan*, 2 Ed. 239; and see *Churchill* v. *Dibben*, 9 Sim. 447, n.; *Dillon* v. *Grace*, 2 Sch. & Lef. 463. As to copyholds, see *George* v. *Jew*, Amb. 627.

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or property settled to separate use;

[her executors the ordinary legal rights (*q*). A married woman can also dispose by will of all personal property given to her separate use (*r*); since, in respect of such property, she is a *feme sole;* and it is immaterial that the legal estate is not vested in trustees, since the husband, and all persons on whom the legal estate may devolve, will be deemed trustees for the persons to whom the wife has given the equitable interest (*s*), and this separate trust of the principal attaches on all the produce or accumulations of such principal (*t*); and there seems to exist no sound reason why the same rule should not hold in the case of real estate, wherever previous to marriage (*u*) there has been a valid settlement or agreement for a settlement of such property to the separate use of the intended wife, or where another person has given or devised land to trustees for her separate use. "The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal: but a court of equity, having created in both a new species of estate, may in both cases modify the incidents of that estate (*x*)." It is true, indeed, that where the produce of separate personal property has been laid out in land, which has been conveyed or agreed to be conveyed to the wife, it has been held that the wife cannot devise such land away from her heir at law (*y*). And perhaps such would still be the decision in a similar case, because it might well be considered that by a transaction of that nature the married woman had purposely relinquished her se-

—and its produce and accumulations;

—but if they be invested in land, qu.

[(*q*) *Ex parte Fane*, 16 Sim. 406; 1 Roper, Husb. and Wife, 170; *Sturgis* v. *Corp*, 13 Ves. 190; *Tucker* v. *Inman*, 4 M. & Gr. 1076; *Maas* v. *Sheffield*, 10 Jur. 417, 1 Rob. 364; and see *Williams on Executors*, 46 et seq.

(*r*) A declaration in the husband's will is sufficient to show that the property is the wife's separate estate, and does not merely operate as an assent, which would be insufficient if the husband died first, *Re Smith*, 1 Sw. & Tr. 125, 27 L. J. Prob. 39. In *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48, 27 L. J. Prob. 21, Sir *C. Cresswell* decided that a verbal agreement between husband and wife that they should live separate, and that she should never claim to be supported by him, and that he should allow her to enjoy her own earnings and property for her separate use, constituted those earnings and property the separate property of the wife. The decision does not seem capable of being supported; the distinction between an agreement between husband and wife which is ineffectual, and a declaration of trust by the husband in favour of his wife for her separate use which is effectual, seems to have been overlooked.

(*s*) *Rich* v. *Cockell*, 9 Ves. 369; *Parker* v. *Brooke*, ib. 583; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46, 3 B. C. C. 8; *Caton* v. *Ridout*, 1 Mac. & G. 599, 2 H. & Tw. 33; *Rowe* v. *Rowe*, 2 De G. & S. 294.

(*t*) *Fettiplace* v. *Gorges*, sup.; *Gore* v. *Knight*, Pre. Ch. 255, 2 Vern. 535; *Ashton* v. *McDougal*, 5 Beav. 56; *Darkin* v. *Darkin*, 17 Beav. 578; *Humphery* v. *Richards*, 25 L. J. Ch. 442.

(*u*) During coverture, land belonging to the wife could be effectually settled to her separate use only by means of the Fines and Recoveries Act.

(*x*) Per Lord *Lyndhurst*, *Baggett* v. *Meux*, 1 Phill. 628, with reference to the validity of a clause restraining a married woman from alienating land settled to her separate use in fee.

(*y*) *Churchill* v. *Dibben*, 9 Sim. 447, n.

[parate capacity; but so she would in a similar conveyance or transfer to herself of personal estate. But would the same result follow if the land were conveyed to trustees for the separate use of the married woman? May she not contract for such a conveyance, as will protect the purchased lands from her heir at law, as effectually as she may exclude her husband from personal estate purchased with her separate property? If so, then *Churchill* v. *Dibben* is no authority for maintaining a distinction between real and personal property in this respect. On the other hand, no authority has been found establishing a complete similarity between them. In *Harris* v. *Mott* (*z*), where real estate was devised to a married woman for her separate use in fee, and she contracted to sell, and died, having devised the property to her husband, who filed a bill for specific performance, Sir *J. Romilly*, M. R., thought the case too doubtful to compel the purchaser to take the title in the absence of the heir. Savings out of an allowance made by a husband for the separate maintenance of his wife are in equity treated as her separate estate (*a*); of which, therefore, she may dispose by will. But savings out of pin-money are said to belong to the husband (*b*); on the principle that pin-money is an allowance made for a particular purpose, and, if not applied for that purpose, reverts to the donor.]

Savings out of maintenance.

Pin-money.

A woman, whose husband has been banished for life by act of parliament (*c*), [or whose husband is attainted (*d*),] may dispose, by will, of her real and personal estate; for, as he is civilly defunct, she is restored to the rights and privileges of discoverture. [And the same rule seems to hold with respect to the wife of an alien enemy (*e*), and of a felon-convict transported for life (*f*).] And where the husband is a felon-convict, transported for a term of years, it should seem that, as his marital rights are suspended (*g*), the wife's disabilities ought to cease during the

Wife of an exile;

—or of an alien enemy, may make a will;

—but it is not clear whether the wife of a felon-convict can.

[(*z*) 14 Beav. 169.

(*a*) *Brooke* v. *Brooke*, 25 Beav. 342. Secus at law, *Messenger* v. *Clark*, 5 Exch. 388.

(*b*) *Jodrell* v. *Jodrell*, 9 Beav. 45; *Howard* v. *Digby*, 2 Cl. & Fin. 634; and per *Wood*, V. C., *Barrack* v. *M'Culloch*, 3 Kay & J. 114. See, however, Sugden's Law of Property, p. 163, contra.]

(*c*) *Countess of Portland* v. *Prodgers*, 2 Vern. 104.

[(*d*) *Newsome* v. *Bowyer*, 3 P. W. 37. And see per Sir *W. P. Wood*, in *Davies* v. *Gough*, 2 Kay, 627; and per *Abbott*, C. J., *Bullock* v. *Dodds*, 2 B. & Ald. 275.

(*e*) *Deerly* v. *Mazarine*, 1 Salk. 116.

(*f*) *Re Martin*, 2 Roberts. 405, 15 Jur. 686; *Atlee* v. *Hook*, 23 L. J. Ch. 776.]

(*g*) See *Ex part Franks*, 1 M. & Sc. 11, 7 Bing. 762, [deciding that the wife of such a husband may be made a bankrupt. It is true that in Co. Lit. 133 a, it is said that *banishment* for a time is not a civil death: but neither is *transportation* for life.

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same period: [and that, consequently, if he should die under sentence, a will made by her during his transportation ought to be effectual to pass property acquired by her in the meantime; but in the case of *Coombs* v. *The Queen's Proctor* (*h*), Sir *John Dodson* decided, that where the wife of a felon under sentence of transportation for years died intestate, leaving property acquired after his conviction, such property belonged to the crown, and not to her next of kin. In the argument for the wife's next of kin, it was admitted that the property of a felon-convict, whether acquired before the conviction, or afterwards during the term of transportation, was forfeited to the crown; but it was contended that the felony prevented property acquired by the wife, subsequently to the conviction, from devolving on the husband (*i*). The learned Judge, however, seems to have assumed the latter point, and laboured only to prove the former. The grounds of his decision may be summed up in his own words, that, "on the death of the wife the property devolved to her husband; that is, would have devolved to him but for being a felon-convict; *it devolved upon him;* he acquired, but cannot take it for himself; he acquires it for the crown." Most of the reasoning upon which the learned Judge founded his decision is applicable to the case of transportation for life as well as transportation for years, and the decision itself is applicable to a case of testacy as well as of intestacy. So that he would seem to disagree with the decision in *Re Martin* (*k*), which it is singular he did not notice in his judgment, though he himself argued it, and it was cited before him, and though he discussed a variety of other cases less nearly affecting the question before him.]

Subsequent confirmation of will originally void.

A will made during any personal disability, of course, is not rendered valid by the fact of the testator having outlived such disability, unless its removal were followed by some act of confirmation or adoption amounting in law to a publication (*l*). In the Ecclesiastical Court, the delivery by a widow of an instrument executed during coverture into the custody of another, as the will of the depositor, has been held to be a sufficient republication of a will of personal estate (*m*).

(*h*) 2 Roberts. 547, 16 Jur. 820.

(*i*) Is there any case in which property comes *by act of law* to a person who cannot hold it? "Lex nihil facit frustra." See, as to aliens, Co. Lit. 8 a, 7 Rep. 25 a; and see *Collingwood* v. *Pace*, 1 Vent. 417, Bridg. by Ban. 414; *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92.

(*k*) Ubi sup.]

(*l*) 1 Eq. Ca. Ab. 171, pl. 3; [*Price* v. *Parker*, 16 Sim. 198; *Trimmell* v. *Fell*, 16 Beav. 537.]

(*m*) *Miller* v. *Brown*, 2 Hagg. 209.

Devises by aliens.

A devise of lands by an alien is at least voidable (*n*); the crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remain in him with all the incidental qualities belonging to such estates; on which ground it has been held, that an alien tenant in tail in possession might suffer a common recovery (*o*); and he may, of course, now execute its substitute, an enrolled conveyance, and thereby bar the issue in tail and remainders: and, by parity of reasoning, the will of an alien will vest his defeasible title in the devisee (*p*; though it is clear, that if he dies intestate, the land will escheat to the crown, or other lord, pro defectu tenentis, without any inquest of office, because an alien can have no heirs (*q*).

Devises by traitors and felons.

Persons attainted of high treason are incompetent to devise their lands, since, by several old statutes (*r*), the real estates of a traitor are, by the attainder, ipso facto vested in the crown.

The lands of all persons attainted for petit treason and felony, formerly escheated to the king or other feudal lord (*s*), by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable, as in the case of an alien (*t*); and such is still the case as to persons not entitled to the benefit of the statute 54 Geo. 3, c. 145, which provides, that no attainder for felony, except in cases of high treason, or of the crimes of petit treason, (since abolished by statute (*u*)), or murder, or of abetting, procuring, or counselling the same, "shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same."

As this statute not only saves the right of the heir, but also

(*n*) See Shep. Touch. 404.
(*o*) 4 Leon. 84.
(*p*) See Shep. Touch. 404.
(*q*) Co. Litt. 2 b.
(*r*) See 4 Jarm. Conv. 2nd ed. 186.
[(*s*) Subject to the right of the crown to hold the lands vested in the person attainted at the period of the attainder for a year and a day. 1 Steph. Com. 417.]
(*t*) Shep. Touch. 404.
(*u*) 9 Geo. 4, c. 31, s. 2.

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that of "every person or persons to whom the right or interest of any lands, &c., after the death of the offender might have appertained" if no such attainder had occurred, there is some ground to contend, that it enables persons convicted of, or rather attainted for, any other than the excepted offences, to alien their real estate by will. But though the words are certainly large, the legislature, it is conceived, could hardly have intended to leave in the offender the power of disposing of his lands, not only by will, but also by a conveyance inter vivos, which would be necessarily consequential on the concession of the power of devising. The point is less likely to arise, in the present mitigated state of our criminal code, than formerly, when capital punishment was more frequently inflicted, and still more frequently recorded.

Consequences of escheats now frequently remitted.

[However, it is to be observed, that the consequences of an escheat are now frequently remitted where the crown is the party to take the benefit; for by modern acts of parliament, in all cases where a title has accrued to the crown by escheat for want of heirs, or by reason of any forfeiture, the sovereign is empowered (notwithstanding the statute which has restrained the alienation of the royal demesnes in general to leases for thirty-one years) to make grants to any person for the purpose of restoring the land to the family of the former owner, or carrying into effect any grant, conveyance or *devise* of it which he may have intended to make (*x*).]

Wills of traitors and felons.

Treason and felony incapacitate persons from making a will of personal estate, which [if vested (either in possession or remainder),] becomes forfeited to the crown on conviction (*y*); and this incapacity extends to a felo de se, who is, however, capable of devising his real estate, as there is in such case no attainder (*z*). In every case of felony in which sentence of death is not recorded, [that is to say, in which there is no attainder,] the prisoner's competency to devise or otherwise dispose of his real estate is not affected (*a*).

Effect of stat. 7 Will. 4 & 1 Vict. c. 26, upon the disabilities of testators.

The statute of 1 Vict. c. 26, has left all personal disabilities

[(*x*) 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 4, c. 17.

(*y*) 2 Bl. Comm. 499; *Re Thompson's Trusts*, 22 Beav. 506. *Contra* as to goods which he has as executor of another, of which he may make a will. See *Williams on Executors*, p. 53, n. (*f*). *Contra* also as to contingent interests, where the felony is not capital, *Stokes* v. *Holden*, 1 Keen, 145; or where a conditional free pardon has been granted, *Gough* v. *Davies*, 2 Kay & J. 623.

(*z*) *Norris* v. *Chambres*, 7 Jur. N. S. 59.

(*a*) *Rex* v. *Willes*, 3 B. & Ald. 510, 3 Inst. 55; *Rex* v. *Bridger*, 1 M. & Wel. 147; *Re Harrop's estate*, 3 Drew. 726.]

affecting the testamentary power as they stood under the pre-existing law, with the exception of infancy, which formerly (we have seen) did not incapacitate persons of a certain age from bequeathing personal estate; whereas the recent act (sect. 7) has provided, in general terms, that *no will* made by any person under the age of twenty-one years shall be valid: thus destroying at a blow the long-existing distinction between wills of real and wills of personal estate in regard to the age of testamentary competency. The statute has even carried this principle so far as to abolish, in regard to infant testators, the paternal power of appointing guardians, conferred by the act of 12 Car. 2, c. 24; so that a person under age is now not competent by will to appoint a guardian to his children. In short, the disability of infancy affects the testamentary power, under the new law, no less universally than it does the power of disposition *by deed;* and, with respect to the appointment of guardians just referred to, is even more extensive (*b*), for the power of nominating guardians by deed given to an infant father by the statute of Charles seems to be still in force; and this will go far towards preventing any practical inconvenience, which might otherwise have resulted from the abolition of the power of infant fathers to appoint guardians *by will.*

Mode of computing age.

It may not be quite superfluous to remark, in conclusion of this branch of the subject, that, in computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821 (*c*); and as the law does not recognize fractions of a day (*d*), the age would be attained at the first instant of the latter day.

(*b*) Infants, too, of the age of fifteen, are, in certain cases, competent to convey gavelkind lands by feoffment.

(*c*) *Herbert* v. *Torball,* 1 Sid. 162; S. C. Raym. 84, [8 Vin. Dev. G. pl. 20; *Anon.* 1 Salk. 44; *Howard's case,* 2 ib. 625. But a person attains "his 25th year" when he becomes 24 years old, *Grant* v. *Grant,* 4 Y. & C. 256.

(*d*) See *Lester* v. *Garland,* 15 Ves. 257.]

CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

Testator may dispose of whatever would devolve upon his general representatives.

THE power of testamentary disposition extends to all interests in real and personal estate, which, at the decease of the testator, would, if not so disposed of, devolve to his general real, or personal representatives (*a*), whether the testator be the legal or the beneficial owner only, or unite in himself both these characters. Tried by this rule, it is obvious that a devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator, of the pre-deceased joint tenant, in case he had died intestate (*b*). If, on the other hand, the testator survives his companion in the tenancy, the efficacy of the devise or bequest formerly depended on the nature of the property; in the case of a freehold interest, the devise was void as not authorized by the statute 34 Hen. 8, c. 5, the testator not having a sole estate when he made his will; and, by parity of reasoning, any divided part or share which, after the execution of the will, he might have acquired on [a severance of the jointure, or] a partition of the property, would not pass thereby (*c*). But this reasoning, it is obvious, did not apply to leasehold property or other personal estate; a future interest in which, devolving by survivorship or acquired by partition, would, like all other after-acquired personalty, pass by a general or residuary bequest; and such, it will be remembered, is now the rule with respect to real estate devised by wills made since the year 1837. In regard to such a will, therefore, it is unnecessary to inquire whether the devising joint tenant had become solely seised by survivorship at the period of its execu-

Joint estates not devisable.

[(*a*) Or, if he became entitled by descent, on the heir or customary heir of his ancestor, 1 Vict. c. 26, s. 3. And see *Ingilby* v. *Amcotts*, 21 Beav. 585.]

(*b*) Co. Litt. 185 a.

(*c*) *Swift* d. *Neale* v. *Roberts*, 1 W. Bl. 476, 3 Burr. 1488.

tion; it is enough that he had acquired a devisable interest in the estate at the time of his decease (*d*).

Where the several co-proprietors are tenants in common, or coparceners, each has [a sole estate, and therefore] an absolute power of testamentary disposition over his or her undivided share.

Executory interests, when devisable.

An executory interest in real or personal estate, was (and of course still is) disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator; in other words, if it be descendible or transmissible. This doctrine, in regard to real estate, was recognized in the case of *Goodtitle* v. *Wood* (*e*), and was finally established in *Roe* d. *Perry* v. *Jones* (*f*), where an estate was devised by will (on failure of certain limitations to the younger sons of A.) to the only son of A. in fee, in case he should have but one son who should live to attain twenty-one. A. had an only son B., who, in the lifetime of his father, after he had attained his majority, made a will, devising all his estate in possession or reversion; and the question was, whether this will operated to pass the executory use which B. had during his

(*d*) The doctrine respecting joint tenancies comes under consideration in practice most frequently in regard to trust estates which, where vested in a plurality of persons, are commonly limited to them as joint tenants, on account of the obvious convenience attending the devolution of the estate to the survivors or survivor for the time being, instead of the title to the respective shares being deducible through the representatives of the several deceased trustees. The testacy or intestacy of any trustee, who at his decease leaves a co-trustee (between whom and himself there existed a joint tenancy), it is unnecessary to inquire into; but in case he were the sole trustee at his death, his will, if he left any, should be examined, in order to ascertain whether it contains an express devise of, or a devise capable of operating on freehold interests vested in the testator as trustee; and if the will (being made before the year 1838) were subject to the old law, it would be also proper to see that the surviving trustee had become solely entitled by survivorship before the making of the will. Where the deceased trustee was a female under coverture, or was uninterruptedly subject to any other personal disability affecting the testamentary capacity, of course the necessity of an inquiry into the existence of a will is superseded. It is then only requisite to ascertain who is the common-law heir (as to freehold interests), or the customary heir (as to copyholds), of the deceased trustee; though it is to be observed, that if the trustee in question were a married woman, and the subject of the trust were a freehold of inheritance, the legal title would not be complete without the junction of her surviving husband, in case she had had issue by him capable of inheriting the property; the husband having, under such circumstances, an estate for life as tenant by the curtesy. This is a point which is sometimes overlooked. Dower, also, attaches on a mere legal ownership, but as it is not an actual estate, being only a legal right, the enforcement of which would be restrained in Equity, the concurrence of the widow of a deceased trustee is never required.

As to the devise of trust estates.

(*e*) Willes, 211; *S. C.* cited 3 T. R. 94.

(*f*) 1 H. Bl. 30; *S. C.* in B. R. 3 T. R. 88; [and see *Moor* v. *Hawkins*, 2 Eden, 342, Fearne, C. R. 366; *Ingilby* v. *Amcotts*, 21 Beav. 585, which also explains the sense in which "descendible" is to be here understood.]

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father's lifetime. The Court of King's Bench held that it did; Lord *Kenyon*, C. J., drawing a distinction between such an interest and a mere possibility, like that which an heir has from his ancestor. Mr. Justice *Buller* observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle.

The converse of the proposition of the learned Judge is equally true, namely, that an interest which is not transmissible cannot be devised. An instance of this species of interest occurred in the case of *Doe* v. *Tomkinson* (*g*), where a testator devised his real estate to A. and B. and the survivor of them, and to be disposed of by the survivor as she might, by will, devise. A. survived B., having in the lifetime of B. made a will, devising her contingent interest; but which interest was held not to pass by the devise, on the ground that the person who was to take was not in any degree ascertainable before the contingency happened. The reasoning of the Court merely assigns a ground for the decision which is common to executory interests of every description; for it is the uncertainty, who will become entitled, which renders the interest contingent. The true ground, it is submitted, is, that the contingency, depending on survivorship, necessarily takes effect in the lifetime of the testator, and, therefore, the interest cannot be the subject of a devise, which is inoperative until death (*h*). If the reason assigned by the Court of King's Bench in *Doe* v. *Tomkinson* were the correct reason, it would follow that, in the case of a limitation to several persons, and the heirs of the one first dying, such interest would, under the old law, not be devisable, since it differs from the limitation which occurred in that case, only in regard to the nature of the con-

(*g*) 2 M. & Sel. 165.

[(*h*) It is presumed that the meaning of this passage in the text is, that the interest at the date of the will being contingent, but the interest that the will would actually operate upon being vested, there is in fact a new interest acquired after the date of the will, which cannot pass by it; in other words, the will is revoked by the alteration of estate consequent upon the happening of the contingency. To this view the case of *Jackson v. Hurlock*, 2 Ed. 263, seems directly opposed. In that case a testator devised lands, then conveyed them to uses which were to arise on his intended marriage, and under which he would take a remainder in fee; then made a codicil republishing his will, and afterwards married and died without issue of that marriage; and it was held, that the lands, in which, under the settlement, his interest at the date of the codicil was contingent, but became vested on his marriage, passed by the will and codicil. It is conceived that the decision in *Doe* v. *Tomkinson* must be referred to the ground that the interest of the survivor was a power and not an estate, and could not be exercised until the donee actually answered the description under which the power was given to him, that is, became the survivor. In 1 Sugd. on Pow. 338, 7th ed., the case is treated as being a limitation of a power, and see *McAdam* v. *Logan*, 3 B. C. C. 310, and Mr. Eden's note; Fearne, C. R. 370.]

tingency, the person to take being, in the one case no less than in the other, wholly unascertainable before the contingency happens; and yet the conclusion that such an interest may be disposed of by will, seems indisputable. The point is not now of much practical importance, as it cannot arise under a will made since the year 1837, the statute of 1 Vict. c. 26, having expressly provided (no doubt with a special view to meet the particular case now under consideration) that the testamentary power conferred by it "shall extend 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 have become vested."

As to rights of action.

A right of action was not, under the old law, devisable. Thus, a reversion in fee expectant on an estate tail, which had been discontinued by the act of the tenant in tail, could not be devised (*i*).

Rights of entry.

And the same doctrine was applicable to rights of entry. This point was much discussed in the case of *Goodright* v. *Forrester* (*k*), where A. being tenant for life, with reversion to B. in fee, A. levied a fine come ceo, &c., after which, and when his estate had been thus reduced to a mere right of entry, B. made a will devising the property in question, the validity of which devise was the point in dispute. The case was eventually decided on another ground, after an energetic protest from Sir *J. Mansfield*, C. J., against the doctrine which affirmed the invalidity of the devise; but which seems nevertheless to be sound law. Such, it is evident, was the opinion of *Eyre*, C. J., in the case of *Cave* v. *Holford* (*l*), of Lord *Eldon*, in *Attorney-General* v. *Vigor* (*m*), and of the Court of King's Bench, in the more recent cases of *Doe* d. *Souter* v. *Hull* (*n*) [and *Culley* v. *Doe* d. *Taylerson* (*o*)]; and Lord *Eldon*, moreover, intimated an opinion, that a will made during *disseisin* was invalid, though the testator happened to die seised, on the ground that the testator was not seised at the date of the will; but that if he then had the land, and was disseised afterwards, the devise was good, as a disseisee after re-entry is by relation seised ab initio; which certainly

(*i*) *Baker* v. *Hacking*, Cro. Car. 387, 405; see also *Doe* d. *Cooper* v. *Finch*, 1 Nev. & M. 130; [*S.C.* 4 B. & Ad. 283.]
(*k*) 8 East, 564, 1 Taunt. 578.
(*l*) 3 Ves. 669.
(*m*) 8 Ves. 282.
(*n*) 2 D. & Ry. 38.
[(*o*) 11 Ad. & Ell. 1020.]

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appears to be more consistent with principle than the contrary position advanced in the early case of *Bunter* v. *Coke* (*p*).

[When it is said that rights of entry were not devisable, this extends only to rights of entry, properly so called, created by actual disseisin, and not to a mere right to recover possession of the land from an adverse possessor, or a person holding over after the determination of his lawful title, for in such cases the freehold was in the testator, and of course might have been devised by him (*q*).]

All such questions, however, are precluded as to wills made since the year 1837, by the recent statute, which has expressly extended the testamentary power to "all rights of entry for conditions broken and other rights of entry." [And as to rights of action, the question cannot recur since the statute 3 & 4 Will. 4, c. 27, s. 36, abolishing real actions, on which alone it is conceived the question could have arisen (*r*).

Where a conveyance has been executed under circumstances which would give the conveying party a right to have it set aside by the Court of Chancery, and reconveyance decreed, such right is clearly devisable (*s*).

Personal property limited by settlement merely to the executors or administrators of the settlor may be disposed of by his will, since he himself takes absolutely under such a limitation (*t*).

Chose in action.

In the case of *Bishop* v. *Curtis* (*u*) it was argued that under the 3rd section of the 1 Vict. c. 26, a bequest of a chose in action would pass to the legatee the right to sue in his own name; but the Court of B. R. decided that the act did not make any thing bequeathable as personal estate, which might not have been bequeathed previously to the passing of that act.]

After-acquired freehold interests formerly not devisable.

A will disposing of any interest in real estate of which the testator was seised, operated, under the old law, in the nature of a conveyance, and, consequently, extended only to hereditaments belonging to the testator when he made the devise. This rule was early established, in relation as well to devises by custom, as to devises under the statutes of Hen. 8, which shows that

(*p*) Salk. 237.

[(*q*) *Doe* v. *Hull*, 2 D. & Ry. 38; *Culley* v. *Doe*, 11 Ad. & Ell. 1021.

(*r*) Besides, the act 1 Vict. c. 26, extends the devising power to all real estate, which includes (s. 1) any estate, *right* or *interest* in lands.

(*s*) *Uppington* v. *Bullen*, 2 D. & War. 184, 1 Con. & L. 291; *Stump* v. *Gaby*, 2 D. M. & G. 623; *Gresley* v. *Mousley*, 4 De G. & J. 78.

(*t*) *Morris* v. *Howse*, 4 Hare, 599; *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559.

(*u*) 21 L. J. Q. B. 391.]

it did not (as commonly supposed) arise from the mode of penning those statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extended no less to equitable than to legal interests. If, therefore, a testator before the year 1838, devised all the real estate of which he should be seized at the time of his decease, and after the making of his will he purchased lands in fee-simple, such after-acquired property, whether it was conveyed to the testator himself, or to a trustee for him, did not pass by the will, but descended, as to the legal inheritance in the former case, and as to the equitable inheritance in the latter, to the testator's heir-at-law (*x*).

Operation of a devise on equitable interests.

Where a testator had an equitable interest in the devised lands when he made his will, and afterwards acquired the legal ownership, the equitable interest passed by the will, and the subsequently-acquired legal estate descended to the heir, who, of course, became a trustee for the devisee. If, on the other hand, the testator were seised only of the legal estate, at the time of the execution of his will, and afterwards acquired the equitable interest, (being the converse case,) as where, being a mortgagee in fee at the date of the will, he subsequently purchased the equity of redemption, the devisee was a trustee of the legal estate, which he derived through the will, for the heir-at-law to whom the equitable inheritance descended (*y*). Cases of the former description frequently occurred, where a man contracted to purchase a freehold estate, then devised it, and, subsequently to the execution of his will, took a conveyance of the property, and then died without republishing his will (*z*). The testator being equitable owner under the contract (*a*), his interest passed by the will to the devisee, whose equitable right the heir was bound to clothe with the legal title. In these and many other cases, great inconvenience occurred from the incompetency of a testator to dispose by will of his after-acquired real estate; and questions

(*x*) *Bunter* v. *Coke*, 1 Salk. 237; S. C. Holt, 248, nom. *Buckingham* v. *Cook*, 3 Bro. P. C. Toml. 19; *Langford* v. *Pitt*, 2 P.W. 629; [*Harwood* v. *Goodright*, Cowp. 90.]

(*y*) *Strode* v. *Lady Falkland*, 3 Ch. Rep. 187, [2 Vern. 625.]

(*z*) *Greenhill* v. *Greenhill*, Pre. Ch. 320, [2 Vern. 679, Gilb. Eq. R. 77;] *Green* v. *Smith*, 1 Atk. 572; *Gibson* v. *Lord Montford*, 1 Ves. 494; *Capel* v. *Girdler*, 9 Ves. 509; *Holmes* v. *Barker*, 2 Madd. 462. [Same law as to copyholds, *Seaman* v. *Woods*, 24 Beav. 372. A valid contract will not be *presumed* to have been entered into before the date of the will for the purchase of lands conveyed to the testator immediately after that date, *Cathrow* v. *Eade*, 4 De G. & S. 527.

(*a*) It was sufficient if the vendor alone was bound by the contract, *Morgan* v. *Holford*, 1 Sm. & Gif. 101, semb.]

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often arose as to the actual state of the rights and obligations of the parties under the contract, on which the validity of the devise depended (*b*), and also as to the effect of certain modes of conveyance, in producing a revocation of the devise of the equitable interest. The removal of this incapacity, therefore, is not the least of the advantages conferred by the recent statute, which has expressly extended the testamentary power to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. But it may, of course, be necessary, even under the new law, to go into the inquiry, whether the circumstances attending a contract for purchase or sale by a deceased person, are such as to render the contract obligatory; for upon this fact would depend the question, (which has lost none of its importance by the recent enactment,) whether, as between the representatives of the deceased testator or intestate, it is to be regarded as real or personal estate; and this may and often does depend on extrinsic circumstances, ascertainable by parol testimony. In the case of *Lacon* v. *Mertins* (*c*), Lord *Hardwicke* decreed a parol contract to be carried into execution as between the real and personal representatives of the deceased vendor, the purchaser submitting to perform it, *and acts of part performance, sufficient to take it out of the Statute of Frauds, being proved.* In *Buckmaster* v. *Harrop* (*d*), a bill by the purchaser's heir-at-law for a similar purpose was dismissed by Sir *Wm. Grant*, M. R., on the ground that a binding contract had not been proved.

Contract binding on purchaser at his death, subsequently rendered incapable of completion.

Where the contract is binding on the purchaser at the time of his death, his heir or devisee is entitled to the benefit of it; in other words, is entitled to consider the contract as having converted the personal estate, quoad the purchase-money, into real estate; although from subsequent events, arising out of the situation of the deceased purchaser's estate, the contract should, as against the vendor, be rescinded. Thus, in the case of *Whittaker* v. *Whittaker* (*e*), where Whittaker, having contracted for the purchase of an estate, afterwards by his will devised certain real estates to trustees to certain uses, and then reciting the contract, he gave to the trustees all the residue of his property, upon trust (inter alia) to dispose of a sufficient part thereof, and therewith to pay the remainder of the purchase-money, and

(*b*) *Duckle* v. *Baines*, 8 Sim. 525.
(*c*) 3 Atk. 1.
(*d*) 7 Ves. 341.
(*e*) 4 Bro. C. C. 30.

complete the contract, and thereupon take a conveyance to the uses of the thereinbefore devised estates. Before the contract was completed the testator died, and the executors not being able to collect sufficient assets to carry the contract into execution within the necessary time, the vendor instituted a suit against them, and the contract was eventually cancelled under a decree of the Court. The devisee then filed a bill to have the amount of the purchase-money laid out in the purchase of land to be settled to the same uses, and Sir *R. P. Arden*, M. R., decreed accordingly; his Honor being of opinion that the acts of the executors could not affect the rights of the parties; and the Master of the Rolls also rested his decision on the general principle, that devisees to whom a contracted-for estate is given, are, if the contract fails *from any cause*, entitled to have the money laid out for their benefit, and that the case of an heir-at-law was less favoured. This doctrine, however, we shall presently see, was overruled by Lord *Eldon* in the case next stated.

Effect of uncompleted contract.

The true principle is, that where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate, which is the subject-matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee; but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his heir or devisee is not entitled to say he will take the estate with its defects, or have the purchase-money laid out in the purchase of another.

If not binding on devisor, devisee cannot insist upon its being completed.

Such is the doctine of the case of *Broome* v. *Monck* (*f*), where a bill was filed by the devisee of a purchaser of a contracted-for estate against the vendor and the personal representative of his own devisor, praying a specific performance of the contract, or that the purchase-money might be laid out in the purchase of another estate, and it appeared that a good title could not be made; Lord *Eldon*, after great deliberation, dismissed the bill. The contract expressed, in the usual manner, that the remainder of the purchase-money should be paid upon a good title being made, and the codicil directed that the contract should be carried into execution; but his Lordship's decision was founded on the general principle, and not on the particular terms of the contract. In adverting to *Whittaker* v. *Whittaker*, which

(*f*) 10 Ves. 597. See also 1 Ves. 218; [*O'Shea* v. *Howley*, 1 J. & Lat. 398.]

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was urged as an authority for the plaintiff, his Lordship observed, that it was very difficult to maintain the doctrine in it, which went beyond what was necessary for the decision. The case was no more than this:—The vendor had a good title. The estate at the death of Whittaker in equity belonged to the devisees of his real estate. The vendor objected he was not to be held to the contract for ever, and the embarrassment of his (Whittaker's) affairs gave him a right to be off. But as to the devisees of the land and the legatees of the money, their interests were completely fixed at the death of the testator; and the only question was, whether the embarrassment of his affairs giving that right to the vendor, should vary the rights as between them; and it was quite clear, that if the real representative had been an heir instead of a devisee, the question would have been just the same. The cases establish, that whatever is the state of liability of the party himself at his death, must be the state of liability to be considered upon questions between those representing him after his death (*g*); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate and you shall pay for it." "I have not found any case," observed his Lordship, "that has induced me to suppose that if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet being the real representative, he is entitled to take it as it is, though the ancestor never meant so to take it, or intimated any purpose of retiring from that situation in which he had a right either to insist upon a good title, or to refuse the estate; and though there is no proof that the ancestor would have paid for the estate with a bad title, yet the heir shall insist that the personal estate shall pay for it out of the assets. None of the cases give any colour for that; *Green* v. *Smith* (*h*), indeed, seems to state a doctrine quite inconsistent." His Lordship, therefore, held that, as no title could be made, the devisees were not entitled to take this estate, or to have another estate bought for them.

State of liability of the party himself at his death, governs the question between those claiming under him.

What evidence of intention by devisor to accept title necessary.

It will be observed, that Lord *Eldon* adverted to the circumstance of the purchasing devisor not having himself shown an intention to take the estate with a bad title. It is conceived, his Lordship here alluded to such evidence of intention as would have amounted to an acceptance of the title. Nothing short of

[(*g*) See *Curre* v. *Bowyer*, 5 Beav. 6, n.] (*h*) 1 Atk. 572.

this, it is presumed, could have any effect; for, to admit parol evidence of intention *as such* would be liable to the objection attaching to the reception of extrinsic evidence in aid of, or in opposition to, a written will (*i*). It is true that, under the doctrine in question, the devise is incidentally affected by this evidence, since, as already observed, the inquiry whether the contract was obligatory on the testator at his decease, lets in any evidence which would be admissible in a suit between the vendor and vendee, of circumstances discharging the vendee, as a difference in the estate from that contracted for, not capable of being the subject of compensation, or the like. Of course the vendor could not take advantage of the waiver, by the heir or devisee, of objections to the title which his ancestor or devisor might have advanced, he (*i. e.*, the heir or devisee) having in that event no interest in the estate.

Question, where the deceased purchaser was bound, but the vendor was not.

In the cases of *Whittaker* v. *Whittaker*, and *Broome* v. *Monck*, the contract seems to have been binding on the vendor, and, therefore, those cases do not decide what would be the effect, where the deceased purchaser was bound at his decease, but the vendor was not, a case which clearly may and often does arise; as where a written contract has been entered into, which is duly signed by one party and not by the other, and the signing party dies before there has been any act of part performance, which would render the contract obligatory on the other. It is clear, that in such a case, the surviving (*k*) party may choose or not to enforce the performance of the contract against the representatives of the deceased: should he decline, of course the contract is at an end, and the property remains unconverted as between the real and personal representatives of the deceased party. If, on the other hand, the surviving party choose to compel performance, the question arises between the respective representatives of the deceased, whether such conversion has taken place. For instance, suppose the deceased party to be the vendor, if the surviving party, *i. e.* the purchaser, should (as he may) call upon the heir or devisee of the deceased vendor, to convey to him the property in pursuance of his ancestor's or testator's contract—upon the doctrine in question would depend the destination of the purchase-money, which, if the contract is to be considered as effecting an absolute conversion of the pro-

[(*i*) See *Rose* v. *Cunynghame*, 11 Ves. 550.]

(*k*) The fact of survivorship is introduced merely for the convenience of distinction; it would, of course, be immaterial whether the party represented as the survivor were living or not.

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perty, would belong to the personal representatives; if not, to the heir or devisee of the deceased vendor. The writer is not aware of any direct authority on the point; but, perhaps it would be considered as governed by the cases (which seem to be analogous in principle), in which, there being in a lease of a freehold estate, a clause entitling the lessee, pending the term, to purchase the demised property, and the lessor having died before the option of the lessee has been declared, the latter has *subsequently* elected to purchase the property. Under such circumstances, it was held by Lord *Eldon*, in the case of *Townley* v. *Bedwell* (*l*), on the authority of a previous decision of Lord *Kenyon* (*m*), (but without, it should seem, approving the principle), that the rents until an election to purchase should be made, belonged to the heir or devisee; but that when it was made, the purchase-money went to the personal representative of the vendor. [Notwithstanding these decisions, Sir *J. Knight Bruce*, V. C., in the cases of *Drant* v. *Vause* (*n*), and *Emuss* v. *Smith* (*o*), decided that a specific devise by name of the property subject to the option, carried to the devisee the purchase-money also, whenever the option was exercised. His Honor seems to have been desirous, from the obvious injustice of the rule, to find some ground of distinction, and to have thought that the specific gift of the property by name furnished this ground; but it must be observed, that the cases of *Lawes* v. *Bennet*, and *Townley* v. *Bedwell*, were decided on general principles, applicable either to a descent or to a devise, whether in general or particular words. And in a recent case, not possessing a similar ground of distinction, Sir *R. T. Kindersley*, V. C., with apparent reluctance, followed the authority of the older cases (*p*).

Cases where there is an option to purchase.

Devises of copyholds.

By the common law, copyholds could not be devised except by virtue of a special custom of the manor of which they were held, nor were they affected by the Statutes of Wills passed in the reign of Hen. 8 (*q*). When a copyholder wished to devise his copyhold, it was originally necessary that he should make a surrender to the use of his last will; the estate then passed by the surrender and not by the will, which was only a direction of the uses of the surrender (*r*); but the testator till his death,

(*l*) 14 Ves. 591. [See also *Knollys* v. *Shepherd*, 1 J. & W. 499.]

(*m*) *Lawes* v. *Bennet*, 1 Cox, 167. [Compare *Wright* v. *Rose*, 2 S. & St. 323, which is very similar to cases of option to purchase, and in that view opposed to *Townley* v. *Bedwell*.]

[(*n*) 1 Y. & C. C. C. 580.

(*o*) 2 De G. & S. 722.

(*p*) *Collingwood* v. *Row*, 26 L. J. Ch. 649.

(*q*) 1 Watk. Cop. 122, 2 Rol. Rep. 383.

(*r*) *Att.-Gen.* v. *Vigor*, 8 Ves. 286.

[and afterwards his heirs, continued to have the legal copyhold interest till the devisee was admitted (*s*); and accordingly upon a surrender without admittance by way of mortgage, the mortgagor having the whole legal estate, and not a mere equity of redemption (which we shall hereafter see was devisable without surrender), must have made a second surrender to the use of his will in order to enable him to devise (*t*).

Will of a copyholder in joint tenancy a severance.

The surrender, and not the will, being the operative part, so to speak, of the devise, one joint tenant could, by surrendering to the use of his will, and then devising to a stranger, sever the jointure (*u*), and, in most manors, also bar his widow of freebench.

Stat. 55 Geo. 3, dispensing with surrender to use of the will.

By the statute 55 Geo. 3, c. 192, all devises thereafter to be made of copyhold lands, though not surrendered to the use of the testator's will, were rendered as valid *as if a surrender had been made.* This statute merely supplied the omission of a surrender; and it was immaterial that a surrender had, in fact, been made to the use of the will, but that the will could not operate upon it, not being properly executed according to the terms of the surrender, since the statute supplied a second surrender (*x*).

Only dispenses with formal surrenders.

But this statute supplied formal surrenders only, and therefore did not dispense with a particular mode of surrender required by the custom, to give validity to a devise by a married woman (*y*), such surrender being considered as a protection to her.

Custom not to surrender to use of a will bad.

It seems the better opinion, that a custom in a manor that the copyhold tenant shall not devise through the medium of a surrender to the use of his will, is bad (*z*): at all events, such a custom will not be presumed from the fact that no entry is to be found on the court rolls of any such surrender (*a*).

[(*s*) 1 Watk. Cop. 122, and see *Roe* v. *Jeffereys*, 2 Wils. 13.

(*t*) *Doe* d. *Shewen* v. *Wroot*, 5 East, 132.

(*u*) Co. Litt. 59 b; *Porter* v. *Porter*, Cro. Jac. 100; 2 Cox, 156; 2 Ves. 609. In *Edwards* v. *Champion*, 3 D. M. & G. 202, it was doubted by *Parke*, B., *Cresswell*, J., and Lord *Cranworth*, L. C., whether a surrender by joint tenant to the use of the will of another whose will did not come into operation until after the death of the surrenderor could operate to produce a severance. The learned Judges gave no reasons for their doubt, which appears in fact not to be sustainable without at the same time denying that a surrender by a joint tenant to the use of his own will effects a severance. Whatever might have been the effect of the peculiar wording of the stat. 55 Geo. 3, c. 192, stated presently in the text, it is clear that, under the present act, 1 Vict. c. 26, s. 3, a will of copyholds (without surrender) will not operate as a severance or a bar of freebench.

(*x*) *Doe* d. *Hickman* v. *Hickman*, 4 B. & Ad. 56.

(*y*) *Doe* v. *Bartle*, 5 B. & Ald. 492, 1 D. & Ry. 81.

(*z*) *Wardell* v. *Wardell*, 3 B. C. C. 117; *Pike* v. *White*, ib. 287; but see 1 Evans' Stat. p. 450.

(*a*) *Doe* d. *Edmunds* v. *Llewellin*, 2 C. M. & R. 503, 5 Tyr. 899; *Doe* d. *Dand* v. *Thompson*, 7 Q. B. 897.

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Equitable interests in copyholds devisable without surrender.

[An equitable interest in copyholds under a trust or right of redemption, or a contract for purchase, being incapable of surrender, was devisable without any such formality, and it was immaterial in the last case that a surrender had been made to the use of the purchaser, so long as he had not been admitted (*b*): and the right of the equitable owner to devise his interest could not be controlled by the custom of the manor (*c*).

Customary freeholds.

Customary freeholds, though not held at the will of the lord, yet if alienable by surrender and admittance, were devisable in the same manner as copyholds (*d*).]

As to devises of after-acquired copyholds.

Copyholds, equally with freeholds, were subject to the rule, which, under the old law, restricted a devise to lands of which the testator was seised when he made his will (*e*). A devise of copyholds, therefore, however comprehensive in its terms, did not pass an after-acquired copyhold estate (*f*), except so far as such estate might have been brought within its operation by a subsequent surrender to the use of the will (which could not be the case where the testator's interest was only equitable), the surrender being construed to have the effect of extending a general devise of copyholds to lands acquired in the interval between the will and the surrender (*g*); and it was decided that a surrender to such uses as the testator "*shall*" by will appoint applied to a will antecedently executed, it being considered that the surrenderor referred to that will which should be in existence at his death (*h*).

After-acquired copyholds pass as part of a manor.

And here it may be observed, that as every copyhold is parcel of the manor to which it belongs, a devise of the manor was held to comprise such copyholds, though acquired by the lord after the making of his will (*i*). It is clear, too, upon a principle somewhat analogous, that if a person having a remainder or reversion in fee, expectant on an estate for life, devised that remainder or reversion, and then by any means acquired, and by

[(*b*) *Davies* v. *Beversham*, 2 Freem. 157, 3 Ch. Rep. 76; *Car* v. *Ellison*, 3 Atk. 73; *King* v. *King*, 3 P. W. 358; *Gibson* v. *Lord Montfort*, 1 Ves. 489; *Greenhill* v. *Greenhill*, 2 Vern. 679; *Phillips* v. *Phillips*, 1 My. & K. 664; *Seaman* v. *Woods*, 24 Beav. 372, where the purchaser took under a power of sale in a will.

(*c*) *Lewis* v. *Lane*, 2 My. & K. 449.

(*d*) *Doe* v. *Huntingdon*, 4 East, 288; *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Doe* d. *Dand* v. *Thompson*, 7 Q. B. 897. These cases appear to overrule Lord *Hardwicke's* apparent opinion to the contrary in *Hussey* v. *Grills*, Amb. 299.]

(*e*) *Harris* v. *Cutler*, cit. 1 T. R. 438, n.; *Spring* v. *Biles*, ib. 435, n.

[(*f*) *Phillips* v. *Phillips*, 1 My. & K. 664.]

(*g*) *Heylin* v. *Heylin*, Cowp. 130; *Att.-Gen.* v. *Vigor*, 8 Ves. 287.

(*h*) *Spring* v. *Biles*, 1 T. R. 435, n., overruling *Warde* v. *Warde*, Amb. 299, which is contra.

(*i*) *Roe* d. *Hale* v. *Wegg*, 6 T. R. 708.

such acquisition extinguished, the estate for life, the devise carried the estate thus acquired, the merger of which merely had the effect of accelerating the ulterior estate (*k*).

Devise by devisee or surrenderee of copyholds before admittance void.

Under the old law, too, a devisee or surrenderee of copyholds before admittance, was wholly incapable of devising them (*l*). The same doctrine was at one period considered to apply to an heir whose incompetency to devise was supposed to have been established by the case of *Smith* v. *Triggs* (*m*); but which case, rightly understood, seems not to have warranted any such doctrine. It was frequently cited, however, as an authority on this point (*n*), but as such it has been completely overruled by the case of *Right* d. *Taylor* v. *Banks* (*o*), the facts of which were as follow:—On the 13th of February, 1781, John Taylor was admitted to the copyholds in question, which he afterwards surrendered to the use of his will, and then by his will devised part to his son Samuel (who was his heir-at-law) in fee, and part to his daughter Mary, in fee. Mary Taylor, on the death of the testator, entered, but was never admitted; she died, leaving her brother Samuel her customary heir; Samuel Taylor, who, as heir of his father, was entitled to the whole, (for the devise to him by the former did not break the descent,) [and Mary, never having been admitted, he took her share also, as heir to his father, and not as heir to her (*p*),] entered, but was never admitted. By his will he devised the copyholds in question—the validity of which devise was the point at issue. The Court held that the devise was good, relying much on the doctrine in Coke's Copyholder, section 41, that the heir is tenant immediately after the death of his ancestor, and may, before admittance, surrender into the hands of the lord; and also on *Brown's case* (*q*), *Brown* v. *Dyer* (*r*), *Morse* v. *Faulkner* (*s*), *Doe* v. *Tofield* (*t*), *Wilson* v. *Weddell* (*u*), which severally support the same doctrine, and were considered by Lord *Tenterden* and the rest of the Court to outweigh the recent dicta to the contrary, which were all founded

Devise by an unadmitted heir held to be good.

[(*k*) *Buckingham* v. *Cook*, Holt, 253.]

(*l*) *Wainwright* v. *Elwell*, 1 Mad. 627; [*Phillips* v. *Phillips*, 1 My. & K. 664; *Matthew* v. *Osborne*, 17 Jur. 696.]

(*m*) 1 Str. 487.

(*n*) See Sir *T. Plumer's* judgment in *Wainwright* v. *Elwell*, 1 Mad. 632; and Sir *L. Shadwell's* judgment in *King* v. *Turner*, 2 Sim. 548. [Reversed, 1 My. & K. 456.]

(*o*) 3 B. & Ad. 664.

[(*p*) *Smith* v. *Triggs*, 1 Str. 487, and observations of Lord *Tenterden* in *Right* v. *Banks*, p. 670. It is material to notice this point, as otherwise the case would be an authority, that the heir of an unadmitted devisee could devise, though the devisee herself could not.]

(*q*) 4 Rep. 22 b.

(*r*) 11 Mod. 73.

(*s*) 1 Anst. 13.

(*t*) 11 East, 251.

(*u*) Yelv. 144.

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on a mistaken view of the case of *Smith* v. *Triggs*. The point was again agitated, and received a similar determination in the cases of [*King* v. *Turner* (*x*)] and *Doe* d. *Perry* v. *Wilson* (*y*).

Devises by unadmitted devisee or surrenderee, under recent act.

The recent act has precluded any question of this nature in regard to wills which are subject to its operation, by expressly affirming the testamentary power of an unadmitted heir: indeed it goes much further, by extending the devising power to an unadmitted devisee or surrenderee. [It repeals the 55 Geo. 3, c. 192, which only *supplied* a surrender, and makes the will itself, without any surrender, confer a right to admittance, notwithstanding that the copyholds, in consequence of the want of a custom to devise or surrender to the use of a will, or in consequence of there being a custom that a will or 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 the will previously to the passing of the act (*z*). Thus all questions arising under the former act respecting the validity of a devise, in consequence of the power to devise being still left dependent on the power to surrender to the use of the will (though the surrender itself was not required), are now set at rest.] Copyholders also participate in the benefit of the enactments which extend the devising power to after-acquired real estate, and other interests not before devisable, and are, on the other hand, bound by those which (as we shall see) regulate the ceremonial of execution. Copyholds are also, in common with freeholds, subject to the several clauses by which the legislature has propounded certain new canons or rules of construction, which in general appear to be of a nature to admit of application to copyhold estates (*a*).

Bequests of chattel interests in lands.

Bequests of chattel interests in land are governed by principles wholly different from those which regulate devises of freehold estates: they do not, like the latter, pass directly to the legatee, as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, who is bound, in subordination to the paramount claims of creditors, to give effect to any bequest in the will, specific or residuary, comprising the property in question; and, therefore, even under the old law, it was quite unnecessary, as

[(*x*) 1 My. & K. 456.]
(*y*) 5 Ad. & Ell. 321; [and see *Doe* d. *Winder* v. *Lawes*, 7 Add. & Ell. 195.
(*z*) 1 Vict. c. 26, s. 3.
(*a*) The form of admittance of a devisee of copyholds is now somewhat simplified by stat. 4 & 5 Vict. c. 35, ss. 88, 89, 90.]

regarded the testator's competency of disposition, to go into the inquiry, whether he was, at the time of making the will, possessed of a term of years which formed part of his property at his decease (*b*); such an inquiry being no less irrelevant in the case of a bequest of leaseholds held by a chattel lease, than in that of a horse or a watch, or any other personal chattel.

Freeholds *pur autre vie.*

Freeholds pur autre vie require a distinct consideration in connexion with the testamentary power. This species of estate stands distinguished from all other interests, freehold or chattel—by this peculiar quality, that it is capable of being rendered transmissible to either real or personal representatives, according to the terms of the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law: for it seems now to be admitted that the devolution of the estate is regulated by the words of limitation contained in the last conveyance, without regard to the mode of its original creation. Estates pur autre vie are devisable by the express terms of the Statute of Frauds, (29 Car. 2, c. 3, s. 12), the act of Henry 8 being (according to the prevalent and probably the better opinion) confined to estates of inheritance in fee-simple (*c*).

Devolution of estates pur autre vie.

Though the Statute of Frauds required three witnesses to the devise of an estate pur autre vie, yet where the property devolved otherwise than to the heirs of the owner, (*i.e.* where it was limited either to his executors or administrators, or to the last taker indefinitely, without any express mention of either class of representatives), it was distributable as part of his personal estate, whether he died testate or intestate; and by a necessary consequence of this principle, an executor taking it as such was bound to give effect to any bequest or direction in the will affecting such property, though the will might not have been attested in the manner required by the statute in question (*d*). By the recent act (sect. 3), [the previous enactments respecting estates pur autre vie were repealed, and] the testamentary power is expressly extended 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

(*b*) See *Wind* v. *Jekyl*, 1 P. W. 575; see also *James* v. *Dean*, 11 Ves. 388.
(*c*) *Anon.* Cart. 211.
(*d*) *Ripley* v. *Waterworth*, 7 Ves. 425; [in connexion with which case see *Bearpark* v. *Hutchinson*, 7 Bing. 178, 4 M. & Pay. 848, as to rents *pur autre vie.*

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same shall be a corporeal or an incorporeal hereditament; [and by sect. 6 it is enacted, that if no disposition shall be made of any estate pur autre vie of a freehold nature, it shall be assets in the hands of the heir, and that 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 the 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. So that where a bastard having the trust of an estate pur autre vie limited to him and his heirs, dies without heir, there being thus no special occupant, the property goes in case of intestacy to the administrator in trust for the crown (*e*): or if there be a will appointing an executor but not disposing of the lease, the executor will hold for his own benefit, unless the will be such as before the act 1 Will. 4, c. 40, s. 2, constituted him a trustee (*f*).]

Devise by *quasi* tenant in tail of estates *pur autre vie.*

A question often agitated, but never entirely settled, in regard to the devising power over estates of this description, was whether where they were limited to the tenant *pur autre vie and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted on all hands that if the property were undisposed of, it would devolve to the heir special per formam doni; it was equally clear that an alienation *by deed*, [if made by the quasi tenant in tail in possession (*g*),] was an effectual bar to the entail; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory. In *Doe* v. *Luxton* (*h*), Lord *Kenyon* inclined to think that the devise was good; but his Lordship's dictum stands opposed to that of Lord *Redesdale*, in the case of *Campbell* v. *Sandys* (*i*); and to [the opinion of the Court of B. R. in Ireland,

[(*e*) *Reynolds* v. *Wright*, 25 Beav. 100, 9 W. R. 211.

(*f*) *Powell* v. *Merritt*, 1 Sm. & Gif. 381; *Cradock* v. *Owen*, 2 ib. 241.

(*g*) If made by tenant in tail in remainder, it must be with the concurrence of the owner of the previous estate in possession (*Slade* v. *Pattison*, 5 L. J. N. S. Ch. 51; *Allen* v. *Allen*, 2 D. & War. 307, 332; *Edwards* v. *Champion*, 3 D. M. & G. 202), and could never, therefore, be made by will.]

(*h*) 6 T. R. 293.

(*i*) 1 Scho. & Lef. 294.

[in the case of *Hopkins* v. *Ramage* (*k*), who thought that a quasi tenant in tail could not by will exclude the title of the issue or remainder men,] and such was evidently the impression of Sir *T. Plumer* in the case of *Blake* v. *Luxton* (*l*) [and of Sir *E. Sugden* in the case of *Allen* v. *Allen* (*m*).] The recent statute does not in terms dispose of this debateable point, but has, it should seem, done so in effect, by the language of the general enabling clause, sect. 3, which extends the devising power to "all real estate and all personal estate which he (the testator) 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.*"

The terms of this enactment evidently restrict it to cases in which property, in the absence of disposition, would devolve to the *general* real or personal representatives of the testator, as distinguished from the case now under consideration, in which the devolution would be to the heir *special.*

[(*k*) Batty, 365. The decision of Lord *Manners* in *Dillon* v. *Dillon*, 1 Ba. & Be. 77, does not touch the question, for the quasi tenant in tail died without issue, and therefore, at her death, there was nothing for the will to operate upon, and the learned Judge expressly rested his decision on this fact. In *Hopkins* v. *Ramage* the circumstances were precisely similar, but the opinion of the Court was expressed in general terms.]

(*l*) Coop. 185.

[(*m*) 2 D. & War. 307, 326.]

CHAPTER V.

WHO MAY BE DEVISEES OR LEGATEES (*a*).

Devises to corporations.

THE statute of 34 Hen. 8, c. 5, expressly excepted out of its enabling clause devises to bodies politic and corporate; and, accordingly, it was held, that a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be. The recent statute contains no such prohibition, the legislature having contented itself with regulating and defining the powers and capacities of testators, without in any manner interfering with, or attempting to define, the capacities of persons to take under testamentary dispositions, which it has left to be ascertained and determined by the application of the general principles of law. If, therefore, the disability of corporations to acquire real estate by devise, had been created by the statute of Henry, the recent act of the 7th of Will. 4 & 1 Vict. c. 26, would, by repealing that statute without reviving the prohibition, have had the effect of giving validity to such devises; but this is not the case. The disability of corporations to hold real property was created by various antecedent statutes (*b*), which appear to have been founded on the principle, that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats, and other feudal profits. Hence, the necessity of obtaining the king's licence, he being the ultimate lord of every fee in the kingdom; but this licence only remitted his own rights, and did not prevent the right of forfeiture accruing to intermediate lords. Doubts having arisen, however, at the Revolution, how far such licence was valid (*c*), as being an exercise of the dispensing power formerly claimed by the

Disability of corporations to take by devise.

(*a*) [See also Chap. III. on the personal disabilities of testators.]

(*b*) Magna Charta, c. 36; 9 Hen. 3, c. 36; 7 Edw. 1, c. 1; [13 Edw. 1, c. 32, & c. 33;] 34 Edw. 1, st. 3; 18 Edw. 3, st. 3, c. 3; 15 Rd. 2, c. 5; 23 Hen. 8, c. 10.

(*c*) 2 Hawk. P. C. 391, [Co. Lit. 99 a, n. (1), by Butler.]

crown (but which, it is pretty evident, it was not, but merely a waiver of its own right of forfeiture), the statute 7 & 8 Will. 3, c. 37, was passed, which provides that the crown for the future, at its own discretion, may grant licences to alien or take in mortmain, of whomsoever the tenements shall be holden. At this day, therefore, the licence from the crown protects against forfeiture to any intermediate lord.

Devises to corporations in trust.

Where real estate is devised upon trust to a corporation not licensed, or not empowered by act of parliament or charter, to take lands in mortmain, the devise is, of course, void at law, and the estate descends to the heir *charged with the trust* (supposing that it is not illegal as being in favour of charity), in the same manner as where a devise to a trustee fails by the death of the devisee in trust in the testator's lifetime (*cc*).

It should be observed, however, that devises to corporations are authorized by some acts of parliament. For instance, the statute of 43 Eliz. c. 4, was held to render valid appointments to corporations for charitable uses (*d*); and though devises to such uses are now prevented by the act of 9 Geo. 2, c. 36, yet the 4th section of the latter statute, excepting out of its operation gifts to the Colleges in the two English Universities, and the Colleges of Eton, Winchester, and Westminster, seems to have had, so far as it goes, a similar effect in conferring validity on devises to those corporations. Again, the stat. 43 Geo. 3, c. 107, enables persons to devise lands to the Governors of Queen Anne's Bounty; and the stat. 43 Geo. 3, c. 108, authorizes, under certain limitations, the devise to any persons or bodies politic or corporate, not exceeding five acres of land, for the erection, repair, purchase, or providing of churches or chapels, where the Liturgy of the United Church of England and Ireland shall be used, or of the mansion-house for the residence of the minister, or of any out-buildings, offices, churchyard, or glebe, for the same respectively. And similar enactments have been made in favour of many other charity corporations (*e*).

Devises to aliens.

Alienage cannot, strictly speaking, be ranked among the incapacities to *take* real estate by devise, as the property remains in the alien till office found, when it devolves to the crown (*f*). On this principle, where lands are devised to an alien and another,

(*cc*) *Sonley* v. *Clockmakers' Company*, 1 B. C. C. 81; [*Incorporated Society* v. *Richards*, 1 D. & War. 258.]

(*d*) *Flood's case*, Hob. 136.

(*e*) Vide Church Building Act, 9 Geo. 4, c. 42, and other statutes stated post, Chap. IX., and in Shelford on Charitable Uses.

(*f*) *Duplessis* v. *Attorney-General*, 1 Bro. P. C. Toml. 415.

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concurrently as joint tenants, the entirety does not vest in the latter (as would be the effect if the devise to the alien were absolutely void), but in both jointly; and if the crown does not during the joint lives seize the alien's undivided moiety (as it might do after office found (*g*)), then, on the decease of the alien, leaving his co-devisee surviving, such moiety will devolve to the latter by virtue of the jus accrescendi, which is incidental to every joint tenancy, subject, of course, to the crown's right of seizure, after office: which would, by relation, overreach the title of the surviving joint tenant to the alien's moiety (*h*). If, however, the alien survives his co-devisee, he does not, in the opinion of some persons, thereby become entitled to the entirety, he being disabled from acquiring a title by operation of law, even for the benefit of the crown, on the principle that the law, by its own act, never gives an estate to one whom it does not permit to retain it (*i*); but though the principle is unquestionable, perhaps, this application of it may be fairly excepted to, as the survivor seems to be *in* by the original gift.

A trust of freehold or copyhold lands declared in favour of an alien is forfeited to the crown;

[Where a trust in lands for life, or any greater estate is created in favour of an alien by will or otherwise, it has been doubted whether the crown can get the benefit of the trust. In *Att.-Gen.* v. *Sands* (*k*), *Hale*, C. B., said he thought such a trust was forfeitable to the king; but he cited as his authority the case of *The King* v. *Holland* (*l*), in which it appears on examination that no such point was decided; the case being one where the trust of a copyhold having been declared in favour of an alien, it was held in B. R. that the king was not entitled, upon an inquisition as to what lands the alien was possessed of, to seize the copyholds; and judgment of amoveantur manus was awarded, with an indication of opinion, that the king's remedy, if any, was in equity. This opinion seems to be supported by C. B. *Gilbert* (*m*). For, though the crown could claim no more than was in the alien, and must, therefore, resort to Chancery to get possession of the profits, or to have the estate executed to it, yet the fact that "the Chancery could not compel one to execute a trust for an alien" (*n*) appears not to have suggested to *Gilbert*, C. B. (*o*),

(*g*) *King* v. *Boys*, Dy. 283, b.

(*h*) *Forset's case*, cit. 1 Leon. 47, 4 Leon. 82.

(*i*) See *Collingwood* v. *Pace*, 1 Vent. 417, [Bridg. by Ban. 414.

(*k*) 3 Ch. Rep. 20, 1 Sid. 403; better reported in Hard. 495, and 2 Freem. 130. As to the expression "forfeitable" there used, see 24 Beav. 20.

(*l*) Alleyn, 14, Sty. 20, 40, 75, 84, 90, 94.

(*m*) Gilb. Uses, 43, 204.

(*n*) Per *Rolle*, J., *Rex* v. *Holland*, Sty. 20.

(*o*) Gilb. Uses, loc. cit.

[or to *Hale*, C. B., and *Turner*, B. (*p*), the existence of any insuperable obstacle to the crown seeking a remedy in that Court. But Sir *L. Shadwell*, V. C., agreeing with them that the Court would not do so idle a thing as to hear an alien insist that there was a trust for him, when it would know at the same time that he could not have any benefit from it, could not see how the crown, which must claim through him, could have any right to the property (*q*). The difficulty, however, (if it be a difficulty,) is one which exists quite as much with regard to the legal as with regard to the trust estate; for an alien could never sue in a real or mixed action (*r*), and could never, therefore, recover the possession of land which he had purchased. Yet, as the estate was certainly in him, it was never doubted that the crown, on office found, might seize this legal estate (*s*): and why should the rule be different in equity?

The question was argued at length before Sir *J. Romilly*, M. R., in the recent case of *Barrow* v. *Wadkin* (*t*), and decided by him in favour of the crown. In the course of an elaborate judgment, reviewing all the authorities on the point, his Honor observed, that though this was not a case of forfeiture, it was useful to consider what occurred, in cases where the interest of a cestui que trust became forfeited to the crown; because, if the benefit of the trust was in the crown, the right of enforcing it must be the same, whether it came to the crown by forfeiture or prerogative. In cases of attainder and outlawry, continued his Honor, the crown takes the equitable interest of the person attainted (*u*) and of the outlaw, and obtains possession of them through the instrumentality of this Court: and yet the same argument would apply; it might be said, neither the person attainted nor the outlaw can enforce the execution of the trust, because he cannot obtain the benefit of it, and the crown can only enforce it through him. Relying on this argument, Sir *J. Stuart*, V. C., had, a short time previously, in *Rittson* v. *Stordy* (*x*), decided that a trust for an alien resulted for the benefit of the heir (*y*). But the M. R. expressed himself as not satisfied with the reasoning upon which that decision was

[(*p*) *Att.-Gen.* v. *Sands*, Hard. 495, 2 Freem. 130. See also *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. Rep. 92.

(*q*) *Burney* v. *Macdonald*, 15 Sim. 6.

(*r*) Co. Lit. 129 b.

(*s*) Ante, p. 59.

(*t*) 24 Beav. 1. In America it seems to have been decided that the trust is forfeited to the state, *Hubbard* v. *Goodwin*, 3 Leigh, 492, 2 Kent's Com. 62, note. See further on this point Sand. Uses, 5th ed. p. 309, note.

(*u*) See Lewin on Trusts, p. 675, 3rd ed.

(*x*) 3 Sm. & Giff. 230.

(*y*) As against the *trustee* and the *alien* this agrees with the opinion of the M. R., 24 Beav. 9.

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[founded; and considering that the decision was right on other grounds, and did not require the determination of this question, his Honor felt bound to form an independent judgment upon it, and accordingly decided in favour of the crown. The crown then takes, not for any reason arising out of the doctrine of tenures (*a*), but by its prerogative on grounds of public policy (*b*), a title which extends, à fortiori, to the trust of chattel interests in land (*c*), except such as an alien may himself hold (*d*).]

—also the trust of chattels real.

The proceeds of real estate can be given to an alien.

It was formerly much discussed, whether the proceeds of real estate, which is impressed with a trust for conversion, can be given to an alien. In the case of *Foudrin* v. *Gowdey* (*e*), where a testator gave a power of sale over real estate, and also certain leasehold property to his executors, and bequeathed the produce of the sale to aliens, Sir *J. Leach*, M. R., held, that the crown was entitled, on the ground that this was an interest in land. His Honor adverted to the circumstance that the real estate was

[(*a*) Escheat or forfeiture. Forfeiture there is not: and the crown cannot take the trust of realty by escheat, *Burgess* v. *Wheate*, 1 Ed. 177, 1 W. Bl. 123; *Davall* v. *New River Company*, 3 De G. & S. 394; *Beale* v. *Symonds*, 16 Beav. 406. In Co. Lit. 191 a, n. vi, 11, Mr. Butler suggests that a better ground in favour of the claim of the crown might, perhaps, have been found, by resorting to its acknowledged prerogative of being entitled to the bona vacantia, or every species of property of which no owner is discoverable: but the suggestion has never been acted upon. As to Lord *Loughborough's* often-cited dictum, that "the crown comes under no head of equity," *Walker* v. *Denne*, 2 Ves. jun. 179, see the M. R.'s judgment in *Barrow* v. *Wadkin*. The dictum appears to be warranted when used with reference to a trust for conversion in a case where there is a total failure of the objects of the trust. Thus, in *Walker* v. *Denne*, the crown was held not entitled to enforce against the next of kin a trust for laying out money in land where there was a total failure of cestuis que trustent, and the only result would be to enable the crown to claim by escheat: and in *Taylor* v. *Haygarth*, 14 Sim. 8, where real and personal estate was devised to trustees on trust for sale, and the surplus proceeds were left undisposed of, and all legacies and annuities had been satisfied out of the personalty, Sir *L. Shadwell*, V. C. held, on a failure of heirs and next of kin, that the trustee was entitled for his own benefit, and that the crown was not entitled to a decree for sale merely that it might take the produce as bona vacantia. But it does not follow "because the crown could not enforce the execution of a trust to sell in favour of a non-existing person, that therefore the crown could have no benefit of a trust for an existing person, the beneficial interest in which had through that person become vested in the crown;" per M. R., 24 Beav. 17. In *Henchman* v. *Att.-Gen.*, 3 My. & K. 485, the claim of the crown to a sum of money provided by the will to be paid by the devisee of lands to a charity, and assumed to be an exception from the devise (see post, Ch. XI.), was negatived, and the money held to sink for the benefit of the devisee. The difference between this case and that of the alien is, that in the latter there is a person who can take though he cannot hold, in the former the object cannot take.

(*b*) Co. Litt. 2 b.

(*c*) See *Middleton* v. *Spicer*, 1 B. C. C. 201; *Taylor* v. *Haygarth*, 14 Sim. 8; *Cradock* v. *Owen*, 2 Sm. & Giff. 241; *Powell* v. *Merritt*, 1 ib. 381; *Reynolds* v. *Wright*, 25 Beav. 100, 9 W. R. 211; *Read* v. *Stedman*, 26 Beav. 495. These cases relate to a total failure of next of kin; and if they differ in principle from the point noticed in the text, go rather beyond what is needed to establish that point.

(*d*) Co. Lit. 2 b, 1 Steph. Com. 453, & infra.]

(*e*) 3 My. & K. 383.

not devised to trustees—the testator having merely created a power of sale; but some of the remarks in the judgment take a wider scope, being no less applicable to the case of a devise to trustees upon trust for sale. On the other hand, in the case of *Du Hourmelin* v. *Sheldon* (*f*), where real estate was devised to trustees, in trust to sell, and stand possessed of the proceeds upon certain trusts, under which aliens became interested in certain contingent shares, Lord *Langdale*, M. R., held the crown not to be entitled to those shares, on the ground that this was not a trust conferring on the aliens an interest in land, but merely a right to have the land converted into money; and that the policy of the law in regard to mortmain, (which had been much pressed in argument as analogous in principle,) depended upon considerations entirely different. His Lordship observed that in *Foudrin* v. *Gowdey*, there was a mere direction to sell, and not a trust for sale—at all events it was a solitary case—and the policy of the law as to mortmain had been in it confounded with the policy of the law as to alienage; and Lord *Cottenham*, on appeal, being of the same opinion, affirmed the decree (*g*). His Lordship observed, "If the crown is entitled in this case, it must be entitled to all monies left to aliens, if raised out of land; and, if so, it would operate against the legacies of alien legatees directed to be raised out of land; nor could any debtor or other person direct his land to be sold for payment of his debts, if any of his creditors should happen to be foreigners; nor could any foreigner enforce a claim against his English debtor, if the latter had no other property than real estate (*h*). It was argued, that, after payment of the charges, the legatees might elect to take the estate in land; but they have not done so; and what the Attorney-General claims is money and not land. The incapacity to hold land is founded upon reasons not applicable to money. The testatrix has given to her legatees no option to take the land; and if she had, or if the law had given the option, it would be no reason why the legatee should forfeit money which he can enjoy, because, instead thereof, he might have elected to take land which he cannot enjoy."

As to denization and naturalization.

The disabilities of alienage may be removed partially, by a grant of letters of denization from the crown, or wholly, by an

(*f*) 1 Beav. 79.

[(*g*) 4 My. & Cr. 525, and see *Master* v. *De Croismar*, 11 Beav. 184.]

(*h*) But see stat. 13 Edw. 1, stat. 3, & 27 Edw. 3, c. 9, which, for the encouragement of trade, gave to creditors (including aliens) by statute merchant, or statute staple, a remedy against the lands of their debtors.

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act of parliament, investing the alien with the rights and privileges of a British subject. A denizen may hold land which he takes by act of the party, and even those which devolve to him by act of law, except, of course, that he cannot claim by descent, from or through his father, if an alien (*i*). In the case of *Foudrin* v. *Gowdey* (*k*), it was decided by the Master of the Rolls, that the letters of denization in that case had a retrospective operation, enabling the grantee to hold lands antecedently acquired; the effect being to relinquish the crown's rights in regard to such lands, and confirm the inchoate title of the alien thereto. Such grants, it seems, expressly authorize the denizen to hold lands theretofore granted, and the form has been in use ever since the reign of Elizabeth.

Acts of naturalization not retrospective.

An act of naturalization is always so framed as not to render valid antecedent conveyances of the alien, the terms of the enactment being, that he *shall be* and is *henceforth* naturalized, &c. (*l*).

Power of the Secretary of State to grant certificates of naturalization.

[By a recent statute (*m*) the Secretary of State is empowered to grant certificates of naturalization, and it is enacted that the grantee *shall* enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except, &c. The terms of this act appear to give the certificate the same effect as an ordinary act of naturalization. By another section of the statute (*n*) it is enacted, that every alien friend may "by *grant*, lease, demise, *assignment*, *bequest*, representation, or *otherwise*, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade or manufacture *for any term of years not exceeding twenty-one years*, as fully (except the right to vote at elections for members of parliament) as if he were a natural-born subject of the United Kingdom." An important question arises under this section, whether if an estate in fee-simple in lands be devised to an alien they are immediately forfeitable to the crown, or whether he

What rights are conferred by such certificates.

(*i*) Mr. Justice *Blackstone* (1 Com. 379) lays it down broadly, that an alien cannot take by inheritance, on the ground that his parent, through whom he must claim, being an alien, had no inheritable blood: but the reason is not co-extensive with the position; for cases may be suggested, in which it would not be applicable; for instance, suppose A. (father) a denizen, and B. (his oldest or only son) also a denizen, the father dies intestate, seised of lands in fee simple, such lands would unquestionably descend to B. See Sir *Matthew Hale's* judgment in *Collingwood* v. *Pace*, 1 Vent. 417; which contains much learning in relation to aliens.

(*k*) 3 My. & K. 383.

(*l*) *Fish* v. *Klein*, 2 Mer. 431.

[(*m*) 7 & 8 Vict. c. 66, s. 6. As to naturalization in the colonies see 10 & 11 Vict. c. 83.

(*n*) Sect. 5. It is remarkable that the words "bequest" and "representation" only, and not "devise," occur in this section.

[can hold for the twenty-one years, and the crown only seize after the expiration of that term. As by the common law an alien may *take* an estate in a fee-simple by devise, though he cannot *hold* it, and as the act does not seem to say that the *estate* of the alien is to be merely an *estate* for years, there seems no reason why he should not *take an estate in fee-simple*, but be able *to hold* it only for twenty-one years. Such an interest would appear not to be unknown to the law; for the Lords of the Privy Council are in the habit of granting licences (*o*) to hold in mortmain, limited to a given number of years (usually thirty-one years). These licences are generally renewed at the end of the term, and under them corporate bodies are in the habit of purchasing lands in fee-simple (*p*). Supposing that such a licence authorizes the purchase of fee-simple lands, and enables the corporation to confer a good title, provided they sell and convey them away before the licence expires (which seems the reasonable interpretation), it would seem to follow that under the analogous terms of the act, an alien could *hold* as well as *take* lands in fee-simple by devise, and could make a good title to them by conveyance executed within twenty-one years from his testator's decease, which latter power the framers of the act probably never intended to confer (*q*).]

As to devises and legacies to attesting witnesses.

Another disqualification, which the policy of the law, in its wholesome anxiety to remove temptations to perjury, has created, arises from the fact of the devisee or legatee being made an attesting witness of the will. It is obvious that nothing could be more dangerous than to allow a will to be supported by the testimony of persons who are beneficially interested in its contents. When, therefore, the Statute of Frauds required to the validity of a devise of land, that it should be attested by *credible* witnesses, persons having a beneficial interest under the will were held not to sustain this character; and, accordingly, a will of freehold estate attested by such persons was invalid; and that, too, not only as to the part which created the interest of the attesting witness, but in regard to the whole. In applying this principle it was long a question, whether the witness could be

Period of credibility.

[(*o*) See 10 & 11 Vict. c. 78.

(*p*) In Parliamentary paper, No. 24 (ordered by the House of Lords to be printed, 30th Nov. 1852), there is mentioned a licence to the Lancashire Insurance Company, to take securities made by way of *mortgage in fee, the licence not to extend beyond thirty-one years.* The Privy Council, therefore, consider that the fact of the licence being only for a term of years is not inconsistent with a right to hold an estate in fee under it.

(*q*) See observations on this act 8 Jurist, part 2, p. 445.]

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rendered competent by destroying his interest by means of a release or payment before his examination; in other words, whether the credibility of the witnesses was to exist at the period of the attesting act, or of the judicial inquiry into its sufficiency. Against the latter hypothesis Lord *Camden*, in the case of *Doe* d. *Hindson* v. *Hersey* (*r*), made an able and energetic protest. "A will," said his Lordship, "is often executed suddenly in a last sickness, and sometimes in the article of death, and a great question to be asked in such cases is, whether the testator were in his senses when he made the will, *and, consequently, the time of the execution is the critical moment which required guard and protection.* What is the employment of the witnesses?—it is to attest, and to judge of the testator's sanity when they attest; and if he is not capable, they ought to refuse to attest. In some cases the witnesses are passive; here they are active, and, in truth, the principal parties to the transaction; the testator is intrusted to their care." [The majority of the Court were, however, against Lord *Camden's* opinion.]

The doctrine contended for by this distinguished Judge seems eventually to have prevailed (*s*), and is evidently more reasonable than the alternative rule, which would have led to this absurd and mischievous consequence, that a will might have been invalidated by the *subsequent* conduct of a witness affecting his credibility of character, and occurring, it might be, after the death of the testator, when there was no possibility of repairing this disaster to the will.

It was soon found that the holding a will of freeholds to be invalid on account of the existence of an interest, however remote or minute, in any one of the attesting witnesses, was productive of much inconvenience; and it being apparent that to render the witness competent, by depriving him of the benefit which affected his disinterestedness, was far better than to sacrifice the entire will, the statute 25 Geo. 2, c. 6 (*t*), was passed, which, after reciting the 29 Car. 2, c. 3, s. 5, provided, that if any person should attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift or appointment of

Stat. 25 Geo. 2, c. 6. Beneficial devises and legacies to attesting witnesses void;

(*r*) 4 Burn's Eccl. Law, 27.

(*s*) *Brograve* v. *Winder*, 2 Ves. jun. 636. [It must be observed that this case only decided that a witness disinterested at the time of the execution of the will and the death of the testator, was a good witness, notwithstanding that he was interested at the time of his examination, and that Lord *Camden's* opinion is directly opposed to the cases of *Lowe* v. *Jolliffe*, 1 W. Bl. 365, and *Goodtitle* v. *Welford*, Dougl. 139, where a legatee after release was held a competent witness.

(*t*) Ir. Parl. 25 Geo. 2, c. 11.]

or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, should be thereby given, or made, such devise, &c., should, so far only as concerned such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person should be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding such devise, &c.; but it was enacted (section 2), that in case by any will or codicil any lands, tenements, or hereditaments, were or should be charged with any debt or debts, and any creditor, whose debt was so charged, had attested, or should attest, the execution of such will or codicil, every such creditor, notwithstanding such charge, should be admitted as a witness to the execution of such will or codicil, within the intent of the said act. Sects. 3, 4, and 5, relate only to wills made on or before the 24th of June, 1752, and the remaining sections are not very important.

—and witnesses competent.

Creditors whose debts are charged, good witnesses.

On this statute it was decided: 1st. That it extended exclusively to persons beneficially interested, and not to a devisee or executor in trust (*u*). 2ndly. That the act did not apply to wills of [copyholds (*x*) or of] personal estate (*y*), for as such wills did not require an attestation at all, there was no ground for invalidating the gift to the witness; but [in the case of *Doe* v. *Mills* (*z*),] it was decided in regard to wills of freehold lands, that the fact that the witness was not wanted to make up the statutory number (there being three others) did not render valid a gift to such supernumerary witness: [and this rule applies to every case of a gift to a witness by a will coming under the operation of the recent act (*a*).

Points decided on the statute.

In the case of *Hatfield* v. *Thorpe* (*b*), where there was a devise to the wife of a witness, it was argued that the statute 25 Geo. 2, c. 6, did not apply, except where the witness took a direct interest, and, as his interest here was only consequential, the whole will was void under the 29 Car. 2, c. 3, but the words of the certificate are expressly confined to saying, that the devise

Whether the statute applied where there was a gift to the husband or wife of a witness.

(*u*) *Anon.* 1 Mod. 107; *Lowe* v. *Jolliffe*, 1 W. Bl. 365; *Holt* v. *Tyrrell*, 1 Barn. K. B. 12; *Battison* v. *Bromley*, 12 East, 250; *Phipps* v. *Pitcher*, 6 Taunt. 220; *S. C.* 1 Mad. 144; see also *Goss* v. *Tracey*, 1 P. W. 290; *Goodtitle* v. *Welford*, Doug. 139.

[(*x*) *Jillard* v. *Edgar*, 3 De G. & S. 502.]

(*y*) *Emanuel* v. *Constable*, 3 Russ. 436; *Brett* v. *Brett*, 1 Hagg. 58, n.; *Foster* v. *Banbury*, 3 Sim. 40.

[(*z*) 1 Mood. & Rob. 288.

(*a*) *Wigan* v. *Rowland*, 11 Hare, 157.

(*b*) 5 B. & Ald. 589.

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[to the wife was void, and intimate nothing as to the validity of the rest of the will. It seems to have been the opinion of the court in an old case (*c*), that even a gift to the separate use of the wife incapacitated the husband from being a witness, since he was eased in her maintenance.

A witness to a codicil confirming the will can take under the will.

Where a testator by will devised property to his widow, and by codicil, to which she was a witness, confirmed his will, it was held that the gift to her by the will remained unaffected: but she was of course held not to be entitled to property purchased after the date of the will, and which would have passed to her by force of the republication, if she had not been a witness to the codicil (*d*).]

Stat. 1 Vict. 26.

By the recent act of the 1st of Vict. c. 26, the legislature has adopted the principle, and extended the operation, of the enactments in the statute of 25 Geo. 2, c. 6, (which it repeals, except as to the colonies in America).

Will not to be void on account of incompetency of attesting witnesses.

Sect. 14 provides, 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.

Gift to an attesting witness or wife or husband of witness to be void.

Sect. 15, 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.

Creditor attesting to be admitted a witness.

Sect. 16, 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

[(*c*) *Holdfast* v. *Dowsing*, 2 Str. 1253. V. C. *Leach*.]
(*d*) *Denne* v. *Wood*, 4 L. J. (O. S.) 57,

execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

Sect. 17, 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.

Remarks upon new law as to interested witnesses.

These enactments, it will be observed, [preclude, as to wills coming within their provisions, all questions arising under the old law as to the effect of a gift to the husband or wife of an attesting witness, and they] extend the disqualification of the witness to take beneficially to wills of every description; the act having, by assimilating the execution of wills of real and personal estate, destroyed all ground for distinguishing between them in regard to this point.

[Upon the construction of the 15th section it has been decided that a legatee under a will does not lose his legacy by attesting a codicil which confirms the will (*e*): and further, that a residuary legatee, by so doing, does not lose his share of the residue, although the codicil in fact increases that share by revoking some particular legacies (*f*). Each witness attests only the instrument to which he puts his name.]

Executor now not entitled to undisposed-of personalty.

In allowing an attesting witness to be appointed executor, whether he be or be not in terms made an executor in trust, regard is evidently had to the statute of 1 Will. 4, c. 40, which, it will be remembered, precludes executors from claiming, by virtue of their office, the beneficial interest in the undisposed-of personal estate of their testator, to which, by the pre-existing law, an executor was entitled, where the will did not afford any presumption of a contrary intention, a point which was often difficult of solution.

The great change, however, effected by the recent statute in regard to the witnesses, is in expressly dispensing with all personal qualifications; but, on this subject (a discussion of which would be out of place here), the reader is referred to some remarks in a future chapter which treats of the execution of wills.

Devise to heir, its effect under the old law.

In conclusion, it is proper to notice another disability to take by devise, which formerly arose out of the doctrine, that where a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was *in* by

[(*e*) *Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 Kay & J. 642, 7 D. M. & G. 470; in conformity with the rule respecting real estate before the act, see last p.

(*f*) *Gurney* v. *Gurney*, ubi sup.]

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descent and not by purchase; and it was held, that neither the imposition of a pecuniary charge (*g*), nor even the engrafting on the devise to the heir an executory devise (*h*), had the effect of interrupting the descent. If, however, the quality of the estate which the heir took by the devise differed from that which would have descended upon him, he of course acquired the property as devisee. On this principle a devise for life to the testator's heir, with remainder over, conferred on him an estate by purchase (*i*).

Devises to testator's heir.

So, if a testator devised freehold lands to his two daughters, (being his co-heiresses at law,) to hold to them and their heirs, they both took by purchase, because under the devise they were joint-tenants and not co-parceners, as they would have been by descent (*k*); and the rule was the same if the devise were to them as tenants in common; a tenancy in common (though making somewhat nearer approach to) being different from an estate in co-parcenary (*l*). Of course a devise to one of several co-heirs or co-heiresses made the devisee a purchaser (*m*); [and so it seems would a contingent remainder devised to the person who at a stated time should be the testator's heir-at-law (*n*).]

Whether the doctrine in question extended to testamentary appointments was a point of some nicety, and occasioned much discussion (*o*), into which, however, it is not now proposed to enter, as questions of this nature cannot arise under any will, future or recent; the statute of 3 & 4 Will. 4, c. 106, s. 3, having provided that, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land *as a devisee*, and not by descent.

Stat. 3 & 4 Will. 4, c. 106, s. 3, making heir-devisee a purchaser.

[Infants (including infants en ventre sa mère (*p*)), femes

(*g*) *Haynsworth* v. *Pretty*, Cro. El. 833, 919; *S. C.* Moo. 644; *Clarke* v. *Smith*, 1 Salk. 241.

(*h*) *Chaplin* v. *Leroux*, 5 M. & Sel. 14; *Doe* v. *Timins*, 1 B. & Ald. 530; *Manbridge* v. *Plummer*, 2 My. & K. 93. [So in case of copyholds, *Smith* v *Triggs*, 1 Str. 487.

(*i*) That in cases of marshalling, the heir, under an express devise to him, had the rights of a devisee, see *Biederman* v. *Seymour*, 3 Beav. 368; à fortiori, since the stat. 3 & 4 Will. 4, c. 106, s. 3; see *Strickland* v. *Strickland*, 10 Sim. 374.]

(*k*) Cro. El. 431. [And see *Swaine* v. *Burton*, 15 Ves. 365.]

(*l*) *Bear's case*, 1 Leon. 112, 315.

(*m*) Co. Litt. 163 b; [*Reading* v. *Royston*, 1 Salk. 242.]

(*n*) 1 Sanders Uses, 133 n., (4th edition), citing *Cholmondeley* v. *Clinton*, 2 J. & W. 1.

(*o*) See *Hurst* v. *Earl of Winchelsea*, 1 W. Bl. 187, [2 Ld. Ken. 444, 2 Burr. 879;] *Langley* v. *Sneyd*, 7 J. B. Moo. 165, [3 Br. & B. 243, 1 S. & St. 45.

(*p*) *Burdet* v. *Hopegood*, 1 P. W. 486; *Mogg* v. *Mogg*, 1 Mer. 654.

[coverte and insane persons are not incapacitated from taking by devise or bequest though they cannot manifest their acceptance; acceptance, however, will be presumed unless such presumption would work injury to the devisee or legatee. The disability of coverture, though invalidating a conveyance at common law from the husband to the wife, does not prevent her from taking under his will, the coverture having in fact ceased when the will takes effect (*q*).]

[(*q*) Lit. s. 168.]

CHAPTER VI.

EXECUTION AND ATTESTATION OF WILLS MADE BEFORE THE YEAR 1838.

SECTION I.

As to Freeholds of Inheritance.

Enactment in the Statute of Frauds as to the execution of wills,

THE 5th section of the Statute of Frauds (29 Car. 2, c. 3) required that all devises and bequests of any lands or tenements (*a*), devisable either by force of the Statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, should be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and should be attested and subscribed in the presence of the said devisor, by three or four credible witnesses.

is now indirectly affected as to its construction by decisions of the Ecclesiastical Courts.

[Before proceeding to discuss this enactment, it should be premised, that though by the statute 1 Vict. c. 26, the ceremonial of execution is somewhat varied, yet several of its individual parts remain unaltered, so that the cases decided under the later statute bearing upon the interpretation of the words "signature," "presence," "direction," "other person," "attested," "subscribed," which are common to both enactments, are equally authorities upon the interpretation of the same words in the statute 29 Car. 2, c. 3; and thus (since the execution of bequests of personal estate is now assimilated to that of devises of real estate), the construction of the older statute although never within the sphere of the Ecclesiastical Courts, is nevertheless indirectly affected by many of their decisions on the statute of Victoria.]

Mark, a sufficient signing;

The first inquiry suggested by the statute 29 Car. 2, is, what amounts to a "signing" by the testator? It has been decided that a mark is sufficient, and that, notwithstanding the testator is

(*a*) [Observe that the word *hereditaments* is omitted in this clause, though occurring in the next, see *Buckridge* v. *Ingram*, 2 Ves. jun. 662; but no question seems ever to have been raised on this omission.]

able to write (*b*), [and though his name does not appear on the face of the will (*c*); and, a mark being sufficient, of course the initials of the testator's name would be sufficient (*d*); and it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark (*e*),) or that against the mark was written a wrong name (*f*), or that his hand was guided in making the mark (*g*). But where two sisters made mutual wills in favour of each other, the words mutatis mutandis being precisely the same, and by mistake each signed the will of the other, such signature was held invalid, neither having in fact executed her own will, but merely a paper, which, if it was a will, gave all her property to herself, and was therefore void (*h*); and even if the gift had been to a third person, evidence could have been admitted to show that the paper, though executed by the testatrix with due formality, was not in fact her will (*i*), though such evidence could not have been used to give effect to the gift to the sister. The mere fact of signing a paper, with due formality as a will, does not, therefore, *per se* show that the paper was the testator's will.]

—sealing, not.

At one time it appears to have been thought, that even sealing alone, without signing, would suffice (*k*); the contrary, however, is indisputable; not indeed from positive decision, but from the unanimous opinion of every Judge who has referred to the point, from Lord Chief Baron *Parker* and his coadjutors in the case of *Smith* v. *Evans* (*l*), (though the learned Chief Baron on another occasion (*m*), erroneously supposed it to have been decided the other way,) down to Lord *Eldon* in the case of *Wright* v. *Wakeford* (*n*).

[Both statutes expressly permit the testator's signature to be made by some other person by his direction. That other person may, it seems, be one of the witnesses (*o*), and it is immaterial that he signed his own name instead of the name of the testator (*p*). And where the testator directed a person to sign the will

(*b*) *Taylor* v. *Dening*, 3 Nev. & P. 228; *S. C.* nom. *Baker* v. *Dening*, 8 Ad. & Ell. 94.

[(*c*) *Re Bryce*, 2 Curt. 325.

(*d*) *Re Savory*, 15 Jur. 1042.

(*e*) *Re Redding*, 2 Rob. 339, 14 Jur. 1052; *Re Glover*, 11 Jur. 1022, 5 No. Cas. 553; and see the corresponding cases as to signature of a witness, post, p. 76.

(*f*) *Re Clarke*, 27 L. J., Prob. 18, 4 Jur. N. S. 243, 1 Sw. & Tr. 22.

(*g*) *Wilson* v. *Beddard*, 12 Sim. 28.

(*h*) *Anon.* 14 Jur. 402.

(*i*) See *Hippesley* v. *Homer*, T. & R. 48, n.; *Trimleston* v. *D'Alton*, 1 D. & Cl. 85, noticed in Chap. XIII.; *Re Fairburn*, 4 No. Cas. 478]

(*k*) See *Lemayne* v. *Stanley*, 3 Lev. 1, [1 Freem. 538; *Warneford* v. *Warneford*, 2 Str. 764.]

(*l*) 1 Wils. 313; [and see 2 Ves. 559.]

(*m*) *Ellis* v. *Smith*, 1 Ves. jun. 12.

(*n*) 17 Ves. 458.

[(*o*) *Re Bayley*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262.

(*p*) *Re Clark*, 2 Curt. 329.

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[for him, which that person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of &c.," and then followed the signatures of the witnesses, the will was held good (*q*).]

One signature of several sheets sufficient.

One signature, of course, is sufficient, though the will be contained in several sheets of paper; and where the testimonium at the end referred to the preceding sides of the sheet of letter paper, as subscribed by the testator, the fact of those sides being omitted to be signed, was held not to affect the validity of the will, as the testator evidently intended the signing and sealing of the last side to apply to the whole (*r*). It was immaterial, under the Statute of Frauds, in what part of the will the testator's name was written (*s*); and where the whole will was in the testator's handwriting, the name occurring in the body, as the usual exordium—"I, A. B., do make," &c., was decided to be a sufficient signing (*t*). But the signature, whatever were its local position, must have been made with the design of authenticating the instrument; for it should seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned (*u*), though it should be observed, that in *Right* v. *Price* the point was not decided; and the reasoning seems only to apply where the intention of repeating the signature remained to the last unchanged; for a name originally written with such design might afterwards be adopted by a testator as the final signature; and such it is probable, would be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing.

As to position of name.

Publication, whether requisite.

It will be observed that the testator is merely required by the statute of Car. 2, to "sign;" but it was formerly considered that, independently of this enactment, publication was necessary to complete the testamentary act. Lord *Hardwicke*, in particular, in the case of *Ross* v. *Ewer* (*x*), strenuously insisted on the necessity of a will of freehold lands being published. On the other

[(*q*) *Re Blair*, 6 No. Cas. 528.]

(*r*) *Winsor* v. *Pratt*, 5 J. B. Moo. 484, 2 Br. & B. 650. [And see *Marsh* v. *Marsh*, 1 Sw. & Tr. 528, 6 Jur. N. S. 380.]

(*s*) This, it will be remembered, is altered by the recent statute as to wills made since 1837.

(*t*) *Lemayne* v. *Stanley*, 3 Lev. 1, Freem. 538, 1 Eq. Ca. Ab. 403, pl. 9; *Cook* v. *Parsons*, Pre. Ch. 184; see also *Hilton* v. *King*, 3 Lev. 86; *Grayson* v. *Atkinson*, 2 Ves. 454; *Coles* v. *Trecothick*, 9 Ves. 249; [compare *Blennerhasset* v. *Day*, 2 Ba. & Be. 104, 119.]

(*u*) *Right* v. *Price*, Dougl. 241; see also *Griffin* v. *Griffin*, 4 Ves. 197, n.; *Coles* v. *Trecothick*, 9 Ves. 249; *Walker* v. *Walker*, 1 Mer. 503; and cases cited post.

(*x*) 3 Atk. 156.

hand, in the case of *Moodie* v. *Reid* (*y*) Lord C. J. *Gibbs* expressed a decided opinion that publication was not an essential part of a will; not being, as he conceived, necessary to devises by custom at common law, nor made so by the statutes of Hen. 8 and Charles 2; and subsequent Judges have virtually adopted the latter opinion, they having (as we shall presently see) decided that a will of freehold lands may be duly executed by a testator, without any formal recognition of, or allusion to, the testamentary act; indeed, without his uttering a syllable declaratory of the nature of the instrument.

Acknowledgment of signature before witnesses sufficient.

Another question under the same act was, whether the attesting witnesses ought to see the testator actually sign, or whether his acknowledgment of the signature was sufficient; as to which it was decided, not only that an acknowledgment would suffice, but that it might be made before each witness separately, and need not take place in the simultaneous presence of all. The point, though doubted in some of the early cases (*z*), was decided by Sir *Joseph Jekyl*, M. R., in the case of *Smith* v. *Codron* (*a*), where A. signed and published a will in the presence of two witnesses, then a third person was called in, to whom the testator showed his name, telling him that was his hand, and bidding him witness it, which the witness did in the testator's presence, who, two hours afterwards, told him that the paper he had subscribed was his will: this was held to be a good execution. Since this case, the doctrine has been confirmed in a series of decisions, reaching down to a very recent period (*b*).

Acknowledgment before each witness sufficient.

As it was sufficient for the testator to sign before some, and acknowledge the signature before the rest of the witnesses, so by necessary consequence an acknowledgment before all was equally effectual. This was decided in the case of *Ellis* v. *Smith* (*c*) by Lord *Hardwicke*, with the assistance of Sir *John Strange*, M. R., Lord C. J. *Willes*, and Lord C. B. *Parker*. Lord *Hardwicke* considered the sufficiency of the testator's declaration to have been virtually decided by the cases establishing that the witnesses might attest at different times; for, if the testator signed three times, there were three executions, and none of them good.

(*y*) 7 Taunt. 361; [and see *Doe* d. *Spilsbury* v. *Burdett*, 4 Ad. & Ell. 14, *S. C.* 6 M. & Gr. 386, and 10 Cl. & Fin. 340, in D. P.]

(*z*) *Cook* v. *Parsons*, Pre. Ch. 184, and *Dormer* v. *Thurland*, 2 P. W. 506.

(*a*) 2 Ves. 455, cit.

(*b*) *Stonehouse* v. *Evelyn*, 3 P. W. 253; *Grayson* v. *Atkinson*, 2 Ves. 454; *Ellis* v. *Smith*, 1 Ves. jun. 11; *Addy* v. *Grix*, 8 Ves. 504; *Westbeach* v. *Kennedy*, 1 Ves. & B. 362; *Wright* v. *Wright*, 5 M. & Pay. 316, 7 Bing. 457.

(*c*) 1 Ves. jun. 11.

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What amounted to an acknowledgment.

The next question was, what constituted a sufficient acknowledgment before the witnesses. In the case of *Gryle* v. *Gryle* (*d*), Lord *Hardwicke* doubted whether it was enough for the testator to say before the witness, "This is my will," without a resealing (for the instrument in that case had the unnecessary appendage of a seal), or unless the testator had declared it to be his handwriting; but the doubt appears to have vanished from the mind of the noble Judge in the case of *Ellis* v. *Smith* (*e*), where the question is stated in general terms to be, whether a testator's declaration before three witnesses, that it is his will, was equivalent to signing; and the conclusion, therefore, of the learned Judges who decided that case in favour of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration.

Witnesses need not be apprized of the nature of instrument.

Recent adjudications have placed the point beyond all doubt by going much farther; these cases having decided that where a testator, who had previously signed his will, merely requested the witnesses to subscribe the memorandum of attestation, though they neither saw his signature, nor were made acquainted with the nature of the instrument they attested, the will, nevertheless, was duly executed according to the statute (*f*). "When we find," said Lord C. J. *Tindal*, in the case of the *British Museum* v. *White*, "the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his."

What a sufficient signature by the witnesses;

—a mark;

—initials;

The next statutory requisition is, that the will be "attested and subscribed" by three witnesses. A mark has been decided to be a sufficient subscription (*g*); but it is never advisable, where it can be avoided, (and now that the art of writing is so common, seldom necessary), to employ marksmen, as witnesses. [The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution (*h*), but

(*d*) 2 Atk. 176.

(*e*) 1 Ves. jun. 11.

(*f*) *British Museum* v. *White*, 3 M. & Pay. 689, 6 Bing. 310; *Wright* v. *Wright*, 5 M. & Pay. 316, 7 Bing. 457; *Johnson* v. *Johnson*, 1 Cr. & Mees. 140, [3 Tyrw. 73; *Hudson* v. *Parker*, 1 Rob. 14, 8 Jur. 786; *Gaze* v. *Gaze*, 3 Curt. 451, 7 Jur. 803; but see *Ilott* v. *Genge*, and other cases noticed post, with reference to the late Act, under which a stricter acknowledgment is required.]

(*g*) *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, id. 504; [*Re Amiss*, 2 Rob. 116, 7 No. Cas. 274; *Re Ashmore*, 3 Curt. 756.

[(*h*) *Re Christian*, 2 Rob. 110, 7 No. Cas. 265.

[not if they are placed in the margin opposite to, and apparently for the purpose only of identifying alterations (*i*). A witness need not sign his own name, if the name actually subscribed be intended to represent his name (*k*). But if the wrong name be signed with the intention of making it appear that the will was attested by the person to whom that name belongs, instead of the actual witness, the subscription is insufficient (*l*). Putting their seals to the will is not sufficient (*m*). If the witness cannot write, his hand may be guided by another person (*n*), but it has been doubted whether it is sufficient for the witness, if he can write, to hold the top of the pen while another writes his name (*o*); in fact, there seems to be no distinction between the words "sign" and "subscribe;" any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness,—with, however, these exceptions, that the subscription of the witness is specially required to be in the presence of the testator, and must not, as in the case of a testator, be a signature made by some other person for the witness, or by the witness himself at some other time, and merely acknowledged by him in the presence of the testator (*p*).

—wrong name;

—sealing;

—guiding the hand.

Difference between signature by witness and by testator.

Where the will has been once attested by a witness, it is not sufficient for him, on a re-execution, to go over his name with a dry pen; he must do some act apparent on the face of the paper (*q*); otherwise it is no more than an acknowledgment. And where a witness to a former execution, on attesting a will for the second time, did not again write her name, but after her name written on the first execution, wrote the name of her residence, "Bristol," Sir *H. J. Fust* considered that to be no proof of the attestation, and he decided that the will was not properly re-executed (*r*).

Must be an act apparent on the paper.

This decision has been followed by Sir *C. Cresswell*, in a

[(*i*) *Re Martin*, 6 No. Cas. 694, 1 Rob. 712. The question quo animo is one of fact, provable by extrinsic evidence: and it may be doubted whether in the case cited the Court came to a right conclusion on the evidence. See infra.

(*k*) *Re Olliver*, 2 Spinks, 57.

(*l*) *Pryor* v. *Pryor*, 29 L. J. Prob. 114.

(*m*) *Re Byrd*, 3 Curt. 117, 1 No. Cas. 490.

(*n*) *Harrison* v. *Elvin*, 3 Q. B. 117, 2 G. & Dav. 769; *Re Frith*, 1 Sw. & Tr. 8, 27 L. J. Prob. 6, 4 Jur. N. S. 288.

(*o*) *Re Kilcher*, 6 No. Cas. 15. In this case there was no explanation of the proceeding.

(*p*) *Moore* v. *King*, 3 Curt. 243, 2 No. Cas. 45, 7 Jur. 205; *Re Cope*, 2 Rob. 335; *Re White*, 2 No. Cas. 461, 7 Jur. 1045; *Re Mead*, 1 No. Cas. 456.

(*q*) *Playne* v. *Scriven*, 1 Rob. 772, 7 No. Cas. 122, 13 Jur. 712; *Re Cunningham*, 1 Searle & S. 132, 29 L. J. Prob. 71.

(*r*) *Re Trevanion*, 2 Rob. 311.

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[case (*s*), where a witness to a former execution, on attesting a re-execution of a will, wrote the day of the month against his former signature, and crossed one of the letters in it, not intending that the mark made by crossing the letter should stand for his signature; but supposing that the addition of the date was equivalent to a repetition of the signature. In both these cases the attestation was insufficient, because there was no proof that the word "Bristol" in the one case, and the mark across the letter in the other, were intended to represent the witness's signature. "He must do something that shall stand for his name." The learned Judge said, as to the date, that it "was to give effect to his attestation at that time, by making the signature before written equivalent to a repetition of it;" and it seems open to question whether, under these circumstances, the date, being intended as a repetition of the signature, might not fairly have been considered as a signature.

Position of witness's signature.

It is immaterial in what part of the will the signature of the witnesses is placed; for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the fourth side (*t*), and the will ending on the middle of the third side, and two of the witnesses signing at the end, and another signing in a vacant space on the second side opposite the other two, was held a sufficient attestation by three witnesses under the Statute of Frauds (*u*), but it must of course be proved that any part of the will which follows the signatures of the witnesses was written before they signed (*x*). But where a testator signed on five sheets, and his signature was attested on the first four, and the fifth sheet contained an attestation clause, and his signature only; and there was no evidence to show that the witnesses attested the last signature, the will was held not to have been properly executed (*y*); and where two instruments purporting to be a will and codicil were written on different pages of the same sheet of paper, and both were signed by the testatrix, but the first alone was attested, the codicil was rejected, as there was an evident intention that each should be separately signed and attested (*z*).

[(*s*) *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 433, 5 Jur. N. S. 581; 28 L. J. Prob. 132.

(*t*) *Re Chamney*, 1 Rob. 757, 7 No. Cas. 70; Sugd. R. P. Statutes, 338.

(*u*) *Roberts* v. *Phillips*, 4 Ell. & Bl. 450, 24 L. J. Q. B. 171.

(*x*) *Re Jones*, 1 No. Cas. 396.

(*y*) *Ewens* v. *Franklin*, 1 Deane, 7, 1 Jur. N. S. 1220.

(*z*) *Re Taylor*, 2 Rob. 411; and see per Lord *Campbell*, 24 L. J. Q. B. 175.

[It has been held where an executed will was altered, and the witnesses only put their initials against the alterations, that the will was not properly re-executed (*a*). But this decision seems no longer tenable, inasmuch as the initials were intended to represent the signature, and it was proved that they were written with the intent to attest the will, and they were consequently, according to the later authorities, a sufficient subscription, though written in the margin.]

What constituted a sufficient attestation.

No particular form of words was essential to constitute an attestation (*b*). It was not requisite that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, though such fact, of course, must be clearly and distinctly proved by oral testimony, when the validity of the will is called in question, whether the memorandum of attestation records it or not (*c*). Where the death [or absence] of the witnesses prevents the obtaining actual proof, a compliance with the statutory requisition in all its parts, would, it seems, even in the absence of express statement, generally be presumed (*d*): [and since the passing of the late act, the Ecclesiastical Court has granted probate of a will where both the witnesses deposed that the requirements of the act had not been complied with, being satisfied, by the circumstances, that the evidence was mistaken (*e*); and in another case, where the witnesses so deposed, but not positively, their evidence was allowed to be rebutted by that of another person present at the execution, assisted by the attestation clause, whence it appeared that the requirements of the statute had been complied with (*f*). The presumption of compliance with the statutory requirements, however, will only be made where the will appears on the face

Due execution when presumed.

Even against evidence of the witnesses.

[(*a*) *Re Martin*, 6 No. Cas. 694.

(*b*) Under the act 1 Vict. c. 26, s. 9,] it is expressly dispensed with.

(*c*) *Hands* v. *James*, Comyn, 531; *Croft* v. *Pawlett*, 2 Str. 1109; *S. C.* 8 Vin. Ab. 128, pl. 4; *Brice* v. *Smith*, Willes, 1; *Rancliff* v. *Parkyns*, 6 Dow, 202; [*Doe* v. *Davies*, 9 Q. B. 648; *Hitch* v. *Wells*, 10 Beav. 84.]

(*d*) *Hands* v. *James*; *Croft* v. *Pawlett*, supra; [*Re Seagram*, 3 No. Cas. 436; *Re Mustow*, 4 No. Cas. 289; *Re Johnson*, 2 Curt. 341; *Re Luffman*, 5 No. Cas. 183; *Re Dickson*, 6 ib. 278; *Trott* v. *Trott*, 29 L. J. Prob. 156, 6 Jur. N. S. 760.

(*e*) *Leach* v. *Bates*, 6 No. Cas. 699.

(*f*) *Baylis* v. *Sayer*, 3 No. Cas. 22; see also *Gove* v. *Gawen*, 3 Curt. 151; *Blake* v. *Knight*, ib. 547; *Pennant* v. *Kingscote*, ib. 642; *Re Hare*, ib. 54; *Cooper* v. *Bockett*, ib. 648, 2 No. Cas. 391, 10 Jur. 931; *Brenchley* v. *Still*, 2 Rob. 162; *Chambers* v. *Queen's Proctor*, 2 Curt. 433; *Keating* v, *Brooks*, 4 No. Cas. 253; *Re Noyes*, ib. 284; *Burgoyne* v. *Showler*, 1 Rob. 5; *Thomson* v. *Hull*, 16 Jur. 1144, 2 Rob. 426; *Re Attridge*, 6 No. Cas. 597; *Bennett* v. *Sharp*, 1 Jur. N. S. 456; *Foot* v. *Stanton*, 1 Deane, 191, 2 Jur. N. S. 380; *Farmer* v. *Brock*, 1 Deane, 187, 2 Jur. N. S. 670; *Re Holgate*, 1 Sw. & Tr. 261, 5 Jur. N. S. 251, 29 L. J. Prob. 161; *Lloyd* v. *Roberts*, 12 Moo. P. C. C. 158; *Re Thomas*, 1 Sw. & Tr. 255, 28 L. J. Prob. 33; *Gwillim* v. *Gwillim*, 1 Searle & S. 26, 29 L. J. Prob. 31; *Cregreen* v. *Willoughby*, 6 Jur. N. S. 590.

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[of it, to have been duly executed, or where (the will being lost) proper evidence is adduced of its having been so executed (*g*); and the testator's own declarations of the fact are insufficient (*h*). And the presumption is clearly rebutted where it is sworn by competent persons that the names of the seeming witnesses are fictitious, and are in the testator's own handwriting (*i*).]

"Presence" of a testator, what amounts to it.

The will, it will be observed, was [and still is] required to be subscribed by the witnesses, in the *presence* of the testator. The design of the legislature, in making this requisition, evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the Courts, in fixing the signification of the word "presence." To constitute "presence," in the first place, it was (and, of course, still is) essential that the testator should be mentally capable of recognizing the act which is being performed before him; for, if this power be wanting, his mere corporal presence would not suffice. Thus, if a testator, after having signed and published his will, and before the witnesses subscribe their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient (*k*).

Mental consciousness essential.

And the testator ought not merely to possess the mental power of recognizing, but be actually conscious of, the transaction in which the witnesses are engaged; for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room in which it was done would not avail (*l*). Nor, on the other hand, would the circumstance of the testator *not* being in the same room invalidate the attestation, if it took place *within his view*. Thus, in the case of *Shires* v. *Glasscock* (*m*), where the testator being in extreme illness, the witnesses after he had signed his will withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses subscribed the will. It was proved that the testator might have seen from his bed, through the lobby and the broken glass window, the table in the gallery where the witnesses subscribed; and this was adjudged to be sufficient; for (it was observed) the statute required attesting in his presence to prevent

[(*g*) *Re Gardner*, 27 L. J., Prob. 51.
(*h*) *Re Ripley*, 1 Sw. & Tr. 68.
(*i*) *Re Lee*, 4 Jur. N. S. 790.]
(*k*) *Right* v. *Price*, Doug. 241.
(*l*) See *Longford* v. *Eyre*, 1 P. W. 740.
(*m*) 2 Salk. 688; *S. C.* cit. Carth. 81.

obtruding another will in place of the true one; it was, therefore, enough if the testator *might* see; it was not necessary that he *should* actually see the signing; because if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within view of the testator; he might have seen it, and that was enough.

Sufficient if the testator *might* have seen.

So, in the case of *Davy* v. *Smith* (*n*), where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door, and the door of the room where the testator lay, were open, so that he might have seen them subscribe their names if he would; this was held to be sufficient, though there was no proof that the testator did see them subscribe. And if the witnesses subscribe their names in the same room where the testator lies, though the curtain of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence (*o*).

It is not even necessary that the testator should be in the same house with the witnesses; for, in *Casson* v. *Dade* (*p*), where a *feme coverte*, having power to make a writing in the nature of a will, ordered such an instrument to be prepared, and went to her attorney's office to execute it; but, being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might have seen what passed; Lord *Thurlow* was of opinion that the will was well executed.

Testator and witnesses need not be in same house.

Upon the same principle it is clear, that the mere contiguity of the places occupied by the testator and the witnesses respectively will not suffice, if the testator's view of the witnesses' proceedings is necessarily obstructed. Thus, in *Eccleston* v. *Petty* (*q*), where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall, and it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested.

Mere contiguity not sufficient, if the testator's view be interrupted.

(*n*) 3 Salk. 395.
[(*o*) *Newton* v. *Clarke*, 2 Curt. 320.]
(*p*) 1 B. C. C. 99, Dick. 586.
(*q*) Carth. 79; *S. C.* Comb. 156, 1 Show. 89, Ca. T. Holt, 222; [and see *Re Colman*, 3 Curt. 118; *Re Ellis*, 2 Curt. 395; *Re Newman*, 1 Curt. 914.]

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Testator must be capable of seeing in his actual position.

And it was not enough, that in *another* part of the same room the testator might have perceived the witnesses, if, in his actual position he could not. And, therefore, in the case of *Doe* d. *Wright* v. *Manifold* (*r*), where the testator was in bed in a room, from one part of which he might, by inclining his head into the passage, have seen the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord *Ellenborough* said:—"In favour of attestation it is presumed, that if the testator might see, he did see; but I am afraid, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence."

Where a testator is unable to move without assistance;

—where he is blind.

[If the testator be unable to move without assistance, and have his face turned from the witnesses, so that it is out of his power to see them, if he so wished, the attestation will be insufficient (*s*); and where the testator is blind, it has been decided that the position of the witnesses must be such, that the testator, if he had had his eyesight, might have been able to see them sign (*t*).]

Where the evidence fails to show in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table, likely to have been used, would be taken into consideration (*u*).

It is scarcely necessary to add, as a concluding remark on this subject, that the nature of the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator or otherwise, is wholly immaterial (*x*).

Credibility of witnesses.

The statute of Car. 2, it will be observed, required the witnesses to be "credible": which was held to mean such persons as were not disqualified by mental imbecility, interest, or crime, from giving testimony in a Court of justice. The disqualification arising from interest has been noticed in a former chapter (*y*). With respect to crime, it will be sufficient to refer the reader to the numerous and valuable treatises on evidence, which are in the hands of the profession.

Applicability of attestation to several distinct parts of a will;

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the

(*r*) 1 M. & Sel. 294; [*Norton* v. *Bazett*, 1 Deane, 259, 3 Jur. N. S. 1084.

(*s*) *Tribe* v. *Tribe*, 1 Rob. 775, 13 Jur. 793, 7 No. Cas. 132.

(*t*) *Re Piercy*, 1 Rob. 278, 4 No. Cas. 250.]

(*u*) *Winchilsea* v. *Wauchope*, 3 Russ. 444.

(*x*) *Broderick* v. *Broderick*, 1 P. W. 239; *Machell* v. *Temple*, 2 Show. 288.

(*y*) Vide ante, p. 65.

last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date from, and is complete in itself independently of the latter (*z*).

—several testamentary papers;

And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed, unless the contrary were distinctly proved (*a*), as would also that of the attestation being intended to apply to the whole.

—to will and codicil.

The presumption would be somewhat less strong, of course, when each of the several papers has a distinct independent character, as where one is a will and the other a codicil, or where they consist of two separate codicils.

It was held under the devising clause of the Statute of Frauds, that if a testator made a will which he caused to be attested by two witnesses, and afterwards made a codicil which he also procured to be attested by two witnesses, neither the will nor the codicil was adequate to the devise of freehold lands; for though the attesting witnesses to the respective testamentary papers together made up the requisite number, yet, as the memorandum of attestation subscribed to the codicil was evidently not intended to apply to the will, it could not be so construed (*b*). If, however, evidence were adduced of such actual intention, the attestation to the codicil would apply to both (*c*).

Reference to extrinsic documents allowable. Incorporation of document.

A testator may so construct his disposition as to render it necessary to have recourse to some document (as to any other extrinsic matter), in order to elucidate or explain his intention. [The document is then said to be incorporated in the will.] As where a person by his will devises all the lands which were conveyed to him by a certain indenture (specifying the deed), or devises lands to the uses declared by a particular indenture of settlement, it is clear that the indentures so referred to may be consulted for this purpose, without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested (*d*); and it would, it is con-

(*z*) *Carlton* v. *Griffin*, 1 Burr. 549.
(*a*) *Bond* v. *Seawell*, 3 Burr. 1775.
(*b*) *Lea* v. *Libb*, Carth. 35, 3 Salk. 395.
(*c*) *Bond* v. *Seawell*, 3 Burr. 1775.
(*d*) See *Habergham* v. *Vincent*, 2 Ves. jun. 204; also *Molineux* v. *Molineux*, Cro. Jac. 144.

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ceived, be immaterial whether the paper so referred to was in the testator's handwriting, or in that of any other person, and whether it professed to be testamentary or not, as it founds its claim to be received as part of the will, not on its own independent efficacy, but on the fact of its adoption by the attested will. But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points. In the case of *Dillon* v. *Harris* (*e*), a paper was rejected on account of a defect of identification. The testator had by his will referred to a certain paper, as being in the handwriting of the devisee, and which he stated himself to have placed in the custody of his executors. And it was held, that a paper found in the testator's custody, and which had not been delivered by him to the executors, was not sufficiently identified, though in the devisee's handwriting, as he might have written several papers; and though it was in the testator's custody at his decease, there was no evidence of its having been in his custody when he made his will.

[Questions similar to that raised in the last case have, since the passing of the late act, frequently come before the Ecclesiastical Courts, and where the document intended to be incorporated was distinctly referred to (*f*), and shown either by extrinsic (as in the cases infra) or by internal evidence (*g*) to have been in existence, they have admitted it to probate (*h*). In cases of greater doubt, the result of their decision seems to be, that if the paper sought to be incorporated has been shown to some person before the execution of the will, as the paper proposed to be incorporated (*i*), or if it has written upon it, "this is the paper referred to in my will," or similar words, and there is evidence to show that it was written *before* the will was made (*k*), then it is sufficiently incorporated. Two things therefore must be proved,—the identity of the document, and that it was written before the will was made. Where the date, heading, and other particulars of the paper referred to, are so distinctly referred to, that there can be no doubt of identity, and the will states the paper to be then in

(*e*) 4 Bligh, N. S. 329. [See observations on this case, 1 Rob. 87, 3 No. Cas. 255, 8 Jur. 878, *S. C.*

(*f*) See *Re Greves*, 1 Sw. & Tr. 250, 28 L. J., Prob. 18.

(*g*) *Swete* v. *Pidsley*, 6 No. Cas. 190; *Wood* v. *Goodlake*, 1 No. Cas. 144.

(*h*) *Re Countess of Durham*, 3 Curt. 57, 1 No. Cas. 365, 6 Jur. 176; *Re Pewtner*, 4 No. Cas. 479; *Re Darby*, ib. 427, 10 Jur. 164; *Jorden* v. *Jorden*, 2 No. Cas. 388; *Re Dickens*, 3 Curt. 60, 1 No. Cas. 398; *Re Almospino*, 1 Sw. & Tr. 508, 29 L. J. Prob. 46; but see *Re Edwards*, 6 No. Cas. 306; *Collier* v. *Langebear*, 1 No. Cas. 369.

(*i*) *Re Smartt*, 4 No. Cas. 38.

(*k*) *Re Willesford*, 3 Curt. 77, 1 No. Cas. 404; *Re Bacon*, 3 No. Cas. 644.

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[existence, it will be assumed, in the absence of circumstances leading to the contrary conclusion, that the paper was then in existence (*l*). So if there is a reference to the document by such terms as to make it capable of identification by extrinsic evidence, such evidence is admissible; and the identity being proved, the incorporation is complete. Thus, in the case of *Allen* v. *Maddock* (*m*), an unexecuted will was held to have been incorporated in a duly executed codicil by the heading: "This is a codicil to my last will and testament," no other document having been found to answer to the reference. And where a document headed "Instructions for the will of J. Wood," disposed of the residue "in such manner as the testator should direct by his will to be indorsed thereon," and the testator afterwards made a will, which though not indorsed as the "instructions" was expressed to be made "in pursuance of the instructions for his will," no other instructions being found, it was held that the "instructions" in question were incorporated in the will (*n*). The circumstance that the paper is described in the will as "made or to be made" is a strong ground for considering that it was not then in existence, and therefore that it is not duly incorporated (*o*). But it seems that the paper, though written after the date of the will, may be incorporated if subsequently the testator executes a codicil to his will, on the ground, it is presumed, that the codicil republishes the will and makes it speak from the date of the codicil (*p*).

In the case of *Sheldon* v. *Sheldon* (*q*), Dr. *Lushington* went very fully into the question when incorporated papers were to be included in the probate. It seems that in some cases there is a *necessity*, in others, merely a *title* or option to have them included in the probate. "The *title* to probate," said the learned Judge, "depends upon the clearness and sufficiency of the words of incorporation, the *necessity* of taking probate will depend upon the validity or invalidity of the instrument to be incorporated. For instance, if a man by will or codicil simply ratifies a deed, valid *per se*, no one would be compelled to take probate of that

[(*l*) *Re Hunt*, 2 Rob. 622; *Re Willmott*, 1 Sw. & Tr. 25; *Re Ash*, 1 Deane, 14, 2 Jur. N. S. 526.

(*m*) 11 Moore, P. C. C. 427. In the face of this and of the other authorities cited above, the case of *Re Sotheron*, 2 Curt. 831, 1 No. Cas. 73, would not now be followed.

(*n*) *Wood* v. *Goodlake*, 4 Monthly Law Mag. 155, 1 No. Cas. 144.

(*o*) *Re Skair*, 5 No. Cas. 57; *Re Astell*, ib. 489, n. See also *Re Hakewill*, 1 Deane, 14, 2 Jur. N. S. 168, and *Re Countess of Pembroke*, 1 Sw. & Tr. 250, 1 Deane, 182, 2 Jur. N. S. 526, is perhaps referable to this ground.

(*p*) *Re Hunt*, 2 Rob. 622.

(*q*) 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877.

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[deed, but the *title* to probate remains the same; if he ratifies an instrument invalid or inoperative *per se*, then the *title* and *necessity* co-exist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a title to probate, and if there be litigation, there is also necessity; *for, I have yet to learn how a Court of Law could give effect to such will, unless the instrument referred to formed part of the probate.*" The last remark is most important, as showing that declarations of trust of personal property in a will should never, where it can be avoided, be declared by reference to any other instrument, but be always contained in the will itself; otherwise, the instrument referred to, or a copy of it, must be included in the probate (*r*): unless there is a special reason against it, as the great length of the instrument referred to; when extracts, proved by affidavit to be the only essential parts, will be held sufficient (*s*): and, if the original instrument is in the power of the parties seeking probate, the Ecclesiastical Court is not satisfied with a copy, but will insist on the original instrument being deposited (*t*), except under very special circumstances, when a notarial copy will be received (*u*). Where a deed referred to in the will was in the hands of trustees, who refused to deliver it up, probate of the will alone was decreed (*x*).]

Testator cannot by his will empower himself to dispose by an unattested codicil.

Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which the Statute of Frauds was directed, and indeed, give to the will an operation in the testator's lifetime, contrary to the fundamental law of the instrument. Accordingly, where a testator by a will, attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons, and for such estates, as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this assumed power, executed an instrument attested by two witnesses, which he styled a deed-poll, and thereby carried

[(*r*) See *Sheldon* v. *Sheldon*, ante.
(*s*) *Re Countess of Limerick*, 2 Rob. 313.
(*t*) *Re Pewtner*, 4 No. Cas. 479.
(*u*) *Re Dickens*, 3 Curt. 60, 1 No. Cas. 398. Where the reference is to a will already in the registry of the Court; an office copy will be admitted, *Re Darby*, 4 No. Cas. 427.]
(*x*) *Re Battersbee*, 2 Rob. 439.

on the series of limitations commenced in his will, it was decided after much consideration, that this instrument operated as a codicil to the will, and, consequently, was incapable of affecting the freehold lands, for want of an attestation by three witnesses (*y*).

[The principle established by the last case, though professedly acquiesced in, seems nevertheless to have been transgressed in the case of *Stubbs* v. *Sargon* (*z*), so far at least as regards the grounds on which it was decided. The devise was of a freehold house to the persons who should be in copartnership with the testatrix at the time of her decease, or to whom she should have disposed of her business. Lord *Langdale*, M. R., and on appeal from his decision Lord *Cottenham*, C., decided that the devise was valid. Lord *Cottenham* said, "The difference between this case and *Habergham* v. *Vincent* is, that the will in *Habergham* v. *Vincent* contained no devise of the remainder (in fee after the limitation of the previous particular estates); it only declared that the remainder should be for such persons and for *such estates*, as the testator should, by any deed or instrument, attested by two witnesses, appoint. This was no disposition of the property, but a reservation by will, inoperative till the testator's death, of a power to dispose in his lifetime of freehold property, by an instrument not attested according to the Statute of Frauds. In the present case, *the disposition is complete*. The devisee, indeed, is to be ascertained by a description contained in the will, but such is the case with many unquestionable devises." The learned Judge then proceeded to advert to devises to second or third sons, or to the person who should be the testator's wife or servant at the time of his death, &c. Now it certainly was going a very great way to say that the disposition in the case in question was *complete*; it is conceived that no devise can be complete till every act depending *solely upon the volition of the devisor* has been done, to point out *of what* and *to whom* the devise is. Every such act is

(*y*) *Habergham* v. *Vincent*, 2 Ves. jun. 204, 4 B. C. C. 353; *Rose* v. *Cunynghame*, 12 Ves. 29; *Wilkinson* v. *Adam*, 1 V. & B. 422; *Whytall* v. *Kay*, 2 My. & K. 765; [*Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468, 7 Jur. 262, 2 No. Cas. 230; *Briggs* v. *Penny*, 3 De G. & S. 546; *Johnson* v. *Ball*, 5 De G. & S. 85. These cases are to be distinguished from *Smith* v. *Attersoll*, 1 Russ. 266, where the paper was signed by the *trustees*, and operated as an admission of the trusts. In *Metham* v. *Duke of Devon*, 1 P. W. 530, a testator directed his executors to pay a sum of money as he should by deed appoint; and subsequently, by a deed referring to the will, he made an appointment, which the Court held to be valid, on the ground that the deed was a part of the will, and in the nature of a codicil. The report does not state whether the deed was admitted to probate, as of course it ought to have been.

(*z*) 2 Keen, 255, 3 My. & Cr. 507.

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[part of the last will of the devisor, and unless it be such an act as the statute prescribes for pointing out his last will, it must be disregarded; but so far as the ascertainment of the subject or object of the devise depends on the acts of persons other than the devisor, another element is introduced, upon the mode of evidencing which the statute places no restriction. Of all the so-called analogous cases put by the Lord Chancellor, not one would depend on the will of the testator alone; in fact, his reasoning, if it proves anything, proves too much; for, as the devise is *complete* when the estate is given to a person to be ascertained by any future act of the testator, this act may be the mere writing of a paper signed by him, nay, it may be a verbal mention of the devisee to a third person, and thus the whole law, as to the execution of wills, would be evaded (*a*). These observations apply only to the *reasons* for the decision in the case of *Stubbs* v. *Sargon;* whether the act to be done in that case by the testatrix, was an act solely depending on herself, and not on other persons also, might not have been easy to decide; for instance, if her business had been a valuable one, and she had disposed of it by way of gift, the question who should be the donee might then be said to have depended on her alone, as every person would accept a valuable gift; but this raises quite a different question from that above discussed.]

On the same principle, it was decided, when personal property was disposable by a will not sufficient in point of execution to operate on freehold estates, that a testator could not so convert his real estate into personalty by a will duly attested, as to render it disposable by an unattested codicil, as personal estate (*b*).

General charge of legacies extends to legacies given by unattested codicil.

In one instance only, and that founded upon special grounds, not interfering with the principle in question, the freehold estate of a testator was, under the Statute of Frauds, indirectly liable to be affected by an unattested codicil. This occurred where a testator had by a will, duly attested, charged his real estate with legacies; which charge, it was held, extended not merely to the legacies bequeathed by that will, but also to such as were subsequently bequeathed by an unattested codicil (*c*).

[(*a*) See *Clayton* v. Lord *Nugent*, 13 M. & Wels. 200; where, according to Lord *Cottenham*, there was a "complete" devise.]

(*b*) See *Sheddon* v. *Goodrich*, 8 Ves. 481; *Hooper* v. *Goodwin*, 18 Ves. 156; *Gallini* v. *Noble*, 3 Mer. 691.

(*c*) *Hyde* v. *Hyde*, 3 Ch. Rep. 83, 1 Eq. Ca. Ab. 409; *Masters* v. *Masters*, 1 P. W. 421; *S. C.* 2 Eq. Ca. Ab. 192, pl. 7; Lord *Inchiquin* v. *French*, Amb. 33; [*Hannis* v. *Packer*, ib. 556;] *Brudenell* v. *Boughton*, 2 Atk. 268; *Habergham* v. *Vincent*, 2 Ves. jun. 204; *S. C.* 4 B. C. C. 353; *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Sheddon* v. *Goodrich*, 8

This doctrine was considered to be warranted by the rule applicable in the case of a general charge of debts; for, since a testator may, after charging his real estate with debts, increase the burthen on the land to an indefinite extent, by contracting fresh debts, without any further direct act of exoneration, it was thought that a charge of legacies ought, upon the same principle, to include legacies given by an unattested codicil; in short, that as a charge of debts extends to all debts which may happen to be owing at the testator's decease, so, a charge of legacies extends to all legacies which shall *then* appear to be bequeathed.

Limit of the rule which extends a general charge to legacies bequeathed by an unattested codicil.

If, however, a testator, instead of creating a general charge of legacies (leaving it to the ordinary rule to determine what are such), subjected his freehold estate expressly to such legacies as he should thereafter bequeath by an unattested codicil, *and direct to be paid out of his real estate*, this was considered as amounting, in effect, to the reservation of a power by will to charge the estate by an unattested codicil; and, consequently, the legacies bequeathed by such codicil did not affect the land. It will be perceived, that such a case differs from that of a charge of legacies generally, in this respect, that, unless the codicil bequeathing a legacy expressed that the land should be charged therewith, it could not be charged; and, therefore, it was not chargeable on the land as legacy merely, but by the special onerating terms of an unattested testamentary instrument (*d*). If the testator had contented himself with charging his real estate with such legacies as he should bequeath by an unattested codicil, this would have been effectual. Thus, in the case of *Swift* v. *Nash* (*e*), where a testator by his will directed the produce of real estate, which he had devised in trust for sale, to be applied in payment of the legacies which he might bequeath by any codicil or codicils to his will, it was held, that an annuity given by an unattested codicil was a charge on the fund. Of course, where a testator by his will charges his lands with the payment of the legacies "*hereinafter*" bequeathed, the charge does not extend to legacies bequeathed by a codicil (*f*).

General charge of legacies to be bequeathed by codicil, valid.

"Hereinafter," how construed.

Ves. 481; *Wilkinson* v. *Adam*, 1 V. & B. 445. [It is remarkable that this singular exception, which later Judges have professed not to understand, formed one of the instances by which Lord *Cottenham* supported his reasoning in *Stubbs* v. *Sargon*; the general rule, which is directly opposed to that reasoning, was not referred to.]

(*d*) *Rose* v. *Cunynghame*, 12 Ves. 29.

(*e*) 2 Kee. 20.

(*f*) *Bonner* v. *Bonner*, 13 Ves. 379; [*Strong* v. *Ingram*, 6 Sim. 197; *Radburn* v. *Jervis*, 3 Beav. 450; *Early* v. *Benbow*, 2 Coll. 355;] see also *Bengough* v. *Edridge*, 1 Sim. 173; [*Rooke* v. *Worrall*, 11 Sim. 216.]

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Whether the doctrine applies where real estate is primarily charged.

It is to be observed also, that a general charge, either of debts or legacies, onerates the land only as an auxiliary fund, the personalty being still primarily liable; which circumstance has been so often mentioned as an ingredient in cases of this nature, as to suggest a doubt whether the rule under consideration would not be repelled by the absence of it; though, certainly, the analogy to a charge of debts suggests no such limitation of the doctrine; for if a person by his will charges his real estate with his debts, the charge will extend to all the debts which he owes at his decease, whether the personalty be exempted therefrom, or not. At all events, it is clear, that a testator, after having charged his real estate with legacies, without exempting the personal estate from its primary liability, may, by an unattested codicil, bequeath *any portion* of his personalty exempt from such liability; which, of course, would have the same effect in augmenting the burthen upon the land, as an increase in the amount of the legacies (*g*).

Sum charged specifically and exclusively upon land not revocable by unattested codicil.

In accordance with the suggested limitation of the doctrine to legacies payable out of the general personal estate, it seems to have been decided, that, though such legacies once charged, by a will duly attested, might be revoked or modified by an unattested codicil (*h*); yet, that a sum, whether annual or in gross, which was charged specifically and exclusively upon land, was susceptible of no alteration in regard to the subject or object of the devise, by means of an unattested codicil; and the circumstance that a certain portion of personalty was combined with the real estate in the charge, would not vary the principle. And, therefore, where a testator devised an annuity out of a certain estate, *stock and utensils*, it was held not to be affected by an unattested codicil expressly revoking it (*i*). And even where a testator by a will, duly attested, gave all his real and personal estate to trustees, upon trust, out of the rents of the real and the produce of the personal estate, to pay his debts and funeral and testamentary expenses and legacies, and, in the next place, to pay two life annuities; and the testator, by a codicil, attested by one witness only, revoked one of the annuities, it was held, that such annuity continued a charge upon the real estate (*k*). It seems difficult to say that the annuities were not payable in

(*g*) *Coxe* v. *Bassett*, 3 Ves. 155.
(*h*) *Brudenell* v. *Boughton*, 2 Atk. 268; *Att.-Gen.* v. *Ward*, 3 Ves. 327.
(*i*) *Beckett* v. *Harden*, 4 M. & Sel. 1; [and see *Locke* v. *James*, 11 M. & Wels. 901.]
(*k*) *Mortimer* v. *West*, 2 Sim. 274.

the first instance out of the personal estate (*l*); and in this point of view, the case stands alone.

[Where a legacy given out of a mixed fund, consisting of personal estate and the proceeds of realty directed to be sold, was revoked by an unattested codicil, it was held that the legatee was entitled to such proportion of the legacy as the realty bore to the personalty (*m*).]

But, even where the charge on the land was confessedly auxiliary, yet it seems, that if a testator, instead of expressly revoking the legacies bequeathed by his will, attempted by an unattested will to make an entirely new disposition of his freehold and personal estate, as this was operative on the personalty only, the legacies continued to be a charge on the real estate; because the effect of what the testator had done, was merely to withdraw one of the funds on which the legacies were charged, and not the legacies themselves (*n*). And it would be immaterial in such a case, that the will contained an express clause of revocation of all former wills (*o*).

Section II.

As to Personal Estate and Copyholds.

Stat. 29 Car. 2, c. 3, s. 19, concerning nuncupative wills.

Nuncupative wills were not forbidden by the Statute of Frauds, but were placed under such restrictions, as practically abolished them; it being provided (sect. 19), that no nuncupative will should be good, where the estate bequeathed exceeded the value of thirty pounds, that was not proved by the oaths of three witnesses, present at the making thereof; nor unless it were proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his

(*l*) See *Fitzgerald* v. *Field*, 1 Russ. 428.

[(*m*) *Stocker* v. *Harbin*, 3 Beav. 479.]

(*n*) *Buckeridge* v. *Ingram*, 2 Ves. jun. 652.

(*o*) *Sheddon* v. *Goodrich*, 8 Ves. 500.

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own home, and died before he returned to the place of his or her dwelling. It was also enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony should be received, to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will. It was nevertheless provided, that any soldier, being in actual military service, or any mariner or seaman, being at sea (which was held to apply to seamen on board merchants' vessels), might dispose of his moveables, wages, and personal estate, as before the act. Such wills have been subjected to peculiar regulations, by various statutes (*p*).

What a good execution of a will of personalty.

The enactment which prohibited, or rather, as we have seen, regulated nuncupative wills, was considered not to apply to a will which was reduced into writing during the lifetime and by the direction of the testator; such a will, therefore, was sufficient for the disposition of personal estate, though it had not been signed, and was never actually seen by the testator (*q*). In two instances, however, the legislature imposed additional formalities of execution, namely, in regard to estates pur autre vie, as to the devise of which (though transmissible as personalty, unless where the heir takes as special occupant) the Statute of Frauds required three witnesses; and stock in the public funds, which, it was provided by certain acts of Parliament, should pass only by wills attested by two witnesses. But these exceptions to the general rule were, in a great measure, rendered nugatory, by the doctrine established by the case of *Ripley* v. *Waterworth* (*r*), that an executor, taking freeholds pur autre vie as special occupant, or even in the absence of special occupancy, under the statute of 14 Geo. 2, was bound to deal with them as part of the general personal estate of the deceased lessee, though bequeathed by a will not attested by three witnesses. The same principle would, it is conceived, apply to estates pur autre vie and stock *specifically* bequeathed, which an executor would unquestionably not be allowed to hold, in opposition to a specific legatee claiming under an unattested will. Such a question, of course, cannot arise under a will which is subject to the present law, as the recent

(*p*) 26 Geo 3, c. 63; 32 Geo. 3, c. 34, s. 1; 11 Geo. 4, c. 20, ss. 48, 49, 50, and 2 & 3 Will. 4, c. 40, ss. 14 & 15, [which are not affected by the 1 Vict. c. 26, see sections 11 & 12.]

(*q*) See *Allen* v. *Manning*, 2 Add. 490; *Re Taylor*, 1 Hagg. 641.

(*r*) 7 Ves. 425, [and see 18 Ves. 273, 1 Russ. 589, 11 M. & Wels. 323. But where the heir would have taken as special occupant, three witnesses were still required, *Marwood* v. *Turner*, 3 P. W. 166.

statute has abolished all distinctions in regard to the mode of execution between the various species of property.

Principles adopted by ecclesiastical courts in adjudicating on the validity of wills.

Although the law, until the recent alteration, did not require a will of personal estate to be authenticated by an attestation, or even by the signature of the testator, yet, in deciding on the validity of a will whose antiquity of date (*s*) brings it within that law, the Ecclesiastical Courts do not confine themselves to the mere proof of the handwriting of the testator (*t*): the history of the instrument is carefully and diligently scrutinized, and with more or less jealousy in proportion as its contents appear to be conformable to, or irreconcilable with, the moral obligations of the testator, and any previously avowed scheme of testamentary disposition. In tracing such history, the custody in which the instrument is found is, of course, most important. If the will is discovered carefully preserved among the papers of the testator, or has been by him deposited in the hands of a confidential and disinterested friend, there is a strong presumption in its favour; while, on the other hand, should it come out of the custody of a person who is interested in its contents, suspicion is excited, and still more, if (as has sometimes happened) the alleged depositary remains in concealment, contenting himself with transmitting the document anonymously to some party interested in maintaining its validity; under such circumstances, indeed, the Ecclesiastical Court has invariably rejected the alleged testamentary paper (*u*). Nothing, it is obvious, could be more dangerous than to assume and recognise the validity of a document, thus stamped with every mark of suspicion, on the mere strength of evidence as to the genuineness of the signature of the deceased, seeing with how much skill and success handwriting is frequently imitated; and this danger though diminished, is not excluded where the entire will (not the signature only) purports to be in the handwriting of the deceased (*x*). Where, however, the evidence of handwriting is in favour of the genuineness of the signature, and there is corroborative evidence, derived

(*s*) In *Pechell* v. *Jenkinson*, 2 Curt. 273, an undated and unattested codicil was found to a will dated in 1830. The testatrix died in January, 1839. There was no evidence to show when the codicil was made, and it was held that, in such a case where the deceased was as likely to do what she had done before as after 1 Vict. c. 26, the presumption should rather be that it was done before and was therefore valid. In like manner unattested alterations in a will which was dated before 1838, the testator surviving till 1855, were held in *Re Streaker*, 28 L. J. Prob. 50, to have been made before the act.

(*t*) *Machin* v. *Grindon*, 2 Lee, 406; *Crisp* v. *Walpole*, 2 Hagg. 531; and other cases cited, 4 Hagg. 224.

(*u*) *Rutherford* v. *Maule*, 4 Hagg. 213; *Bussell* v. *Marriott*, 1 Curt. 9.

(*x*) *Rutherford* v. *Maule*, 4 Hagg. 213.

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from circumstances, showing the probability of such a document having been executed, its validity will be recognised (*y*).

Copyholds not within the Statute of Frauds.

Copyholds were held not to be within the clause of the Statute of Frauds, which required wills to be attested by three witnesses; and this seems to have been the result of the narrow construction which that section of the statute received from the courts of judicature, rather than of any restrictive terms in the enactment itself, the language of which, in the opinion of some Judges of later times, was sufficiently comprehensive to have warranted its application to copyholds (*z*). It seems to have been thought, however, that as copyholds passed by the surrender and will taken together, and not by the will alone, (the will merely declaring the uses of the surrender, and the effect being the same as if the devisee's name had been inserted in the surrender,) a will of copyholds was not a devise or bequest of lands or tenements, within the 5th and 6th sections of the statute (*a*). The consequence was, that any instrument which was adequate to the testamentary disposition of personal estate was held to be sufficient for the devise of copyholds.

What constitutes a will of personalty and copyholds.

Accordingly, not only did an unattested writing, signed by the testator, operate as an effectual devise of copyholds, but testamentary papers, neither authenticated by the signature, nor even in the handwriting of the testator, were adjudged to be sufficient, if reduced into writing during the life of the testator, by his direction. And though the ground upon which copyholds were held, originally, not to be within the statute,—namely, that the estate passed by the combined operation of the surrender and will,—did not apply to equitable interests, which cannot be the subject of a surrender, yet, the well-known maxim, equitas sequitur legem, required that they should be governed by the same rule (*b*). [Equitable interests in customary freeholds passing by surrender (or deed having the effect of a surrender), and admittance, seem to have stood on the same footing: though on this point the authorities are not quite distinct (*c*).]

As to incomplete papers.

Cases, however, sometimes occurred under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made

[(*y*) *Wood* v. *Goodlake*, 1 No. Cas. 144.]

(*z*) See 2 P. W. 258, 1 Ves. 227, 7 East, 322.

(*a*) See 7 East, 322.

(*b*) *Tuffnell* v. *Page*, 2 Atk. 37, 2 P. W. 261, n.; *Carey* v. *Askew*, 1 Cox, 244; [*Wildes* v. *Davies*, 1 Sm. & Giff. 475.

(*c*) See *Wilson* v. *Dent*, 3 Sim. 385, pro; contra, *Hussey* v. *Grills*, Amb. 299, which case is doubted, 2 Scriv. Cop. p. 569; *Willan* v. *Lancaster*, 3 Russ. 108, seems to have gone on the question, whether the requisites of the power were complied with.]

necessary to the efficacy of the will, by the testator himself; he having chosen to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitively resolved on adopting the paper as his will. Thus, if there is found among the papers of a testator a will, written in his own handwriting, and concluding with the usual words "In witness," &c., but to which the testator's signature is not attached, it is clear that such paper, bearing as it does such evident marks of incompleteness, is not entitled to be treated as the final will of the deceased (*d*): though adequate as a will in writing to satisfy the requisitions of the old law. On this ground, too, the Prerogative Court has, in several instances, refused to grant probate of a paper, which the deceased had signed, and to which he had added a memorandum of attestation: he having died without ever making use of such memorandum, though he had abundant opportunity of doing so. Thus, in the case of *Beaty* v. *Beaty* (*e*), where the deceased, who died on the 21st of March, 1822, left a testamentary paper, dated the 6th of June, 1820, signed by him, containing an attestation clause in the following words— "Signed, sealed, and delivered, in the presence of," but which clause was not subscribed by any witnesses. A person who had attested a former will of the deceased, proved a conversation with him, in which the deceased said, that he had destroyed the will formerly attested by him, and had made another (meaning, it should seem, the paper in question); Sir *J. Nicholl* said:— "As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed, the presumption of law is *against* a testamentary paper with an attestation clause not subscribed by witnesses." The learned Judge proceeded to observe, that "the presumption against an instrument so circumstanced was a slight one, where the instrument, like that before the Court, was perfect in all other respects (*f*). Slight as it was, however, it must be rebutted by

Paper rejected on account of an uncompleted form of attestation.

(*d*) *Abbott* v. *Peters*, 4 Hagg. 380.

(*e*) 1 Add. 154; see also *Walker* v. *Walker*, 1 Mer. 503; [*Scott* v. *Rhodes*, 1 Phillim. 12; *Harris* v. *Bedford*, 2 Phillim. 177; *Stewart* v. *Stewart*, 2 Moo. P. C. C. 193.]

(*f*) See also *Doker* v. *Goff*, 2 Add. 42.

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some extrinsic evidence of the testator intending the instrument to operate in its subsisting state, before it could be admitted to probate." In reference to the deceased's conversation with the attesting witness of the former will, the learned Judge observed, that the mere vague declarations of testators that they have made their wills, are not always to be implicitly relied on; and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, that he has made a will, when he has *written* a testamentary paper, though unfinished (*g*).

Distinction where the testator is prevented from performing the concluding act of authentication.

Where, however, the testator's design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary preventing cause, no inference of the absence of matured testamentary intention arises from the imperfect state of the document, which, therefore, notwithstanding its defect, will be accepted as the will of the deceased, provided it fully discloses his testamentary scheme. As in the case which occurred in reference to the will of William Huntington, where the facts were as follows:—An attorney had taken down from the deceased's own mouth, a statement of his intentions respecting his property, which was read over to, and approved by him, and a fair copy directed to be made, and brought to him the next morning, to be executed as a will; but the testator died in the course of the night. Sir *J. Nicholl* held this circumstance of the direction to the attorney to make a fair copy, and to bring it the next morning for execution, to be conclusive of the testator having fully made up his mind on the subject of his will; and accordingly pronounced in favour of the testamentary paper (*h*).

What an adequate preventing cause.

In order to warrant the reception of the unfinished paper, it is not necessary that there should have been a physical impos-

(*g*) These cases appear to have overruled some early decisions, in which imperfect papers were admitted to probate as wills; unless those decisions can be referred to the principle next adverted to in the text, which seems doubtful, as but little allusion is made in them to the point, now so much regarded—whether the non-completion of the instrument was the consequence of the voluntary neglect of the deceased, or of inevitable accident. See *Cobbold* v. *Baas*, 4 Ves. 200, n.; *Haberfield* v. *Browning*, ib. In the case of *Roe* d. *Gilman* v. *Heyhoe*, 2 W. Bl. 1114, an instrument which was signed only, was held to be a valid will for devising copyholds (having been proved in the Ecclesiastical Court), though in the testimonium clause it was referred to as being under the hand and seal of the testator. From the evidence, however, it appeared that the testator had subsequently treated it as his will. See further on this subject, 1 Wms. Exors. 74, 75, 5th ed.

(*h*) 2 Phillim. 213; see also *Carey* v. *Askew*, 1 Cox, 241, 1 Wms. Exors. 61, 5th ed.

sibility of the testator's completing it before his dissolution; it is enough that the obstacle was such as to account for its being left incomplete, without having recourse to the supposition of an immaturity or change of testamentary intention. Thus, where a person went to the office of his attorney, on the 10th of December, and gave instructions for his will, promising to call and execute the will, when prepared, which he never did, though he lived to the 15th; but, as it appeared that the deceased did not afterwards leave his house, the state of his health being such as to render his doing so inconvenient, though not impossible; and as an anxiety, expressed to the attorney, to conceal it from his (the deceased's) wife, supplied a reason for his not sending for the will to be executed at home, the Court pronounced in favour of the written instructions taken down by the attorney, on the oral dictation of the deceased (*i*).

Contents of the paper must be complete.

But this doctrine in favour of imperfect papers obtains only, where the defect is in regard to some formal or authenticating act, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control. And, therefore, where a person while dictating his will to an amanuensis, is stopped by sudden decease, or the rapid declension of his mental or physical powers, such paper cannot be admitted to probate, as containing his entire will, without the most unequivocal testimony that the deceased considered it as finished; and the fact that the paper professes to dispose of the deceased's whole estate is not conclusive as to its completeness, because testators not unfrequently begin with such a universal disposition, and then proceed to bequeath specific portions of their property, by way of exception thereout. And the inference that the alleged will discloses part only of the intended disposition, would be strengthened by the circumstance of its not embracing persons, who, from their intimate relationship to the deceased, and from the contents of a prior revoked will, it was rather to be expected would have been primary objects of his consideration (*k*).

(*i*) *Allen* v. *Manning*, 2 Add. 490.

(*k*) *Montefiore* v. *Montefiore*, 2 Add. 354; see also *Griffin* v. *Griffin*, 4 Ves. 197, n. This case afforded two sufficient grounds for the rejection of the paper; first, that it was not the whole will; and, secondly, that its completion was not prevented by inevitable circumstances.

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Presumption against unfinished papers.

In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behoves those who assert its testamentary character distinctly to show, either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it (*l*). And the Prerogative Court will not grant probate of such defective papers, without the consent or citation of the next of kin (*m*).

Informal paper intended as a present will.

It ought to be observed, however, that we are not to rank among inchoate or unfinished testamentary papers, one which is shown to have been intended to perform the office of a present will, (if the expression may be allowed,) though executed for a temporary purpose, as appears by the testator having designated it a "memorandum of an intended will," or "head of instructions," or "a sketch of an intended will which I intend to make when I get home," &c. And it has frequently occurred that a testator has ultimately adopted as his final will, a paper so originally designed as instructions for, or in contemplation of, a more formal testament (*n*).

In all such cases, however, the Ecclesiastical Court requires very distinct evidence of a testator eventually adhering to and adopting, as his deliberate will, the preliminary document, in case he afterwards lived long enough to have executed a more complete instrument (*o*). But cases of this kind depend so much upon their particular circumstances, that little is to be learnt from general positions; and the inquirer into the subject is recommended to consult the cases referred to below, a full statement of which the limits of the present work do not allow.

(*l*) *Reay* v. *Cowcher*, 1 Hagg. 75, 2 ib. 249; *Wood* v. *Medley*, 1 ib. 661; *Re Robinson*, ib. 643; *Bragge* v. *Dyer*, 3 Hagg. 207; *Gillow* v. *Bourne*, 4 Hagg. 192. As to the contrary presumption in favour of a regularly executed and apparently complete will, vide *Shadbolt* v. *Waugh*, 3 Hagg. 570; *Blewitt* v. *Blewitt*, 4 Hagg. 410.

(*m*) *Re Adams*, 3 Hagg. 258.

(*n*) *Barwick* v. *Mullings*, 2 Hagg. 225; *Hattatt* v. *Hattatt*, 4 Hagg. 211; *Torre* v. *Castle*, 1 Curt. 303; [1 Wms. Exors. 62 et seq., 5th ed.]

(*o*) *Dingle* v. *Dingle*, 4 Hagg. 388; *Coppin* v. *Dillon*, ib. 361. [A subsequent complete will of course supersedes "Instructions for a Will." But sometimes the subsequent will refers to and incorporates the instructions; see *Wood* v. *Goodlake*, 1 No. Cas. 144.

SECTION III.

Execution and Attestation of Wills made since the Year 1837.

Execution of wills made since the year 1837.

THE statute 1 Vict. c. 26 (s. 9), provides, "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) *it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest* (*p*) *and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*"

As to the signature being at the foot or end.

[The provision in this enactment, relative to the signature of the will being at the "foot or end" thereof (which was evidently intended only to do away with the rule before noticed, that the name of the testator written in the commencement, thus:—"I, A. B., do make, &c.," was a sufficient signature), seems at first to have answered the purpose intended; subsequently, however, the Ecclesiastical Courts came to the conclusion that the words "foot or end" were to be construed strictly, and that if the signature did not immediately follow *under* the dispositive part of the will, and in such a manner that nothing could be written between the signature and the last words, the will was not properly executed (*q*). To obviate the inconveniences arising from these decisions, it was enacted by the statute 15 & 16 Vict. c. 24, (framed and introduced by Lord *St. Leonards* when Lord Chancellor:)—

Statute 15 & 16 Vict. c. 24.

1. That where by an act passed in the 1 Vict. (c. 26), intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, every will shall so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act,

[(*p*) The word "attest" is omitted from the corresponding Act of the Indian Council, see 5 Moo. P.C.C. 137.

(*q*) See the decisions on this point collected and observed upon, Sugd. R. P. Statutes, p. 311 et seq.

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[if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to, the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will (*r*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately (*s*) after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause (*t*), or of the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside, the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath, or which follows it (*u*): nor shall it give effect to any disposition or direction inserted after the signature shall be made.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court

[(*r*) See *Re Gullan*, 1 Sw. & Tr. 23, 27 L. J., Prob. 15, 4 Jur. N. S. 196; *Trott* v. *Trott*, 29 L. J. Prob. 156, 6 Jur. N. S. 760.

(*s*) *Page* v. *Donovan*, 3 Jur. N. S. 220, where the signature was at the end of a notarial certificate, immediately following the will, and detailing the circumstances under which it was made, and it was held good.

(*t*) *Re Mann*, 28 L. J. Prob. 19; *Re Dinmore*, 2 Rob. 641.

(*u*) *Re Greata*, 2 Jur. N. S. 1172; *Re Peach*, 1 Sw. & Tr. 138.

[of competent jurisdiction, in consequence of the defective execution of such will.

The wording of this statute may perhaps seem unnecessarily particular to the reader who has not consulted the decisions which led to its enactment; but it is considered unnecessary to treat of those decisions in this work, since the 2nd section of the statute renders it almost impossible that the validity of any will should hereafter have to be determined by them.

Alterations introduced by the recent enactments.

The points in which these enactments coincide with the Statute of Frauds have already been noticed, and the decisions thereon have been placed before the reader.

It remains to notice in what respects the law has been placed upon a new footing :—]

1st, Wills of real and personal estate are subject to the same rule [as to the ceremonial of execution], and such rule differs from that which previously obtained in regard to either species of property; two witnesses, instead of three, as formerly, are required to a will of freehold land, and two witnesses are also necessary to a will of personal estate or copyholds, which formerly required no attestation.

2ndly, [The signature of the testator must be somewhere near the end of the instrument, and so as not to be immediately over, or preceding any of the dispositive parts of the instrument, but it need not immediately follow or be under any of the dispositive part; whereas formerly the signature might be in any part of the instrument.

3rdly, The signature of the testator is to be "made" or "acknowledged" (the "signature," and not, as formerly, the "will," being the subject of acknowledgment)] in the simultaneous presence of the witnesses (*x*); whereas formerly the signature might be "made" before one, and [the will] acknowledged before the rest, or acknowledged before all the witnesses separately, [without any of them having seen the signature.]

4thly, A form of attestation is expressly dispensed with.

Lastly, The witnesses are not required, as heretofore, to be "credible," and some modification has taken place in regard to the disqualification arising from interest.

What amounts to an acknowledgment.

[The first alteration to be noticed is that respecting "acknowledgment." We have seen that, under the Statute of Frauds, when acknowledgment came to be admitted, the subject to be

[(*x*) *Moore* v. *King*, 3 Curt. 243, 2 No. Cas. 45, 7 Jur. 205.

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[acknowledged was the devise or bequest, that is, the will or paper writing itself; under the recent act, the subject to be acknowledged is the "signature of the testator," whether made by the testator, or by another for him (*y*), and the law on this point may be very shortly stated.

1st, There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature (*z*), not even though the testator should expressly declare that the paper to be attested by them is his will (*a*).

2ndly, When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will (*b*), or a direction to them to put their names under his (*c*), or even a request by the testator (*d*), or by some person in his presence (*e*), to sign the paper, is sufficient.

3rdly, When the signature is seen or expressly acknowledged it is not material that the witnesses are not told that the instrument is a will (*f*), or are deceived into thinking that it is a deed (*g*).

In a late case, where the testator's signature had been written for him by a person who afterwards called in two other persons, and bid them sign their names as witnesses, and *after* they had signed, the testator sealed the will, and said "I deliver this as my act and deed," Sir *H. J. Fust* said there had been no acknowledgment by the testator (*h*). As the learned Judge did not refer to the words spoken by the testator it seems clear he must have considered those words useless as an acknowledgment, because they were spoken *after* the witnesses had signed.

A testator, whether speechless or not, may acknowledge his signature by gestures (*i*).

[(*y*) *Re Regan*, 1 Curt. 908.

(*z*) *Re Harrison*. 2 Curt. 863; *Ilott* v. *Genge*, 3 Curt. 160, 4 Moo. P. C. C. 265, 8 Jur. 323; and see *Faulds* v. *Jackson*, 6 No. Cas. Supp. 1.

(*a*) *Hudson* v. *Parker*, 1 Rob. 14, 8 Jur. 786; *Shaw* v. *Neville*, 1 Jur. N. S. 408.

(*b*) *Re Davis*, 3 Curt. 748; *Re Ashmore*, ib. 756, 7 Jur. 1045.

(*c*) *Re Philpot*, 3 No. Cas. 2; *Gaze* v. *Gaze*, 3 Curt. 451, 7 Jur. 803; and see other cases mentioned by Lord *St. Leonards*, R. P. Stat. p. 332 et seq., (who seems to think that some of the decisions above cited are conflicting, or the earlier ones overruled by the later ones,) and by Wms. Executors, p. 77, n. (*k*), 5th ed.

(*d*) *Keigwin* v. *Keigwin*, 3 Curt. 607, 7 Jur. 840.

(*e*) *Re Bosanquet*, 2 Rob. 577; *Faulds* v. *Jackson*, 6 No. Cas. Sup. 1; *Re Jones*, 1 Deane, 3, 1 Jur. N. S. 1096.

(*f*) *Keigwin* v. *Keigwin*, sup.; *Faulds* v. *Jackson*, 6 No. Cas. Sup. 1.

(*g*) Sugd. R. P. Stat. p. 334; but see the observations of Sir *H. J. Fust*, in *Willis* v. *Lowe*, 5 No. Cas. 432.

(*h*) *Re Summers*, 7 No. Cas. 562, 14 Jur. 791, 2 Rob. 295.

(*i*) *Re Davies*, 2 Rob. 337; and see *Parker* v. *Parker*, Milw. Ir. Eccl. Rep. 545.

[It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged before *either* of the witnesses signs (*k*). The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times (*l*), and they must themselves subscribe their names in the presence of the testator, though not necessarily in the presence of each other (*m*).

It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution (*n*).

As to not requiring a form of attestation.

The clause in the statute 1 Vict. c. 26, enacting that no form of attestation shall be necessary, has been much observed upon; but it seems to mean only that no clause need be appended to the will, stating that the requirements of the act have been complied with (*o*): and this is not inconsistent with the fact that the witnesses are to "attest," as well as subscribe the will, the word "attest" meaning merely to act as a witness, which might in fact be done without subscription (*p*); although upon the construction of the act it may be that no attestation will satisfy its requirements, except through the outward mark of subscription (*q*). The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different.]

Still, it will be the duty of persons who superintend the execution of wills, not to be content with a bare subscription of the witnesses' names, but to make them subscribe a memorandum of attestation, recording the observance of all the circumstances which the statute makes necessary to constitute a valid execution; (*i.e.* that the signature was made, or acknowledged by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence;) for, though such statement in the memorandum of attestation, is not conclusive, and does not preclude inquiry into the fact, it would afford a much stronger presumption, that the

[(*k*) *Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117; *Cooper* v *Bockett*, ib. 648; *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 433, 5 Jur. N. S. 581, 28 L. J., Prob. 132.

(*l*) *Re Allen*, 2 Curt. 331; *Re Simmonds*, 3 ib. 79; *Moore* v. *King*, ib. 243, 2 No. Cas. 45, 7 Jur. 205.

(*m*) *Faulds* v. *Jackson*, 6 No. Cas. Sup. 1, Sugd. R. P. S. 337. The dictum contra in *Casement* v. *Fulton*, 5 Moo. P. C. C. 140, has not been followed, *Re Webb*, 1 Deane, 1, 1 Jur. N. S. 1096.

(*n*) *Re Dewell*, 17 Jur. 1130.

(*o*) *Bryan* v. *White*, 2 Rob. 315, 14 Jur. 791.

(*p*) *Ricketts* v. *Loftus*, 4 Y. & C. 519; and see *Freshfield* v. *Reed*, 9 M. & Wels. 404; *Burdett* v. *Spilsbury*, 10 Cl. & Fin. 340; *Hudson* v. *Parker*, 1 Rob. 14, 8 Jur. 788.

(*q*) See per Sir *C. Cresswell*, *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 439, 5 Jur. N. S. 581, 28 L. J., Prob. 132.]

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statutory requisition had been complied with, than where it is wanting; [and in the absence of such a memorandum, the witnesses are always called upon by the Court of Probate to make an affidavit that the statute was in fact complied with.] It will not be advisable for a testator, [except where absolutely necessary,] to avail himself of the privilege, which the new act expressly confers, (as the Statute of Frauds, according to the construction which it received from the judicature, also did,) of acknowledging the signature before the witnesses, instead of signing it in their presence, or of the permission to sign by the hand of another. The latter expedient, indeed, ought to be restricted in practice (though the legislature has not so limited it) to cases of extreme physical weakness, rendering it impossible or difficult for the testator to write his name; in such cases, even the exertion of making a mark might be oppressive. Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons; for in regard to this and all other particulars, the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should [though, as we have before seen, it need not necessarily] be in the name of the testator, rather than that of the amanuensis, who should merely be designated in the memorandum of attestation; where it would be proper (though not necessary) that the peculiar mode of execution should be stated.

As to testator's signing by the hand of another.

As to signing by mark, or by an amanuensis.

It will be observed, that in the clause above stated, which regulates the attestation of wills, the legislature has dropped the requisition of credibility, as an ingredient in the qualification of the witnesses; and has, moreover, (s. 14), expressly provided, 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.

Attesting witnesses not required to be credible.

It seems to have been generally considered, that this provision not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses, (as it clearly does,) but, that it even gives validity to the attesting act of an idiot or lunatic. This, however, seems very questionable. The signature, it will be observed, is required to be made or acknowledged by the testator in the *presence* of the witnesses; which

Persons incompetent to give evidence qualified.

would seem to imply that they should be mentally conscious of the transaction, according to the construction which was given (as we have seen (*r*)) to the same word occurring in the devise clause of the Statute of Frauds, which required that the attesting witnesses should subscribe in the testator's "presence;" such requisition being held not to be satisfied in a case, in which the testator fell into a state of insensibility, before the witnesses had subscribed their names to the memorandum of attestation; and the 14th section of the recent statute seems to be perfectly consistent with such a construction; for that clause does not in terms dispense with all personal qualifications in the witnesses to perform the act; it only removes the legal disqualification, arising out of his incompetency to give evidence of the fact in a judicial proceeding, which evidently may co-exist with intellectual capacity, as in the case of a person whose credibility of character has been destroyed by conviction for crime, a species of disqualification which was peculiarly inconvenient, as the testator might have been unaware of its existence, so that there was a special reason for its removal, which does not apply to palpable infirmity. Surely, if the legislature intended to enact so novel (not to say absurd) a doctrine, as that the functions of an attesting witness might be performed by any one who could scratch a paper without the least glimmering of intellectual consciousness, this would have been done in terms more clear and explicit, than by providing that persons incompetent to be admitted as witnesses to prove the execution of a will, should be sufficient attestators—expressions which seem rather to suppose a personal ability on the part of the witnesses to *perform* the act but a legal disability to *prove* it. Perhaps the point is not very likely to occur in practice; for no testator would think of choosing an idiot (*s*) or lunatic as an attesting witness to his will, unless he

Doubt whether qualification extends to lunatics, or other persons mentally incapable.

(*r*) Ante, p. 80; [and see the judgment of Dr. *Lushington* in *Hudson* v. *Parker*, 1 Rob. 14, 8 Jur. 786.]

(*s*) Supposing such persons to be, technically speaking, competent attesting witnesses, the effect of employing two such witnesses would be to render it necessary to have recourse to the testimony of other persons, for the purpose of proving the circumstances of the execution, which could not, in such case, be done (as it usually is) out of the mouths of the witnesses themselves; and it is to be observed that, although, in the case of a deceased witness, proof of handwriting is sufficient, the presumption being, that the will was duly attested, especially if the facts essential thereto were recorded in a memorandum of attestation, which was subscribed by the deceased; yet it does not follow that any such presumption would arise in the case of a lunatic witness, whose subscription (though his handwriting might be proved), could not be considered as affording any security that attention had been paid to the requisitions of the statute.

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Suggestion as to selection of witnesses.

were content to have his own sanity called in question. And here it may be observed, that the enlarged licence now given, in regard to the qualification of witnesses to wills, will not induce any prudent person to abate one jot of scrupulous anxiety, that the duty of attesting a will be confided to persons, whose character, intelligence, and station in society, afford the strongest presumption in favour of the fairness and proper management of the transaction; and preclude all apprehension in purchasers and others, as to the facility with which the instrument could be supported in a court of justice, against any attempt to impeach it; and now that the requisite number of witnesses is reduced to two, it is the more easy, as well as important, that the selection should be governed by a regard to such considerations. A devise or bequest to an attesting witness still, as under the old law, does not affect the validity of the entire will, but merely invalidates the gift to the witness, whose competency the legislature has established, by destroying his interest; and hence the remarks on this enactment have more properly found a place in a preceding chapter, which treats of the disqualifications of devisees (*t*).

Alterations to be signed and attested.

[By the 21st section it is 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 (*u*)."]

How far doctrines of this chapter extend to wills made since 1837.

The recent enactment, it will be perceived, precludes in reference to all wills to which it applies, many of the questions which arose under the Statute of Frauds. The cases respecting the local position of the testator's signature, and as to the admissibility of an acknowledgment, as a substitute for signing before the witnesses, the necessity of publication, and the quali-

(*t*) Ante, p. 65.

[(*u*) See *Re Wingrove*, 15 Jur. 91; *Re Hinds*, 16 Jur. 1161.]

fications of attesting witnesses, are obviously no longer applicable. The statute has also, by assimilating wills of real and personal estate in regard to the ceremonial of execution, gotten rid of the numerous questions which arose out of attempts by testators to create, by an attested will, a power to dispose of or charge their real estate by an unattested codicil, or to cure, by an attested codicil, a defect in the execution of a will or previous codicil; and hence, that part of the present chapter which treats of these several subjects ranges itself under the mass of legal learning, which recent legislation has rendered, or rather will eventually render, obsolete.

The prevention of all questions as to due execution must still mainly depend on the prudence and attention of the practitioner, who will, of course, take care to preclude all doubt as to whether the testator did see the attesting witnesses subscribe, or whether he might have seen them (for this, it will be remembered, is the true point of inquiry), by placing the witnesses and the testator in immediate juxtaposition in the same room during the whole business of the attestation; nor will he for a moment be content to rely on the doctrine to be noticed hereafter, which connects an attested codicil with a prior unattested will or codicil, as a ground for dispensing with a regular clause of attestation to each separate testamentary paper.

Having regard to the necessity [that the signature should now not be above or precede the dispositive part of the will,] it seems advisable, when a testator is in extremis, that the first or only signature should be at the end; for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last.

Section IV.

Defective Execution supplied by Reference, express or implied.

Whether attestation of codicil applies to previous will.

It remains to be considered in what cases a codicil duly attested communicates the efficacy of its attestation to an unattested will or previous codicil, so as to render effectual any devise or bequest which may be contained in such prior unattested instrument. It has been repeatedly decided, [in cases not affected

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[by the recent statute,] where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid.

Where codicil refers to will and both are written on same paper.

Thus, in the case of *De Bathe* v. *Lord Fingal* (*x*), where a testator made a will for the purpose (among others) of appointing guardians to his children. This will was attested by one witness only. The testator afterwards executed a codicil to the will, written on the same sheet of paper, and attested by three witnesses, and which was declared to be a codicil to his will thereunto annexed. The attestation was held to apply to the will, so as to constitute it a good testamentary appointment of guardians within the statute of 12 Car. 2, c. 24, which required that the appointment should have been signed in the presence of two witnesses.

So, in the case of *Doe* d. *Williams* v. *Evans* (*y*), where A. made a will professing to devise freehold property, but which was neither signed nor attested, though an attestation clause was drawn out; a fortnight afterwards a codicil was written below this clause on the same sheet of paper, in the following terms:— "I, A., make a codicil to the foregoing will, and thereby ordain that my wife B. be entitled to 200*l.* of my property in case she marry." (There was no date.) It was signed by the testator and attested by three witnesses, who simply wrote their names under the word "Witness." The Court of Exchequer held, that the execution and attestation applied to the whole of what was on the paper; and, consequently, that the will was duly attested for the devise of freeholds. The learned Barons relied much on the case of *Carleton* v. *Griffin* (*z*), and on the circumstance of the codicil referring to the will; Mr. Baron *Bayley* observing, that if the codicil had not referred to the will, he should have thought that it did not set up that instrument.

Where both are on same paper but without express reference.

In the preceding cases the attested codicil referred to the unattested document, but this was not essential where both were written on the same sheet of paper. Thus, in the case of *Guest* v. *Willasey* (*a*), where a testator, on the back of his will which was duly attested, wrote three codicils of different dates, of which the last alone was attested by three witnesses, *and which did not in terms refer to the preceding codicils*, but merely partially revoked an appointment of executors made by the second codicil, it was held, that the third codicil operated as a republication, not

(*x*) 16 Ves. 167.
(*y*) 1 Cr. & Mees. 42, [3 Tyr. 56.
(*z*) 1 Burr. 549.]
(*a*) 12 J. B. Moo. 2, [3 Bing. 614.]

only of such second codicil, but also of the first, between the contents of which and of itself there was no connexion.

Remarks upon the preceding cases.

As in all the preceding cases the attested and unattested instruments were contained in the same paper, *possibly* it might have been considered that the memorandum of attestation, appended to the posterior document was intended to apply to both; but the line of argument adopted by the Court of Exchequer in *Doe* v. *Evans* (where it will be remembered the codicil in terms referred to the will) does not admit of the case being referred to this principle, but rather leads to the conclusion, that the result would have been the same if the unattested will and the attested codicil had been detached; the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document for the purpose of identifying it. And the observations which fell from the Court of King's Bench in the more recent case of *Utterton* v. *Robins* (*b*), indicate a strong inclination in that Court to a similar opinion. [And in the subsequent case of *Aaron* v. *Aaron* (*c*), where an unattested codicil was referred to by a subsequent duly executed codicil, written on a separate paper, it was held that the former was thereby rendered effectual for the devise of real estate.] These authorities show that no reliance is to be placed on the early case of *Attorney-General* v. *Baines* (*d*), where a testator made a will in his own handwriting, but without witnesses, and afterwards made a codicil, wherein he recited and took notice of the will, which codicil was subscribed by four witnesses, and it was treated as clear by the Lord Chancellor, that the will was inoperative to devise freehold lands.

Where an attested codicil refers to the will, but not to a prior unattested codicil.

It should seem, however, that where the attested codicil is detached from and does not refer to the unattested will or previous codicil, it will not have the effect of curing the defective execution of such prior testamentary document.

Thus, in the case of *Utterton* v. *Robins* (*e*), where a testator, by several unwitnessed memorandums, subsequent to his will (which was duly attested), left a freehold house, which, among other estates, he had acquired since the date of the will, to his daughter, and afterwards made the following codicil, which was duly attested:—"I make this a further codicil to my will: I give and devise all real estates, purchased by me since the execution of

(*b*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.
[(*c*) 3 De G. & S. 475.]
(*d*) Pre. Ch. 270; *S. C.* 3 Ch. Rep. 10.
(*e*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

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my said will, to the trustees therein named, their heirs, &c., to the uses and upon the trusts therein expressed, concerning the residue of my real estates;" it was held, that the house passed to the trustees and not to the daughter.

Whether the "will" includes a codicil added thereto.

In this case the language of the second codicil seemed to repel the supposition, that the testator intended the estates purchased since the execution of the will to pass by the prior codicil; unless, indeed, when he speaks of his "will," he is to be understood as referring to all the prior testamentary documents, including the unattested codicil, according to the principle laid down by Sir *L. Shadwell* in the case of *Gordon* v. *Lord Reay* (*f*), where a testator, by a second codicil (which was duly attested), after reciting his will (which was also duly attested) by date, expressly confirmed all his provisions and bequests in it in favour of a certain individual: and the Vice-Chancellor was of opinion that this confirmation had the effect of entitling her to the benefit of a charge created on his freehold estates, by a prior unattested codicil, on the ground that the second codicil amounted to a republication (*g*) of the first. "The first codicil," said his Honor, "is part of the will, and if the second codicil is a republication of the will, it is a republication of everything that is part of the will. The second codicil does refer to the will; it ratifies and confirms the will and every thing that is part of it."

Since the act 1 Vict. c. 26.

[Though this decision was probably correct with reference to the law as it then stood, under which a paper, though unattested, might be a real codicil for some purposes, namely, as to personal estate, and so far to be considered as part of the will, and republished by a codicil duly attested, republishing the will: yet it does not apply in the present state of the law; for, until a testamentary paper is duly attested, it does not become a codicil in the legal sense of that word, and therefore where a testator makes several codicils, some of which are, but others are not, duly attested, a subsequent codicil, confirming "his will and codicils," confirms only the duly attested codicils.

A codicil not duly attested is not now included in the term "codicils" where there are duly attested codicils to satisfy its strict meaning.

This point was solemnly determined in the case of *Croker* v. *The Marquis of Hertford* (*h*), before the privy council, affirming the decision of Sir *H. J. Fust* in the Prerogative Court (*i*). Doctor *Lushington*, in delivering the judgment of the privy

Case of *Croker* v. *Hertford.*

(*f*) 5 Sim. 274; see also *Crosbie* v. *Macdouall*, 4 Ves. 610, stated post; *Pigott* v. *Wilder*, 26 Beav. 90.

(*g*) As to republication, see post, Chap. VIII.

[(*h*) 4 Moo. P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150.

(*i*) *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468, 7 Jur. 261, 2 No. Cas. 230.

[council, said, that "the strict and primary sense of the word 'codicil' was a testamentary instrument which would, *per se*, become valid immediately on the death of the testator; that the words of the codicil in the case before him, when so interpreted, were sensible with reference to extrinsic circumstances; for there were codicils duly executed so as to come within the strict and primary sense; therefore, according to the rule of construction stated by Mr. Wigram (*k*), however capable the words might be of another and popular interpretation, or however strong the intention of the testator, the strict and primary sense must be adhered to." On the same principle Sir *H. J. Fust* held (*l*), that codicils not duly attested were not ratified by a codicil of subsequent date which referred only to the will. But, as was implied in the reasons given for those decisions, the case is different where there is no instrument which satisfies the strict meaning of the words of reference. Another rule of construction stated by the same learned writer (*m*) then prevails. For where there is nothing in the context of a will to make it apparent that a testator has used words in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, the court may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances they are capable. Accordingly, in the case of *Ingoldby* v. *Ingoldby* (*n*), where there was a paper purporting to be a codicil, and subsequently the testator duly executed a codicil not referring to the paper, except by being called "*another* codicil to my will," Sir *H. J. Fust* held, that the first paper, purporting to be a codicil, was thereby rendered valid, and he distinguished the case before him from *Croker* v. *Marquis of Hertford*, on the ground that there were not, as in that case, any duly executed codicils to which the last codicil could be held to refer.

Nor in the term "will."

A different rule prevails where there is no duly attested codicil;

In the late case of *Allen* v. *Maddock* (*o*), the preceding authorities were elaborately commented upon by Lord *Kingsdown*, in delivering the judgment of the privy council affirming the decision of Sir *J. Dodson* in the Prerogative Court (*p*). In that case a will was made and signed in the presence of one witness only. Subsequently the testatrix made a codicil which com-

or duly attested will.

[(*k*) Wigram on Wills, p. 17.
(*l*) *Haynes* v. *Hill*, 7 No. Cas. 256, 1 Rob 795, 13 Jur. 1058.
(*m*) Wigram on Wills, Prop. 3.
(*n*) 4 No. Cas. 493.
(*o*) 11 Moo. P. C. C. 427.
(*p*) 3 Jur. N. S. 965.

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[menced—"This is a codicil to my last will and testament," and was duly executed. No other will having been found, it was held, upon the parol evidence of the extrinsic circumstances which was admitted to explain the intention of the testatrix (*q*), that the two papers, as together containing the will and codicil, were entitled to probate. From the observations made by Lord *Kingsdown* it is clear that the question whether an imperfectly executed paper is made effectual by a later perfectly executed one depends on the question whether the earlier paper is incorporated in the later: in other words, whether the reference be such as with the assistance (if necessary) of parol evidence of the circumstances will be sufficient to identify it. Difficulties will of course sometimes arise upon the evidence; for instance, a reference by a testator to his last will, or to a first or second codicil, is a reference in its own nature to one instrument to the exclusion of all others, and the description identifies the instrument: but a *general* reference to codicils, of which there may be several, is different, and probably not easy to render effectual by extrinsic evidence. But where the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to the admission of the evidence that by possibility circumstances might have existed in which the instrument referred to could not have been identified. In short, any unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated if the will or codicil is executed according to the requirements of the act of 1 Vict. c. 26, but with this important distinction, that since that act an unattested codicil is not part of the will for any purpose, and consequently is not incorporated or confirmed by a codicil of subsequent date referring only to the will (*r*).

Where a codicil was written on the same paper as an improperly executed will and was called "a codicil to my last will," it was held that the will was rendered valid (*s*); and again, where a codicil written on an imperfectly executed testamentary paper was called a "second codicil," it was held that the imperfect paper was rendered a valid first codicil (*t*); yet the relative position of the instruments in these cases was important only as assisting the identification of the imperfectly executed

The fact that an imperfect instrument is written on the

[(*q*) See Chap. XIII.
(*r*) See 11 Moo. P. C. C. 455, 461.
(*s*) *Re Claringbull*, 3 No. Cas. 1.
(*t*) *Re Smith*, 1 No. Cas. 1, 2 Curt. 796.

[instruments. The authorities clearly show, on the one hand, that it is not essential to the validity of an unattested testamentary instrument that it should be written on the same paper as an attested codicil (*u*), and on the other, that an unattested testamentary instrument is not rendered valid by the mere fact that it is written on the same paper as a valid codicil of subsequent date which does not refer to it (*x*), or on the same paper as a will previously well executed, which the codicil, without mentioning the unexecuted writing, expressly refers to and thereby republishes (*y*): nor yet by the mere fact that all three documents are on the same piece of paper (*z*). The distinction already mentioned which the late Wills Act has introduced in the principle of the decisions on this point under the Statute of Frauds seems to explain why an unattested codicil needs now to be referred to in order to be rendered valid by a subsequent codicil; and consequently the cases of *Guest* v. *Willasey* (*a*), and *Gordon* v. *Lord Reay* (*b*), are not authorities in the present state of the law.

same paper as a perfect one, only facilitates identification.

An unexecuted alteration (*c*) in a will is not rendered valid by a subsequent codicil, ratifying and confirming the will, unless in such codicil the alteration be specially referred to (*d*), or unless it be proved affirmatively by extrinsic evidence, that the alteration was made before the codicil (*e*).]

Unexecuted alterations when rendered valid by subsequent codicil.

[(*u*) See *Allen* v. *Maddock*, 11 Moo. P. C. C. 448, 451, 452; *Re Almosnino*, 1 Sw. & Tr. 508, 29 L. J., Prob. 46.

(*x*) *Re Phelps*, 6 No. Cas. 695; *Re Hutton*, 5 No. Cas. 598.

(*y*) *Haynes* v. *Hill*, 1 Rob. 795, 7 No. Cas. 256, 13 Jur. 1058. The cases *Re Barke*, 4 No. Cas. 44, and *Re Wollaston*, 3 ib. 529, are apparently contra; sed quære.

(*z*) *Re Willmott*, 1 Sw. & Tr. 36; *Re Peach*, ib. 138.

(*a*) Ante, p. 108.

(*b*) Ante, p. 110.

(*c*) Note the difference between an alteration, and an addition or codicil.

(*d*) *Lushington* v. *Onslow*, 6 No. Cas. 183, 12 Jur. 465; see this case and others, post, Ch. VII. s. 2, ad fin.

(*e*) See per Sir *H. J. Fust*, ib.; *Re Tegg*, 4 No. Cas. 531.]

CHAPTER VII.

REVOCATION OF WILLS.

SECTION I.

By Marriage and Birth of Children, or Marriage alone.

Effect of marriage alone under old law;

UNDER the law which existed prior to the act of 1 Vict. c. 26, the marriage of a woman absolutely revoked her will, and that, too, though her testamentary capacity was subsequently restored by the event of her surviving her husband (*a*). [But this rule applied to wills and testaments in the strict sense of those words; for a will made by a married woman before marriage, under a power, was not necessarily revoked by her marriage (*b*); nor if so made during the coverture, was it necessarily revoked by the death of the husband (*c*).]

—in case of a woman;

—in case of a man.

The marriage of a man, however, had no such revoking effect upon his previous testamentary disposition, in regard to either real or personal estate, on the ground, probably, that the law had made for the wife a provision independently of the act of the husband, by means of dower; nor did the birth of a child alone revoke a will made after marriage, since a married testator must be supposed to contemplate such event; and the circumstance that the testator left his wife enceinte without knowing it, was held not to impart to the posthumous birth any revoking effect (*d*).

Old rule as to revocation by marriage and birth of children.

Marriage and the birth of a child conjointly, however, revoked a will, whether of real or personal estate; these circum-

(*a*) *Forse* and *Hembling's* case, 4 Rep. 61, And. 181; *Cotter* v. *Layer*, 2 P. W. 624; *Doe* v. *Staple*, 2 T. R. 695; see also *Hodsden* v. *Lloyd*, 2 B. C. C. 533; [*Long* v. *Aldred*, 3 Add. 48.

(*b*) *Logan* v. *Bell*, 1 C. B. 872; and compare *Douglas* v. *Cooper*, 3 My. & K. 378.

(*c*) *Morwan* v. *Thompson*, 3 Hagg. 239; *Clough* v. *Clough*, 3 My. & K. 296; *Du Hourmelin* v. *Sheldon*, 19 Beav. 389. But of course if the power be given to the wife "in case she dies in the lifetime of her husband," and in case of her surviving, the property is given to her absolutely, a will made during coverture is inoperative if the wife survives, as the power never arose, *Price* v. *Parker*, 16 Sim. 198; *Trimmell* v. *Fell*, 16 Beav. 537.]

(*d*) *Doe* v. *Barford*, 4 M. & Sel. 10.

stances producing such a total change in the testator's situation, as to lead to a presumption, that he could not intend a disposition of property previously made, to continue unchanged. This rule (which was borrowed from the civil law (*e*)) was applied by the ecclesiastical courts to wills of personalty, at an early period (*f*), and was more recently and reluctantly extended to devises of freehold estates, its application to which had been supposed to be precluded by the Statute of Frauds (*g*); but the case of *Christopher* v. *Christopher* (*h*), which occurred in 1771, and another decision which speedily followed (*i*), closed all controversy on the point. The case of *Christopher* v. *Christopher* also decided, that the revocation was not confined to the case of an unmarried testator; but equally applied, where a married man made a will, then survived his wife, married again, and had issue by his second wife. It was also immaterial that the birth of the child was posthumous, and that the probability of such birth was never disclosed to the testator; as the doctrine does not suppose that, in every particular instance, an intention to revoke actually exists; but it annexes to the will a tacit condition, that the party does not intend it to come into

(*e*) The civil law evinced a marked anxiety to guard children from the consequences of negligent omission, or capricious exclusion from the testamentary dispositions of their parents. To exclude a son, it was not sufficient that he was not named in his father's will, but it was necessary *expressly* to disinherit him. "Qui filium in potestate habet, curare debet, ut eum hæredem instituat, vel exhæredem eum nominatim faciat. Alioquin, si eum silentio præterierit, inutiliter testabitur; adeo quidem ut et si vivo patre filius mortuus sit, nemo hæres ex eo testamento existere possit; quia scilicet ab initio non constiterit testamentum." Just. Inst. lib. 2, cap. 13, s. 5.

And the rule was extended to the children of a son who was dead, or ceased to be under his father's power; and was further extended by Justinian to *all* the children of a testator, female as well as male, and all the other descendants by the male line. Lib. 2, c. 13, s. 5.

And even the arrogation of an independent person, or the adoption of a child under the power of its natural parent, (in respect of which the civil law makes special provisions,) was a revocation of an antecedent will. "Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem, eum, qui est sui juris aut per prætorem, secundum nostram constitutionem, eum, qui in potestate parentis fuerit, testamentum ejus rumpitur, quasi agnatione sui hæredis." Lib. 2, c. 17, s. 1.

Rules of the civil law in regard to filial claims to a provision.

The civil law, too, left it open to children to complain, not only that they were omitted in a will, but that they were unjustly disinherited; and the suggestion in such a case was, that the testator was disordered in his senses, though, to support his allegation, it was only necessary to prove that the will was inconsistent with the duty of a parent. See Just. Inst. lib. 2, c. 18, De inofficioso testamento. Happily these laws, so hostile to the spirit and genius of our free constitution, have never found a reception in this country, whose sound policy it has been to leave unfettered the power of disposing of property.

(*f*) *Overbury* v. *Overbury*, 2 Show. 242; *Lugg* v. *Lugg*, 2 Salk. 592, [1 Ld. Raym. 441, 12 Mod. 236;] *Brown* v. *Thompson*, 1 Eq. Ab. 413, pl. 15, *Eyre* v. *Eyre*, 1 P. W. 304, n., and Cas. cit. 2 Ed. 266, 1 Phillim. 478.

(*g*) See *Parsons* v. *Lanoe*, 1 Ves. 192, [1 Wils. 243, Amb. 557;] *Gibbons* v. *Caunt*, 4 Ves. 848.

(*h*) Dick. 445; *S. C.* cit. 4 Burr. 2182.

(*i*) *Sprange* v. *Stone*, Amb. 721.

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operation, if there should be a total change in the situation of his family (*k*).

Question whether children must spring from subsequent marriage.

It has never been decided, whether to produce revocation the children must spring from the subsequent marriage, or it is sufficient that a testator has future children of an existing marriage, survives his wife, and then marries again, but has no children by the second wife. In *Gibbons* v. *Caunt* (*l*), Sir *R. P. Arden*, M. R., inclined to the conclusion, that the order of the events made no difference, and that the will was equally revoked in either case.

Effect of provision for future wife or children or both.

[Marriage and the birth of issue do not produce revocation of a will made before 1838, where there is a provision made for the wife and children by the will itself (*m*), or, it is conceived, by settlement executed previously to the will. But it follows, from the doctrine before alluded to, viz., that this kind of revocation is the result of a tacit condition annexed to the will, taken in connexion with the circumstances as they exist at the date of its execution, that a provision for wife and children, under a settlement executed *after* the will, cannot prevent revocation, as it might have done, if the question had been one merely of intention (*n*). Neither will a provision for the wife alone suffice, though made before the will (*o*); and it is not clear that a provision for children alone, though made before the will, would be sufficient for that purpose; for since, (as we shall presently see) the revocation by marriage and the birth of children results from a legal implication wholly independent of the testator's intention, no circumstance demonstrative of a contrary intention on his part (such as a provision for children, the birth of children necessarily supposing marriage) can affect the question. And the case of *Kenebel* v. *Scrafton* (before referred to), in terms, confines the exception to the case where both wife and children are provided for.]

Effect where will disposes partially only.

According to the opinions of Lord *Mansfield* (*p*), Lord *Ellen-*

(*k*) *Doe* v. *Lancashire*, 5 T. R. 49; [*Israell* v. *Rodon*, 2 Moo. P. C. C. 51; *Matson* v. *Magrath*, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.]

(*l*) 4 Ves. 848.

[(*m*) *Kenebel* v. *Scrafton*, 2 East, 530. This decision was entirely overlooked by Sir *C. Cresswell* in the recent case of *Re Cadywold*, 1 Sw. & Tr. 34, 27 L. J., Prob. 36, which cannot therefore be taken as any authority.

(*n*) *Israell* v. *Rodon*, 2 Moo. P. C. C. 51; overruling *Talbot* v. *Talbot*, 1 Hagg. 705; *Johnston* v. *Wells*, 2 Hagg. 561, and apparently, *Ex parte Earl of Ilchester*, 7 Ves. 348; see also *Matson* v. *Magrath*, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.

(*o*) *Marston* v. *Roe* d. *Fox*, 8 Ad. & Ell. 14, 2 Nev. & P. 504, which seems to overrule *Brown* v. *Thompson*, 1 Eq. Ab. 413, pl. 15.]

(*p*) *Brady* v. *Cubit*, Doug. 31.

borough (*q*), [and *Tindal*, C. J. (*r*),] the revocation does not take place, where the will disposes of less than the whole estate. Supposing this to be clear (though it has never been positively decided), it would remain to be considered, whether a will which actually, though not professedly, disposes of the testator's entire estate, as where there are particular gifts sufficient to absorb the whole, but no residuary disposition, falls within the principle. [Considering, however, that the inquiry is not what the testator intended, but of the fact whether the wife and children be provided for, it can scarcely be doubted that this question would, if it arose, be answered in the affirmative.] In the recent case of *Marston* v. *Roe* (*s*), it was contended, that the descent of an after-acquired real estate upon the child, in whose favour the will was contended to be revoked, prevented the revocation; but Lord C. J. *Tindal*, who delivered the judgment of the Court of Exchequer Chamber, expressed a decided opinion, against allowing the question of revocation, depending upon a tacit condition annexed to the will, to be influenced by circumstances posterior to its execution; though, as the Court considered that what had here descended to the child was a mere legal estate, the case did not raise the point.

Will not revoked in favour of a pre-existing child.

It seems, also, that marriage and the birth of a child or children revoke a will which is subject to the old doctrine, only where the effect of throwing open the property to the disposition of the law, would be to let in such after-born child or children; for, if it would operate for the exclusive benefit of a pre-existing child, the ground for subverting the will fails. Thus, in the case of *Sheath* v. *York* (*t*), where a testator having a son and two daughters, directed his real and personal estate to be sold for payment of his debts and for the benefit of those children. The testator was at that time a widower, he married again, and had issue, one child. The question arose on a bill filed by the creditors for a sale, whether the will was revoked as to the real estate. Sir *W. Grant* held that it was not. "In all the cases," said his Honor, "the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate disposed of by a will made before his birth. The condition implied in these cases was, that the

(*q*) *Kenebel* v. *Scrafton*, 2 East, 541.
[(*r*) *Marston* v. *Roe* d. *Fox*, 8 Ad. & Ell. 57.]
(*s*) 8 Ad. & Ell. 14.
(*t*) 1 Ves. & B. 390.

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testator, when he made his will in favour of a stranger, or more remote relation, intended that it should not operate if he should have an heir of his own body. In this case, there is no room for the operation of such a condition, as this testator had children at the date of the will, of whom one was his heir apparent, and was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children, those children not deriving any benefit whatever from the revocation, which would have operated only to let in the eldest son to the whole of that estate, which he had by the will divided between the eldest son and the other children of the first marriage."

Remarks upon *Sheath* v. *York*.

The reasoning of the Master of the Rolls extends only to cases in which the heir is among the pre-existing children; and, it is probable, that the revocation would take effect, notwithstanding the existence of such children, where the consequence of the intestacy would be to cast the estate on one of the subsequently-born children (being an eldest or only son), or upon the children of both marriages (all being daughters). Such is the rule in regard to personal estate (this, or at least the children's share of it, being distributable among all the children pari passu), a testamentary disposition of which has been decided to be revoked by a subsequent marriage and birth of children, notwithstanding the prior existence of children (*u*). These observations assume, that the effect of the will being revoked by the application of the doctrine in question, will be to produce intestacy; but this is not necessarily the case; for the consequence of the revocation might have been (*x*) to revive a prior uncancelled will, which contained a provision for the wife and children, protecting it from the revocation which the marriage and the birth of children produced on the subsequent will.

Death of child in testator's lifetime immaterial.

At one period, it appears to have been supposed, that, if the child or children, whose birth had revoked, or contributed to revoke the will, died in the lifetime of the testator, this event would restore its efficacy; the reasoning being founded on a fancied, but evidently mistaken analogy to the case of a will, whose operation has been restored by the destruction of a subse-

(*u*) *Holloway* v. *Clarke*, 1 Phillim. 339; [*Walker* v. *Walker*, 2 Curt. 854;] see also *Gibbons* v. *Caunt*, 4 Ves. 849; *Wright* v. *Netherwood*, 2 Salk. Evans's ed. 593, n.

(*x*) Not since 1 Vict. c. 26, s. 22.

quent revoking or inconsistent will (*y*). The latter doctrine, however, is obviously a consequence of the ambulatory state of the instrument, during the testator's lifetime, and stands upon grounds which do not apply to the class of revocations under consideration; and therefore it has been, in later times, most properly adjudged, that a will, once revoked by marriage and the birth of a child, continues revoked, notwithstanding the decease of such child before the will takes effect (*z*).

Rule to be deduced from the cases.

[It seems, therefore, that the rule of law is this, that a will executed before the statute 1 Vict. c. 26, is revoked by subsequent marriage and the birth of issue, unless provision is made for them by the will, or by previous settlement; or unless revocation would produce no benefit to those objects.]

Parol evidence of intention inadmissible.

It was for a long time a question whether the presumed revocation could be rebutted by parol evidence [of circumstances or declarations showing merely a contrary intention on the part of the testator.] In the case of *Brady* v. *Cubit* (*a*), Lord *Mansfield* considered the evidence to be admissible; but his Lordship's notion was warmly opposed by Lord C. J. *Eyre*, in the case of *Goodtitle* v. *Otway* (*b*), the Chief Justice observing, that, in cases of revocation by operation of law, the presumptio juris is so violent, that it does not admit of circumstances to be set up in evidence to repel it. Lord *Kenyon* and Mr. Justice *Buller*, too, in *Doe* v. *Lancashire* (*c*), strongly expressed their objection to, and disregard of, the parol evidence, which had been adduced to show, that the testator intended to make another will, excluding the child, whose birth, with the previous marriage, produced the revocation. Sir *R. P. Arden*, M. R., in *Gibbons* v. *Caunt* (*d*), said, that he believed they went the length of admitting the evidence, but he did not like it. In *Kenebel* v. *Scrafton* (*e*), parol evidence of an intention not to revoke was offered; but Lord *Loughborough*, on sending the case to the Court of King's Bench, observed, "that the parol evidence did not weigh at all, being only conversations, and not amounting to a republication, a court of law would pay no regard to it:" but the conclusion at which the Court arrived on another point rendered it unnecessary to enter into the question of the admissibility of the evidence. This question has now been com-

(*y*) *Wright* v. *Netherwood*, 2 Ev. Salk. 593, n.; 2 Phillim. 266, n.

(*z*) *Helyar* v. *Helyar*, cit. 1 Phillim. 413; *Sullivan* v. *Sullivan*, cit. 1 Phillim. 343; *Emerson* v. *Boville*, 1 Phillim. 342.

(*a*) Dougl. 31.

(*b*) 2 H. Bl. 522.

(*c*) 5 T. R. 61.

(*d*) 4 Ves. 848.

(*e*) 5 Ves. 663; *S. C.* 2 East, 530.

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pletely set at rest by the recent case of *Marston* v. *Roe* (*f*), in the Exchequer Chamber, in which the judges, after an elaborate argument, unanimously decided against the admissibility of the evidence, as being productive of the evils, the prevention of which was the great object of the enactments respecting wills in the Statute of Frauds. This view of the subject, of course, excluded the applicability of the cases in the ecclesiastical courts, where the evidence was long admitted in regard to wills of personal estate (*g*). No question of this nature can occur, under any will made since the year 1837, as the recent act, sect. 18, has provided, "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 administrator, or the person entitled as his or her next of kin under the Statute of Distributions (*h*))." And (s. 19) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Wills made since 1837 absolutely revoked by marriage under 1 Vict. c. 26.

These clauses suggest only two remarks:—

Remarks upon the enactment.

1st, That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate; and that no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected aliunde, will prevent the revocation.

2nd, That merely the birth of a child, whether provided for by the will or not, will not revoke it; the legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce revocation, having wholly disregarded the other.

The new rule, though it may sometimes produce inconvenience, has at least the merit of simplicity, and will relieve this

(*f*) 8 Ad. & El. 14. [This case seems to have been overlooked by Sir *E. Sugden* in *Hall* v. *Hill*, 1 D. & War. 114, 115.]

(*g*) See *Gibbens* v. *Cross*, 2 Ad. 455; *Fox* v. *Marston*, 1 Curt. 494. [The practice of those courts is now altered in conformity with the case of *Marston* v. *Roe*; see *Israell* v. *Rodon*, 2 Moo. P. C. C. 51; *Matson* v. *Magrath*, 1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350.

(*h*) *I. e.*, next of kin, as such. Where the limitation in default of appointment was to the donee's children, who happened to be also his next of kin under the statute, the exception was nevertheless held to apply, *Re Fitzroy*, 1 Sw. & Tr. 133.

branch of testamentary law from the many perplexing distinctions which grew out of the pre-existing doctrine.

Wills made before the late act how revoked since that act.

[Wills made previously to the year 1838 are still governed by the old law, so far as respects revocation by marriage, and the birth of issue. By the 34th section of the recent act, it is enacted, that "the act shall not extend to any will made before the 1st January, 1838;" and though (as we shall hereafter see (*i*), all acts of revocation, *which are apparent on the face of the will*, must, as to wills made before that date, be executed in conformity with the requirements of the new law; yet this section leaves all other modes of revoking such wills—namely, those which do not appear on the face of the will—to the operation of the old law; and, consequently, marriage alone, without the birth of children, will not, at the present day, revoke a will made previously to the year 1838 (*k*).]

Section II.

By Burning, Cancelling, Tearing, or Obliterating.

Revocation of will of lands by burning, tearing, cancelling, or obliterating, under the old law.

By the 6th section of the Statute of Frauds (*l*), a will of freehold estate might be revoked by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence, and by his directions and consent, and the transaction was not required to be attested by witnesses. [And as the revocation of a will of personalty was subject only to the restriction (*m*) of not being altered or changed by any words, or by will by word of mouth only, except the same were committed to writing, any of the acts mentioned in the 6th section were of course sufficient to revoke such a will.]

Revocation of wills of personalty.

Evidence of *animus* admitted.

The enactment has not been construed so strictly as to exclude all evidence tending to show *quo animo* the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances. The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory

[(*i*) *Brooke* v. *Kent*, 3 Moo. P. C. C. 334, and other cases noticed post.

(*k*) *Langford* v. *Little*, 2 Jo. & Lat. 633; *Re Shirley*, 2 Curt. 657, overruling a contrary dictum in *Hobbs* v. *Knight*, 1 Curt. 768.

(*l*) 29 Car. 2, c. 3, s. 6; Irish Parl. 7 Will. 3, c. 12, s. 6.

(*m*) See sect. 22 of Eng. & Ir. Statute.

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evidence, indicating the animus revocandi to be wanting. Thus, if a testator inadvertently throws ink upon his will, instead of sand (*n*), or obliterates [or attempts to destroy] it during a fit of insanity (*o*), it will remain in full force, notwithstanding such accidental or involuntary act. So, the destruction of the instrument by a third person in the lifetime, but without the permission or knowledge of the testator, would not affect its validity; à fortiori, if the destruction took place after his decease (*p*). In the converse case, however, where there is an intention on the part of the testator to destroy the will, but the act is not completed, the authorities present more matter for consideration.

Revocation by partial tearing.

The early case of *Bibb* d. *Mole* v. *Thomas* (*q*) has generally been considered to establish that a very slight act of tearing is sufficient to effect a revocation, if done with such intention; the facts were as follows :—The testator (who had frequently declared himself dissatisfied with his will), being one day in bed near the fire, ordered W., a person who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased; he opened and looked at it, then gave it a rip with his hands, so as almost to tear a bit off, then rumpled it together, and threw it on the fire; but it fell off. However it must soon have been burnt, had not W. taken it up, and put it into her pocket. The testator did not see her do so, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer; the testator several times afterwards said that was not, and should not, be his will, and bid her destroy it; she said at first, "So I will when you have made another;" but, afterwards, upon his repeated inquiries, she falsely told him that she had destroyed it; she asked him to whom the estate would go when the will was burnt? he answered, to his sister and her children. The testator afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother J. M., and desired the person would tell his brother so, and that he wanted to see him; he afterwards wrote to his brother, saying, "I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will;" and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator, however, died

[(*n*) Per Lord *Mansfield*, *Burtonshaw* v. *Gilbert*, Cowp. 52.]

(*o*) *Scruby* v. *Fordham*, 1 Ad. 74. [*Borlase* v. *Borlase*, 4 No. Cas. 139; *Re Shaw*, 1 Curt. 905; *Re Downer*, 18 Jur. 66.]

(*p*) *Haines* v. *Haines*, 2 Vern. 441.

(*q*) 2 W. Bl. 1043.

without making another will. The jury thought this a sufficient revocation, and the Court of Common Pleas was of the same opinion, on a motion for a new trial; Lord C. J. *De Grey* observing, that this case fell within two of the specific acts described by the Statute of Frauds; it was both a burning and a tearing; and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.

Mere attempt to destroy will not necessarily revocatory.

It is not, however, to be inferred from this case, that the mere intention, or even attempt of a testator to burn, cancel, tear, or obliterate his will, is sufficient to produce revocation, within the meaning of the Statute of Frauds; for, the legislature having pointed out certain modes by which a will may be revoked, it is not in the power of the judicature, under any circumstances, to dispense with part of its requisitions, and accept the mere intention or endeavour to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavour may have been frustrated by the improper behaviour of a third person.

Thus, in the case of *Doe* d. *Reed* v. *Harris* (*r*), where it appeared by the evidence of the testator's servant, that the testator had thrown the will on the fire, from which it was immediately snatched by a relative who lived with him, when the fire had merely singed the cover. The testator afterwards insisted upon her giving up the will to be burnt, which she promised to do; and, in order to satisfy the testator, threw something into the fire, which was not the will (as she represented it to be), of which the testator appears to have had some suspicion; for, upon the witness expressing her doubt whether the will had been destroyed, the testator said, "I do not care, I will go to L., if I am alive and well, and make another will." The Court of Queen's Bench held, that the will was not revoked, on the ground that there had been no actual burning of the instrument. "It is impossible," said Lord *Denman*, "to say that singeing a cover is burning a will within the meaning of the statute." Mr. Justice *Patteson* said, "To hold that it was so, would be saying, that a strong intention to burn, was a burning. There must be, at all events, a partial burning of the instrument itself; I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is."

(*r*) 6 Ad. & Ell. 209, [2 Nev. & P. 615.]

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It was held, however, that the slight burning which occurred in this case, with the attendant circumstances and conduct of the testator, though not sufficient to satisfy the Statute of Frauds, yet had the effect of revoking the will, in regard to property to which that statute did not extend, as copyholds (*s*).

Effect where a testator suspends the destroying act before its completion.

But (to return to cases within the statute) it is clear, that if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinized, if the testator himself had put his own construction upon his somewhat equivocal act, by subsequently treating the will as undestroyed.

Thus, in the case of *Doe* v. *Perkes* (*t*), where a testator, upon a sudden provocation by one of the devisees, tore his will asunder; and, after being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury had been done; it was held that the will remained unrevoked. Here, (to use the language of a distinguished Judge) (*u*) the intention of revoking was itself revoked, before the act was complete. [And in *Elms* v. *Elms* (*x*), the testator had torn his will nearly through, but the evidence seemed to show that he intended to do more, and was stopped by the remonstrance of a person present, and it was held that the will was not revoked.]

Presumption as to destruction of wills.

In one instance, the Prerogative Court decided in favour of a will, without any distinct proof of its existence after the death of the testator, or of its destruction in his lifetime; there being strong reason, under all the circumstances, for supposing that the testator had unintentionally destroyed it; or, at all events, that its destruction, whenever effected, was without his concurrence (*y*). The general rule in that court seems to be, that if a will is traced into the testator's possession, and either cannot afterwards be found (*z*), or is found torn (*a*), the presumption is

(*s*) *Doe* d. v. *Reed* v. *Harris*, 8 Ad. & Ell. 1.

(*t*) 3 B. & Ald. 489; [and compare *Re Colberg*, 1 No. Cas. 90, 2 Curt. 832.]

(*u*) Vide 6 Ad. & Ell. 215.

[(*x*) 1 Sw. & Tr. 155, 4 Jur. N. S. 341, 27 L. J., Prob. 96. And see *Re Cockayne*, 1 Deane, 177, 2 Jur. N. S. 454.]

(*y*) *Davis* v. *Davis*, 2 Ad. 223; [and see *Patten* v. *Poulton*, 1 Sw. & Tr. 55, 27 L. J. Prob. 41, 4 Jur. N. S. 341.]

(*z*) *Lillie* v. *Lillie*, 3 Hagg. 184; *Wargent* v. *Hollings*, 4 Hagg. 245; *Tagart* v. *Squire*, 1 Curt. 289; [*Welch* v. *Phillips*, 1 Moo. P. C. C. 299; *Brown* v. *Brown*, 8 Ell. & Bl. 876; *Re Shaw*, 1 Sw. & Tr. 62.]

(*a*) *Hare* v. *Nasmyth*, 3 Hagg. 192, n.; *Lambell* v. *Lambell*, ib. 568; [*Williams* v. *Jones*, 7 No. Cas. 106; *Re Lewis*, 1 Sw. & Tr. 31, 27 L. J. Prob. 31.

(in the absence of circumstances tending to a contrary conclusion (*b*)), that he destroyed or tore it animo revocandi; but that if the will is traced out of the deceased's custody, it is incumbent on the party asserting the revocation, to prove that the will came again into such custody, or was destroyed by his directions (*c*). [If, after executing his will, the testator becomes insane, and it appears that the will was in his custody as well after as before the time when he became so, it cannot be assumed that he tore or destroyed it while he was sane; the fact must be proved affirmatively (*d*).

Obliteration by a pencil.

Where a pencil instead of a pen is used the cancellation is not necessarily ineffectual (*e*), but is always *primâ facie* considered deliberative (*f*), and it must be shown that it was intended to be effectual.]

Effect of partial obliterations.

A revocation by obliteration may be either partial or total. If the testator draws a pen over part of the will only, a revocation is effected pro tanto, and the unobliterated portions remain in force (*g*); as where (to put a common case) a testator, after having devised property to several persons, strikes out the name of one of the devisees, by which act he gives to the will the same operation as if that devisee had died in the testator's lifetime. If the estate or interest of the co-devisees was joint, the entire property would vest in the survivor or survivors; if they were tenants in common, the share of the deceased devisee would lapse, and a partial intestacy be produced (*h*); unless the subject of gift were a pecuniary legacy, or any other article of personal estate, which would fall to the residuary legatee, if there was one, or unless the will was made since the year 1837, in which case the revocation of a specific devise would cast the real estate, which was the subject of such devise, into the hands of the residuary devisee.

In order to constitute a revocatory obliteration, it is not essential that every word shall be obliterated; the revocation is complete if enough of the material part be expunged, to show

[(*b*) As to the evidence required to rebut the presumption, see *Saunders* v. *Saunders*, 6 No. Cas. 518; *Battyl* v. *Lyles*, 4 Jur. N. S. 718; *Re Gardner*, 1 Sw. & Tr. 109, 27 L. J. Prob. 55; *Re Ripley*, 1 Sw. & Tr. 68, 4 Jur. N. S. 342; *Re Simpson*, 5 Jur. N. S. 1366; *Re Pechell*, ib. 406. The will being lost, and the animus revocandi disproved, a copy will be admitted to probate; see same cases.]

(*c*) *Colvin* v. *Fraser*, 2 Hagg. 327; [and see *Wynn* v. *Heveningham*, 1 Coll. 638, 639.

(*d*) *Harris* v. *Berral*, 1 Sw. & Tr. 153.

(*e*) *Mence* v. *Mence*, 18 Ves. 348.

(*f*) *Francis* v. *Grover*, 5 Hare, 39, and the cases there cited.]

(*g*) *Sutton* v. *Sutton*, Cowp. 812.

[(*h*) *Larkins* v. *Larkins*, 3 Bos. & P. 16; *Short* v. *Smith*, 4 East, 419; *Humphreys* v. *Taylor*, 7 Bac. Ab. Gwil. 363.]

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Effect of partial obliteration.

an intention that the devise shall not stand; as where the testator draws his pen across the devisee's name (*i*). But where the name occurred several times in the course of the will, and the testator drew his pen across the name in some instances, and left it standing in others, it was held, that the bequests were not revoked; the Vice-Chancellor observing, that as the description, and in some places the name, of the legatee remained uncancelled, the Court would not be warranted in holding that the bequests to her were revoked (*k*). But the obliteration, in the envelope of a will, of the words referring to it as the will of the testator, accompanied by expressions written by him, showing that he considered that it was revoked by another will, which, for want of being duly attested, had no such operation, is, of course, not such an obliteration as to have the effect of revoking the will.

Thus, where (*l*) the testator by a will dated the 22nd of November, 1796, and by a codicil dated 2nd of July, 1808, both of which were duly attested, devised certain real estates, and afterwards made an unattested will, dated the 25th of September, 1812, which contained a different disposition of the same lands; and at his death all these three instruments were found wrapped up in one piece of paper. The posterior unattested will was contained in an envelope on which was endorsed, "The last will and testament of John Douce Garthwaite, dated the 25th September, 1812." The envelope containing this will was, along with the former will and codicil, inclosed in another envelope, on which was the following endorsement in the testator's own handwriting:—

"The last will &c twenty fifth Sept^{r} 1812
~~The last will and testament & codicil~~ Superseded
of by the above
John Douce Garthwaite 25th April 1812"

The question was, whether the writing and obliteration on the exterior envelope amounted to a revocation of the will of 1796; and Lord *Eldon* was clearly of opinion that it did not.

Effect where cancellation is connected with a new disposition.

And here it may be observed, that, where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant

(*i*) See *Mence* v. *Mence*, 18 Ves. 350.
(*k*) *Martins* v. *Gardiner*, 8 Sim. 73.
(*l*) *Grantly* v. *Garthwaite*, 2 Russ. 90.

the revocation of the old, to depend upon the efficacy of the new, disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force. As where a testator, having some time before executed a will, duly attested, to each sheet of which he had affixed a seal, instructed his solicitor to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals of the old will; when, after all the seals but one had been thus removed, he was informed, that the new will would not be operative upon his lands in its then state, which induced him to desist; and before the new will was complete, the testator died: it was held, that the original will remained unrevoked (*m*).

[But the mere intention to make at some future time a new will, is not enough to prevent revocation. If the testator destroys his will without having done some act which he believes or intends to be a new disposition, the revocation is complete (*n*). Neither does the doctrine apply to past transactions, so that a will which has been cancelled on the supposition that an earlier will is thereby revised, shall, on the failure of that condition (*o*), be re-established.]

Partial obliteration connected with a new disposition.

And the same principle applies to partial alterations; so that, where a testator strikes out the name of a devisee, and at the same time interlines that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative for want of an attestation, the obliteration will also fail of effect (*p*).

Effect where a testator having made two inconsistent wills, revokes posterior will.

Where the posterior of two inconsistent wills is [lost (*q*) or is] cancelled (*r*), or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly is, according to the old law (which, it will be remembered, still applies to all wills made before the year 1838), to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, will come into operation at his decease. This is an

(*m*) *Hyde* v. *Hyde*, [1 Eq. Ab. 409,] 3 Ch. Rep. 155; see also *Onions* v. *Tyrer*, 1 P. W. 343, Pre. Ch. 459; [*Burtonshaw* v. *Gilbert*, Cowp. 49;] *Sutton* v. *Sutton*, Cowp. 812; *Winsor* v. *Pratt*, 5 J. B. Moo. 484, 2 Br. & B. 650; [*Perrott* v. *Perrott*, 14 East, 440; *Scott* v. *Scott*, 1 Sw. & Tr. 258.

(*n*) *Williams* v. *Tyley*, 1 Johns. 530.

(*o*) *Dickenson* v. *Swatman*, 6 Jur. N. S. 831.]

(*p*) *Short* v. *Smith*, 4 East, 419, (this case however did not raise the precise point); *Kirke* v. *Kirke*, 4 Russ. 435; [*Lock* v. *James*, 11 M. & Wels. 901; and see corresponding cases under the late act, post.

(*q*) *Rainier* v. *Rainier*, 1 Jur. 754.

(*r*) *Goodright* v. *Glazier*, 4 Burr. 2512.]

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inevitable consequence of the ambulatory character of the instrument, which character, of course, pervades its whole contents, extending no less to an express clause of revocation, than to every other part (*s*); and hence, the distinction sometimes suggested, between cancelled wills which do, and those which do not, contain such clauses, in regard to their revoking effect upon an earlier uncancelled will (*t*), is wholly without foundation. The clause of revocation, like every other clause, is silent until the death of the testator calls the will into operation; and though the Ecclesiastical Courts appear for a long period to have entertained the notion, that a cancelled will with a clause of revocation, revoked a prior uncancelled one (*u*); yet those Courts have of late greatly modified, if not wholly abandoned the doctrine; for, in the case of *Usticke* v. *Bawden* (*x*), Sir *John Nicholl* laid it down, that the legal presumption was neither adverse to nor in favour of the revival of a former uncancelled, upon the cancellation of a late revocatory, will. The question was, he said, open to decision either way, according to facts and circumstances, and which in the case then before the Court, were thought strongly to favour the revival.

Effect of destroying *one* part of duplicate will.

Sometimes a testator for greater security executes his will in duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire.

In these cases the presumption generally is, that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances. Thus, where (*y*) he cancels that part which is in his own possession (the duplicate being in the custody of *another*), it is very strongly to be presumed, that he does not intend the duplicate to stand, he having destroyed all that was within his reach (*z*). So, if the testator have himself possession of both, the presumption of revocation holds, though weaker (*a*), and even if, having both in his possession, he alters one, and then destroys that

(*s*) *Harwood* v. *Goodright*, Cowp. 92.

(*t*) See Roper on Revocation, 94.

(*u*) Vide cases cited in *Moore* v. *Moore*, 1 Phillim. 412.

(*x*) 2 Ad. 116; [and see *James* v. *Cohen*, 3 Curt. 770. 8 Jur. 249.]

(*y*) See Sir *Edward Seymour's* case, cit. Com. 453; *S. C.* 1 P. W. 346, [2 Vern. 742; and see *Colvin* v. *Fraser*, 2 Hagg. 266; *Rickards* v. *Mumford*, 2 Phillim. 23.]

(*z*) *Burtonshaw* v. *Gilbert*, Cowp. 49; *Boughey* v. *Moreton*, 3 Hagg. 191, n., [2 Ca. tem. Lee, 532.

(*a*) *Re Hains*, 5 No. Cas. 621.]

which he had altered, there is also the presumption, but weaker still.

These several gradations of presumption were stated by Lord Chancellor *Erskine* in the case of *Pemberton* v. *Pemberton* (*b*), the circumstances of which were as follows:—Two parts of a will were found in the possession of a testator at his death, the one cancelled, having various alterations in it, and the other not altered or cancelled; and the finding of the jury in three successive trials at law on these facts, and the evidence generally, was, that the will was not revoked; and in that conclusion the Lord Chancellor finally concurred.

Perhaps, in such a case, the presumption can hardly be said to lean in favour of the revocation at all; for the testator having made alterations in one part, and then cancelled the part so altered *only*, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state.

And it is observable, that, in the case of *Roberts* v. *Round* (*c*), where one of two duplicate wills was found partly mutilated, and the other carefully preserved in the testator's own possession, it was held, that the will remained unrevoked.

The evidence in *Pemberton* v. *Pemberton*, as to the intent with which the act of cancellation was done, consisted partly of subsequent declarations of the testator, and these tended rather to favour the revocation than otherwise; but both Lord *Eldon* and Lord *Erskine* adverted to the very little weight due to expressions thrown out by testators in conversation with persons respecting their wills.

Effect of alteration in one duplicate.

[As the destruction of one copy of a will is generally a revocation of the entire will, so an obliteration made in one copy will be considered of the same effect as if there was no duplicate; for the duplicate wills form together (if such be the intention, which is a question for the jury to decide) but one will and codicil, and an obliteration in one copy is equivalent to an obliteration in both (*d*).]

Effect where same expressions occur in will and codicil, and testator obliterates them in one only.

The principle on which the destruction of one part of a duplicate will is held to be a revocation, has been extended to a case in which the testator, having expressed the same purpose in both a will and codicil, obliterated it in the codicil alone.

(*b*) 13 Ves. 310.
(*c*) 3 Hagg. 548.
[(*d*) *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 724.]

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These circumstances occurred in *Utterson* v. *Utterson* (*e*), where a testator, after disposing of the residue of his real and personal property among his children, introduced into the will an interlineation, excepting his son J., to whom he gave one shilling. By a codicil (being the fifth), after expressing his disapprobation of the conduct of this son, he declared it to be his determination that he (the son) should have no more of his property than one shilling. It appeared that the testator subsequently became reconciled to his son, and cancelled the codicil by drawing his pen across it, *but did not strike out the interlineation in his will.* This raised the question, whether the cancelling of the codicil destroyed the effect of the interlined clause in the will, with reference to some copyhold property; for, as to the freeholds, it was admitted that the interlineation was inoperative, for want of an attestation; and in regard to the personalty, the Ecclesiastical Court had held the cancellation of the codicil to have cancelled the excluding clause in the will; and of this opinion was Sir *W. Grant*, with respect to the copyholds. "Even independently of the parol evidence of reconciliation," said his Honor, "it seems to me, that the act of obliteration speaks as clearly as words could have done a change of intention as to the exclusion, and not merely as to the mode of effecting it. It is the same as if he had said, 'This codicil no longer speaks my sentiments; I am no longer dissatisfied with my son, and no longer mean to make any distinction between him and my other children' (*f*)."

Effect of testator destroying will, and leaving codicil undestroyed.

Sometimes there is found, among the papers of a testator, a codicil without the will of which it professes to be part; in such cases the question arises, whether or not the destruction of the will (which it is to be presumed, in the absence of proof to the contrary, was the act of the testator) operates, impliedly, to revoke the codicil also. This question, of course, depends mainly upon the contents of the several testamentary documents. If the dispositions in the codicil are so complicated with, and dependent upon, those of the will as to be incapable of a separate and independent existence, the destruction of the will necessarily revokes the codicil (*g*); and it should seem, that the general pre-

(*e*) 3 V. & B. 122.

As to expressions of resentment in wills.

(*f*) Here it occurs to remark, that testators should be dissuaded from making or altering their wills (as they are often disposed to do), under the influence of any temporary excitement occasioned by the ill-conduct of a legatee; and, still more, from recording their resentment in their wills, which may have the effect of wounding the feelings of, and casting a stigma on, the offending party long after the transaction which gave occasion to the irritation has been effaced from recollection, or is remembered only to be regretted.

(*g*) *Usticke* v. *Bawden*, 2 Ad. 116; [*Greenwood* v. *Cozens*, 5 Jur. N. S. 497.]

sumption in the Ecclesiastical Courts is rather in favour of the intention to involve a codicil in the revocation of the will, of which it is a part, where a contrary intention cannot be collected, either from the contents of the codicil itself, or from extrinsic evidence (*h*).

But if the codicil is capable, from the nature of its contents, of subsisting independently of the will, its validity will not be affected by the destruction of such will. Thus, where (*i*) a testator having made a will, the contents of which were unknown, the same not being found at his death, subsequently made a codicil in favour of an illegitimate child, born since the date of the will, and its mother, which he entitled, "A codicil to my last will, and to be taken as part thereof;" Sir *H. Jenner* decided, that the codicil was unrevoked, there being nothing to show an intention to revoke it; and the dispositions it contained (which were in favour of those for whom the testator was under a moral obligation to provide, and who were not in existence when the will was executed), being of such a nature as to be capable of taking effect independently of the will.

Revocation by burning, tearing, or otherwise destroying, within the recent statute.

The act 1 Vict. c. 26, s. 20, allows a will to be revoked by "*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." It is enacted by section 21, "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."

Obliterations, &c. in a will to be signed and attested.

[And by section 22 it is 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 inten-

(*h*) *Medlycott* v. *Assheton*, 2 Add. 229; *Coppin* v. *Dillon*, 4 Hagg. 369.

[(*i*) *Tagart* v. *Squire*, 1 Curt. 289; *Clogstoun* v. *Walcott*, 5 No. Cas. 623, 12 Jur. 422; *Re Halliwell*, 4 No. Cas. 400, 9 Jur. 1042.

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[tion 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*."

For the interpretation of the 20th section of this statute it will be seen that we must still refer to the decisions upon the corresponding clause in the Statute of Frauds, so far as they bear upon revocation by "burning" or "tearing." It has been held, that the word "tearing" includes "cutting" (*k*); for, to use the words of the judgment in the case referred to, it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty pieces it was not revoked. The cutting, in order to be effectual, need not necessarily be a cutting up of the whole will; the cutting out of a particular clause or of the name of a legatee will be a revocation pro tanto (*l*); but cutting out that part of the will which may be said to be the principal part (*m*), or that part which gives effect to the whole, as the signature of the testator (*n*), or, it is presumed, of the witnesses (*o*), will cause a revocation of the whole will. And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left (*p*). It has also been decided by the Court of Exchequer (*q*), that tearing off, animo revocandi, the seal of a will (though no seal is necessary to the due execution of a will) constituted a revocation. They said the instrument purported by the attestation clause to be executed under seal, and was published and attested as a sealed instrument, and when the seal was torn off it ceased to be the instrument which the testator purposed to execute and publish. And this authority was followed with approbation by Sir *W. P. Wood*, V. C., in a case (*r*) where a testator made his will on five sheets of paper, signed the first four, and signed and sealed the fifth, with an attestation clause describing the mode of execution: he afterwards tore off

Construction of the word "tearing."

Partial cutting effectual pro tanto,

—and sometimes in toto.

[(*k*) *Hobbs* v. *Knight*, 1 Curt. 768; *Re Cooke*, 5 No. Cas. 390; and see *Clarke* v. *Scripps*, 16 Jur. 783, 2 Rob. 563.

(*l*) *Re Cooke*, supra; *Re Lambert*, 1 No. Cas. 131.

(*m*) *Williams* v. *Jones*, 7 No. Cas. 106.

(*n*) *Hobbs* v. *Knight*, 1 Curt. 768; *Re Gullan*, 1 Sw. & Tr. 23; 27 L. J. Prob. 15; *Re Lewis*, ib. 31, 1 Sw. & Tr. 31; *Re Simpson*, 5 Jur. N. S. 1366.

(*o*) *Birkhead* v. *Bowdoin*, 2 No. Cas. 66. The point was not actually decided: and see *Hobbs* v. *Knight*, 1 Curt. 780, 781; *Abraham* v. *Joseph*, 5 Jur. N. S. 179. Decided accordingly in a case of total obliteration, *Re James*, 7 Jur. N. S. 52.

(*p*) *Re Gullan*, 1 Sw. & Tr. 23, 27 L. J., Prob. 15, 4 Jur. N. S. 196; *Gullan* v. *Grove*, 26 Beav. 64.

(*q*) *Price* v. *Powell*, 3 H. & N. 341.

(*r*) *Williams* v. *Tyley*, 1 Johns. 530.

[the signature from each of the first four sheets and struck through with his pen the signature on the last, and, the animus revocandi being proved in evidence, it was held that the will was revoked by the tearing. Where a will is found torn, evidence is, of course, admissible to show that it is merely the effect of wear (*s*); for mere tearing or destruction without intention to revoke is no revocation under the express terms of the act (*t*).

Meaning of words "otherwise destroying."

The words "otherwise destroying" in the clause now under consideration must be taken to mean a destruction ejusdem generis with the modes before mentioned, that is, destruction in the proper sense of the word of the substance or contents of the will, and not a "destroying" in a secondary sense (*u*), as by cancelling or incomplete obliteration. These, unless they prevent the words, as originally written, from being apparent, that is, apparent by looking at the will itself, are plainly excluded by the statute (*x*), and glasses or other scientific means may be used (*y*) for discovering what the words obliterated originally were. But parol evidence is inadmissible (*z*), except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it; and then under the late statute, as under the Statute of Frauds, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substitutive words not being properly attested, the former gift will remain good, and evidence must be admitted to show what the original words were (*a*). The same rule, it is presumed, applies to an erasure of the name of the legatee (*b*); as it appears to do to an erasure of the name of an executor (*c*).

Parol evidence admissible in cases of conditional revocation.

[(*s*) *Bigge* v. *Bigge*, 9 Jur. 192, 3 No. Cas. 601, and see 1 Eq. Ca. Ab. 402, pl. 3, marg.

(*t*) *Re Tozer*, 2 No. Cas. 11, 7 Jur. 134; *Re Hannam*, 14 Jur. 558; *Clarke* v. *Scripps*, 16 Jur. 783, 2 Rob. 563.

(*u*) *Stephens* v. *Taprell*, 2 Curt. 458; *Hobbs* v. *Knight*, 1 Curt. 779.

(*x*) *Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 Jur. 1114; *Stephens* v. *Taprell*, 2 Curt. 458; *Re Beavan*, ib. 369; *Re Rose*, 4 No. Cas. 101; *Re Brewster*, 29 L. J. Prob. 69, 6 Jur. N. S. 56.

(*y*) *Re Ibbetson*, 2 Curt. 337; *Lushington* v. *Onslow*, 6 No. Cas. 187, 12 Jur. 465.

(*z*) *Townley* v. *Watson*, 3 Curt. 761, 8 Jur. 111, 3 No. Cas. 17.

(*a*) *Soar* v. *Dolman*, 3 Curt. 121, 6 Jur. 512; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334, 1 No. Cas. 99; *Re Ibbetson*, 2 Curt. 337; *Re Reeve*, 13 Jur. 370. If there is no evidence what the words were, probate is decreed in blank, *Re James*, 1 Sw. & Tr. 238.

(*b*) See *Short* v. *Smith*, 4 East, 419.

(*c*) *Re Parr*, 1 Sw. & Tr. 56, 29 L. J. Prob. 70, 6 Jur. N. S. 56; *Re Harris*, 1 Sw. & Tr. 536, 29 L. J. Prob. 79. See also per Sir *W. Grant*, 7 Ves. 379; and *Hale* v. *Tokelove*, 14 Jur. 817, noticed post. *Re Bedford*, 5 No. Cas. 188 is contra. Sed qu.

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Satisfaction proved by obliteration.

[Striking a pen through the gift to a legatee, though not now a sufficient revocation of a legacy, and not to be noticed in the probate, may nevertheless not be altogether without use; for where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the original will would be received as evidence that the payment was intended to be in satisfaction of the legacy (*d*). The Court of Probate, however, sometimes grants a fac simile probate of the will containing interlineations, or parts of the will struck through; and the Court of Construction then seems to consider the alterations as made before execution, and therefore effectual. Where this is really so, the duty of the Court of Probate would seem to be to grant probate of the will as altered, in the same way as if the alterations had been referred to in the attestation clause (*e*).

Distinction as to acts apparent and acts not apparent on the face of a will.

With respect to a will executed previously to the 1st of January, 1838, the question whether it is revoked or altered by any act apparent on the face of it done on or after that date, as by erasure, obliteration or interlineation, must be determined by reference to the provisions of the late act (*f*); but, as has been before noticed, the question whether it is revoked by any act *not apparent on the face of it*, and done on or after that date must be determined with reference to the law as it stood previously to the late act (*g*).

Presumption when alteration is made.

Where obliterations and interlineations appear on the face of a will, and there is no evidence (*h*) to show the time at which they were made, the presumption is that they were made after the execution of the will (*i*); and if there be a codicil to the will, which codicil takes no notice of them, the presumption is, that they were made after the date of such codicil (*k*); but where a will has been drawn with blanks left, *e. g.* for the names of the

[(*d*) *Twining* v. *Powell*, 2 Coll. 262.

(*e*) *Gann* v. *Gregory*, 3 D. M. & G. 777; *Shea* v. *Boschetti*, 18 Jur. 614, 23 L. J. Ch. 652.

(*f*) *Re Livock*, 1 Curt. 906; *Hobbs* v. *Knight*, ib. 768; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334, 1 No. Cas. 93; *Croker* v. *Marquis of Hertford*, 3 Curt. 468, 7 Jur. 262, 4 Moo. P. C. C. 355: and see *Andrews* v. *Turner*, 3 Q. B. 177.

(*g*) Supra, Ch. VII. ad fin., and cases in last note.

(*h*) As to the nature of the evidence necessary, see *Keigwin* v. *Keigwin*, 3 Curt. 607; 7 Jur. 840; *Re Jacob*, 1 No. Cas. 401.

(*i*) *Cooper* v. *Bockett*, 4 Moo. P. C. C. 419, 10 Jur. 931; *Simmonds* v. *Rudall*, 1 Sim. N. S. 115; *Burgoyne* v. *Showler*, 1 Rob. 5, 8 Jur. 814, 3 No. Cas. 20; *Re Thompson*, 3 No. Cas. 441; *Gann* v. *Gregory*, 3 D. M. & G. 777, *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747; *Re James*, 1 Sw. & Tr. 238; *Re White*, 6 Jur. N. S. 808; *Williams* v. *Ashton*, 1 Johns. & H. 115. But see *Re Swindin*, 2 Rob. 192 and qu. Where a will is dated before the late Act it seems that unattested alterations in it will also be deemed to have been made before that Act. *Re Streaker*, 28 L. J. Prob. 50. And see *Banks* v. *Thornton*, 11 Hare, 180.

(*k*) *Lushington* v. *Onslow*, 6 No. Cas. 183, 12 Jur. 465; *Rowley* v. *Merlin*, 6 Jur. N. S. 1165; and compare *Re Mills*, 11 Jur. 1070.

[legatees and the amount of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is, that the blanks were filled in before execution. In the case of *Birch* v. *Birch* (*l*), blanks filled in with black ink were presumed to have been inserted before execution, but blanks filled in with red ink were held to have been inserted after execution, the envelope in which the will was found appearing to have been sealed, opened and re-sealed.

Alteration not duly executed by re-tracing name with dry pen.

Upon the 21st section it has been decided in a case where a testator made some alterations in his will, and he and the attesting witnesses traced over their former signatures with a dry pen, and the witnesses put their initials in the margin opposite to the several alterations, that the alterations were not duly executed (*m*). The initials did no more than identify the alterations, they were not written with the intention of attesting the testator's signature; for it was supposed that this had been effectually done by tracing the former signatures with a dry pen, a proceeding which, as we have before seen, is not equivalent to signing.

Rule as to revival of a prior will by revocation of a later abolished.

The 22nd section abolishes] the rule which gave to the revocation of a posterior will the effect of reviving a prior testamentary instrument, which such posterior will, if it had remained in force, would have revoked: and it is immaterial in such case whether the posterior will owed its revoking efficacy to an express clause of revocation contained in it, or to mere inconsistency of disposition (*n*); and if the later will be lost, its contents may of course be proved by parol evidence (*o.*) But such evidence must be clear and conclusive as to the revocatory nature of its contents, and it is insufficient to show that the lost instrument contained the words, "this is the last will and testament" (*p*). [The latter words of this clause, "unless a contrary intention shall be shown," deserve particular notice: for when compared with the words used elsewhere in the act, namely, "unless a contrary intention shall appear by the will," it is plain that evidence may now be admitted to show how a revival was intended to operate in cases where it may be doubtful whether the whole or part of a will, which has been first partly and then wholly revoked, was intended to be revived:

Parol evidence may be admitted to show how revival is to operate.

[(*l*) 6 No. Cas. 581.

(*m*) *Re Cunningham*, 1 Searle & S. 132, 29 L. J. Prob. 71.

(*n*) *Brown* v. *Brown*, 8 Ell. & Bl. 876; *Hale* v. *Tokelove*, 14 Jur. 817; *Boulcott* v. *Boulcott*, 2 Drew. 25.

(*o*) *Brown* v. *Brown*, 8 Ell. & Bl. 876; *Re Gardner*, 1 Sw. & Tr. 109, 27 L. J. Prob. 55.

(*p*) *Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131.

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[but evidence is not admissible to show that the destruction of the later will was intended to operate as the revival of a previous one (*q*): the cases are plainly different: in the former the act of revival has been performed, and the evidence only explains the effect to be given to it; in the latter, the evidence, if admitted, would be for the purpose of causing a revival by mere intent of the testator, when the statute says a revival shall only take place either by a re-execution of the will itself, or by a codicil duly executed and showing an intention to revive the same (*r*); and *à fortiori*, where there is an express revival of a will by reference thereto in a subsequent codicil, evidence is not admissible to show that a different will was intended to be referred to (*s*).]

Destruction must be in the presence of the testator.

It is observable that both the Statute of Frauds and the recent act require that the destruction should be made in the presence *and* by the direction of the testator: and therefore [a testator cannot revoke his will by authorizing any person to destroy it after his death (*t*); and if in such case the will should be destroyed its contents might be proved aliunde (*u*).]

SECTION III.

By Alteration of Estate.

Revocation by alteration of estate.

UNDER the old law, it was essential to the validity of a devise of freehold lands, that the testator should be seised thereof at the making of the will, and that he should continue so seised without interruption until his decease. If, therefore, a testator, subsequently to his will, by deed aliened lands, which he had disposed of by such will, and, afterwards, acquired a new freehold estate in the same lands, such newly-acquired estate did not pass by the devise, which was necessarily void. The devise

By acquisition of new estate.

[(*q*) *Major* v. *Williams*, 3 Curt. 432, S. C. nom. *Major* v. *Iles*, 7 Jur. 219.

(*r*) The intention must appear by the contents of the codicil, and not by an external act, *e. g.* affixing it to the earlier (revoked) will, *Marsh* v. *Marsh*, 1 Sw. & Tr. 528, 6 Jur. N. S. 380.

(*s*) *Walpole* v. *Cholmondely*, 7 T. R. 138; *Re Chapman*, 8 Jur. 908, 1 Rob. 1. But see *Quincey* v. *Quincey*, 11 Jur. 111, 5 No. Cas. 154. These cases properly come under the head of admission of parol evidence, in aid of the construction of a will; and see accordingly Chap. XIII. post, where they are treated of.

(*t*) *Stockwell* v. *Ritherden*, 6 No. Cas. 414, 12 Jur. 779.

(*u*) *Re North*, 6 Jur. 564.]

of a freehold lease, which was renewed by the testator subsequently to the will, was evidently in this situation (*x*); [but it seems that any alteration in the nature of his interest arising from the mode in which such interest was originally limited (for instance, the alteration of a contingent remainder or of a contingent executory interest into a vested remainder by the happening of events on which such remainder was originally limited to vest) did not work a revocation, the will acting on the original interest in its new form (*y*).]

Not by change depending on original limitations.

A revocation by alienation may be either partial or total. A simple case of partial revocation occurs, where a testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise pro tanto, by subtracting or withdrawing the demised interest from its operation (*z*), but the devise is no further disturbed; and, consequently, the devisee would, even under the old law, still take the inheritance, subject to the term, and, as incidental thereto, the rent, if any, reserved by the lease. So, if a testator, after devising lands in fee, conveys them by deed to the use of himself for life, with remainder to the use of his wife for life, as a jointure, without disposing of, or in any manner assuming to convey the inheritance, the conveyance would revoke the devise pro tanto, and the reversion in fee, expectant on the decease of the testator's wife, would pass under it to the devisee. In both the preceding examples, it will be perceived, that the conveyance is not only partial in its object, but in its operation; it does not, for a moment disturb the testator's seisin of the inheritance, and, therefore, can have no revoking effect, beyond the estate which it substantially alienates and vests in another person. Consistently with this principle, it is clear, that (*a*) where a testator by his will charges his lands with an annuity, and afterwards demises them for a term of years at rack rent, the devise is revoked so far as to deprive the devisee of his legal power of distress, while the tenancy lasts (*b*), but no further; and the annuitant would be entitled in equity, during the suspension of his power of distress, to have the rent, or an adequate portion of it, applied in satisfaction of the annuity.

Partial alienations.

(*x*) *Marwood* v. *Turner*, 3 P. W. 163.

[(*y*) *Jackson* v. *Hurlock*, 2 Ed. 263; stated on this point, ante, Ch. IV., in note.]

(*z*) *Hodgkinson* v. *Wood*, Cro. Car. 23; *Parker* v. *Lamb*, 2 Vern. 495, 3 B. P. C. Toml. 12.

(*a*) *Parker* v. *Lamb*, 3 B. P. C. Toml. 12.

(*b*) This shows the advantage of limiting a term to trustees for securing the annuity, which would entitle them, as the immediate reversioners, to the rent.

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Revocation by conveyances in fee-simple.

Where, however, the conveyance subsequent to the devise, though made for a partial purpose, embraces the entire fee-simple, or the whole estate of freehold which is the subject of the devise, the rule, under the old law, (with some considerable exceptions presently noticed,) is, that the conveyance, though limited in its purpose, and though it instantly revests the estate in the testator, produces a total revocation.

Thus, if a testator on his marriage, in order to secure a jointure rent-charge to his intended wife, conveys lands, (which he had by a will made before 1838 devised in fee,) to the use of trustees for a term of years, for securing the jointure, and then goes on to limit the fee-simple to the use of himself in fee, the latter limitation will revoke the devise in toto (*c*).

As to conveyances of copyholds.

This doctrine, however, does not apply to copyholds. Thus, where A., who was seised in fee of freehold and copyhold estates, devised them by his will, (made before 1838,) and subsequently conveyed the freeholds to the use of himself for life, with remainder to the intent that B., his intended wife, should receive an annuity of 300*l.* for her life, by way of jointure, and subject thereto to trustees for ninety-nine years, upon trusts for securing the jointure, and subject thereto to the use of A., his heirs and assigns for ever. At the same time, the testator surrendered his copyhold lands to the same uses; and it was held, that the devise (though clearly revoked, as to the freeholds, by the conveyance of them) was not as to the copyholds, affected by the surrender beyond the particular estates; onthe ground, that, according to the doctrine of the case of *Thrustout* v. *Cunningham* (*d*), the fee-simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance, to the use of himself (*e*).

Conveyances for a mistaken or unnecessary purpose.

Where the conveyance of a freehold estate has no limited or definite object, or is made for a mistaken or unnecessary purpose, and, though its whole effect is instantly to revest the property in the testator himself, who is *in* of his old estate, yet the momentary interruption of the testator's seisin, thus occasioned, produces a complete and total revocation of the previous devise.

Thus, if a testator, seised in fee of Blackacre, having by a

(*c*) *Goodtitle* v. *Otway*, 2 H. Bl. 516, 1 B. & P. 576, 7 T. R. 399, 2 Ves. jun. 606, n.; *Cave* v. *Holford*, 3 Ves. 650, 7 B. P. C. Toml. 593; see also *Vawser* v. *Jeffrey*, 16 Ves. 519, 2 Sw. 268; [*Briggs* v. *Watt*, 2 Jur. N. S. 1041; *Walker* v. *Armstrong*, 21 Beav. 284; on app. 25 L. J. Ch. 738; *Power* v. *Power*, 9 Ir. Ch. Rep. 178.]

(*d*) 2 W. Bl. 1046, Fea. C. R. 68.

(*e*) *Vawser* v. *Jeffery*, 3 B. & Ald. 462, 3 Russ. 479.

will made before the year 1838, devised such land by name, or all his lands generally, to B. in fee, afterwards by lease and release, or any other assurance, conveys Blackacre to the use of himself for life, remainder to the use of his own right heirs, the conveyance, though it makes no actual change in the testator's estate, will revoke the devise in toto (*f*).

Tortious eviction.

But where the momentary interruption of the testator's seisin is occasioned, not by any act of the testator himself, but by the tortious act of a stranger, the devise, even under the old law, was not affected. As where a testator was disseised subsequently to the making of his will, and afterwards re-entered, the entry restored the original seisin, and by relation the disseisee was considered to have been seised ab initio, so that his devise remained unrevoked (*g*).

But if the disseisee were out of possession at the time of making his will, or at his death, the devise would be inoperative (*h*).

Exchanges.

So, where a man made his will, devising lands, and then exchanged those lands for others, and died; if the exchange were vacated subsequently to the testator's death in consequence of a defect in the title, or in the aliening capacity of the other party, this did not revive the devise (*i*).

Revocation of devises of equitable interests by conveyance.

As equity follows the law, the same general principles which governed the revocation of devises of legal estates were held to apply to devises of equitable interests. The devise of such an interest, therefore, was liable to be revoked by a conveyance similar to that which would have revoked a devise at law. Thus, in the *Earl of Lincoln's case* (*k*), where a testator devised lands, then mortgaged them in fee, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs, until the intended marriage, and after such marriage, to other uses, though the marriage did not take effect, yet the devise was held to be revoked. So, in the later case of *Lock* v. *Foote* (*l*), where A. devised estates, of which he had only the equitable fee, and afterwards agreed to sell part

(*f*) *Burgoine* v. *Fox*, 1 Atk. 575. See also *Darley* v. *Darley*, 3 Wils. 6, Amb. 653, *S.C.* nom. *Darley* v. *Langworthy*, 3 B. P. C. Toml. 359; *Harmood* v. *Oglander*, 8 Ves. 106; [*Sparrow* v. *Hardcastle*, 3 Atk. 798.]

(*g*) *Bunter* v. *Coke*, 1 Salk. 237; *Att.-Gen.* v. *Vigor*, 8 Ves. 282.

[(*h*) Vin. Ab. Dev. R. (6), pl. 1.]

(*i*) *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

(*k*) Show. P. C. 154, 1 Eq. Ab. 411, pl. 11; [in the latter report, the mortgage is stated to have been previous to the will, but this makes no difference in the principle established by the case.] See also *Pollen* v. *Huband*, 1 Eq. Ab. 412, 7 B. P. C. Toml. 433.

(*l*) 5 Sim. 618.

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of the estates, and to remove an objection to the title advanced by the purchaser, (but which was not well founded,) he suffered a recovery of the whole; it was held, that, though the recovery was an equitable one, and the particular purpose for which it was suffered was mentioned in the recovery deed, and though the uses thereby declared of the property not intended to be sold were precisely the same as those which subsisted before the recovery, which was expressed to be in restoration and confirmation of those limitations, the devise was revoked.

Partition no revocation.

The rule that a conveyance in fee of freehold lands, executed for a partial purpose, revokes a will made before the year 1838, admits of two exceptions. The first is in the case of a partition between tenants in common, or co-parceners, which, by whatever kind of assurance effected, does not, even at law, revoke a prior devise, provided the conveyance be confined to the object of the partition, merely assuring to the testator in the lands allotted to him in severalty, an estate precisely correspondent to that which he previously had in his undivided share (*m*). [The manner in which the partition is made might, however, have revoked the devise; as if a testator having an undivided share of lands in A. and B. devise all lands in A. and upon partition lands in B. only are allotted to him; in such case nothing passed by the devise (*n*).]

Manner of partition may cause revocation.

Mortgages.

The other and more considerable exception is, where a testator, subsequently to his will, makes a mortgage of the devised lands, which, it is said, revokes the will in equity, pro tanto only (*o*).

Mortgage inaccurately termed a revocation pro tanto.

To designate a mortgage a revocation pro tanto, however, was [before the statute 17 & 18 Vict. c. 113,] inaccurate, and tended to create an erroneous impression of its actual effect on the rights of the persons claiming through the testator; for the phrase might seem to import, that the transaction was viewed in the light of an intentional withdrawal by the testator of his bounty to the extent of the mortgage, in which case, the devisee would have taken the property cum onere, as against not only the mortgagee creditor, but also as against the testator's

(*m*) *Luther* v. *Kidby*, 3 P. W. 169, n., 8 Vin. Ab. 148, pl. 30; *Risley* v. *Baltinglass*, T. Raym. 240; *Webb* v. *Temple*, 1 Freem. 542; [*Barton* v. *Croxall*, Taml. 164.

(*n*) *Knollys* v. *Alcock*, 5 Ves. 648, 7 ib. 558. Compare *Phillips* v. *Turner*, 17 Beav. 194.]

(*o*) *Hall* v. *Dench*, [1 Vern. 329, 342; But in] 2 Ch. Rep. 54 [the ground of the decision is stated to be that the will was republished;] *Perkins* v. *Walker*, 1 Vern. 97.

own representatives, in the same manner as if the testator had created the charge by his will; but this was not the case, for, unless a contrary intention appeared, the devisee, it is well known, was entitled to have the estate disencumbered out of the personal estate of the testator, not specifically bequeathed (*p*). It was a perversion of language, therefore, to call a mortgage a revocation pro tanto; in short, the term is very inaptly applied, to any cases in which the devise is defeated by the testator's subsequent disposition by deed of the devised property, which are all examples of ademption, rather than of revocation.

In applying the doctrine, that a mortgage effects a partial revocation only, it is immaterial whether the testator had the legal estate, or was equitable owner only (*q*); whether the mortgage conveyance was made by fine, or any other mode of assurance (*r*); whether the mortgagee were the devisee himself (*s*), or a stranger; and, whether the estate of the mortgagee were to vest in possession immediately on its execution, or not until the death of the mortgagor (*t*).

Conveyance upon trust for sale.

Upon the same principle, a conveyance in trust to sell for the payment of debts, was held, under the old law, not absolutely to revoke a previous devise of the property so conveyed (*u*), even though it were accompanied by a declaration that the surplus proceeds of the sale should be held in trust for the grantor, his executors and administrators, [provided, however, that such conveyance had for its object the payment of debts only; the insertion of a further trust, as the payment of an annuity to the wife of the grantor, would have worked a revocation (*x*)]. Bankruptcy also left a testator's will unrevoked, as to any surplus remaining after satisfaction of the claims of creditors (*y*).

Bankruptcy.

Mortgages by demise.

A mortgage for less than the testator's whole estate, of course, does not, even at law, produce revocation ultra the estate to which it extends. Thus, where a testator, after devising freehold lands by a will made before 1838, for an estate in fee, demises them by way of mortgage for one thousand years, the inheritance, subject to the mortgage term, passes by the devise, along with the equity of redemption in the term.

(*p*) *Warner* v. *Hawes*, 3 B. P. C. Toml. 21.

[(*q*) *Jackson* v. *Parker*, Amb. 687.]

(*r*) *Rider* v. *Wager*, 2 P. W. 334; *Jackson* v. *Parker*, Amb. 687.

(*s*) *Peach* v. *Phillips*, Dick. 538; *Baxter* v. *Dyer*, 5 Ves. 656, overruling *Harkness* v. *Bayley*, Pre. Ch. 514.

(*t*) Cro. Car. 23.

(*u*) *Vernon* v. *Jones*, 2 Freem. 117, [Pre. Ch. 32, 2 Vern. 241;] *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685.

[(*x*) *Hodges* v. *Green*, 4 Russ. 28.]

(*y*) *Charman* v. *Charman*, 14 Ves. 580.

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Deed of partition or mortgage, with ulterior limitations.

But if the partition or mortgage conveyance contain ulterior limitations by which the testator's ownership is varied or modified, it works an absolute and entire revocation. As in the often-cited case of *Tickner* v. *Tickner* (*z*), where by a deed of partition between two co-heirs of gavelkind lands, (one of whom had previously made a will devising his share,) the lands allotted to the testator were limited *to such uses as he should by deed or will appoint*, and in default of appointment to him in fee; it was held that by this new limitation of the use, the previous devise of the property was revoked.

Effect of ulterior limitations in mortgage deeds.

So, in the case of *Kenyon* v. *Sutton* (*a*), where a testator executed a conveyance in trust for the payment of his debts, and it was declared that, after payment of his debts, the trustees should convey (not to him simply in fee), *but to such uses as he should by deed or will appoint*, and in default, to him in fee, the devise was held to be wholly revoked.

Again, in the case of *Harmood* v. *Oglander* (*b*), where A. being owner in fee of fee farm rents subject to certain marriage articles, whereby he had agreed to settle them in strict settlement, with reversion to himself in fee, made his will, by which he devised the rents: and subsequently, on borrowing 5,500*l.* from B. by lease and release, for securing the repayment and barring all estates tail, &c., conveyed the fee farm rents in question to C., his heirs and assigns, to the intent that a common recovery might be suffered; and it was declared that such recovery should enure to the use of B. (the mortgagee) for 1000 years, subject to redemption, remainder to the testator for life, with remainder to F. his wife for life, with remainder to himself in fee. The recovery (which, it will be observed, was unnecessary) was never suffered; but Sir *R. P. Arden*, M. R., and afterwards Lord *Eldon*, on appeal, expressed a decided opinion that the devise was revoked, the testator having subjected the property to ulterior limitations beyond the purpose of a mere mortgage; "and considering," his Lordship observed in reference to the authorities, "how very little, in addition to that mere purpose, will revoke." It is clear that if in this case the limitations had been simply to the mortgagee for the term, and subject thereto, to the use of the mortgagor himself in fee, the will would have been revoked, precisely as if without any mortgage the fee had been so limited.

(*z*) Cit. 1 Wils. 309, and 3 Atk. 742 — 745, 750.

(*a*) Cit. 2 Ves. jun. 601.

(*b*) 6 Ves. 199; *S. C.* 8 Ves. 106. [See *Briggs* v. *Watt*, 2 Jur. N. S. 1041; *Power* v. *Power*, 9 Ir. Ch. Rep. 178.]

So in the more recent case of *Hodges* v. *Green* (*c*), where a testator seised in fee, conveyed certain real estates to trustees, upon trust by sale or mortgage to raise certain mortgage and other debts, and the trustees were to stand possessed of the surplus, in trust for the grantor, his executors and administrators, as personal estate; and it was provided, that, until a sale, the trustees should apply the rents in payment, first, of the interest on a mortgage debt, and, secondly, of an annuity to the grantor's wife for her separate use; Sir *J. Leach*, M. R., held that the will was revoked, not (as had been contended) on account of the direction that the residue of the monies arising from the sale should be personal estate, which did not vary the operation of the deed, but on account of the annuity, which might continue after the testator's death.

What expressions newly modify equity of redemption.

What words introduced into the proviso for redemption amount to an indication of intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases abundantly demonstrate that such an intention will not be inferred from equivocal expressions, affording conjecture merely. The deed must distinctly and explicitly show that the estate is to be reconveyed to uses different from those which previously subsisted,—a doctrine which seems to agree with the rule establishing, that the interests of a husband and wife joining in a mortgage of lands held jure uxoris, are not liable to be varied by the inaccurate terms in which the reconveyance is directed to be made (*d*).

Thus in the case of *Brain* v. *Brain* (*e*), where A. subsequently to his will, by a conveyance by way of security, in consideration of 800*l.* advanced by B., conveyed lands to trustees in fee, upon trust to permit him (A.) to enjoy until default of payment; and upon payment of principal and interest, upon trust, to reconvey unto and to the use of A., the testator, his heirs and assigns, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents and purposes, as A., his heirs or assigns, by any deed or deeds, instrument or instruments, in writing under his or their hand or respective hands, should direct, limit, or appoint, clear of all intermediate incumbrances, and, in default of payment, the trus-

(*c*) 4 Russ. 28.

(*d*) *Innes* v. *Jackson*, 16 Ves. 356; 1 Bli. 104; [*Ruscombe* v. *Hare*, 6 Dow, 1, 2 Bli. N. S. 192; *Clarke* v. *Burgh*, 2 Coll. 221; *Hipkin* v. *Wilson*, 3 De G. & S. 738.]

(*e*) 6 Madd. 221.

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tees were empowered to sell; Sir *J. Leach*, V. C., held, that this was a revocation pro tanto only. "The true question," his Honor observed, "is, whether, by the addition of the words which follow the direction to reconvey to the devisor and his heirs, he does, in fact, acquire any new estate or power, or whether these subsequent words do not leave him with the same estate, and the same powers, as he would have had if they had not been used. It is plain, that he, who has a right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, or for any estates and interests, at his pleasure. The authority to make such direction by any deed or instrument under his hand, is the necessary consequence of this conversion of his legal estate into an equitable interest; and the subsequent words are the mere 'expressio eorum quæ tacitè insunt.' I am of opinion, therefore, that the conveyance in question, being by way of security for money, is a revocation pro tanto only." The Vice-Chancellor remarked, that in *Tickner* v. *Tickner*, a new power to appoint to uses was acquired, and that the facts in *Kenyon* v. *Sutton* were not accurately known (*f*).

Mere conveyance of legal estate no revocation in equity.

Though an absolute conveyance by a person having the equitable ownership only, does, we have seen under the old law, revoke a prior devise, by analogy to the rule, which makes a similar conveyance of the legal estate a revocation at law, yet when the testator merely clothes his equitable title with the legal estate, by taking a conveyance of the latter to himself, or merely changes the trustee, as this produces no alteration in the beneficial ownership, which is the subject of the devise, it leaves such devise unaffected.

Thus where (*g*) W., by his will and codicil, devised certain lands which he had contracted to purchase, and afterwards caused the purchased estate to be conveyed to trustees in fee, in trust for himself and his heirs, it was adjudged that this was no revocation; for before the completion of the purchase, the vendor was but a trustee for the purchaser, and the completion of the purchase was but *taking the estate home;* [and so if he had actually taken a conveyance to himself (*h*).]

Contra, if deed modifies the equitable ownership.

If, however, the conveyance does more than vest the legal estate in the testator, and newly modifies his ownership, revo-

[(*f*) And see *Youde* v. *Jones*, 14 Sim. 162.]

(*g*) *Fullarton* v. *Watts*, cit. Doug. 718. See also *Parsons* v. *Freeman*, 3 Atk. 741, 1 Wils. 308; *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 My. & K. 296.

[(*h*) *Seaman* v. *Woods*, 24 Beav. 372.]

cation will, of course, be produced, as it would it the equitable interest separately had been so modified. This question often arose, and, of course, under a will made before 1838, may still arise, where a testator contracted to purchase lands, and in the interval between the contract and the conveyance devised them. In such case, it is clear, that if the conveyance be made to the testator, to the usual limitations for preventing dower, viz. to such uses as he shall appoint, and in default, to the use of himself for life, remainder to a trustee for himself during life, with remainder to him (the purchaser) in fee, the devise will be revoked (*i*). And the same effect is produced where the conveyance is simply to such uses as the devisor shall appoint, and in default of appointment to him in fee (*k*).

Effect of conveyance upon a purchaser's devise after contract.

So it has been decided, that where (*l*) a testator purchased an estate under a parol contract, which was rendered binding by part performance, then devised it, and afterwards took a conveyance (according to the old method of excluding dower) to the use of himself and a trustee jointly in fee, the devise was revoked; the conveyance in such case going beyond the mere purpose of clothing the equitable title with the legal ownership, and making an alteration in the quality of the estate.

No revocation if conveyance be in conformity with contract.

If the contract points out the nature of the limitations which are to be inserted in such conveyance, *and the conveyance is made in conformity thereto*, it is clear that such conveyance (operating as it then does only to turn the equitable into legal estates) will not revoke the devise; but it should seem, that the merely providing that the estate shall be conveyed to the purchaser in fee, or to such other uses as he shall direct, would not prevent the revoking operation of a conveyance to the ordinary uses for preventing dower; for as words to this effect, when inserted in a proviso for redemption in a mortgage, are (we have seen) merely equivalent to a direction to convey to the mortgagor the fee, it seems difficult, consistently, to ascribe to them greater potency in a contract. And it is clear (*m*), that no such effect would be produced by a stipulation that the vendor shall convey to the purchaser, his heirs, *appointees*, or assigns; for even supposing that the introduction of the word "appointees" implies that the conveyance should contain a power of appointment (in which

(*i*) *Rawlins* v. *Burgis*, 2 V. & B. 382; [*Plowden* v. *Hyde*, 2 Sim. N. S. 171, 2 D. M. & G. 684; *Schroder* v. *Schroder*, Kay, 578.]

(*k*) *Tickner* v. *Tickner*, cit. 1 Wils. 311, 3 Atk. 742; *Parsons* v. *Freeman*, 3 Atk. 741.

(*l*) *Ward* v. *Moore*, 4 Mad. 368.

(*m*) *Bullin* v. *Fletcher*, 1 Kee. 369, 2 My. & Cr. 432.

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case a revocation would not have resulted from the mere insertion in the conveyance of such a power), yet the limitation to the testator for life, with remainder to the dower trustee for the life of, and in trust for, the testator, amounts to a new modification of the equitable ownership, and is, for that reason, a revocation of the devise.

Plowden v. *Hyde*. Clothing the equitable estate with the legal, no revocation.

[The doctrine, that merely clothing the equitable estate with the legal title is no revocation, is well illustrated by the recent case of *Plowden* v. *Hyde* (*n*), where an estate, which had been conveyed to the testator to the usual uses to bar dower, was by him appointed and conveyed to a mortgagee in fee, subject to a proviso that on payment of the mortgage money the mortgagee would reconvey the estate to the testator, "his heirs, appointees, or assigns, or to such other person or persons, to such uses, and in such manner as he or they should direct." Subsequently to the mortgage, the testator made his will, devising the mortgaged property; and then, having paid off the mortgage debt, the estate was reconveyed to him, to uses to bar dower in the same manner as on the purchase. Sir *R. Kindersley*, V. C., thought that, after the mortgage, the testator had in equity a clear fee simple estate, and the legal estate not having been reconveyed to him in fee simple his will was consequently revoked. But his Honor's decision was reversed on appeal by the Lords Justices Sir *J. K. Bruce* and Lord *Cranworth*, on the ground before noticed, that an equity of redemption (unless the contrary is distinctly provided) attaches on the estate of the mortgagor, with all the same rights, restrictions and qualifications to which his legal estate had previously been subject. When, therefore, the mortgagor paid off the mortgage, and took a reconveyance of the property to the same uses to which it had stood limited previously to the mortgage, he was, in fact, only doing that which is described as clothing the equitable with the legal estate. It follows from this decision, that if the reconveyance had been simply to the testator and his heirs, his will would have been revoked.

Immaterial whether seisin is changed or not.

In the case just stated Lord *Cranworth* suggested that revocation of a will by subsequent conveyance depended only on the fact of the *seisin* being changed, and that, therefore, if an estate were limited to such uses as A. should appoint, and in default to him in fee, and A., after making his will and devising the estate, had made an appointment, so as to take an estate

[(*n*) 2 Sim. N. S. 171, 2 D. M. & G. 684.

[with the ordinary uses to bar dower, he knew of no authority deciding that this would be a revocation of the will (*o*). It must have escaped his Lordship's recollection, that in *Langford* v. *Little* (*p*), Sir *E. Sugden*, C., under such circumstances decided that a will *was* revoked: indeed, when we consider that (as will be shown hereafter) a will might be revoked by a void instrument passing no interest whatever, it would be scarcely possible to argue that an instrument actually creating new and different estates should leave the will untouched.

Poole v. *Coates*, as to renewable leaseholds, is opposed to other cases.

In the case of *Poole* v. *Coates* (*q*), a testatrix, being entitled to an undivided moiety of a lease for lives containing a covenant for perpetual renewal, made her will devising the moiety, and subsequently joined with the two other persons entitled to the other moiety in procuring a renewed lease to be granted to herself and them as joint tenants: Sir *E. Sugden*, C., decided that her will was not revoked in equity. He said, the effect of a lease with a covenant for perpetual renewal is, in equity, to give the tenant a perpetual interest; that, therefore, if in the case before him there had been a mere simple renewal, though it would have been a revocation at law, it would have had no such effect in equity; but it was argued, that the case went a step further, the renewal being made to the testatrix and two other persons, and, therefore, there was such a change in the estate which the testatrix had as amounted in equity to a revocation; but the mere change of the legal estate, unaccompanied by any alteration of the equitable ownership, would not effect a revocation. A lease of the entire estate to a trustee for the testatrix would have been no revocation, for she would have had the same equitable estate after the renewal as she had before; so a renewal partly to herself, and partly *to a trustee for her, could not be considered as a revocation, for the very same reason.* The mere circumstance that the very same equitable estate which formerly subsisted, had been since *partially clothed* with the legal estate, could not produce such a modification as to work a revocation. In deciding this case the learned Judge expressly stated that he did not intend to impeach the authority of *Rawlins* v. *Burgis*, *Ward* v. *Moore*, and other similar cases before noticed; but it seems impossible to take any substantial distinction in the last-named case. The owner of the equitable estate became a joint-tenant

[(*o*) See 2 D. M. & G. 695.

(*p*) 2 J. & Lat. 613; and see *Walker* v. *Armstrong*, 21 Beav. 284; on app. 25 L. J. Ch. 739.

(*q*) 2 Dr. & War. 493, 1 Con. & L. 531.]

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[of the legal estate, thereby merely partially clothing himself with the legal title: yet it was held a revocation; and in truth this is all that is done in every case of a conveyance to uses to bar dower. In equity the owner of the equitable estate still remains absolute owner; he has only clothed himself with a legal power of appointment, a life estate, and a remainder in fee. It appears always to have been the opinion of the learned Judge that the decision in *Rawlins* v. *Burgis* was not correct, and accordingly he seems to have taken the opportunity, which a slight difference of circumstances offered, to escape from authorities apparently binding on him, and thus to have decided according to his own opinion (certainly the more reasonable) in preference to that of previous Judges.]

As to conveyances in execution of marriage articles.

The same general doctrines are, of course, applicable to equitable interests created by marriage articles; hence the question, whether a conveyance, made in pursuance of such articles, revokes a devise made in the interval between the articles and the conveyance disposing of the equitable interest derived under the articles, depends entirely, under the old law, upon the fact, whether the conveyance merely carries into effect the articles which created the equitable interest in question, or newly modifies the ownership (*r*).

But it is to be observed, that where, by the articles, the intended settlor covenants to convey the lands to certain uses, and subject thereto to the use of himself in fee, this does not sever the equitable from the legal ownership, in regard to such ultimate fee, so as to support a devise made intermediately between the articles and the conveyance, since such severance could only be produced through the medium of an obligation attaching on the covenantor to convey the reversion in fee to himself; and there seems to be no title in any third person to call for such a conveyance, for a man cannot have a legal estate in trust for himself. Upon the principle of this reasoning, Lord *Eldon*, in *Harmood* v. *Oglander* (*s*), [dissented from] the case of *Williams* v. *Owens* (*t*), where the contrary doctrine was advanced by Sir *R. P. Arden*, who appears to have confounded the case of a covenant to convey, with that of an actual conveyance, by means of which, of course, the grantor may effect a severance of the legal and equitable ownership, by vesting the legal inheritance

(*r*) *Parsons* v. *Freeman*, 3 Atk. 761; *Brydges* v. *Duke of Chandos*, 2 Ves. jun. 417; 7 B. P. C. Toml. 505.

(*s*) 8 Ves. 127.

(*t*) 2 Ves. jun. 595.

in the trustee for himself. The learned Judge entertained the notion, that the articles imposed on the covenantor an obligation to convey the fee, which fully accounts for (and, had it been correct, would have justified) the conclusion at which he arrived. The argument, upon which Lord *Eldon* impugned the case of *Williams* v. *Owens*, would seem to involve the conclusion, that an agreement by a testator to convey an estate in fee, to himself, would, for every purpose, be null and void; but the principle has not been followed to this full extent, for in the case of *Vawser* v. *Jeffery* (*u*), both Sir *W. Grant* and Lord *Eldon* were of opinion, that, if a surrender of copyholds to certain limitations (which have been already stated) would have revoked the will at law, the covenant to make such surrender revoked it in equity. And though the assumption upon which this position was based, namely, that the surrender, if made pursuant to the covenant, would have been a revocation at law, was in the subsequent stages of the case decided to be unfounded, yet this circumstance does not necessarily affect the doctrine in question. There is some difference, however, in the line of reasoning pursued by these great contemporary Judges: Sir *W. Grant*, adopting the notion of his learned predecessor (Sir *R. P. Arden*), held, that the covenantor was bound to convey the fee-simple to himself, according to his covenant; while, on the other hand, Lord *Eldon* puts the doctrine rather upon the ground of intention: "It is contended," he said, "that if the widow had applied to this Court, to have the covenant executed, the Court need not have directed any such acts as would raise this question. My present opinion is, that I must consider the testator to have died with the intention which he expresses in this covenant, unless it can be shown that he intended otherwise to execute his purpose of providing a jointure." Lord *Eldon's* observations show, that he considered the case as allied in principle to those (discussed in the next section) in which an ineffectual attempt to convey the devised lands has been held to revoke: though this view of it entirely differs from that of the Court of King's Bench, in the case of *Wright* v. *Littler* (*x*), who thought that a void deed of covenant was not a revocation, as it was not binding on the testator, and expressed no intention to make a present disposition; and Lord *Mansfield* expressly lays it down, that covenants have never been allowed

Effect of covenant to convey to the use of covenantor.

(*u*) 16 Ves. 519, 2 Sw. 268. (*x*) 3 Burr. 1244, 1 W. Bl. 345.

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to be a revocation, unless where the covenantee has a right to specific performance,—a principle which it seems very difficult to refute. In that case, however, the instrument in question was not a deed of covenant, but an unsealed paper, by which the testator "covenanted and agreed" that the lands in question should go and be given to certain persons, and the question was, whether it was testamentary: the Court decided in the negative, and that the paper was not a revocation of a previous will. Of course, a covenant to execute a conveyance, which, if made, would not revoke the will at law, will be inoperative to revoke it in equity (*y*).

Effect of contract for sale after devise.

Another obvious case of revocation in equity (supposing of course the will to be subject to the old law) occurs where the testator devises lands, and then, subsequently to the will, contracts for the sale of them; such a contract, if once obligatory on the testator, will revoke the devise, though it should happen to be rescinded after the testator's decease (*z*), and also, by the better opinion, even though such transaction should have taken place in his lifetime (*a*). [Such would certainly be the case if the estate came back to the vendor in his lifetime, by repurchase, and not under a rescinding of the original contract, although that contract remained uncompleted (*b*).] Notwithstanding the contract for sale, the legal estate passes under the devise, and the devisee is bound to convey it to the purchaser, in pursuance of the contract. If the devise, which might thus, in event, become operative upon the legal inheritance, would have the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations in favour of minors or unborn persons, the testator should immediately after the sale execute a codicil, devising the property to trustees, for the purpose of carrying the contract into effect.

Marriage articles.

Ante-nuptial articles for a settlement have, of course, the same revoking effect in equity, upon a previous devise of the property agreed to be settled, as a contract to sell (*c*).

Effect of settling share of devised lands on one of devisees.

And here it may be observed, that, where a testator who has devised his real estate among his children, in undivided shares,

(*y*) *Vawser* v. *Jeffery*, 3 Russ. 479.

(*z*) *Mayer* v. *Gowland*, Dick. 563; *Tebbot* v. *Voules*, 6 Sim. 40.

(*a*) See *Knollys* v. *Alcock*, 7 Ves. 558, 565; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; [*Curre* v. *Bowyer*, 5 Beav. 6.

(*b*) *Andrew* v. *Andrew*, 3 Sm. & G. 130; on app. 2 Jur. N.S. 719, 25 L. J. Ch. 779.]

(*c*) See *Cotter* v. *Layer*, 2 P. W. 624; *Vawser* v. *Jeffery*, 16 Ves. 519, 2 Sw. 268.

afterwards, upon the marriage of one of such children, conveys or covenants to convey to uses, for the benefit of that child, an aliquot share, equal to that which he had devised to the child, (no doubt, intending to substitute it for the share so devised,) such settlement or covenant does not revoke the devise of that share in toto, there being nothing to identify or connect the devised with the settled share; but it revokes the devise of all the shares pro tanto, letting in the advanced child to participate equally with the others in the remaining shares, not affected by the settlement. Thus, in *Rider* v. *Wager* (*d*), where a testator by his will gave one moiety of his real and personal estate to his elder daughter, and the other moiety to the younger daughter, and afterwards, upon the marriage of the elder with A., covenanted to settle one moiety of all his real estate to the use of himself for life, with remainder to A. and his intended wife for their lives, remainder to the younger children of the marriage in tail, remainder to A. in fee; it was held, that this covenant revoked the will in equity, as to one moiety of the testator's real estate, and that the other moiety passed under the devise in the will to the two daughters, and this was thought to be rendered still more clear by the republishing effect of a codicil which had been executed by the testator after the articles.

Stat. 1 Vict. c. 26. Devises not to be revoked as to testator's disposable interest at decease, by conveyance or like act.

The revocation of devises by an alteration of estate is placed on an entirely new footing by the recent act (*e*), the 23rd section of which provides, 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. [This section applies solely to wills made subsequently to the act; and a will made previously to the year 1838, will still be liable to revocation from an alteration of estate, though occurring subsequently to that date (*f*).]

In regard to wills, the date of which or of any codicil thereto brings them within the new law, a subsequent conveyance of the devised property will not produce revocation, except so far as it

(*d*) 2 P. W. 334: [but must not this case be considered as depending solely on the fact of republication?]

(*e*) 1 Vict. c. 26, s. 23.

[(*f*) *Langford* v. *Little*, 2 J. & Lat. 613.]

CHAPTER VII.

Remarks upon the enactment.

substantially alienates the estate, and withdraws it from the operation of the devise, by vesting the property in another. If a testator, after devising an estate, sells and conveys it to a third person, of course, the devise is still (as formerly) rendered inoperative, and the devisee can have no claim to the proceeds of the sale, even though the will should have directed the conversion of the property, and the proceeds can be traced into an investment (*g*). Where the testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, the devise remains in force as to the legal estate and no further, this being all the interest which the testator has power to dispose of at his decease, and the conversion, as between the real and personal representatives, being completely effected by the contract, (supposing it to be a binding one,) the devisee takes only the legal estate, and the purchase money constitutes part of the testator's personal estate (*h*). [Where the sale of the testator's property is made under a decree for sale for payment of charges, and the sale is excessive, so that a surplus remains after payment of the charges, this surplus will devolve in the same manner as the real estate, and the will is therefore not revoked by such sale (*i*); if, however, the sale is made under a power in another person, it seems that the will is revoked or not, according as the sale is made before or after the decease of the testator, the status at the time of his death determining the nature of the property (*k*).

Effect of a decree for sale.

Effect of sale under compulsory powers in acts of parliament.

Where the sale is made on compulsion under powers given by an act of parliament to a company to take land at a valuation, the authorities do not seem quite consistent as to whether the nature of the property is altered or not: but as this depends more on the special wording of the act under which the sale is made than on general principles, it may be sufficient to refer the reader to the cases on the subject (*l*).]

(*g*) See *Arnald* v. *Arnald*, 1 Bro. C. C. 401.

[(*h*) *Farrar* v. *Earl of Winterton*, 5 Beav. 1; *Moor* v. *Raisbeck*, 12 Sim. 123; *Ex parte Hawkins*, 13 Sim. 569; and see *Knollys* v. *Shepherd*, 1 J. & W. 499; affirmed in D. P. Sugd. Law of Prop. 223; *Re Manchester &c. Rail. Co.*, 19 Beav. 365.

(*i*) *Jermy* v. *Preston*, 13 Sim. 356; *Cooke* v. *Dealey*, 22 Beav. 196.

(*k*) *Wright* v. *Rose*, 2 S. & St. 323; *Bourne* v. *Bourne*, 2 Hare, 35; *Gale* v. *Gale*, 21 Beav. 349.

(*l*) *Midland Counties Railway* v. *Oswin*, 1 Coll. 80; *Midland Counties Railway* v. *Wescomb*, 2 Railw. Cas. 211; *Midland Counties Railway* v. *Caldecott*, 2 Railw. Cas. 394; *Ex parte Hawkins*, 13 Sim. 569; *Ex parte Flamank*, 1 Sim. N. S. 261; *Re Horner's Estate*, 5 De G. & S. 483; *Re Stewart*, 1 Sim. & Gif. 32; *Re Taylor's Settlement*, 9 Hare, 596; *Re Walker's Estate*, 1 Drew. 508; *Re Harrop*, 3 Drew. 726. Where an option to purchase at a specified price was given to A., and the land was bought by a railway company for double that price, A. was held entitled to the difference, *Cant's Estate*, 4 De G. & Jo. 503.]

Section IV.

By void Conveyances.

Attempt to convey revokes a devise, where.

An instrument purporting to be a conveyance, but incapable of taking effect as such, may, nevertheless, operate to revoke a previous devise, on the principle, as it should seem, that the attempted act of conveyance is inconsistent with the testamentary disposition, and, therefore, though ineffectual to vest the property in the alienee, it produces a revocation of the devise. The rule obtains wherever the failure of the conveyance arises either from the incapacity of the grantee, or from the want of some ceremony which is essential to the efficacy of the instrument. Thus, in the case of *Beard* v. *Beard* (*m*), Lord *Hardwicke* decided, that a deed of gift by the testator to his wife of personal estate, which he had previously bequeathed by his will, revoked the bequest; though the deed was inoperative under the rule of the common law, which incapacitates a woman from taking property so disposed of, as the donee of her husband. So it has been often ruled, from a very early period, that a feoffment without livery of seisin, and a bargain and sale without inrolment, revoke a previous devise of the lands thus ineffectually attempted to be aliened (*n*). And the rule has been considered as applying to a common recovery, rendered void by the misnomer of the tenant to the præcipe (*o*), and to an instrument purporting to be an appointment under a power, which at the time was not in the testator (*p*). It is true, that in the last case, the Court was of opinion, that the instrument, if void as an appointment, might take effect as a grant of the reversion; but Lord *Kenyon*, C. J., unreservedly stated, that, "even supposing it was an inadequate conveyance for the purpose for which it was intended, still if it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And, in the more recent case of *Vawser* v. *Jeffery* (*q*), Lord *Eldon* treated it as clear, that an attempt by a testator to convey a copyhold estate by deed, would revoke a previous devise of that estate.

Revoking effect of void conveyances.

Qualifications of the rule.

It has been held, however, that a conveyance to charitable uses, which was void under the statute 9 Geo. 2, c. 36, on account

(*m*) 3 Atk. 72.

(*n*) See *Montague* v. *Jefferies*, Moor, 429, pl. 599. See also 3 Atk. 73, 1 W. Bl. 349, 2 Sw. 274.

(*o*) *Doe* v. *Bishop of Llandaff*, 2 B. & P. N. R. 491. [The point, however, was not actually decided in this case.]

(*p*) *Shove* v. *Pinke*, 5 T. R. 124, 310.

(*q*) 2 Sw. 274.

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of the grantor dying within twelve months after its execution, did not affect a prior devise, on the ground, it is presumed, (for the reasons are not stated,) that the event of the grantor surviving the year, was an implied condition annexed to the deed, and this failing, the intended conveyance was to be considered as a nullity, the effect being the same as if the grantor had expressly made his conveyance dependent on such a contingency (*r*). So it has been decided, that a deed executed by one who is under a personal incapacity to make the attempted disposition, has no revoking effect on a prior devise; for as the principle proceeds upon intention, ability to perform the act seems to be a necessary ingredient, for without such ability there can be no disposing mind. Thus, where a feme coverte, who had a power to appoint real estate by will only, and had also the fee-simple in default of appointment, made a will in pursuance of the power, and subsequently executed a deed purporting to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment (*s*). But if a feme coverte, who has a power of appointing by deed or will, makes a will in exercise thereof, and afterwards, by deed, in execution of her alternative power, directs her trustees to convey to her, which they accordingly do, of course the testamentary appointment is revoked (*t*).

Deeds of conveyance void on account of fraud revoke a will,—where.

It seems clear, that a conveyance which is void at law on account of fraud or covin, is not a revocation: but a different rule obtains, in regard to deeds which are valid at law, though impeachable in equity. The existence of this distinction, indeed, was long vexata quæstio, but all controversy on the point seems to be closed by the recent case of *Simpson* v. *Walker* (*u*); in which it was decided by Sir *L. Shadwell*, V. C., in conformity to the decision of Lord *Hardwicke* in *Hick* v. *Mors* (*x*), and that of Lord *Alvanley* in *Hawes* v. *Wyatt* (*y*), and a dictum of Lord *Eldon* (*z*), and in opposition to a determination of Lord *Thurlow* (*a*), that a deed obtained under circumstances which rendered it void in equity, but which was valid at law, *did* revoke a previous devise.

Rule as to wills since 1837.

A question of this nature, however, cannot arise in regard to wills made subsequently to the year 1837, for as, under the

(*r*) *Matthews* v. *Venables*, 9 J. B. Moo. 286, 2 Bing. 136.
(*s*) *Eilbeck* v. *Wood*, 1 Russ. 564.
(*t*) *Lawrence* v. *Wallis*, 2 B. C. C. 319.
(*u*) 5 Sim. 1.
(*x*) Amb. 215.
(*y*) 2 Cox, 263, 3 B. C. C. 156. See also 7 Ves. 374.
(*z*) 8 Ves. 283.
(*a*) *Hawes* v. *Wyatt*, supra.

recent enactment, even an actual conveyance does not produce revocation, except so far as it may, by alienating the testator's interest, leave the devise nothing to operate upon, it is obvious, that a void or attempted conveyance cannot, under any circumstances, have a revoking effect.

Section V.

By a subsequent Revoking or Inconsistent Will or Codicil.

In considering this head of Revocation, as applicable to wills made before the year 1838, freehold and personal estate must be distinguished. The Statute of Frauds (*b*) enacts, "that no devise in writing of lands, tenements, or hereditaments, nor any clause, thereof, shall be revocable, otherwise than by some other will or codicil in writing or other writing declaring the same, (or by burning, &c.); but all devises and bequests of lands and tenements shall remain and continue in force (until the same be burnt, &c.); or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same."

Stat. 29 Car. 2, c. 3, s. 6. Devises of lands, how to be revoked.

Sect. 22 provides, "That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least." Unless these enactments had placed the revocation of wills under positive restrictions, they might have been revoked in the same manner as before, there being no necessary implication that what is required to constitute a valid execution of an instrument is essential to its revocation; on which principle it was held, before the Statute of Frauds, that a will required to be in writing by the statute of 34 Hen. 8, c. 5, might be revoked by parol (*c*).

Bequests of personalty, how to be revoked.

[(*b*) 29 Car. 2, c. 3, s. 6, Ir. Parl. 7 Will. 3, c. 12, s. 6.]

(*c*) *Cranvel* v. *Sanders*, Cro. Jac. 497. See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Richardson* v. *Barry*, 3 Hagg. 249.

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Difference between devising and revoking clauses of Statute of Frauds.

Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses, as a will devising such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each, therefore, had a circumstance not common to both. This difference, however, (which probably occurred without design,) has been attended with little practical effect; for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation; so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration.

Revocation connected with new disposition.

Revocation, where devise intended to be substituted fails.

If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on the principle before noticed, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same (*d*). But it seems, that, if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked (*e*).

Revocation of wills of personalty.

With respect to the revocation of wills of personal estate, it is to be observed, that questions concerning it most commonly

(*d*) *Eggleston* v. *Speke*, 3 Mod. 258, Carth. 79, 1 Show. 89; *Onions* v. *Tyrer*, 2 Vern. 741, Pre. Ch. 459, 1 P. W. 343; [*Short* v. *Smith*, 4 East, 419.] See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Kirke* v. *Kirke*, 4 Russ. 435; [*Locke* v. *James*, 11 M. & Wels. 901.] But see *Richardson* v. *Barry*, 3 Hagg. 249.

(*e*) *Frenche's case*, 8 Vin. Ab. Dev. O. pl. 4; *Roper* v. *Constable*, 2 Eq. Ca. Ab. 359, pl. 9; *S. C.* nom. *Roper* v. *Radcliffe*, 5 B. P. C. Toml. 360, 10 Mod. 233; [*Tupper* v. *Tupper*, 1 Kay & J. 665.]

occur in the ecclesiastical courts, which, of course, no less than the temporal courts, are bound by the 22nd section of the Statute of Frauds, excluding parol revocations. Accordingly, it was ruled by Sir *J. Nicholl*, that evidence could not be received of the testator's intention orally announced, to adopt the prior of two wills, both of which were found at his decease uncancelled, though it appeared that most of the bequests in the posterior will had lapsed (*f*). But the enactment in question is not considered to preclude the reception of evidence of acts of a testator in his lifetime concerning his testamentary papers; still less does it exclude inquiry into the state in which such papers were found at his decease. And it is to be observed, also, that the requisition of the statute is satisfied by the intention to revoke being reduced into writing in the lifetime, and by the direction, of the testator, though not authenticated by his signature. And on this principle it was decided, that, where a person, at the testatrix's request, addressed a letter to another person having the custody of her will, requesting him to destroy it, this was a sufficient revocation, though the will was not destroyed in compliance with the request (*g*).

Revocation depending on completeness of revoking will.

Revocation often depends on the completeness of the posterior of two testamentary instruments. In such cases the ecclesiastical courts try the validity of the propounded paper by the principles which have been adverted to in a former chapter, to which it will be sufficient to refer (*h*), with the additional observation, that the presumption is always strongly adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and involuntary interruption (*i*).

Question how affected by recent act.

In regard to wills made since the year 1837, however, it can never be a question, whether an informal or apparently unfinished testamentary paper has a revoking operation, for the recent statute (sect. 20) (*k*) has placed a revoking will upon precisely the same footing, in regard to the ceremonial of execution, as a

(*f*) *Daniel* v. *Nockolds*, 3 Hagg. 777.
(*g*) *Walcott* v. *Ouchterlony*, 1 Curt. 580. [And see *Re Ravenscroft*, 18 L. J. Ch. 501; *Meredyth* v. *Maunsell*, Milw. Ir. Eccl. Rep. 132.]
(*h*) Ante, p. 94.
(*i*) *Blewitt* v. *Blewitt*, 4 Hagg. 410; *Gillow* v. *Bourne*, ib. 192.
(*k*) Vide post.

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disposing will; and when that ceremonial has been observed, it can never be said that the will is informal or unfinished.

Distinction between revocation of a gift and of so much of will as contains the gift.

[There are, it appears, two modes of revocation, having different effects. Thus, if there be a bequest by will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of such persons, his share will not accrue to the others (*l*): but if the testator revoke *so much of his will* as contains the gift to one of such persons, this is construed as directing the will to be read as if the name of such person had never occurred in it, and the gift as it then stands is a gift of the whole subject to the remaining persons, who consequently take the revoked share among them in addition to their original shares (*m*).]

A will or codicil may operate as a revocation of a prior testamentary instrument by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property.

Intention to revoke, whether present or future.

In order to produce a revocation of the first kind, an actual and present intention to revoke the will must be indicated; and if the testator's expressions are declaratory only of a future design, they will not be sufficient (*n*); and in an early case, before the Statute of Frauds, a distinction is taken between the effect of a testator saying "I will revoke my will made at P.," which refers to a future act, and when he says "my will made at P. shall not stand," which is a present resolution, the latter being, it was considered, an actual revocation, and the former not (*o*).

Mere intention to revoke by a future act inoperative.

Of course, a mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation. Thus, where A. (*p*) made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A. having acquired other real property, he made another will whereby he devised the newly-acquired property, and then wrote as follows:—"As to the rest of my real and personal estate I intend to dispose of the same by a codicil to this my will hereafter to be made;" it was contended that this clause, though inoperative as a disposition,

[(*l*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Humble* v. *Shore*, 7 Hare, 247. Compare *Shaw* v. *McMahon*, 4 D. & War. 431; as to which see post, vol. 2, c. 32, s. 3.

(*m*) *Harris* v. *Davis*, 1 Coll. 416; and see *Alexander* v. *Alexander*, 5 Beav. 518.

(*n*) *Cleobury* v. *Beckett*, 14 Beav. 588.]

(*o*) *Burton* v. *Gowell*, Cro. El. 306.

(*p*) *Thomas* v. *Evans*, 2 East, 488. See also *Griffin* v. *Griffin*, 4 Ves. 197, n.

indicated an intention to revoke the prior will, but Lord Ellenborough and Mr. Justice Lawrence held that it was not a revocation. They considered the cases before the statute to be applicable, and that the testator merely intended to dispose of the subsequently-acquired real estate, and the property which had lapsed by the death of the residuary legatee: and that, even if this had imported an intent to revoke by making a different disposition in future, it would not, according to the authorities, have amounted to a revocation, unless the Court could ascertain what the difference was.

Express clause of revocation restrained by construction.

[And even an express clause of absolute and present revocation of a former will may be reduced to total or partial silence, either by showing that the clause was inserted by mistake (*q*), or that it is unreasonable to give unrestrained effect to the words; as, *e.g.*, in cases where, by one testamentary paper, a person exercises a power of appointment, and then by subsequent instrument either exercises another and distinct power (*r*), or deals with his own property, and not with the subject of the former power (*s*): in these cases it has been held that the former appointment is not revoked.]

It was decided at an early period, that, in order to revoke a will, it is not sufficient that the existence of a subsequent will should have been found by a jury, it must be found to be different from the former (*t*), and even the latter finding will not avail, if it be added that the nature of such difference is unknown to the jurors (*u*), [and an instrument stating itself to be the testator's last will does not necessarily operate to revoke a prior will, either as regards real (*x*) or personal estate (*y*).]

Revocation by inconsistency of disposition.

The most simple and obvious case of revocation by inconsistency of disposition, is that of a testator having devised lands to a person in fee, and then, by a subsequent will or codicil devising the same lands to another in fee; in such case the latter devise would operate as a complete revocation of the former (*z*). And

[(*q*) *Powell* v. *Mouchett*, 6 Madd. 216, and cases cited ante, p. 73, n. (*i*).

(*r*) *Re Meredith*, 29 L. J. Prob. 155. The parol evidence read at the bar in this case of course formed no ingredient in its decision. See also *Re Merritt*, 1 Sw. & Tr. 112, 4 Jur. N. S. 1192.

(*s*) *Hughes* v. *Turner*, 4 Hagg. Eccl. 52; *Denny* v. *Barton*, 2 Phillim. 575.]

(*t*) *Seymor* v. *Nosworthy*, Hard. 374; *S. C.* Show. P. C. 146. [For this purpose parol evidence is admissible where the subsequent will is lost or destroyed, *Brown* v. *Brown*, 8 Ell. & Bl. 876.]

(*u*) *Goodright* v. *Harwood*, 3 Wils. 497, 2 W. Bl. 937, Cowp. 87, 7 B. P. C. Toml. 489.

[(*x*) *Freeman* v. *Freeman*, 5 D. M. & G. 704.

(*y*) *Cutto* v. *Gilbert*, 9 Moo. P. C. C. 131; *Richards* v. *Queen's Proctor*, 18 Jur. 540.

(*z*) 3 Mod. 206, [Litt. s. 168; *Re Hough's Estate*, 15 Jur. 943, 20 L. J. Ch. 422; *Evans* v. *Evans*, 17 Sim. 107.]

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here, the learned reader cannot fail to perceive in the difference of construction which has obtained, where two devises in fee of the same land are found in one and the same will, and where they are found in several distinct wills, the greater anxiety evinced to reconcile the several parts of the same testamentary paper, than to reconcile several distinct papers of different dates, though constituting, in the whole, one will. In the former case, the devisees (as hereafter shown) take concurrently in order to avoid making one part of the will contradict and subvert another; and in the latter case, no hesitation seems to have been felt in holding the second devise to be revocatory of the first. And the distinction seems to be reasonable; for though it may be very unlikely that a testator should wholly change the object of the devise in the short interval between his passing from one part of the will to the other, there is no such improbability, that, in the longer lapse of time between the execution of two testamentary papers of different dates, such a change of purpose should have occurred.

Rule where several wills are subsisting at death.

[Under the old law] where a testator at different periods of his life made various testamentary papers, some of which he destroyed, and others he left undestroyed, each purporting to contain his last will, this character belonged exclusively to such one of the uncancelled papers as was executed next before his decease (*a*); and in order to ascertain the time of the execution of the respective papers, recourse may be had to evidence, derived either from their own contents, or from extrinsic sources. Sometimes the water-mark, showing the date of the manufacture of the paper on which a will is written, affords decisive proof of its posteriority to another will, the period of whose execution can be ascertained by other means (*b*).

As to contradictory wills of uncertain date.

If, from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to, until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in

(*a*) See *Goodright* v. *Glazier*, 4 Burr. 2512; *Harwood* v. *Goodright*, Cowp. 92. [This rule is of course inapplicable to the present state of the law, see 1 Vict. c. 26, s. 22.]

(*b*) The writer, however, understands that paper, made near the close of a year, sometimes (like literary publications) bears the date of the year following.

vain (*b*). And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper (*c*); supposing, of course, that such latter paper contains no express clause of revocation, [or other clear indication of a contrary intention (*d*).]

Effect where subsequent will is not wholly inconsistent.

As where a testator made a will devising his lands to trustees, for two hundred years, to pay his debts, and afterwards, by another will, devised the same lands to other trustees for three hundred years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all incumbrances affecting the property; Lord *Talbot* held, that the first term of two hundred years was not revoked, as the two terms were not inconsistent, the testator's intention in creating the term of three hundred years being merely for the purpose of giving priority in payment to the specialty debts, and the charges affecting the estate (*e*).

The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however, exists only, either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be to produce partial intestacy (*f*); or else where the posterior paper is styled a codicil: for the office of a codicil being to vary or add to and not wholly supplant a previous will, such a designation of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained.

Numerous are the questions which have arisen in regard to the extent to which a codicil affects the dispositions of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

(*b*) See *Phipps* v. *Earl of Anglesea*, 7 B. P. C. Toml. 443.

[(*c*) *Richards* v. *Queen's Proctor*, 18 Jur. 540.

(*d*) *Plenty* v. *West*, 6 C. B. 201, 16 Beav. 173.]

(*e*) *Weld* v. *Acton*, 2 Eq. Ca. Ab. 777, pl. 26. [The word "deed," occurring four times in this report, seems a mistake for "will," though the report might be made consistent by reading "demise" for "devise;" and see *Coward* v. *Marshal*, Cro. El. 721.

(*f*) In *Plenty* v. *West*, 1 Rob. 264, 4 No. Cas. 103, 9 Jur. 458, Sir *H. J. Fust* denied the applicability of this rule to personalty; but see *Cookson* v. *Hancock*, 1 Kee. 817, 2 My. & Cr. 606.]

Dispositions not to be disturbed more than absolutely necessary.

In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil, as will appear from the following adjudications, which have been selected from a large mass of cases (*g*), that might be cited in illustration of the principle.

Thus, where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B., who shall attain the age of twenty-one years and shall assume the testator's name, the first devise will be revoked only quoad the interest comprised in the executory devise in the codicil; so that, until B. has a son who attains his majority and assumes the testator's name, the property will pass to A. under the devise in the will (*h*).

Charge not revoked by revocation of devise of land charged.

So, where a testator devises lands to A. subject to a charge in favour of B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee (*i*).

Examples of non-revocation by codicil.

So, where a testator by his will devised his estates to C. B. for life without impeachment of waste, and by a codicil directed his trustees to let, until tenant for life married, the lessees to be impeachable of waste, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was contended that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir *W. Grant*, M. R.,

(*g*) Cases as to the combined effect of a will and several codicils are frequently not only very long, but are too special to be of much use as general authorities. *Doe* d. *Hearle* v. *Hicks*, 8 Bing. 475, [1 Cl. & Fin. 20;] *Hicks* v. *Doe*, 1 You. & J. 470; *Alexander* v. *Alexander*, 6 D. M. & G. 593; *Agnew* v. *Pope*, 1 De G. & J. 49; *Patch* v. *Graves*, 3 Drew. 348. The question, whether a codicil was wholly or partially revocatory, was much discussed in the case of *Cookson* v. *Hancock*, 1 Kee. 817, 2 My. & C. 606; see also *Schofield* v. *Cahuac*, 4 De G. & S. 533. [A question often arises whether the whole or only a part of a series of limitations is revoked by a codicil, as to which see *Philips* v. *Allen*, 7 Sim. 446; *Murray* v. *Johnston*, 3 D. & War. 143; *Fry* v. *Fry*, 9 Jur. 894; *Twining* v. *Powell*, 2 Coll. 262; *Sandford* v. *Sandford*, 1 De G. & S. 67; *Ives* v. *Ives*, 4 Y. & C. 34; *Daly* v. *Daly*, 2 J. & Lat. 753; *Morrison* v. *Morrison*, 2 Y. & C. C. 652; *Boulcott* v. *Boulcott*, 2 Drew. 25, 35; *Wells* v. *Wells*, 17 Jur. 1020; *Alt* v. *Gregory*, 2 Jur. N. S. 577. Where the residue was given to executors by will, and a codicil directed that A. should also be executor, and that the will should take effect as if his name had been inserted therein as executor, A. was held not entitled to a share of residue, *Hillersdon* v. *Grove*, 21 Beav. 518.]

(*h*) *Duffield* v. *Duffield*, 3 Bli. N. S. 261, [1 D. & Cl. 268, 395; and see *Doe* d. *Evers* v. *Ward*, 16 Jur. 709, 21 L. J. Q. B. 145; *Re Colshead*, 2 De G. & J. 690; *Norman* v. *Kynaston*, 9 W. R. 50.]

(*i*) *Beckett* v. *Harden*, 4 M. & Sel. 1; [*Young* v. *Hassard*, 1 Dr. & War. 638; *Fry* v. *Fry*, 9 Jur. 894; and compare *Ravens* v. *Taylor*, 4 Beav. 425, *contrà*.]

held, that there was no inconsistency, and nothing to take the timber from the tenant for life (*k*).

Again, where a testator by his will bequeathed as follows: "As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the residue of his personal estate to A., and gave the same to B. It was held, that the revocation was confined to the residue, and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c. (*l*).

[And where a trust fund, which by will was given to the children of A. living at a stated period, with a power of advancement in the trustees, was by codicil, "in lieu of such disposition," given to the children of A. living at a different period, and in other respects the will was confirmed; it was held that the power of advancement was not revoked (*m*).

Case of *Doe* v. *Marchant*; gift in codicil confined to property acquired after the date of the will.

In the case of *Doe* d. *Murch* v. *Marchant* (*n*), the testatrix devised and bequeathed all her real and personal estate on an event which happened, to B. T. absolutely. Subsequently, the testatrix made a codicil in which she noticed the happening of the event, and that she had become entitled to other real and personal estate which was not comprehended in her said will, "but which also *with my other estates and property* I now intend to dispose of for the benefit of B. T. (save only the bequests hereinafter made) for her life, with such limitations and in such manner as hereinafter expressed, *instead of the devise and bequest* (*o*) contained in my said will;" and after giving some specific and pecuniary bequests, she devised and bequeathed all her real and personal estate upon trust for B. T. for life, with remainders over. Notwithstanding the very strong expressions in the codicil, it was held that B. T. took an estate in fee simple in the real property devised by the will, and that the codicil operated solely upon the real property acquired subsequently to the date of the will, and in which only she took a life estate. *Tindal*, C. J., said there was no clause of revocation in the

(*k*) *Lushington* v. *Boldero*, G. Coop. 216.

(*l*) *Clarke* v. *Butler*, 1 Mer. 304; [see also *Barclay* v. *Maskelyne*, 5 Jur. N. S. 12.

(*m*) *Hill* v. *Walker*, 4 Kay & J. 168; see also *Butler* v. *Greenwood*, 22 Beav. 303; Arrowsmith's Trusts, 6 Jur. N. S. 1232, 7 ibid. 9.

(*n*) 6 M. & Gr. 813, 7 Scott, N. R. 644.

(*o*) By the construction adopted no estate was given by the codicil *instead* of that given by the will.

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[codicil, nor if the will and codicil were compared together was any such intention apparent.

Had the will in the last case been dated subsequently to the 31st of December, 1837, the after-acquired real estate, which passed by the codicil to B. T. for life, would, as we shall hereafter see, have been included in the devise by the will to B. T. in fee; and then it is conceived the codicil must have been considered as a revocation of the devise in the will, unless the words of recital could have been considered to have any restraining operation. No stress appears to have been laid on these words; indeed they rather told against the decision, the sole ground of which appears to have been, that the codicil might be considered as made for the purpose of passing estates acquired subsequently to the will, and thus will and codicil might stand together. It must be remembered that the decision in the last case did not touch the bequests of the personalty, with respect to which the remarks just made would apply equally under the old as under the new law; and accordingly where a testator by one codicil bequeathed the residue of his personal estate to his wife for life, and after her death to A., and by a second codicil he bequeathed the residue of his personal estate *not thereinbefore or by his will or any other codicil disposed of*, to A. and B. equally after the death of his wife, Lord *Cottenham*, then M. R., thought that as everything was disposed of by the will and first codicil, the residuary gift in the second codicil had under its very words nothing to operate upon (*p*); but his decision was reversed by the House of Lords, Lords *Brougham* and *Lyndhurst* giving it as their opinion that the testator must have intended to pass something by the second codicil, and the only mode of giving it any effect was to consider it as revoking the residuary gift in the first codicil. Lord *Cottenham* adhered to his original opinion (*q*). But where there is a gift by codicil of the residue of a particular fund, and then by a subsequent codicil a general gift of residue, as the two gifts are not necessarily inconsistent, the latter will not revoke the former (*r*).

Case of *Douglas* v. *Leake*. Gift of residue in codicil revokes gift of residue in will.

Contra where the gift in the will is of a particular residue.

Where a testator directed his trustees, to whom he had given all his property, to carry on his business for ten years, and then to sell and hold the proceeds upon trust, as to one moiety for his

Case where held change of trustee merely and no revocation of trusts.

[(*p*) *Douglas* v. *Leake*, 5 L. J. N. S. Ch. 25.

(*q*) *Earl of Hardwicke* v. *Douglas*, 7 Cl. & Fin. 795, West, P. C. 555; and compare *Lee* v. *Delane*, 4 De G. & S. 1.

(*r*) *Inglefield* v. *Coglan*, 2 Coll. 247; and see *Evans* v. *Evans*, 17 Sim. 108, stated post.

[daughter and her children, and as to the other moiety for the children of his son, and by a codicil revoked that part of his will which empowered his trustees to sell, and instead thereof authorized his daughter to take possession of his property and to dispose thereof at her discretion; it was held, that this was not an absolute gift to the daughter, but only constituted her a trustee in place of the trustee named in the will (*s*).

Revocation as to one office does not extend to other offices.

Where a person is appointed to more than one of the offices of guardian, executor, and trustee, a revocation by codicil of the appointment to one of the offices, is not a revocation of the appointment to any other office (*t*); unless it is clear, as by directing "trustees" to pay debts and legacies, that the several offices (of trustee and executor) are to be filled by the same persons (*u*); nor is a legacy to a trustee, as a mark of respect, revoked by the appointment of another trustee in his place (*x*).

Same meaning given to expressions in will and codicil.

If the testator uses words in a peculiar sense in his will, the same sense will, according to the general rule, be attributed to them in a codicil, so as not to disturb the will more than necessary. Thus, in the case of *Evans* v. *Evans* (*y*), the testator devised tithes, and then devised all his real estates of what nature or kind soever, and by codicil devised in a different manner all his real estates of what nature or kind soever. Sir *L. Shadwell*, V. C., held that the second gift in the will did not, but that the gift in the codicil did include the tithes; the Court of Q. B. (*z*), however, differed from him on the last point, holding that the words "real estates" in the codicil were to be interpreted in the same manner as in the will.

Distinction between revoking effect of a new will and of a codicil.

Care must be taken to observe the distinction, before adverted to, which exists where the later of two testamentary papers is a complete will and not merely a codicil; for the former, so far as regards personal estate, will then be entirely revoked: thus a will disposing of all the testator's property, but not appointing an executor, was, in the case of *Henfrey* v. *Henfrey* (*a*), held to be a total revocation of a prior will, the executors under

[(*s*) *Newman* v. *Lade*, 1 Y. & C. C. C. 680; and see *Barry* v. *Crundall*, 7 Sim. 430; *Froggatt* v. *Wardell*, 3 De G. & S. 685; and compare *Schofield* v. *Cahuac*, 4 De G. & S. 533.

(*t*) *Ex parte Park*, 14 Sim. 89; *Fry* v. *Fry*, 9 Jur. 894; *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Worley* v. *Worley*, 18 Beav. 58; and see *Hare* v. *Hare*, 5 Beav. 629.

(*u*) *Barrett* v. *Wilkins*, 5 Jur. N. S. 687.

(*x*) *Burgess* v. *Burgess*, 1 Coll. 367.

(*y*) 17 Sim. 86.

(*z*) *Williams* v. *Evans*, 1 Ell. & Bl. 727.

(*a*) 2 Curt. 468, 4 Moo. P. C. C. 29, 6 Jur. 355; and see *Crosbie* v. *Macdoual*, 4 Ves. 616.

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[which were not admitted to prove the latter will; and in some early cases (*b*), the mere appointment of a different executor in a subsequent paper, purporting to be a distinct will, which, by the civil law, amounted to a complete disposition of the personal estate, appears to have been held sufficient to revoke a prior will. But these cases have met with only a modified approval, and do not furnish an invariable rule. Thus, if upon examination of the whole will, the intention appears to be, that the subsequent document should be codicillary only, the appointment of a different executor will not work a revocation, even as to personal estate (*c*); and with regard to realty, the revocatory effect of a will, as distinguished from a codicil, is admitted with still greater reluctance, for it has been held that a general devise of all real estate contained in a second will, does not revoke a specific devise contained in a former will (*d*).]

Estates A. and B. are devised to the same uses: revocation as to A. does not affect B.

It may be observed, that where a testator, in order to avoid repetition, has by his will declared his intention respecting a property, (say Whiteacre,) then being devised by him, to be similar to what he had before expressed concerning another property (say Blackacre) antecedently given, and he afterwards by a codicil, or by obliteration, or otherwise, revokes the devise of Blackacre, such revocation does not affect the devise of Whiteacre. Thus, in the case of *Darley* v. *Langworthy* (*e*), where a testator by his will devised a certain estate to certain limitations, and then proceeded to annex thereto another estate, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and subsequently, by an act in his lifetime, he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will.

So, where a testator by his will bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the re-

[(*b*) *Whitehead* v. *Jennings*, and *Burt* v. *Burt*, cited 1 Phillim. 412.

(*c*) *Richards* v. *Queen's Proctor*, 18 Jur. 540.

(*d*) *Freeman* v. *Freeman*, 5 D. M. & G. 704. The land in dispute was copyhold, and would not have passed by the general devise, inasmuch as the will was dated before the new Wills Act: but this does not appear to have influenced the judgment of the Court. "No case," said Sir *G. Turner*, L. J., "has been cited where a distinct property having been given by a first will, the disposition of it has been revoked by another will making no reference to that property."]

(*e*) 3 B. P. C. Toml. 359, reversing Lord *Camden's* decree in *Darley* v. *Darley*, Amb. 653; see also Lord *Sidney Beauclerk* v. *Mead*, 2 Atk. 167; [*Salter* v. *Fary*, 12 L. J. Ch. 411.]

sidue, it was held that this was no revocation of the specific bequest (*f*).

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts thereinafter expressed concerning his residuary personal estate; he then bequeathed his residuary personal estate upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner. Sir *J. Leach*, M. R., held, that by this alteration in the disposition of the personal estate, the devise of the realty was not affected; the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate, in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will, would have been no revocation of the disposition of the produce of the freehold estate; and his Honor observed, it could make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents and purposes, by compendious words of reference (*g*). [This construction, however, does not seem to apply where plate, pictures, &c., are directed to go along with a mansion-house (*h*).]

Rule different as to heirlooms.

If the devise of the principal estate is not simply revoked, but is modified only, it is not too hastily to be concluded, that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the Master of the Rolls in the last case, might seem to conduct to such a conclusion; for a different construction prevailed in the case of *Lord Carrington* v. *Payne* (*i*), where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate to be laid out in land to be settled to such uses and upon such trusts, &c., as he had declared concerning his real estate. By a codicil he revoked so much of his will as directed the settlement of his real estate to those limitations, and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir *R. P. Arden*, M. R., held, that the bequest of the personalty was not revoked. He considered that

Distinction, where the first devise is modified only.

(*f*) *Roach* v. *Haynes*, 6 Ves. 153.
(*g*) *Francis* v. *Collier*, 4 Russ. 331.
[(*h*) *Evans* v. *Evans*, 17 Sim. 108.]
(*i*) 5 Ves. 404.

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though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both properties); and that it was no more than if the devisor had with his own hand inserted the name of one devisee before another, and then republished his will.

Unless the case of *Lord Carrington* v. *Payne* can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

Absolute revocation held not restrained by recital.

It is to be collected from the case of *Holder* v. *Howell* (*k*), that where a testator in a codicil recites that an inconvenient consequence may result from a devise in his will, as that in a particular event the devisee or legatee would be unprovided for contrary to his intention, and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts which he particularizes, and which are the same as the former trusts, with the exception of the matter expressly intended for correction, *and of one other of the trusts, which he wholly omits;* this omission, though probably undesigned, cannot be supplied. The principle of this case seems to be inconsistent with, and it may, therefore, be considered as overruling the earlier case of *Matthews* v. *Bowman* (*l*), where a testator, having devised the residue of his estate to his daughters as tenants in common, by a codicil made for a particular purpose re-devised it to them, omitting the words of severance, it was held, that the legatees were tenants in common.

Clear gift in will not revoked by doubtful expressions in codicil.

Another principle of construction is, that where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil.

Thus, in the case of *Goblet* v. *Beechey* (*m*), where a testator by his will gave a specific chattel to A.; afterwards by a codicil he gave a number of articles of a different kind, and of much less value, to B., and in enumerating those articles introduced

(*k*) 8 Ves. 97, [and see *Cole* v. *Wade*, 16 Ves. 46.]

(*l*) 3 Anst. 727, a reporter of very doubtful authority, [and see *Re Lewis*, 14 Jur. 514, 7 No. Cas. 436.]

(*m*) 3 Sim. 24, 2 R. & My. 624; [compare *Baldwin* v. *Baldwin*, 22 Beav. 413.

an imperfectly written word, which might be supposed to designate the chattel previously given to A.: it was held, that the bequest to A. was not thereby revoked.

Cases where revocation not implied from ambiguous expressions.

[In the case of *Gordon* v. *Hoffman* (*n*), a legacy of 3000*l.* was given by will, and by codicil a legacy of 4000*l.* "in addition to the legacy of 2000*l.* given by my will;" the mention of the legacy of 3000*l.* as being only of 2000*l.* was held not to reduce it to the latter amount. Again, in the case of *Bunny* v. *Bunny* (*o*), a testatrix by her will gave to the seven children of J. B. a legacy of 200*l.* each, and other interests: by her first codicil she revoked the legacies of 200*l.* each to the children of J. B. and all other benefits given them by her will, and in lieu thereof gave only the legacy of 200*l.* each to A., B., C., D. and E., five of the children of J. B. By a second codicil she revoked all the legacies she had left in her *will* to J. B.'s children; and by a third codicil she revoked the legacy of 200*l.* by a previous codicil to her said will given to A. The question was, whether the legacies given by the first codicil to the plaintiffs B., C., D. and E. were revoked by the second codicil; which depended on what the testatrix meant by the word "will" in the second codicil. The word would generally mean all the previous unrevoked testamentary papers (*p*): but if that was what the testatrix meant, it was not easy to account for the subsequent revocation (by the third codicil) of a supposed existing gift to A. in the first codicil. It was true that if she meant the will only without the codicil, then she was doing what was unnecessary, as the legacies in the will had already been revoked by the first codicil; nevertheless it was held, that the former interpretation best answered the apparent meaning of the testatrix, and that the legacies to B., C., D. and E. were not revoked. And this construction was aided by the third codicil which revoked the legacy given to A. by a previous codicil, showing that the testatrix considered that A., and consequently the plaintiffs also, had at that time legacies left by the previous testamentary papers. And in the case of *Cleobury* v. *Beckett* (*q*), legacies were given in a codicil to a class of persons "except A., who is not intended to take any benefit under my will or this codicil." It was held by Sir *John Romilly*, M. R., that

[(*n*) 7 Sim. 29; and *Mann* v. *Fuller*, Kay, 624.

(*o*) 3 Beav. 109; and see *Pratt* v. *Pratt*, 14 Sim. 129; *Sawrey* v. *Rumney*, 5 De G. & S. 698; *Stokes* v. *Heron*, 12 Cl. & Fin. 161.

(*p*) See *Crosbie* v. *Macdoual*, 4 Ves. 610, post, p. 176.

(*q*) 14 Beav. 583; see also *Agnew* v. *Pope*, 1 De G. & J. 49.]

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[these words did not operate as a revocation of an express gift by the will to A. He observed that such words were extremely ambiguous, and did not seem to him to import a distinct and present revocation of the devise in the will.]

Intention to revoke may be indicated by informal expressions.

But an intention to revoke, though expressed in loose and untechnical language, or in terms capable per se of a limited interpretation, must nevertheless prevail, if it can be clearly collected from the whole will (*r*). [On this principle, it is not necessary that the gift to be revoked should be accurately referred to (*s*); or that the legatee by the will should be actually named in the codicil (*t*).]

Revocations founded on mistake.

And here, it may be observed, that where a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact, which turns out to be false, the revocation does not take effect; being, it is considered, conditional, and dependent on a contingency which fails.

Thus, in the case of *Campbell* v. *French* (*u*), where a testator, having by will bequeathed to the two grandchildren of his late sister 500*l.* each, by a codicil declared, that he revoked the legacies bequeathed by his will to such grandchildren, "they being all dead," and the fact appearing to be that they were living, Lord *Loughborough* held, that the legacies were not revoked.

So, in the case of *Doe* d. *Evans* v. *Evans* (*x*), where a testatrix by her will, dated July, 1819, devised lands to A. for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail; and by a codicil, dated in 1829, after reciting the above devise, *and that A. had died without leaving issue*, she devised the lands to B. The fact was that A. died in 1827, leaving a posthumous child, whose birth was not known to the testatrix when she made her codicil, but she afterwards became acquainted with it. The Court considered that this was a conditional revocation; and the fact being contrary to what the testatrix supposed, the devise in the will remained in force.

Distinction where the fact itself, and where the advice or belief of the fact, is the ground of revocation.

Had the testator in the two preceding cases, instead of making the death of the devisee or legatee, under the circumstances

(*r*) *Read* v. *Backhouse*, 2 R. & My. 546.

[(*s*) *Pilcher* v. *Hole*, 7 Sim. 208; *Carrington* v. *Payne*, 5 Ves. 423.

(*t*) *Ellis* v. *Bartrum*, 25 Beav. 107.]

(*u*) 3 Ves. 321.

(*x*) 2 Per. & D. 378, [10 Ad. & Ell. 228.]

described, the ground or reason of the revocation, founded such revocation on his advice or belief only of the fact, it is conceived that the result would have been different. A distinction of this nature seems to be warranted by the case of *The Attorney-General* v. *Lloyd* (*y*), where a testator, having, by a will made before the passing of the statute of 9 Geo. 2, c. 36 (*z*), devised lands and bequeathed personalty to be laid out in lands for charitable uses, made a codicil posterior to the act, by which, after reciting that *being advised* the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did by such codicil give his personal estate to the charitable uses before mentioned; and he did thereby give his real estate to B. Though the testator's notion as to the invalidity of the devise in the will was erroneous, it was held that the devise to B. took effect (*a*).

So, where a testatrix by her will bequeathed 300*l.* among such of the children as should be living of E., and by a codicil proceeded as follows: "I give to my brother's son C. the 300*l.* designed for E.'s children, as I know not whether any of them are alive, and if they are well provided for," Sir *R. P. Arden*, M. R., held C. to be entitled, though the children of E. were living. He observed, that "it was argued, and with some ground, that if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from Cicero de Oratore) of pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte hujus institutionis vis est nulla: but the testatrix goes further, that she doubted if they were living whether they might not be well provided for, and she totally deprives them of that provision. The Court will not inquire whether they are well provided for or not (*b*)."

[And where a bequest to A. in a will was in a codicil treated as a bequest to B., and as lapsed by the death of B., and a new disposition was therefore made by the codicil, it was held that the will was not revoked (*c*).]

Whether legacies by codicil are on the same terms as those given by will.

It is often a question whether a legacy bequeathed by a codicil is payable out of the same fund, or is subject to the same restric-

(*y*) 3 Atk. 552, 1 Ves. 32; [and see the observations of Lord *Eldon*, 1 Mer. 148, 149.]

(*z*) See Chap. IX. Sect. 1, post.

(*a*) *Willett* v. *Sandford*, 1 Ves. 178, 186.

(*b*) *Att-Gen.* v. *Ward*, 3 Ves. 327.

[(*c*) *Barclay* v. *Maskelyne*, 1 Johns. 124.]

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tions, as a legacy bequeathed to the same person by the will. If the second legacy is expressly given upon the same conditions, &c., of course the affirmative does not admit of doubt (*d*); and [the same construction prevails] where the legacy by codicil is expressed to be in addition to (*e*), [or in substitution for (*f*),] the legacy given by the will. [But it seems that where a legacy is given to A. for life, with remainder over, another legacy given to A. in addition to the legacy before mentioned, will be construed an absolute gift to him; and it is only where the original legacy is absolute or defeasible on certain terms in the party to whom the additional legacy is given, that the second gift is held to be on similar terms. In no case has it been held that the latter gift is to go to parties entitled under the subsequent limitations of the former gift (*g*).]

When legacies by codicil are payable out of same fund as legacies by will.

In some instances the same construction has prevailed where the intention to assimilate the respective legacies or classes of legacies has been less distinctly indicated. As in the case of *Leacroft* v. *Maynard* (*h*), where a testator devised his real estate upon trust to sell and apply the produce in paying (among other legacies) 50*l.* to each trustee, to the Foundling Hospital 2000*l.*, and to the hospitals of L. and S. 1000*l.* each. Afterwards, by a codicil he revoked the devise and legacy to one of the trustees, and substituted another trustee, to whom he gave a legacy of 50*l.* He also revoked the legacies to the three hospitals, and gave 1500*l.* to the Foundling, 500*l.* to the Infirmary of N., and a sum to be distributed among the poor of S. It was unsuccessfully contended for the charities, that the legacies given by the codicil were not, like those of the will, charged on the land, and were therefore valid. The Lord Chancellor seems to have thought, that the necessity which this would have occasioned of holding, that the legacy to the new trustee must also come

(*d*) *Lloyd* v. *Branton*, 3 Mer. 108; see also *Cooper* v. *Day*, Id. 154; [*Corporation of Gloucester* v. *Wood*, 3 Hare, 131, 1 H. of L. Ca. 272.]

(*e*) *Crowder* v. *Clowes*, 2 Ves. jun. 449; [*Russell* v. *Dickson*, 2 D. & War. 138; *Day* v. *Croft*, 4 Beav. 561; *Burrell* v. *Earl of Egremont*, 7 Beav. 223; *Cator* v. *Cator*, 14 Beav. 463; *Warwick* v. *Hawkins*, 5 De G. & S. 481; but the effect of the context may prevent an additional legacy from being paid precisely in the same manner as the original, *Overend* v. *Gurney*, 7 Sim. 128; *King* v. *Tootel*, 25 Beav. 23.

(*f*) *Cooper* v. *Day*, 3 Mer. 154; *Russell* v. *Dickson*, 2 D. & War. 133; *Martin* v. *Drinkwater*, 2 Beav. 215; *Bristow* v. *Bristow*, 5 Beav. 289; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fenton* v. *Farington*, 2 Jur. N. S. 1120. A legacy given "instead" of another, was held upon the context not to be substitutional in *Haley* v. *Bannister*, 23 Beav. 336.

(*g*) *More's Trust*, 10 Hare, 171; *Mann* v. *Fuller*, Kay, 624.]

(*h*) 1 Ves. jun. 279, [3 B. C. C. 233;] see also *Brudenell* v. *Boughton*, 2 Atk. 268; [*Bonner* v. *Bonner*, 13 Ves. 379; *Williams* v. *Hughes*, 24 Beav. 474.

out of the personalty, formed a conclusive argument against the construction. [But it seems that even without this ground the decision must have been the same (*i*).]

So, in the case of *Fitzgerald* v. *Field* (*k*), where a testator gave his personal and freehold estates to trustees, upon trust, with the money arising from his personal estate, and in aid thereof, by sale or mortgage of part of the freeholds, to pay certain annuities and legacies. By a codicil he revoked this bequest and devise, and gave the real and personal estate to other trustees upon the trusts in his will and codicil mentioned. He then bequeathed an annuity to A. for life, *with the payment of which he charged the residue of his said lands*, and with a power of distress. Lord *Gifford*, M. R., held, that, whatever might be the construction if the codicil stood alone, it was evident, looking at the will and codicil together, the intention of the testator was, that all his personal estate should be applied in the first instance to the payment of annuities and legacies. [But this does not apply where the residue is by the will given to the legatees in proportion to the legacies *therein*, or *by the will* bequeathed to them, and by codicil additional legacies are given to some of the legatees; consequently, the proportion, in which the residue is to be divided, remains unaltered (*l*).]

Whether legacy given by codicil is exempt from duty like those of will.

Whether a legacy bequeathed by a codicil is to participate in an exemption from duty created by the will in favour of the legacies in general given by the will (*m*), or of some particular

[(*i*) *Johnstone* v. *Earl of Harrowby*, 6 Jur. N. S. 153.]

(*k*) 1 Russ. 428.

[(*l*) *Hall* v. *Severne*, 9 Sim. 515; see *Sherer* v. *Bishop*, 4 B. C. C. 55.]

(*m*) The following expressions have been held to exempt the legatees from payment of duty. A direction to executors to make payment of all the legacies *without any deduction* (*Barksdale* v. *Gilliat*, 1 Sw. 562); or to pay the annuities and legacies *clear of property tax and all expenses whatsoever attending the same.* (*Courtoy* v. *Vincent*, T. & R. 433.) Or a gift of real and personal estate to executors in trust, to pay to J. D. for life an annuity of 46*l.* *clear of all deductions whatsoever*; though it was contended that the words excluding deduction referred to the payment of the land tax, being applicable to the annuity only as a charge on real estate. (*Dawkins* v. *Tatham*, 2 Sim. 492.)

What expressions exempt legacy from duty.

Again, where the direction was that annuities should be paid to the legatees *without any deduction or abatement out of the same on any account or pretence whatsoever*; and the argument for the exemption was considered to be strengthened by the fact that there were no other deductions to which the annuitants were liable. (*Smith* v. *Anderson*, 4 Russ. 352.) So, where the legacies were to be paid *free from all expense.* (*Gosden* v. *Dotterill*, 1 My. & K. 56.) Again, where the annuity was to be paid out of land *clear of all taxes and deductions whatsoever.* (*Stow* v. *Davenport*, 5 B. & Ad. 359, [2 Nev. & M. 835.)] So, where an annuity or *clear* yearly sum of 500*l.* was charged on a certain farm, and was to be paid half-yearly *clear of all taxes and outgoings.* (*Louch* v. *Peters*, 1 My. & K. 489.) So, where a testator devised to J. M. for his life one annuity or *clear* yearly sum of 100*l.* charged upon his estates at C., which estates he then devised in trust to raise the annuity, *and the costs, charges, and expenses attending the raising and paying the same*; and then in trust for A.

What expressions exempt annuity from duty.

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legacy for which the legacy in the codicil is substituted, has often been a point of dispute. Even in the latter case, it seems the intention to exempt the substituted legacy must be distinctly indicated, there being no necessary inference that the legacy bequeathed by the codicil is to stand pari passu in all respects with the legacy for which it is substituted. Thus, where the legacies bequeathed by a will were to be paid free from legacy duty, and the testator by a codicil bequeathed to the husband of one of the legatees who had died an equal legacy, "instead of" the legacy given by the will to the deceased wife, it was held by Lord *Eldon*, affirming a decree of Sir *J. Leach*, V. C., that the legacy given by the codicil was an independent, distinct, substantive bequest; and, therefore, was not within the exemption (*n*).

So, where a testator by his will gave to A. and B. an annuity of 300*l.*, equally to be divided between them, during their joint lives, *free from all taxes and stamp duties*, and after the death of one of them, to the survivor during her life, and after the death of the survivor, over to C. for life. By a codicil the testator revoked the annuity of 300*l.*, and gave A. and B. a clear annuity

for life, with remainder over. (*Gude* v. *Mumford*, 2 Y. & C. 448.) The preceding cases have overruled *Hales* v. *Freeman* (4 J. B. Moo. 21, 1 Br. & B. 391), in which case, however, the question whether the legacy was liable to duty was never raised. And it should seem (notwithstanding the cases of *Burrows* v. *Cottrell*, 3 Sim. 375—(where, indeed, the question was not raised), [*Sanders* v. *Kiddell*, 7 Sim. 536, and *Marris* v. *Burton*, 11 Sim. 161), that a gift of a *clear* sum or annuity, involves an exemption from duty. (*Harper* v. *Morley*, 2 Jur. 653; *Ford* v. *Ruxton*, 1 Coll. 403; *Bailey* v. *Boult*, 14 Beav. 595; *Haynes* v. *Haynes*, 3 D. M. & G. 590; and see *Hodgworth* v. *Crawley*, 2 Atk. 376.) A distinction has, indeed, been taken between this simple case and the case of a direction to trustees to set apart a sum of money sufficient to produce a *clear* yearly sum, where the trusts of the corpus is for persons in succession. (*Sanders* v. *Kiddell; Marris* v. *Burton; Bailey* v. *Boult;*) and it was actually so decided in *Pridie* v. *Field*, 19 Beav. 499. But this distinction does not seem to be tenable on principle. *Wilks* v. *Groom*, 2 Jur. N. S. 798. (*Harper* v. *Morley*, ubi sup.)]

As to exemption from property tax.

But where a testatrix gave her real and personal estate upon trust to pay off the debts of her late husband, it was held that the legacy duty was to be borne by the legatee-creditors, though it was contended that the testatrix's object would not be completely effected without paying the duty out of the general estate; but the C. J. observed that the entire debt had been paid, and the legacy duty was a burthen imposed on the legatee after he had received the legacy. (*Foster* v. *Ley*, 2 Scott, 438, [2 Bing. N. C. 269.)

A direction in a will that the legacy duty on the legacies "*herein*" given shall be paid out of his estate, does not extend to legacies given by codicil, even though the codicil is directed to be taken as part of the will. (*Early* v. *Benbow*, 2 Coll. 355, and see *Radburn* v. *Jervis*, 3 Beav. 450); secus where legacies generally are given duty free. (*Byne* v. *Currey*, 2 Cr. & Mees. 603, 4 Tyr. 479; see also *Williams* v. *Hughes*, 24 Beav. 474.)

Property-tax is a charge on the person, and therefore a gift free of all taxes and deductions, does not exempt the donee from payment of that duty, *Wall* v. *Wall*, 15 Sim. 513; *Lethbridge* v. *Thurlow*, 15 Beav. 339.]

(*n*) *Chatteris* v. *Young*, 2 Russ. 183; see also *S. C.* 6 Mad. 30, where the bequests are inaccurately stated.

of 100*l.* each, with benefit of survivorship. It was held, that the gift by the codicil was independent of the gift in the will, and, therefore, the annuities were not exempt from the duty (*o*).

It is clear, however, that if a testator by his will gives a legacy free from duty, and by a codicil, after reciting his intention of increasing the legacy, revokes it, bequeathing in lieu thereof a larger sum to the same legatees upon the same trusts, &c., the latter is also exempt (*p*).

Implied revocation by the effect of a codicil reviving an earlier will.

Sometimes a codicil has the effect of impliedly revoking the posterior of two wills, by expressly referring to and recognising the prior one, as the actual and subsisting will of the testator.

Thus, if a testator makes a will in the year 1830, and at a subsequent period (say in 1840) makes another will inconsistent with the former, but without destroying such former will, and he afterwards makes a codicil which he declares to be a codicil to his will of 1830, this would set up the will so referred to, in opposition to the posterior will (*q*); and parol evidence that the testator actually intended to refer to the will of 1840 would be inadmissible (*r*). An inaccuracy in regard to the date of the will referred to would not prevent the application of this doctrine, unless the mistake were such as to render it doubtful which of the two wills the testator had in view (*s*). And under the old law (*t*) it seems to have been considered in the Ecclesiastical Court at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will), sufficiently indicates an intention to treat that as the subsisting will, especially if (as happened in the case referred to) the posterior will was out of the testator's custody, so that he had no opportunity of cancelling it (*u*).

Republication of will by codicil, without referring to intermediate codicil, does not revoke latter.

In applying the doctrine that a reference in a codicil to the prior of two wills as the actual will of the testator sets it up against a posterior will, it is necessary to bear in mind, that every codicil is

(*o*) *Burrows* v. *Cottrell*, 3 Sim. 375.

(*p*) *Cooper* v. *Day*, 3 Mer. 154.

(*q*) *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402; *S. C.* nom. *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138; [*Payne* v. *Trappes*, 11 Jur. 854, 1 Rob. 583; *Re Chapman*, 8 Jur. 902, 1 Rob. 1.]

(*r*) *Crosbie* v. *Macdoual*, 4 Ves. 610; [*Payne* v. *Trappes*, supra.]

(*s*) *Jansen* v. *Jansen*, cit. 1 Ad. 39; [and see *Thomson* v. *Hempenstall*, 1 Rob. 783, 13 Jur. 814, where the internal evidence was sufficient to correct the mistake as to date.]

(*t*) Qu. since 1 Vict. c. 26; see ante, p. 112.

(*u*) *Rogers* v. *Pittis*, 1 Ad. 30; see also Lord C. B. *Eyre's* judgment in *Barnes* v. *Crowe*, 1 Ves. jun. 488; *Guest* v. *Willasey*, 12 J. B. Moo. 2, [2 Bing. 429.]

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a constituent part of the will to which it belongs; for in a general and comprehensive sense, a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred, that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it; and, accordingly in a case (*x*) where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the will; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will, this confirmation of the will was held not to revive the parts of it which were altered or revoked by the preceding codicils; Sir *R. P. Arden*, M. R., observing, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it.

In one case in the Ecclesiastical Court, it was held, that the mere fact of the testator ratifying his will and certain specified codicils, did not of itself amount to an implied revocation of other codicils not so specified (*y*). But, in another case, the Court arrived at a different conclusion, on a comparison of the contents of all the instruments, and looking at the conduct of the testatrix in relation to them (*z*).

Doctrine as applied to wills under the new law.

Such questions may occur, even in regard to wills made since the year 1837; for though the 22nd section of the recent statute (*a*), prevents the revival of a revoked will, except by re-execution, or by "a codicil showing an intention to revive the same," and, therefore, no such effect would follow from the *mere* revocation of a posterior revoking will; yet it still holds, according to the doctrine of Lord *Orford's* case, that a recognition in a codicil of the earlier of two inconsistent and undestroyed wills, by date or otherwise, as the will on which the codicil is founded, shows an intention to revive such earlier will (*b*). [It has been

Recognition in a codicil of a revoked will may revive it;

(*x*) *Crosbie* v. *Macdoual*, 4 Ves. 610; see also *Gordon* v. *Lord Reay*, 5 Sim. 274, stated ante, p. 110; [*Wade* v. *Nazer*, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627.]

(*y*) *Smith* v. *Cunningham*, 1 Ad. 448.

(*z*) *Greenough* v. *Martin*, 2 Ad. 239.

(*a*) Ante, p. 135.

[(*b*) *Payne* v. *Trappes*, 11 Jur. 854, 1 Rob. 583; *Re Chapman*, 8 Jur. 902, 1 Rob. 1.

but such will, in order to be revived, must be in existence.

[doubted, however, whether it is not essential that the will referred to should, though revoked, be in existence; whether if it has been destroyed it can be revived, though its contents might be satisfactorily proved from other sources. But the reference to it, though it may be futile so far as respects revival, will be still effectual to revoke a later will, the doctrine of conditional revocation not being as it seems admitted (*c*).]

[(*c*) *Hale* v. *Tokelove*, 2 Rob. 318, 14 Jur. 817.]

CHAPTER VIII.

REPUBLICATION.

Republication, what.

REPUBLICATION is of two kinds, express and constructive. Express republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will. Under the Statute of Frauds, to republish a devise of freehold estate required an attestation by three witnesses; while, on the other hand, a will might have been republished with respect to copyholds and personalty without any attestation. It was not often necessary, however, to inquire as to the republication of wills of personal estate (*a*), inasmuch as a residuary bequest, even under the old law, embraced all that species of property of which the testator died possessed; so that republication (which merely causes the will to speak and operate from the period of its being republished) had no effect in enlarging the operation of such a bequest.

Express republication.

Constructive republication by codicil.

Constructive republication takes place where a testator, for some other purpose, makes a codicil to his will; in which case the effect of the codicil, if not neutralised by internal evidence of a contrary intention, is to republish the will. By this means, under the old law, lands of inheritance acquired since the execution of the will were often brought within the operation of any general or residuary devise contained in such will, and that, too, though the codicil expressed no intention to republish, and though it was not annexed to, or declared to be a part of, and did not in terms confirm the will, and whether the codicil related to real estate or personalty only; the result being precisely the same as if the general or residuary devise had been incorporated into the codicil itself (*b*). And the same principle applied to a devise of

(*a*) As to the republication of wills of personalty, vide *Long* v. *Aldred*, 3 Ad. 48; *Miller* v. *Brown*, 2 Hagg. 209.

(*b*) *Acherley* v. *Vernon*, Com. 381, 2 Eq. Ab. 769, pl. 1; 3 B. P. C. Toml. 85; *Potter* v. *Potter*, 1 Ves. 437; *Piggott* v. *Waller*, 7 Ves. 98; *Goodtitle* v. *Meredith*, 2 M. & Sel. 5; *Guest* v. *Willasey*, 12 J. B. Moo. 2, [2 Bing. 429, 3 Bing. 614; *Skinner* v. *Ogle*, 4 No. Cas. 74, 9 Jur. 432; *Earl's Trust*, 4 Kay & J. 673;] see also *Doe v. Davy*, Cowp. 158; *Gibson* v. *Montfort*, 1 Ves. 485.

estates within a certain locality; thus, if a testator devised all his lands in the county of Kent, and after the execution of his will purchased other lands in that county, and then made a codicil attested by three witnesses, the intermediately-acquired lands (not being otherwise disposed of by such codicil) passed under the will (*c*).

Immaterial that codicil devises part of lands acquired since execution of will.

The circumstance of the testator having by the codicil expressly devised *part* of his estates purchased since the execution of the will, to the uses therein declared concerning his residuary real estate, does not exclude the rest of such after-purchased estates from the operation of the same residuary devise, brought down, by the republishing effect of the codicil, to the date of such codicil (*d*). Indeed, when we admit that the effect of the republication is to make the will speak from the date of the codicil, it follows that an express devise in the codicil of particular lands, acquired since the execution of the will, to the residuary devisee, could no more exclude the other newly-acquired lands from the residuary devise, so republished, than a devise of particular lands in the will itself could prevent other lands, then belonging to the testator, from passing under such residuary clause. On the same principle, an express devise for life of the intermediately-acquired estate, to the person who is residuary devisee in fee in the will, would not prevent the reversion in fee in the same lands from passing under such devise to the same devisee, by force of the republication (*e*).

Perhaps in scarcely any instance has the republishing operation of a codicil been carried to so great a length as in the case of *Rowley* v. *Eyton* (*f*), where after-acquired lands, expressly devised by the codicil to the residuary devisee of the will, were held to be subject to a general charge of debts created by the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E.; and having subsequently purchased several copyhold estates, by a codicil, attested by three witnesses, devised them to his said son in fee. Sir *W. Grant*, M. R., held that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts; the learned Judge evidently assuming, that if the specific devise had

(*c*) *Beckford* v. *Parnecott*, Cro. El. 493; *Barnes* v. *Crowe*, 1 Ves. jun. 486, 4 B. C. C. 2; [*Yarnold* v. *Wallis*, 4 Y. & C. 160; *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591, and see 1 Wms. Saunders, 278, n.]

(*d*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Hulme* v. *Heygate*, 1 Mer. 285.

(*e*) *Williams* v. *Goodtitle*, 10 B. & C. 895, 5 Man. & Ry. 757.

(*f*) 2 Mer. 128.

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been in the will, the lands comprised therein would have been subject to the charge (*g*). Perhaps it is not quite clear that the decision would have been the same, if the codicil had devised the lands in question to any other person than the residuary devisee in the will.

Republication negatived by contents of codicil itself.

But of course, the operation of a codicil to extend the devise in a will made before 1838, to intermediately-acquired lands, may be negatived by the contents of the codicil itself, indicating a contrary intention; for though the republication takes place without positive intention, yet it can never operate in spite of such intention. If, therefore, it can be collected from the codicil, that the testator had in his contemplation the identical property which was the subject of disposition in the will, and that only, the intermediately-acquired lands will not pass under the residuary devise in the will. The leading case of this class is *Bowes* v. *Bowes* (*h*), which was as follows:—G. B., in 1749, made a will devising all his lands and hereditaments (with certain exceptions) to his wife, and five other persons in fee, upon certain trusts. In 1754, he bought and became seised of an undivided part of a freehold property. In 1758, by a codicil duly attested, reciting that he had by his will devised all his lands and hereditaments to his wife and the other persons, (naming them,) upon trust, he thereby revoked all the above devises, so far as related to two of the trustees; and he thereby gave and devised *his said* lands, tenements and hereditaments to the remaining trustees (naming them), their heirs and assigns, upon the same trusts and purposes as he had devised the same by his will; at the same time revoking the legacies he had given to the removed trustees. And the testator concluded with declaring the codicil to be part of his will. The House of Lords, in conformity to the unanimous opinion of all the Judges, held that the will was not republished so as to pass lands acquired between the will and codicil, on the ground that the word "said," confined the operation of the codicil to the lands which had actually been devised by the will. Lord *Thurlow* (then ex-Chancellor) alone dissented; the ground of his lordship's argument being, that the testator, when he recited his having devised all his lands, supposed his after-purchased lands would pass; and that the words "my said lands," referred

(*g*) But, on this point, see *Spong* v. *Spong*, 1 Y. & J. 300; *S. C.* in D. P. 3 Bli. N. S. 84, [1 D. & Cl. 365.]

(*h*) 7 T. R. 482, 2 B. & P. 500; S. P. *Hughes* v. *Turner*, 3 My. & K. 666; [*Hughes* v. *Hosking*, 11 Moo. P. C. C. 1.]

to what he had supposed he had conveyed. Lord *Eldon*, however, showed that the House ought to decide the question, as if the testator actually did know that the will had not passed the after-purchased lands; that when in the codicil he referred to the will as having passed all his lands, he did no more than recite his former devise; but that when he came to the operative part of the codicil he changed the tense of the verb: and though in the former part he said, "whereas I have devised," &c.; yet in the latter he said, "I do hereby revoke, and I do hereby give and devise." If, therefore, by the former words, "all my freehold and copyhold lands," the testator were understood to include all the after-purchased lands, by the latter words of the codicil he must be understood to be revoking a devise of these lands, which he had not at the time the will was made; for his expressions of revocation were co-extensive with the expressions of devise; these expressions, therefore, unless explained by the context, would be unintelligible; but the word "said," clearly showed that they were both intended to be confined to the lands which the testator possessed at the time of the will; and this construction rendered them consistent.

So, in the case of *Parker* v. *Briscoe* (*i*), where a testator having by his will devised his real estate, and subsequently acquired other lands by descent, but erroneously supposing them to have passed to him and his sons in strict settlement by the will of the last owner, he, by a codicil, altered certain limitations in his will, for the express purpose of preventing the union of his own estates with the estates supposed to be devised; the Court concurred in the argument that the language of the codicil negatived the application of the devise in the will to the property in question.

Again, in *Monypenny* v. *Bristow* (*k*), where a testator having by his will, after certain particular devises, devised all the residue of his real estate to his brothers A., B., and C., by a codicil, reciting that he was desirous of making a more liberal provision for his wife, and that she might enjoy the whole of his real estates for her life, gave certain lands to his wife, which by his will he had given to his brothers, and then devised a certain property, and all other the real estate, *which by his will he had given to his brothers*, in trust (inter alia) for his wife for life, and subject thereto, upon the trust declared by his will; it was held by Sir *J.*

(*i*) 3 J. B. Moo. 24, [8 Taunt. 699.]

(*k*) 2 R. & My. 117; see also *Smith* v. *Dearmer*, 3 Y. & Jerv. 278; compare *Williams* v. *Goodtitle*, 10 B. & Cr. 895, [5 Man. & Ry. 757. The report of the case in B. & Cr. is not correct.]

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Leach, M. R., and afterwards, on appeal, by Lord *Brougham*, C., that, notwithstanding the generality of the testator's recited intention respecting his wife, the terms of the dispositive part of the codicil prevented its operating to republish the residuary devise in the will, so as to comprise two freehold houses which the testator had, since its execution, acquired.

The recent case of *Ashley* v. *Waugh* (*l*), seems to present the extreme point to which the doctrine in question has been carried. By his will the testator devised all his real estate to A. and B. upon trust for sale. By a codicil, after reciting this devise, he revoked the appointment of A., and appointed C. to be a trustee and executor of his "said" will; and the Lord Chancellor thought that this case came within the principle of *Bowes* v. *Bowes*, or, at all events, that it was not so clear that lands intermediately acquired passed under the general devise in the will, by the republishing effect of the codicil, as that a purchaser ought to be compelled to take the title.

Case of *Doe* v. *Walker*.

[On the other hand, in the case of *Doe* d. *York* v. *Walker* (*m*), the testator, by his will made previously to 1838, devised all the lands "of which I am seised or possessed," &c. at B., to two trustees upon certain trusts; by codicil, in the year 1838, reciting the devise to his trustees upon trust, and that he had determined to appoint J. C. as an additional trustee, he gave and devised all his lands, &c., situate at B. aforesaid, "*and described and devised* in my said recited will," to the use of J. C. in fee upon the trusts of his will, and he directed that his will should be read and construed in the same manner and should have the same operation and effect in all respects as if J. C. had been named and appointed a trustee thereof in addition to the other trustees, *and in all other respects he ratified and confirmed his said will*. *Parke*, B., in giving judgment, said that if the codicil had not contained the last words, the Court would most probably have considered that the case fell within the authority of *Bowes* v. *Bowes*, and the other cases of a similar kind which we have before noticed, but that the true construction of the last words were, that the testator thereby ratified and confirmed his will in all other respects than those in which he had altered it by the previous provisions in his codicil, and consequently he might be considered as having made a new will of the date of the codicil exactly the same as the old will, with the alterations

(*l*) 4 Jur. 572.

[(*m*) 12 M. & Wels. 591; see also per *Abinger*, C. B., 4 Y. & C. 166, 167; and *Langdale* v. *Briggs*, 3 Sm. &. G. 246.

[contained in the codicil. The result was that lands at B., which the testator had purchased after the date of his codicil, passed by the devise (*n*).]

Effect of republication upon specific devises, under old law.

Hitherto, republication has been viewed only as affecting general devises. In regard to specific devises, the principle, that the will speaks from the date of the republication, is to be received with more caution and reserve. It is clear, however, that the devise of a particular property republished by the re-execution of the will, or the execution of a codicil, will, even under the old law, comprise a new estate in that property intermediately acquired by the testator, and falling within the terms of the republished devise. As where a testator, by a will made before 1838, devised a leasehold estate for lives, afterwards renewed the lease, and then republished the will, it was held that the renewed lease passed under the devise (*o*). So, where a testator has by such a will devised certain freehold lands, which devise is revoked by a conveyance of the lands to particular uses, with the ultimate limitation to the use of the testator himself in fee, after which the testator makes a codicil to his will, duly attested, but without devising or mentioning the lands in question, the estate which reverted to the testator on the execution of the revoking conveyance, passes by the effect of the republication, under the devise (*p*).

Does not shift specific devise to a different property.

Republication by codicil or otherwise, however, did not under the old law extend a specific gift in the will to property which that gift was not originally intended to embrace, though answering to the same description. Thus, if a testator by a will, made before the year 1838, devised his estate called Blackacre, or bequeathed his horse called Bob, and afterwards sold the estate or horse and bought another of the same name, a subsequent codicil, made before the year 1838, did not by its republishing force make the devise or bequest extend to the new purchase. So it has been repeatedly held that a legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a constructive republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy, though containing an express confir-

[(*n*) 1 Vict. c. 26, s. 34. For the purpose of the question now under consideration the case was the same as if the lands purchased after the date of the codicil had been purchased between the dates of the will and codicil.]

(*o*) *Carte* v. *Carte*, 3 Atk. 180; see also *Alford* v. *Earle*, 2 Vern. 209.

(*p*) *Jackson* v. *Hurlock*, 2 Eden, 263.

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mation of the will in the usual general terms (*q*). The case of *Holmes* v. *Coghill* (*r*) seems to afford a further illustration of the principle. There the testator having, under his marriage settlement, (subject to an estate for life in himself and an estate tail limited to his sons in strict settlement,) a power to charge 2000*l.* upon certain estates, executed that power by will duly attested. Afterwards he and his eldest son suffered a common recovery, and limited the lands to uses discharged from the power. By the same instrument they limited to the testator a power by will to charge the 2000*l.* on other lands. Subsequently, he executed a codicil, duly attested, to his will. It was contended that this codicil, by republishing the will, rendered it a good execution of the new power. But Sir *William Grant*, though he admitted the general principle as to republication, held that this was not a good execution of the power. "It speaks," said he, "only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration affecting different estates." (*s*).

[There was this essential difference, therefore, under the old law, between a general residuary appointment under a power and a general residuary devise, namely, that the appointment, however extensive in terms, never could, by the effect of mere republication, be made to include more than it included originally, whereas a residuary devise, when merely republished, included all that could have been included in it if actually made at the time of republication (*t*). So, if the will refer expressly to the date of its own execution (*u*), or to a particular custom then existing (*x*), a codicil will not so republish it as to make it speak of the later date, or of an altered custom.]

Republication does not revive a devise or bequest lapsed by death of the devisee or legatee.

The same principle, of course, applies to the *objects* of gift; it is

(*q*) *Izard* v. *Hurst*, 2 Freem. 224, [2 Eq. Ca. Ab. 769;] *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Booker* v. *Allen*, 2 R. & My. 270; *Powys* v. *Mansfield*, 3 My. & Cr. 376; see also *Drinkwater* v. *Falconer*, 2 Ves. 623; *Crosbie* v. *Macdoual*, 4 Ves. 610; [*Cowper* v. *Mantell*, 22 Beav. 223.]

(*r*) 7 Ves. 499; *S. C.* 12 Ves. 206; [see also *Jowett* v. *Board*, 16 Sim. 352.

(*s*) See accordingly *Walker* v. *Armstrong*, 21 Beav. 284; *Cowper* v. *Mantell*, 22 Beav. 223; *Du Hourmelin* v. *Sheldon*, 19 Beav. 389; *Hope* v. *Hope*, 18 Jur. 823.

(*t*) Under the recent act 1 Vict. c. 26, s. 24, it is immaterial that the power, if a general one, was not in existence at the time the will was made; *Cofield* v. *Pollard*, 3 Jur. N. S. 1203; and per *Wood*, V. C., 1 Kay & J. 526, 527; but it seems doubtful whether it alters the law as to particular powers; see post, remarks on *Stillman* v *Weedon*, 16 Sim. 26.

(*u*) *Stillwell* v. *Mellersh*, 20 L. J. Ch. 356.

(*x*) *Doe* d. *Biddulph* v. *Hole*, 16 Q. B. 848.]

clear, therefore, that a codicil did not, and does not (for here the new and old law coincide), by its republishing operation, revive a devise or bequest, the object of which has previously died in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in the testator's lifetime, and he afterwards has another nephew of the same name, the republication of the will would be inoperative to carry the property to the second nephew John (*y*). The case of *Perkins* v. *Micklethwaite* (*z*), indeed, may seem at first sight to contradict this position, for in that case a legacy originally designed for a son of the testator, who died after the execution of the will, was held to belong, by the effect of the codicil, to a subsequently-born son of the same name; but the express terms of the codicil appear to have warranted the construction, since it gave to the latter a legacy, *over and above what the testator had given him by his will.*

Republication does not cure defect of expression in will.

The effect of republication can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication; it cannot invest with a devising efficacy expressions which originally had none; and, therefore, where (*a*) a testator, who was devisee in tail of certain lands, in allusion to them, said, "which, though I could now legally dispose of, I mean fully to confirm to the devisees in remainder," and afterwards suffered a common recovery of the lands, to the use of himself for life, remainder to such uses as he, by deed, will, or codicil, should appoint. He then executed a codicil, whereby he expressly confirmed the will; and it was contended, that the effect of the whole was to pass the estates in question to the remainder-men; but the Court of King's Bench held, that the will contained no devise, the expressions rather importing an intention to *leave the property alone*, than to dispose of it, and that the codicil could not alter the construction.

Whether, under old law, republication brings property comprised in a lapsed specific devise within residuary devise in will.

Though it is quite clear, as we have seen, that republication has no effect in restoring the operation of a specific devise, which has failed by the decease of its object in the testator's lifetime, yet it was somewhat doubtful under the old law, whether lands, of which a devise in fee had so lapsed, passed by a residuary devise in the republished will. This seems to depend on the point whether, if the specific devisee had been dead when the will was made, the residuary devise would have comprised the

(*y*) See 2 Ves. 626; see also *Doe* v. *Kett*, 4 T. R. 601.

(*z*) 1 P. W. 275.

(*a*) *Lane* v. *Wilkins*, 10 East, 241.

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lands expressed to be given to the person so deceased; for, if it would not, then the lands, the devise of which subsequently lapses, could not, by the effect of the republication, pass under the residuary devise; because republication merely makes the will speak from its own date, and cannot bring within the scope of a devise in the will any subject which it would not have comprehended, in case the circumstances under which the republication takes place, had existed at the period of the original execution of the will. In short, the inquiry is no other than simply this, whether, under wills made before 1838, a residuary devise includes particular lands, the devise of which is void ab initio.

The [only] authority on the point [appears to be] the case of *Doe* v. *Sheffield* (*b*), where the Court of King's Bench treated it as clear, that where a testator devised certain lands to the sisters of A., and the residue of his lands, *not thereinbefore disposed of*, to B., and it turned out that all the sisters of A. were dead when the will was made, the lands in question passed by the residuary clause. The real facts of the case, however, as eventually ascertained, did not raise the question (*c*).

Suggested conclusion from *Doe* v. *Sheffield*.

Although, in the case just stated, the extension of a residuary clause to lands comprised in a specific or particular devise in fee, which is void ab initio, appears rather to have been assumed than discussed, and though, if the matter were res integra, there might be ground to contend that a residuary devise, being in its nature specific, ought not to extend to any interest in real estate, which the will purports to dispose of; yet, considering how imperfectly this principle has been adhered to, the probability is, that a residuary clause would be held (in accordance with the notion of the judges who decided *Doe* v. *Sheffield*) to take in all that is not effectually disposed of, according to circumstances existing at the making of the will (*d*); and, consequently, that in the case of the lapse of a particular devise in fee, succeeded by the republication of the will, a residuary clause in the republished will would operate on the lands comprised in the

(*b*) 13 East, 526.

[(*c*) The case of *Williams* v. *Goodtitle*, as reported 10 B. & Cr. 895, is sometimes cited as an authority that a residuary devise passed lands, a previous devise of which in the same will or codicil was void; but the report of the case in 5 Man. & Ry. 757, shows that no such question arose in it; lands were devised to trustees for *a term of years*, (not in fee as might be supposed from the report in B. & Cr.) upon charitable trusts; and as the reversion on the term, supposing it a valid term, would have passed under the devise of the residue, it followed, of course, that the term being void, the residuary devisee took an estate in possession; the sole question was, whether the will was republished, so as to pass after-required lands.

(*d*) See however *Re Brown*, 1 Kay & J. 522.

lapsed devise. The point, however, cannot be considered as settled, and possibly now may never arise, as it cannot occur under a will made since the year 1837; the recent act having (sect. 25) expressly and (as preventing all such questions) most beneficially extended a residuary devise to all property comprised in lapsed or void devises.

Lapse of residuary devise as to aliquot share.

If the residuary devise itself has lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety (*e*).

Republication, how far affected by the recent act.

The doctrine of republication will lose much of its interest under the new law, not, indeed, by the effect of the provision which dispenses with publication as part of the ceremonial of execution (though this may seem to render the term *re*-publication scarcely appropriate (*f*)), but by the operation of the enactment, which makes the will speak, in regard to the subjects of disposition, from the death of the testator; and more especially of the provision, which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. This, of course, will render it unnecessary, in regard to wills made since 1837, to have recourse to the doctrine which makes a codicil, by means of its republishing force, extend a general devise in a will to after-acquired real estate.

It is to be remembered, however, that with respect to the *objects* of gift, the recent statute leaves the pre-existing law untouched; though, considering how slight an effect is produced by a republishing codicil in this respect (for we have seen that it does not revive a lapsed gift), this forms no very large exception to the remark, as to the diminished practical interest of the doctrine of republication, in connexion with the new law.

Effect of republication of will by codicil made since 1837.

However, where a will made *before* is republished by a codicil made *on* or *since* the 1st of January, 1838, or by re-execution,

[(*e*) See *Skrymsher* v. *Northcote*, 1 Sw. 566.]

(*f*) But see the 34th section of the act, stated post.

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in the manner prescribed by the new law, the effect of such republication will be most important; it will not, as heretofore, merely extend any general or residuary devise in such will to intermediately-acquired real estate, but will, unless a contrary intention be indicated, bring within its operation all the real estate to which the testator may be entitled at his decease, and make the will speak, in regard to the property comprised in it, from that period; in short, the codicil (the contents not forbidding), or the re-execution, will have the effect of subjecting the will for all purposes to the operation of the new act, the 34th section having expressly provided, that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of the act, be deemed to be made at the time at which the same shall be so re-executed, republished, or revived (*g*).

[Where a will made since the act is so worded as to exclude after-acquired lands from a general devise, a codicil republishing the will has no more effect in altering the effect of the general devise, than it would have had if both instruments had been subject to the old law (*h*).]

It remains only to be observed, that a codicil or re-execution may still, as formerly, operate to revive a will which has been revoked by marriage, or by a subsequent will, or otherwise; but the remarks on this subject have been anticipated in a former chapter (*i*), to which the reader is referred.

[(*g*) See *Winter* v. *Winter*, 5 Hare, 306; *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591; *Andrews* v. *Turner*, 3 Q. B. 177; *Skinner* v. *Ogle*, 4 No. Cas. 74, 9 Jur. 432; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334.

(*h*) *Re Farrer*, 8 Ir. Com. L. Rep. 370.

(*i*) Ante, p. 175.]

CHAPTER IX.

RESTRAINTS ON THE TESTAMENTARY POWER.

SECTION I.

Gifts to Superstitious and Charitable Uses.

Superstitious uses, what.

[ABOUT the period of the Reformation, statutes were passed to defeat or prevent dispositions of property to purposes which were then pronounced to be superstitious. Thus by the statute of 1 Edw. 6, c. 14, the king was declared entitled to all real (*a*) and personal (*b*) property theretofore disposed of for the maintenance of persons to pray for the souls of the dead men in purgatory or to maintain perpetual obits, lamps, &c.; such dispositions were declared to be superstitious, and, as such, void. This act does not affect dispositions made subsequently to its date; but, by the previous statute of 23 Hen. 8, c. 10, similar and other superstitious (*c*) uses thereafter declared of land (except for terms of not more than twenty years) were made void. But there is no statute making superstitious uses void generally (*d*): and the latter statute does not relate to personalty. Superstitious uses, however, in the case of personal as well as real estate, though] not within the letter of these statutes, are nevertheless void, by the general policy of the law; and, in such cases, if charity be not the object, but the design of the bequest be to secure a benefit to the testator himself, (as to say masses for his soul, &c.,) the testator's own representative (who would be entitled if there was no such gift), and not the Crown, would be let in (*e*).

[(*a*) Sects. 5 & 6.
(*b*) Sect. 7.
(*c*) *Porter's case*, 1 Co. 24. The use results to the donor, ib.
(*d*) Per Sir *W. Grant*, *Cary* v. *Abbott*, 7 Ves. 495.]
(*e*) *West* v. *Shuttleworth*, 2 My. & K. 684. In this case [the void bequest was of a portion of the residue; and, therefore, did not fall back into the remaining residue, but went to the next of kin; see *Skrymsher* v. *Northcote*, 1 Sw. 566.]

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Secret trusts.

It has been decided, that devisees may be compelled to disclose whether they take subject to a secret trust of this nature (*f*).

A most extraordinary decision was made on these statutes shortly before the Revolution. It was held by Lord Keeper *North*, that a bequest to Mr. Baxter, of 600*l.* to be distributed among sixty pious ejected ministers, and legacies also to Mr. Baxter (one of them), to be laid out in his book, intitled "A Call to the Unconverted," were void, as superstitious (*g*); but the decree was reversed by the Lords Commissioners.

Protestant dissenters.

It is clear, that not only is a bequest to the poor ministers of Protestant dissenters good, but one having for its object the propagation of their religious opinions is also valid; provided that such opinions, although at variance with the doctrines of the Established Church, are not contrary to law (*h*); [thus bequests to an Unitarian chapel, and to support an Unitarian missionary (*i*), or for the benefit of poor Irvingite ministers (*k*), or to the Baptist minister of a particular chapel (*l*), are valid.]

Stat. 2 & 3 Will. 4, c. 115.

Before the recent alteration of the law, bequests for the propagation of the Roman Catholic religion were unlawful (*m*); but the statute of 2 & 3 Will. 4, c. 115, s. 1, after noticing the acts in favour of Protestant dissenters, and a Scotch Act imposing penalties on Roman Catholics; and reciting, that notwithstand-

(*f*) *King* v. *Lady Portington*, 1 Salk. 162; *S. C.* 1 Eq. Ca. Ab. 96, pl. 6; see further, as to superstitious uses, Duke Char. Uses, 106, 4 Rep. 104, Cro. Jac. 51, 1 Eq. Ca. Ab. 95, pl. 1, et seq., and Shelf. Ch. Us. 89, where the cases, early and modern, are collected. [See also *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17, where it was decided that a bequest in *Ireland* for masses for the testator's soul is valid.]

(*g*) *Att.-Gen.* v. *Baxter*, 1 Vern. 248; 2 ib. 105, 1 Eq. Ca. Ab. 96, pl. 9.

(*h*) *Att.-Gen.* v. *Hickman*, 2 Eq. Ca. Ab. 193; *West* v. *Shuttleworth*, 2 M. & K. 684; and see statutes 18 & 19 Vict. c. 81, ss. 2, 3, and c. 86, s. 2. In the case of *Doe* v. *Hawthorn*, 2 B. & Ald. 96, Mr. Justice *Abbott*, afterwards Lord *Tenterden*, suggested a doubt whether the trust of a chapel for the use of a congregation of Protestants "assembling under the patronage of the trustees of the late Countess of Huntingdon's College," was not a superstitious use, within the statute of 23 Hen. 8, c. 10. It is notorious, however, that the Court of Chancery unhesitatingly entertains suits for carrying into effect trusts of places of worship belonging to Protestant dissenters. The principles on which it deals with such trusts are stated with great fulness and perspicuity by Lord *Eldon*, in his elaborate judgment in the case of *Att.-Gen.* v. *Pearson*, 3 Mer. 353, which bears more immediately on the position of Dissenters who deny the doctrine of the Trinity. The recent cases of *West* v. *Shuttleworth*, 2 My. & K. 684, [and *Re Barnett*, 29 L. J. Ch. 871,] are also conclusive authorities (if authority were wanting), against Lord *Tenterden's* doctrine, which, indeed, the writer would not have considered it necessary to notice, (as the opinion was extrajudicial, and thrown out very doubtingly,) had it not been cited by a modern writer without comment, and in immediate juxtaposition, too, with a bequest, "to find, support, and maintain for evermore, a taper of wax of a pound weight to stand and burn before the image of Our Lady," &c. (Shelf. Ch. Us. 89.)

[(*i*) *Shrewsbury* v. *Hornbury*, 5 Hare, 406.

(*k*) *Att.-Gen.* v. *Lawes*, 8 Hare, 32.

(*l*) *Att.-Gen.* v. *Cock*, 2 Ves. 273.]

(*m*) *Cary* v. *Abbott*, 7 Ves. 490, see also 4 Ves. 433, 6 Ves. 566, 1 Ba. & Be. 145; [*Gates* v. *Jones*, cit. 2 Vern. 266.]

ing the provisions of various acts, passed for the relief of his Majesty's Roman Catholics subjects, doubts had been entertained, whether it were lawful for his Majesty's subjects professing the Roman Catholic religion in *Scotland*, to acquire and hold as real estate the property necessary for religious worship, education, and charitable purposes, and that it was expedient to remove all doubts respecting the right of his Majesty's subjects professing the Roman Catholic religion in *England* and *Wales* to acquire and hold property necessary for religious worship, education, and charitable purposes, enacts, "That his Majesty's subjects professing the Roman Catholic religion, *in respect of their schools, places for religious worship, education, and charitable purposes in Great Britain*, and the property held therewith, and the persons employed in or about the same, shall, in respect thereof, be subject to the same laws, as the Protestant dissenters are subject to in *England* in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise." By sect. 3, the act is not to extend to any suit actually pending, or commenced, or any property then in litigation, in any Court in Great Britain.

Roman Catholics placed on same footing as Protestant dissenters in respect of their schools, &c.

It has been held, that the act is retrospective, *i. e.* that it applies to the will of a testator who died before its passing (*n*); and also, that it authorizes a bequest for the promotion of the Roman Catholic religion, as it places persons of this persuasion on the same footing as Protestant dissenters, the diffusion of whose religious tenets (as already observed) may be the subject of a valid trust. It is clear, however, that the Roman Catholic Relief Act has no effect in rendering valid gifts to superstitious uses, as legacies to priests for offering masses for the repose of the testator's soul, &c. (*o*); [nor, it is presumed, would it render valid such a trust as that which was the subject of discussion in the case of *De Themines* v. *De Bonneval* (*p*), namely, for printing and publishing a book which taught that the Pope had in all ecclesiastical matters a supremacy which was paramount even to the authority of the temporal sovereign. The case arose before the statute referred to, but Sir *John Leach* rested his decision entirely on the fact that to allow such a publication was against public policy (*q*).

Bequest for propagation of Roman Catholic religion.

(*n*) *Bradshaw* v. *Tasker*, 2 My. & K. 221; [but Sir *E. Sugden* doubted whether this was rightly decided, see 1 D. & War. 380.]

(*o*) *West* v. *Shuttleworth*, 2 My. & K. 684.

[(*p*) 5 Russ. 288.

(*q*) See also *Briggs* v. *Hartley*, 14 Jur. 683, 19 L. J. N. S. Ch. 416; which seems rather a strong decision as to what is against public policy.

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Jews.

[Jews also are now by statute 9 & 10 Vict. c. 59, placed on the same footing as Protestant dissenters (*r*).]

Stat. 43 Eliz. c. 4.

Charity has been defined to be a general public use (*s*). In order to ascertain what are charitable purposes, recourse is usually had to the statute of 43 Eliz. c. 4, which enumerates various kinds of charity: viz. the relief of aged, impotent, and poor people (*t*); maintenance of sick and maimed soldiers and mariners, schools of learning (*u*), free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives (*x*); and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

What are charitable uses.

Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. Thus, gifts (*y*), for the erection of water-works for the use of the inhabitants of a town (*z*), or to be applied for the "good" of a place (*a*), or for the general improvement of a town (*b*), or for the establishment of a life-boat (*c*), or of a botanical garden (*d*), to the trustees and for the benefit of the British Museum (*e*), to the widows and orphans (*f*), or the poor inhabitants of a parish (*g*), (which is held to apply to those not receiv-

[(*r*) The cases on this subject previous to this act were, *Da Costa* v. *De Pas*, Amb. 228, 1 Dick. 258, 2 Ves. 274, 276, 7 Ves. 76, Sw. 487, and 2 J. & W. 308; and *Straus* v. *Goldsmid*, 8 Sim. 614. The only difference between 2 & 3 Will. 4, c. 115, s. 1, and 9 & 10 Vict. c. 59, s. 2, is the omission from the latter enactment of the words, "and the persons employed in or about the same": which appears immaterial to the purposes of this treatise. See as to superstitious uses, *Michel's Trusts*, 29 L. J. Ch. 547.]

(*s*) Amb. 651.

[(*t*) *Nash* v. *Morley*. 5 Beav. 177.

(*u*) *Att.-Gen.* v. *Nash*, 3 B. C. C. 587.

(*x*) Does not include prisoners for crime, as poachers, *Thrupp* v. *Collett*, 26 Beav. 125. A bequest for such a purpose is against public policy and void.

(*y*) It makes no difference that the fund is raised by tax on the inhabitants of the town; the purpose alone is the criterion; *Att.-Gen.* v. *Eastlake*, 11 Hare, 205.]

(*z*) *Jones* v. *Williams*, Amb. 651.

(*a*) *Att.-Gen.* v. *Earl of Lonsdale*, 1 Sim. 105.

(*b*) *Howse* v. *Chapman*, 4 Ves. 542; *Att.-Gen.* v. *Heelis*, 2 S. & St. 67; [*Mitford* v. *Reynolds*, 1 Phil. 185.]

(*c*) *Johnson* v. *Swan*, 3 Mad. 457.

(*d*) *Townley* v. *Bedwell*, 6 Ves. 194; [but it is not clear that it would have been so decided unless the testator had signified his expectation that the garden would be a public benefit.]

(*e*) *British Museum* v. *White*, 2 S. & St. 595.

(*f*) *Att.-Gen.* v. *Comber*, 2 S. & St. 93; [*Thompson* v. *Corby*, 27 Beav. 649.]

(*g*) *Att.-Gen.* v. *Clarke*, Amb. 422, also 14 Ves. 364.

ing parochial relief(*h*),) or to the churchwardens in aid of the poor's rate (*i*), or the widows and children of seamen belonging to a port (*k*), [or to "poor credible industrious persons, residing at A., with two children or upwards, or above fifty years of age, maimed or otherwise unable to get a living" (*l*); or for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the singers in church (*m*), or for building an organ gallery in a church (*n*), or endowing or erecting a hospital (*o*), or for deserving literary men who have been unsuccessful (*p*), or for letting out land to the poor at a low rent (*q*), or for the increase and encouragement of good servants (*r*), or for the benefit of ministers of any denomination of Christians (*s*), or for the benefit, advancement, and propagation of learning in every part of the world (*t*), or for establishing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man, and for maintaining a lecturer thereon(*u*), and gifts in aid of the public revenue of the state (*x*), and finally, gifts for any purpose either of a public (*y*)] or of a religious nature (*z*), have been respectively held to be charitable. It is evident from the preceding examples, that, to constitute a charity in the legal sense, the poor need not be (though they commonly

(*h*) *Bishop of Hereford* v. *Adams*, 7 Ves. 324; *Att.-Gen.* v. *Wilkinson*, 1 Beav. 372; [and see *Att.-Gen.* v. *Bovill*, 1 Phill. 762; *Att.-Gen.* v. *Corporation of Exeter*, 2 Russ. 45.] As to a gift to the inhabitants of a place, see *Rogers* v. *Thomas*, 2 Kee. 8.

(*i*) *Doe* v. *Howell*, 2 B. & Ad. 744.

(*k*) *Powell* v. *Att.-Gen.*, 3 Mer. 48.

[(*l*) *Russell* v. *Kellett*, 3 Sm. & Gif. 264. It was held first, that the gift pointed to individuals, and some having died before payment, that there could be no execution cy-pres (as to which, see post, end of this Ch.); but secondly, that the gifts were charitable, and did not pass to the representatives of those who, though they survived the testatrix, died before payment.

(*m*) *Turner* v. *Ogden*, 1 Cox, 316; see also *Durour* v. *Motteux*, 1 Ves. 320.

(*n*) *Adnam* v. *Cole*, 6 Beav. 353.

(*o*) *Pelham* v. *Anderson*, 2 Eden, 296, 1 B. C. C. 444; *Att.-Gen.* v. *Kell*, 2 Beav. 575.

(*p*) *Thompson* v. *Thompson*, 1 Coll. 395.

(*q*) *Crafton* v. *Frith*, 15 Jur. 737, 20 L. J. Ch. 198.

(*r*) *Loscombe* v. *Wintringham*, 13 Beav. 87.

(*s*) *Att.-Gen.* v. *Hickman*, 2 Eq. Abr. 193; *Att.-Gen.* v. *Gladstone*, 13 Sim. 7; *Att.-Gen.* v. *Cock*, 2 Ves. 273; *Att.-Gen.* v. *Lawes*, 8 Hare, 32; *Shrewsbury* v. *Hornby*, 5 Hare, 406; *Grieves* v. *Case*, 4 B. C. C. 67, 2 Cox, 301, 1 Ves. jun. 548; *Thornber* v. *Wilson*, 3 Drew. 245, 4 ib. 350: secus if it be to the person *now* minister, semb. ib. 351.

(*t*) *Whicker* v. *Hume*, 14 Beav. 509, 1 D. M. & G. 506, 7 H. of L. Ca. 124.

(*u*) *London University* v. *Yarrow*, 23 Beav. 159, 1 De G. & J. 72. And see *Marsh* v *Means*, 3 Jur. N. S. 790.

(*x*) *Thellusson* v. *Woodford*, 4 Ves. 227; *Nightingale* v. *Goulbourn*, 5 Hare, 484, 2 Phil. 594; *Newland* v. *Att.-Gen.*, 3 Mer. 684; *Ashton* v. *Lord Langdale*, 15 Jur. 868, 20 L. J. Ch. 234.

(*y*) Per Lord *Cottenham* in *Att.-Gen.* v. *Aspinal*, 2 My. & Cr. 622, 623; *Att.-Gen.* v. *Corporation of Shrewsbury*, 6 Beav. 220; *Att.-Gen.* v. *Corporation of Carlisle*, 2 Sim. 437; *British Museum* v. *White*, 2 S. & St. 596.]

(*z*) *Att.-Gen.* v. *City of London*, 1 Ves. jun. 243; *Powerscourt* v. *Powerscourt*, 1 Moll. 616; [*Baker* v. *Sutton*, 1 Keen, 232; *Att.-Gen.* v. *Stepney*, 10 Ves. 22; *Townshend* v. *Carus*, 3 Hare, 257; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 266.]

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are) its sole or especial objects; on which principle, Sir *John Leach* treated a school for the education of gentlemen's sons, as a "school of learning" within the statute of 43rd of Eliz. (*a*).

What are not charitable uses.

The erection or repair of a monument to perpetuate the memory of the donor, is not a charitable purpose (*b*); nor is the repairing of a vault or tomb containing his remains; contrà, it seems, if the vault is to be used for the interment of the donor's family (*c*). [Again, bequests for purposes of benevolence, liberality (*d*), or general utility (*e*), are not charitable bequests; and a gift to one of the chartered companies of the city of London to increase their stock of corn, which they are (or were) compelled to keep for the London market, is not charitable, since it is in effect a gift to the company absolutely (*f*). A devise of lands upon trust to distribute the rents on certain days amongst several specified families according to their circumstances, as in the opinion of the trustees they might need assistance, has been held not to be a devise for a charitable purpose, but a trust for the families named, and good for so long as the rule against perpetuities would allow. How long that was, was not decided (*g*).]

Bequest for specified poor families not charitable.

Bequests to be given in private charity bad.

In *Ommanney* v. *Butcher* (*h*), the testatrix declared as to certain money, that she wished it to be given in private charity. Sir *T. Plumer*, M. R., held that the words did not create a trust which could be carried into effect. The charities recognised by the Court were public in their nature, and such as the Court could see to the execution of; but here the disposition was confined to private charity. Assisting individuals in distress was private charity; but such a purpose could not be executed by the Court or the Crown (*i*). [So a gift to found a private museum is not charitable (*k*).]

(*a*) *Att.-Gen.* v. *Earl of Lonsdale*, 1 Sim. 109.

(*b*) *Mellick* v. *President of the Asylum*, Jac. 180; [*Adnam* v. *Cole*, 6 Beav. 353; and see *Mitford* v. *Reynolds*, 1 Phil. 185, where the point was raised but not decided, and *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Willis* v. *Brown*, 2 Jur. 987; *Trimmer* v. *Danby*, 25 L. J. Ch. 424.]

(*c*) See [*Gravenor* v. *Hallum*, Amb. 643;] *Doe* d. *Thompson* v. *Pitcher*, 3 M. & Sel. 407, 2 Marsh. 61, 6 Taunt. 359. The statute 9 Geo. 2, c. 36, had been complied with, and, therefore the point did not arise. Perhaps the latter branch of Lord *Ellenborough's* doctrine is open to exception. A distinction seems to run through the cases between gifts for the benefit of the donor's own family and that of strangers. The former are not, in general, considered to be charitable.

[(*d*) *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 Ves. 532; *James* v. *Allen*, 3 Mer. 17; *contrà* by the law of Scotland; *Miller* v. *Rowan*, 5 Cl. & Fin. 99.

(*e*) *Kendall* v. *Granger*, 5 Beav. 300.

(*f*) *Att.-Gen.* v. *Haberdashers' Company*, 1 My. & K. 420.

(*g*) *Liley* v. *Hay*, 1 Hare, 580.

(*h*) 1 T. & R. 260.

(*i*) Lord *Langdale*, M. R., seems to have thought a bequest "for the relief of domestic distress, and assisting indigent but deserving individuals," a good charitable bequest, *Kendall* v. *Granger*, 5 Beav. 303.

(*k*) *Thomson* v. *Shakespeare*, 1 Johns. 612, 6 Jur. N. S. 281; *Carne* v. *Long*, 29 L. J. Ch. 503, 4 Jur. N. S. 474, 6 ib. 639.]

Bequest not necessarily charitable on account of professional or official character of legatee.

A gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator having accompanied the gift with an expression of his expectation, that the devisee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially. Thus, in the case of *Doe* d. *Phillips* v. *Aldridge* (*l*), where the devise was to the Rev. A. A., a dissenting minister (described as preacher at the meeting-house of L.) for life, the testator adding, "And I further expect that he will, with the help of God, after my decease, without delay, settle and forward everything in his power, to promote and carry on the work of God at L. aforesaid, both in his lifetime and after his decease;" it was contended, that the devise to A. A. was void, as charitable, being not in his individual capacity, but in the character of preacher, and in confidence that he would discharge the duties of that station. But the Court held that it was not charitable, and thought the point too clear for discussion.

Again, in *Doe* d. *Toone* v. *Copestake* (*m*), where an estate was devised to trustees, to be applied by them, and the officiating minister of the congregation or assembly of the people called Methodists, assembling at L., and as they should from time to time think fit to apply the same; the Court of King's Bench held, that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in the case of the *Bishop of Durham* v. *Morice*, [and it was not argued that the trust was restricted to pious and charitable purposes merely because the Methodist minister was appointed a trustee (*n*).

All indefinite trusts void except in favour of charity.

The Court of Chancery does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All monies, therefore, not bequeathed in charity must have some definite object or must devolve as undisposed of (*o*), except in cases where it may be held that the trustee takes absolutely. The general consideration of such gifts will be reserved for a subsequent chapter, as more properly falling

(*l*) 4 T. R. 264; compare this case with *Grieves* v. *Case*, 4 Bro. C. C. 67, 2 Cox, 301, 1 Ves. jun. 548; [*Thornber* v. *Wilson*, 3 Drew. 245, 4 ib. 350.]

(*m*) 6 East, 328.

[(*n*) In the two cases last stated it was only decided, that the devisees could recover at law the property devised, the trust (if any) not being charitable; whether they took beneficially, or whether, as trustees for the heir-at-law, the trust being void for uncertainty, it was not within the province of the court to determine.

(*o*) *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 ib. 522; *James* v. *Allen*, 3 Mer. 17.

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Bequests for charitable and other indefinite purposes void altogether; —distinction formerly taken.

[under the head of gifts void for uncertainty; but it must be here noticed, that where the bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, the whole bequest is void. A distinction not now recognized, was indeed formerly taken, that such a bequest was good, if there were trustees named, to whose discretion the testator had committed the carrying out of his intentions, and with whom, therefore, the court would not interfere (*p*). Such a distinction will be found inconsistent with the decisions subsequently noticed; and it seems now established, that the Court will only recognize the validity of trusts which it can either itself execute or can control when in process of being executed by trustees (*q*).]

Thus, in *Vesey* v. *Jamson* (*r*), where a testator gave the residue of his estate to his executors, upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes, as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. Sir *J. Leach*, V. C., observed, that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether, and the next of kin become entitled.

So, in the case of *Ellis* v. *Selby* (*s*), where a bequest for such charitable *or other* purposes as the trustees and the survivors or survivor of them, his executors or administrators, should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof, was held not to be a

[(*p*) *Waldo* v. *Cayley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 My. & K. 59; the latter case though decided subsequently to *Vesey* v. *Jamson*, stated in the text, did not notice it; and see the observations of *Cottenham*, C., 1 My. & Cr. 293.

(*q*) *Nash* v. *Morley*, 5 Beav. 182.]

(*r*) 1 S. & St. 69.

(*s*) 7 Sim. 352.

bequest absolutely devoting the property to charity; Sir *L. Shadwell*, V. C., said, "Here the testator has expressly drawn a distinction between charitable purposes and other purposes; and I must, therefore, take it that he meant either charitable purposes or purposes not charitable; but whether the purposes not charitable were to be purposes which might give a beneficial interest to the trustees, or some other purposes, the testator has nowhere made clear. It is uncertain whether the trust was to be for charitable purposes or for purposes not charitable. Then it is nothing more than if he had given an estate to A. or to B. (*t*), which would be void; and my opinion is, that the gift of this portion of the personal estate is void for uncertainty." [This decision was subsequently affirmed by Lord *Cottenham*, C. (*u*).

In *Williams* v. *Kershaw* (*x*), the testator directed his trustees to apply the residue of his personal estate to and for such benevolent, charitable and religious purposes as they in their discretion should think most advantageous and beneficial. It was decided by Lord *Cottenham*, when M. R., that the gift was void for uncertainty.

In *Kendall* v. *Granger* (*y*), the trustees were directed to dispose of the residue for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whatsoever. Lord *Langdale*, M. R., decided that the gift of the residue was void for uncertainty. He said that to make the bequest valid, it must be obligatory on the trustees to apply the *whole* (*z*) of it in charity; it was not a question whether the trustees *might* apply the fund to a charitable purpose, but whether by the words of the will they were bound to do so. To make the bequest valid it must be obligatory on them; he thought there were older cases, showing that where charitable purposes were mentioned, the Court would have taken care that the application should have been made to those purposes, but he was bound by the later decisions.

And the foregoing cases, where the gifts were held to be void

[(*t*) This does not seem quite correct, the true parallel was a gift to A., or for such other person *as the trustees should think fit*; which would not be void, unless the trustees were dead, or refused to exercise the discretion, *Fordyce* v. *Bridges*, 10 Beav. 99.

(*u*) 1 My. & Cr. 286.

(*x*) 5 L. J. N. S. Ch. 84, 5 Cl. & Fin. 111.

(*y*) 5 Beav. 303. See also *Thomson* v. *Shakespeare*, 1 Johns. 612, 6 Jur. N. S. 281.

(*z*) See *James* v. *Allen*, 3 Mer. 17.

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Distinction where the gift is for charitable and other *ascertained* objects, though apportionment left to trustees.

[for uncertainty, are not to be confounded with cases where the bequest is for a charitable purpose, and also for another ascertained object, even though the amount to be devoted to each object be not specified, and the apportionment be left to the discretion of trustees. The distinction between this and the former class of cases is obvious; for in one the trust is such that the Court can control the execution of it so far as to see that the trustees appropriate no part of the benefit to themselves: in the other, the trust not charitable is so indefinite as to be wholly beyond the control of the Court; and to hold that such a gift is valid, would be in effect to hold the trustees entitled for their own benefit.

Trustees declining to apportion, donees take equally.

The objects among whom the trustees are to apportion the testator's bounty, being sufficiently definite, are not to be disappointed by the trustees refusing to exercise their power or dying before doing so. In such event, the Court will divide the fund equally among the several objects, upon the principle that equality is equity.

Thus, in the case of *Attorney-General* v. *Doyley* (*z*), where a testator directed his trustees and the survivor, and the heirs of such survivor, to dispose of his property to such of his relations of his mother's side as were most deserving, *and* for such charitable purposes as they should also think most proper: one of the trustees declined to act, and Sir *J. Jekyll*, M. R., directed that one-half of the property should go to the testator's relatives on the mother's side, and the other half to charitable uses.

So, in the case of *Salisbury* v. *Denton* (*a*), where a testator bequeathed a fund to be at the disposal of his widow by her will, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the poor of O. as she might prefer, and under such restrictions as she might prescribe; and the remainder to be at her disposal among the testator's relatives as she might direct: the widow having died without exercising her power of apportioning the fund, it was held by Sir *W. P. Wood*, V. C., that the gift was not void, but that the Court would divide the fund in equal moieties.

In *Adnam* v. *Cole* (*b*), where a testator bequeathed the residue of his personal estate (consisting partly of leasehold property),

[(*z*) 4 Vin. Abr. 485, 2 Eq. Cas. Ab. 194, 7 Ves. 58, n.

(*a*) 3 Kay & J. 529.

(*b*) 6 Beav. 353. The trust for building the organ gallery failed of course under 9 Geo. 2, c. 36, so far as it depended on the leaseholds.

[to trustees upon trust to lay out the same in building such a monument to his memory as they should think fit, and in building an organ gallery in the parish church, it was held by Lord *Langdale*, M. R., that the trustees had not rightly exercised their discretion in applying the whole to the monument, and he referred it to the Master to ascertain in what proportion the residue ought to be divided between the two objects.

This case, it will be observed, differs from the preceding, in the mode of division adopted by the Court; the specific description of the objects enabling the Court to apportion the fund between them without resorting to the expedient of cutting the knot by equal division. But the case is equally an authority against holding the bequest void for uncertainty.

With these authorities the case of *Down* v. *Worrall* (*c*), stands in apparent conflict. There the testator bequeathed the residue of his personal estate to trustees upon trust to apply the same as he should by any codicil appoint, and in default, to or for charitable or pious uses, at their discretion, *or* otherwise for the separate benefit of his sister, independently of her husband, and of all or any of her children in such manner as his trustees should think fit. The trustees applied part of the fund for the benefit of the sister and her children, and part for charitable uses, and one of them then died; it was held that neither the surviving trustee nor the Court could exercise the discretion reposed in the two trustees, and that consequently the remainder of the fund must go as undisposed of. Now there could have been no doubt as to the validity of the disposition while two trustees remained alive, and the death of one, though it put an end to the exercise of any further discretion by the survivor, ought not, on the principle of the cases already stated, to have deprived the objects named of the undistributed portion of the fund; for the difference in the wording of the trust, viz. the use of the disjunctive "or" between the names of the several objects instead of the copulative "and," will hardly account for the decision. It affected, indeed, the power of the trustees, for they might, in consequence, have given all to either of the objects; but that power not having been exercised, the ordinary rule of the Court would seem to have been applicable, according to which each object was entitled to share equally (*d*).]

[(*c*) 1 My. & K. 561. 5 Ves. 495, 8 Ves. 561.]
(*d*) See *Brown* v. *Higgs*, 4 Ves. 708,

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Policy of early times in regard to charity.

The policy of early times strongly favoured gifts, even of land, to charitable purposes. Thus, not only was no restraint imposed on such dispositions by the early statutes of wills, but the act of 43 Eliz. c. 4 (*e*), as construed by the Courts, tended greatly to facilitate gifts of this nature, such act having been held to authorize testamentary appointments to corporations for charitable uses (*f*), and even to enlarge the devising capacity of testators, by rendering valid devises to those uses by a tenant in tail (*g*); and also by a copyholder, without a previous surrender to the use of the will (*h*), though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like (*i*).

To the same policy we may ascribe that rule of construction presently considered, by the effect of which, property once devoted to charity was never allowed to be diverted into any other channel, by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the tide of public opinion appears to have flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which, it may be presumed that the practice of disposing by will of lands to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered, that this disposition would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death.

Stat. 9 Geo. 2, c. 36.

No hereditaments or personal estate to be laid out in the purchase of hereditaments, to be disposed

Accordingly, the stat. of 9 Geo. 2, c. 36, (usually, but rather inaccurately, called the Statute of Mortmain,) enacted, that no hereditaments, or personal estate (*k*) to be laid out in the purchase of hereditaments, should be given, conveyed, or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incum-

(*e*) Ante, p. 192.

(*f*) *Flood's case*, Hob. 136.

(*g*) *Att.-Gen.* v. *Rye*, 2 Vern. 453; *Att.-Gen.* v. *Burdett*, ib. 755. See also 3 Ch. Rep. 154.

(*h*) *Rivett's case*, Moore, 890, pl. 1253, 3 Ch. Rep. 220. But, as to which, now, see ante, p. 59.

(*i*) See *Collinson's case*, Hob. 136.

[(*k*) But a covenant to pay a sum to a charity after covenantor's death, though it may affect both real and personal assets, is not touched by the act, *Alexander* v. *Brame*, 7 D. M. & G. 525; and see same case as to validity of "devices to evade the statute."

of or charged for the benefit of any charitable use, other than by indenture enrolled in Chancery, &c.

bered in trust or for the benefit of any charitable uses whatsoever (*l*), unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented, sealed and delivered in the presence of two credible witnesses, twelve calendar months before the death of the donor, including the days of the execution and death, and enrolled (*m*) in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death, and unless the same be made to take effect in possession for the charitable use, and be without any power of revocation, reservation, trust, &c., for the benefit of the donor, or of any persons claiming under him (*n*).

Exception.

[The 2nd section provides, that purchases for valuable consideration shall not be avoided by the death of the grantor within the twelve months, leaving, however, such purchases subject to the other conditions imposed by the act (*o*). The 3rd section declares all gifts, conveyances, settlements, of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, &c., not perfected according to the act void. The 4th section excepts from the operation of the act the two universities of Oxford and Cambridge, and the scholars upon the foundation of the colleges of Eton, Winchester, or Westminster. The 5th section puts a restriction on the number of advowsons to be held by any college in the Universities, which restriction has since been removed (*p*). The 6th section excepts Scotland from the act.

What species of property within the statute.

The species of property savouring of realty to which the act has been held to extend, and which are not overruled by recent decisions, are the following:]—the privilege by a grant from the crown of laying chains in the river Thames, for mooring ships (*q*); money secured by mortgage of turnpike tolls (*r*), or by an assignment of the poor's rates and county rates (*s*), [or of rates imposed on the occupiers of houses in a town by improvement commissioners (*t*);] leaseholds and money secured on mortgage,

[(*l*) A conveyance of land to churchwardens and overseers of a parish to build a poor house, under 59 Geo. 3, c. 12, is not within the act, *Burnaby* v. *Barsby*, 4 H. & N. 690.

(*m*) A deed conveying to a charity land already in mortmain does not require enrolment, 6 Jur. N. S. 970.]

(*n*) This does not preclude the donor from reserving to himself a power of regulating the charity, 2 Cox, 301. See also 1 Mer. 327.

[(*o*) On this section see *Price* v. *Hathaway*, 6 Mad. 304, and 9 Geo. 4, c. 85.

(*p*) 45 Geo. 3, c. 101.]

(*q*) *Negus* v. *Coulter*, Amb. 367.

(*r*) *Knapp* v. *Williams*, 4 Ves. 430, n.; *Ashton* v. *Lord Langdale*, 4 De G. & S. 402.

(*s*) *Finch* v. *Squire*, 10 Ves. 41.

[(*t*) *Thornton* v. *Kempson*, Kay, 592; *Ion* v. *Ashton*, 6 Jur. N. S. 879. Compare *Bunting* v. *Marriott*, 19 Beav. 163.]

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whether in fee or for years (*u*); and even judgment debts, so far as they operate as a charge on real estate (*x*). And where a testator had bequeathed his personal estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute, and accordingly could not pass with the rest of his personal estate (*y*).

Shares in Joint Stock Companies holding land not within the act;

[It was originally held by Sir *John Leach* in *Tomlinson* v. *Tomlinson* (*z*), that canal shares were within the Mortmain Act, though the act of parliament incorporating the company directed that the shares should be deemed personal estate, and should be transmissible as such. But "the current of modern decisions is against the older cases (*a*), and while there is to be discovered an inclination formerly to carry the provisions of the act beyond the legislature, the tendency of modern decisions has been the other way (*b*)." Accordingly it is now settled that shares in all joint stock companies or partnerships whether incorporated or not (*c*), having power to hold land for trading purposes (*d*), where such land is vested in the corporation or in individuals (as the case may be), in trust only to use the land for the purpose of profit, as part of the stock in trade, even though the undertaking be based entirely upon the holding of land, as in the cases of railway, dock, gas, and canal companies, and also, of course, where the holding of land is only incidental to the business, as in the case of banking and assurance companies, are excluded from the operation of the act (*e*). And it does not appear that this exclusion depends in any degree on the clause

(*u*) *Att.-Gen.* v. *Graves*. Amb. 155; *Att.-Gen.* v. *Caldwell*, ib. 635; *Att.-Gen.* v. *Meyrick*, 2 Ves. 44; *Att.-Gen.* v. *Earl of Winchelsea*, 3 B. C. C. 373; [*S. C.* nom. *Att.-Gen.* v. *Hurst*, 2 Cox, 364;] *White* v. *Evans*, 4 Ves. 21; *Currie* v. *Pye*, 17 Ves. 462. [See s. 3 of the Act, and *Toppin* v. *Lomas*, 16 C. B. 159.]

(*x*) *Collinson* v. *Pater*, 2 R. & My. 344.

(*y*) *Harrison* v. *Harrison*, 1 R. & My. 71.

[(*z*) 9 Beav. 459.

(*a*) See the cases already cited and also in connection therewith the more recent cases of *Baxter* v. *Brown*, 7 M. & Gr. 198; *Boyce* v. *Green*, Batty, 608; Lord *Cranworth's* judgment, *Edwards* v. *Hall*, 6 D. M. & G. 92; and Lord *Truro's*, *Myers* v. *Perigal*, 2 ib. 600.

(*b*) Per Lord *St. Leonards*, 2 D. M. & G. 619.

(*c*) As to companies or partnerships not incorporated see *Myers* v. *Perigal*, 11 C. B. 90, 2 D. M. & G. 599; *Watson* v. *Spratley*, 10 Exch. 222; *Hayter* v. *Tucker*, 4 Kay & J. 243; and the authorities cited in those cases.

(*d*) See 10 & 11 Vict. c. 78.

(*e*) *Att.-Gen.* v. *Giles*, 5 L. J. N. S. Ch. 44; *Sparkling* v. *Parker*, 9 Beav. 450; *Walker v. Milne*, 11 Beav. 507; *Thompson* v. *Thompson*, 1 Coll. 381; *Hilton* v. *Giraud*, 1 De G. & S. 183; *Ashton* v. *Lord Langdale*, 15 Jur. 868, 20 L. J. Ch. 234; *Myers* v. *Perigal*, 16 Sim. 533; *In re Langham*, 1 Eq. Rep. 118; *Edwards* v. *Hall*, 11 Hare 1, 6 D. M. & G. 74 (overruling *Ware* v. *Cumberlege*, 20 Beav. 503). And shares in a railway company, whose line is leased to another company at a rent, are on the same footing, *Linley* v. *Taylor*, 1 Giff. 67.

[commonly found in acts of parliament, making the shares personal estate, and transmissible as such; for shares in companies, regulated by deed of settlement only, are found among those so excluded (*f*). Now since the exclusion of shares in companies of the latter description cannot depend on any clause in their deed of settlement purporting to make their shares personal estate and transmissible as such (for the deed could have no such effect (*g*),) it follows that no importance is to be attached to a similar clause in an act of parliament, although the act might have such an effect. Indeed, such a clause is of itself manifestly insufficient for the purpose in question, as there are many kinds of property which are personal estate and transmissible as such, which are, nevertheless, as the reader will see, within the operation of the act (*h*). These considerations show, that the exclusion from the operation of the Mortmain Act of shares in companies regulated by deed, must arise, not from the terms of the deed, but from the nature of the interest of each individual shareholder. "The true way to test it," said Lord Leonards, in *Myers* v. *Perigal* (*i*), "would be to assume that there is real estate in the company vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? Or, if there was a house upon the land, could any two or more of the members enter upon the occupation of such house? I apprehend they clearly could not; they would have no right to step upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits. No incumbrancer of an individual member of the company would have any such right. In short, a member has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits, out of whatever property those profits might be found to have resulted." These observations apply with at least equal force to incorporated companies where the land is vested in the corporation (*k*); and the

[(*f*) *Att.-Gen.* v. *March*, 5 Beav. 432; *Ashton* v. *Lord Langdale*, 15 Jur. 868, 20 L. J. Ch. 234; *Myers* v. *Perigal*, 21 L. J. C. P. 217, 2 D. M. & G. 599, reversing the decision on this point, 16 Sim. 537.

(*g*) *Att.-Gen.* v. *Mangles*, post, Chap. XIX., Sect. 1.

(*h*) See *Curling* v. *Flight*, 2 Phil. 613; *Bligh* v. *Brent*, 2 Y. & C. 268; the latter case arose on the Chelsea Waterworks Act, which contained no clause declaring the shares personal estate, yet a share was held to pass by an unattested codicil; and see observations of *Alderson*, B., *Bradley* v. *Holdsworth*, 3 M. & Wels. 424.

(*i*) 2 D. M. & G. 620.

(*k*) *Baxter* v. *Brown*, 7 M. & Gr. 216; *Bradley* v. *Holdsworth*, 3 M. & Wels. 422; and see observations of *Abinger*, C. B., and *Parke*, B., in *Bligh* v. *Brent*, 2 Y. & C. 279, 280.

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[fact that by the dissolution of a company the shareholders may become specifically interested in the real property is to be considered as a remote event, and no more avoiding a bequest of a share to a charity than a like bequest of a simple contract debt would be avoided, because it might ultimately become a judgment debt, and thus a charge upon realty (*l*).

Whether different rule applies to mining shares.

Shares in mining companies are equally within the reason of this rule: for though the employment of land may be supposed to be greater in degree in mining companies, yet the nature of the property in the share is the same as in the shares of other trading partnerships, into the capital of which land or the use of it does not so largely enter. Accordingly it has been held that shares in a mine, conducted on the cost-book principle, may be bequeathed to a charity (*m*). And there appears to be at least equal reason for applying a similar rule to the shares of common joint-stock mining companies (*n*). But in *Morris* v. *Glynn* (*o*), the M. R. held a bequest of shares in such a company to a charity void. Indeed, his Honor did not rely on any distinction between the case before him and that of cost-book mines: but upon a principle applicable to both cases, and which is inconsistent with the validity of a bequest of *any* mining shares to a charity. "I think," said his Honor, "the distinction in these cases is this: it is necessary to ascertain whether the object of the partnership is a dealing with the land itself, or whether its object is a dealing with some other matters, to accomplish which land is held by it, but merely as an accessory to that other purpose. In the latter case I think that a bequest of shares to charity is not obnoxious to the Statute of Mortmain, but that in the former case it is." And again, "This is an interest in land, and in the profits derived from land. These persons are united together for the purpose of working mines, and of dividing the profits to be derived from the land itself; and it is quite different from an ordinary trading company. If it were a company established for the purpose of acquiring land, and dividing it or letting it out, would not that be an interest in land? Again, if it had been a company to farm an estate and divide the profits, would that be different from letting it to tenants and dividing the

[(*l*) See 5 Beav. 442, 2 D. M. & G. 620, 7 ib. 525, 10 Exch. 222, 245. Whether shares of the nature now under consideration are goods and chattels within the Bankrupt Act, see *Ex p. Vauxhall Bridge Company*, 1 Gl. & J. 101, and In *re Lancaster Canal Company, Dilworth's case*, Mont. & Bli. 94.

(*m*) *Hayter* v. *Tucker*, sup.; see also *Watson* v. *Spratley*, sup.; *Powell* v. *Jessop*, 18 C. B. 337; *Walker* v. *Bartlett*, ib. 845.

(*n*) See Bainbridge on Mines, ch. vi. s. 5.

(*o*) 27 Beav. 218.

[rents (*p*)? Nor in my opinion does a difference exist for this purpose between a company established for the sale of iron ore to manufacturers, and one established for the purpose of raising that ore, manufacturing it themselves, and selling it in its manufactured state."

The answer to the foregoing questions, it is conceived, must be found in the observations already cited of Lord St. Leonards: the nature of the shares, and not of the business, must determine the question; and if the right of the shareholder be merely to call for his share of the profits, and not for a specific part of the land itself, he may legally bequeath his shares to charity.

But if the land of a company or partnership be vested in any person in trust, not for the purposes of the undertaking generally, but for the individual shareholders or partners in proportion to their shares, then such shares are an interest in land within the meaning of the act Geo. 2, for then the individual shareholder would have power to call upon the trustee, not merely for his share of the profits, but for part of the very land itself, which, in the cases previously considered, was not the case (*q*).

Railway debentures.

Tothill Fields Improvement bonds have been held not to be within the act, though for money borrowed on the credit of the rates (*r*). So railway scrip or debentures, if in the form of a promissory note (*s*), are not within the act; but if in the form of an assignment by the company of the undertaking, and the tolls, &c., then they are within the act.

Tenant's fixtures.

Fixtures in a leasehold house, which, on the determination of the lease, the testator might carry away with him, may be bequeathed to charity (*t*).]

Where A., being entitled to certain sums of money which were to be raised by the execution of a trust for sale of real estate, bequeathed all his personal estate to B., who survived A., and afterwards died, having bequeathed the residue of her personal estate to charity; it was contended, that, as the period for raising the sums in question had arrived in the lifetime of B., (though they were not actually raised until after her decease,) it was a

[(*p*) See however *Broughton* v. *Hutt*, 3 De G. & J. 501.

(*q*) Per Sir *W. P. Wood*, V. C., *Hayter*, v. *Tucker*, 4 Kay & J. 251.

(*r*) *Bunting* v. *Marriott*, 19 Beav. 163; but the precise nature of the security is not stated. Compare the case of Westminster Improvement bonds, *Toppin* v. *Lomas*, 16 C. B. 159, and Bath Improvement bonds, *Howse* v. *Chapman*, 4 Ves. 542.

(*s*) *Myers* v. *Perigal*, 16 Sim. 533; *Ashton* v. *Lord Langdale*, 4 De G. & S. 402; *Langham's Will*, 10 Hare, 446; but see *Walker* v. *Milne*, 11 Beav. 507.

(*t*) *Johnston* v. *Swann*, 3 Mad. 467.]

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breach of duty in the trustees not to raise them, and this neglect ought not to invalidate the gift, especially as the charities had no right to elect to take it as land; but Sir *J. Leach*, V. C., held, that these sums, constituting an interest in land at the testatrix's death, could not legally be given to the charities (*u*). [However, in the case of *Shadbolt* v. *Thornton* (*x*), where H. being possessed of leaseholds gave all her estate and effects to F., who died nine days after her, having by his will given charitable legacies, Sir *L. Shadwell*, V. C., decided that the legacies should not abate in proportion. He said it was the duty of the person administering to have sold the leaseholds and paid the debts, funeral and testamentary expenses. There was a legal obligation to sell, and they must be taken to have been sold. It is to be observed that the case before Sir *John Leach* was not cited; and further, that as there was no legal obligation to sell, except within a year, it was going very far to say that the sale must be considered to have been made within nine days. When, however, we consider the turn that recent decisions have taken, it is not improbable that this decision would be followed; and indeed the principle on which it was decided seems to have been already sanctioned by Sir *W. P. Wood*, V. C., in *Edwards* v. *Hall* (*y*), where that learned Judge held that *arrears of rent* were not within the act. But growing crops (which pass under a devise of the land on which they are growing, and clearly therefore savour of realty), are within the act (*z*).]

Money to arise from the sale of leaseholds held not within the act;

—nor arrears of rent.

Secus as to growing crops.

If the pecuniary gift is partly charged upon land and partly personal, it will be void pro tanto. And therefore, where a testator devised a freehold estate to be sold, and the produce applied, together with so much of the personal estate as should be necessary, to secure an annuity of 30*l.* for the life of A., and after his death, the principal to go to a charity; the freehold estate not being sufficient to raise the money, it was held that the bequest was good as to the residue, which was to be raised out of the personal estate (*a*).

Legacy partly real, and partly personal, void pro tanto.

Where lands are devised in trust for a charity, the trust not only is itself void, but vitiates the devise of the legal estate on which it is ingrafted (*b*); and therefore, in such cases, the heir

Charitable trust vitiates the legal estate.

(*u*) *Att.-Gen.* v. *Harley*, 5 Mad. 321.
[(*x*) 17 Sim. 49.
(*y*) 11 Hare, 6, 6 D. M. & G. 74.
(*z*) *Symonds* v. *Marine Society*, 2 Giff. 325.]
(*a*) *Waite* v. *Webb*, 6 Mad. 71.
(*b*) *Adlington* v. *Cann*, 3 Atk. 155; *Doe* d. *Burdett* v. *Wrighte*, 2 B. & Ald. 710; [*Pilkington* v. *Boughey*, 12 Sim. 114; *Cramp* v. *Playfoot*, 4 Kay & J. 479; except perhaps in the case of a secret trust (see post, p. 212), proved by parol evidence and set aside in equity. See Lewin on Trusts, p. 79, 3rd ed.]

may recover at law, except where there are other trusts not charitable, which, of course, would entitle the trustees to retain the estate, and oblige the heir (*c*) to prosecute his claim in equity (*d*).

Where the conveying of land to a charity is enjoined as a condition *subsequent*, as where the devise is to A., on condition that he shall convey Whiteacre (part of the devised estate) to a charity, the condition alone is void, and the devise is absolute (*e*).

Bequest of proceeds of real estates to charity illegal.

Though the statute does not in terms apply to the proceeds of land directed to be sold, yet it is settled by construction, that a fund of this nature is within its spirit and meaning (*f*), on the ground, it should seem, that the legatee *might* have elected to take it as land; and a legacy payable out of such a fund of course shares the same fate (*g*). The act, however, does expressly embrace the converse case of money being directed to be laid out in land (*h*), and the prohibition applies not only where the investment in land is expressly directed by the will, but also where it results from the nature and regulations of the charity itself (*i*).

So, of bequest of money to be laid out in land.

Recommendation to purchase held to be mandatory.

A recommendation to trustees to purchase land is imperative, and, consequently, has the same invalidating effect, as a trust which is mandatory in terms (*h*). But, if an option be given to the trustees to lay out the money in land, or upon government or personal security (*l*), [or, if the regulations of the charity be such that the money bequeathed might, if the act were out of the way, be applied either in one way or the other (*m*); and indeed in all cases where the trust *may* be carried out without con-

As to where trustees have an option to invest in land or other security.

(*c*) But if the devise were of particular lands in fee, and the will contained a residuary devise, the failure of the former would, under a will made since 1837, let in the residuary devisee, not the heir.

(*d*) *Wilett* v. *Sandford*, 1 Ves. 186; see also *Doe* v. *Copestake*, 6 East, 328; *Doe* v. *Pitcher*, 6 Taunt. 359; [*Arnold* v. *Chapman*, 1 Ves. 108; *Young* v. *Grove*, 4 C. B. 668; *Doe* d. *Chidgey* v. *Harris*, 16 M. & Wels. 517; *Wright* v. *Wilkin*, 9 W. R. 161.]

(*e*) *Poor* v. *Miall*, 6 Mad. 32.

[(*f*) *Att.-Gen.* v. *Lord Weymouth*, Amb. 20]; *Curtis* v. *Hutton*, 14 Ves. 537; *Trustees of British Museum* v. *White*, 2 S. & St. 595.

(*g*) *Page* v. *Leapingwell*, 18 Ves. 463; [but see *Shadbolt* v. *Thornton*, 17 Sim. 49, ante.]

(*h*) *Att.-Gen.* v. *Heartwell*, 2 Ed. 234; *Pritchard* v. *Arbouin*, 3 Russ. 458.

(*i*) *Widmore* v. *Woodroofe*, Amb. 636; *Middleton* v. *Clitherow*, 3 Ves. 734. And see *Denton* v. *Manners*, 25 Beav. 38, 2 De G. & J. 675.

(*k*) *Att.-Gen.* v. *Davies*, 9 Ves. 546; *Kirkband* v. *Hudson*, 7 Pri. 212; [*Pilkington* v. *Boughey*, 12 Sim. 114.]

(*l*) *Soresby* v. *Hollins*, Amb. 211, [9 Mod. 221; *Widmore* v. *Governors of Queen Anne's Bounty*, 1 B. C. C. 13, n.; *Att.-Gen.* v. *Parsons*, 8 Ves. 186;] *Curtis* v. *Hutton*, 14 Ves. 537; [*Edwards* v. *Hall*, 11 Hare, 11, 12, 6 D. M. & G. 89.

(*m*) *Church Building Society* v. *Barlow*, 3 D. M. & G. 120; *Carter* v. *Green*, 3 Kay & J. 591; *Denton* v. *Manners*, 2 De G. & J. 675, 682. Unless the purpose of the gift be expressly confined to the illegal object, see last case.

[travening the statute (*n*) the bequest is valid.] It was lately attempted to bring within the scope of this principle a direction to invest on such mortgage securities as the trustees should approve, which, it was contended, authorized the trustees to lay out the fund on mortgages of personal chattels, or on Irish or Scotch real securities (some of which the testator was already possessed of); but Lord *Langdale*, considering that the reasoning savoured too much of refinement, held the bequest to be void (*o*).

Where the purchase of land is the ultimate object the trust is bad.

So, if investment in land is the ultimate destination of the money, the bequest will not be protected by the circumstance of provision being made for its suspension during an indefinite period; and, therefore, a gift of personal estate, to be laid out in the purchase of lands, has been repeatedly held to be void, although the trustees were empowered to invest the money in the funds until an eligible purchase could be made (*p*); [neither will a direction to purchase, though accompanied by a legal alternative direction for the application of the money in case the purchase cannot be conveniently made, give the trustees such a discretion as to take the bequest out of the statute, where there is no impediment to the primary trust but the statute (*q*).] These determinations have clearly overruled the case of *Grimmett* v. *Grimmett* (*r*); and it seems somewhat difficult to reconcile with them the more recent case of *Att.-Gen.* v. *Goddard* (*s*), where a testatrix, after bequeathing 1000*l.* Indian annuities, to trustees, for charitable purposes, added, "as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift, Sir *T. Plumer*, M. R., hesitatingly held the bequest to be valid, though he admitted it to be doubtful whether the clause in the will did not amount to a direction to purchase land, and whether the discretion extended to anything further than the selection of the estate.

Even though there be an option "in case land cannot be conveniently purchased."

[(*n*) *Mayor of Faversham* v. *Ryder*, 18 Beav. 318, 5 D. M. & G. 350; *Baldwin* v. *Baldwin*, 22 Beav. 419; *London University* v. *Yarrow*, 1 De G. & J. 72. In *Carter* v. *Green*, ubi sup., Sir *W. P. Wood*, V. C., coupled the declaration establishing the validity of the gift with a further declaration that the application of any part of the fund in question towards purchasing land would be an illegal application of the bequest: but in *Baldwin* v. *Baldwin*, ubi sup., the M. R. refused to make any such declaration, or to give any directions as to the application of the fund. The point does not appear to be of great importance: in either case the Attorney-General could file an information to compel the legal application of the fund.]

(*o*) *Baker* v. *Sutton*, 1 Kee. 224.

(*p*) *Grieves* v. *Case*, 4 B. C. C. 67, Dick. 251, [1 Ves. jun. 548, 2 Cox, 301;] *English* v. *Orde*, Duke, Ch. Uses, 432; *Pritchard* v. *Arbouin*, 3 Russ. 458; [*Mann* v. *Burlingham*, 1 Keen, 235.

(*q*) *Att.-Gen.* v. *Hodgson*, 15 Sim. 146.]

(*r*) Amb. 210.

(*s*) T. & R. 348.

Legacy valid where the purchase of land is not essential to the trust.

It is clear, that where the will is silent as to the purchase or acquisition of land, and the charitable trust or purpose is of a nature which admits of its being fully and conveniently executed without such purchase or acquisition, the legacy is good. Thus, where the testator bequeathed 2,800*l.* three per cent. reduced annuities, and directed the dividends to be applied "for and towards establishing a school," Lord *Thurlow* said, that this did not include the purchase or renting of land: the master might teach in his own house, or in the church (*t*). So, in another case, the bequest of personalty, "to be a perpetual endowment and maintenance of two schools," was considered, by *Richards*, C. B., to be so far good; though it was rendered void by the addition of a recommendation to purchase land (*u*). And even where the interest of the bequeathed fund was directed to be applied in providing a proper school-house, Sir *J. Leach*, V. C., thought that, as the intention might be executed by hiring a house, without the necessity of purchasing land, the bequest was valid; and that too, though the will contained expressions showing that the testator contemplated the perpetuity of the charity (*x*). So, where the trustees were expressly directed to apply the income of a charity fund in the purchase or rental of an appropriate building (*y*).

Contra where purchase of land intended though not essential.

[Much reliance was in these cases placed on the circumstance that the purposes of the will were to be answered out of the annual income as it arose, leaving the principal untouched. But where a legacy was given towards establishing a school near the Angel Inn at E., *provided a further sum could be raised in aid thereof if found necessary;* Sir *G. Turner*, V. C., said that the first words rather indicated an intention to occupy a site in the neighbourhood referred to, but that the latter words removed all doubt, showing that the establishment of the school was not to be by a succession of small payments, but by the immediate expenditure of a sum of money. He thought it clear that the intention was that land should be purchased (*z*).

So, in the case of *Dunn* v. *Bownas* (*a*), where a testator be-

(*t*) *Att.-Gen.* v. *Williams*, 4 B. C. C. 526, [2 Cox, 387;] see also *Att.-Gen.* v. *Jordan*, Highmore on Mortmain, 225. [Also *Martin* v. *Wellstead*, 23 L. J. Ch. 927; *Hartshorne* v. *Nicholson*, 26 Beav. 58.]

(*u*) *Kirkbank* v. *Hudson*, 7 Price, 221.

(*x*) *Johnson* v. *Swann*, 3 Mad. 457; [and see *Crafton* v. *Frith*, 15 Jur. 737, 20 L. J. Ch. 198.]

(*y*) *Davenport* v. *Mortimer*, 3 Jurist, 287, (V. C. *Shadwell.*)

[(*z*) *Att.-Gen.* v. *Hull*, 9 Hare, 647; and see *Att.-Gen.* v. *Hodgson*, 15 Sim. 146; *Longstaff* v. *Renneson*, 1 Drew. 28.

(*a*) 1 Kay & J. 596.

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[queathed a sum of money to the mayor and corporation of N., in trust for the purpose of establishing a hospital for twelve poor widows, with a monthly allowance of twenty shillings to each, the surplus to be applied in providing for them coals, clothing, or other necessaries; and he declared that the bequest was to be carried into effect at the death of his sisters, or during their lives if they should think proper, in which case they should be allowed to name the first inmates. Sir *W. P. Wood*, V. C., held that the only way in which the trust could be executed, was to buy a house with part of the fund, and that the reference to "surplus income" was not sufficient to alter this plain conclusion.

It appears, therefore, that the "foundation" (*b*), or establishment (*c*) of an "institution" (*d*), and still less its "endowment" (*e*), do not of themselves imply a transaction inconsistent with the Mortmain Act. But that as well the particular objects of the gift, as the context of the will, are to be looked at in order to fix the meaning of these ambiguous terms.]

Legacy to be applied in erecting school-house, bad.

It has been much questioned whether a bequest of money, to be applied in the erection of a school-house, or other building, for charitable purposes, is bad, as involving a trust to purchase. Lord *Hardwicke* considered that if the trustees could get a piece of ground given to them, so that land need not be purchased, the gift was good (*f*); but the contrary is now settled (*g*).

Legacy on condition that legatee provides land, void.

And it is equally clear that a legacy, [on condition that the legatee provide land for effecting the testator's object, is void, as being in truth a purchase of the land from the legatee (*h*).] And it would not avail, that charity legatees, by whom a fund is directed to be laid out in the erection of buildings, possess and offer to appropriate for the purpose land already in mortmain, unless the bequest were so framed as not to admit of a new purchase being made for the occasion (*i*).

[(*b*) *Salusbury* v. *Denton*, 3 Kay & J. 529; *London University* v. *Yarrow*, 1 De G. & J. 72.

(*c*) Cases ante, p. 209.

(*d*) *Baldwin* v. *Baldwin*, 22 Beav. 416.

(*e*) *Edwards* v. *Hall*, 11 Hare, 1, 6 D. M. & G. 74.]

(*f*) *Vaughan* v. *Farrer*, 2 Ves. 182; *Att.-Gen.* v. *Bowles*, ib. 547, [3 Atk. 806.]

(*g*) *Foy* v. *Foy*, 1 Cox, 163; [*Pelham* v. *Anderson*, 2 Ed. 296, 1 B. C. C. 444, n.;] *Att.-Gen.* v. *Nash*, 3 B. C. C. 588; *Att.-Gen.* v. *Whitchurch*, 3 Ves. 144; *Chapman* v. *Brown*, 6 ib. 404; *Att.-Gen.* v. *Parsons*, 8 ib. 186; *Att.-Gen.* v. *Davies*, 9 Ves. 535; *Pritchard* v. *Arbouin*, 3 Russ. 458; [*Att.-Gen.* v. *Hodgson*, 15 Sim. 146; *Smith* v. *Oliver*, 11 Beav. 481.

(*h*) *Att.-Gen.* v. *Davies*, 9 Ves. 535; and see *Dunn* v. *Bownas*, 1 Kay & J. 602.]

(*i*) *Giblett* v. *Hobson*, 5 Sim. 651, 3 My. & K. 517. In this case Lord *Brougham* held that circumstances dehors the will might be investigated for the purpose of getting at the intention. [Sed qu. See per Lord *Wensleydale*, in *Philpott* v. *St. George's Hospital*, 2 H. of L. C. 338, 27 L. J. Ch. 74.

Legacy to build on land void,

[It is a general rule, that, unless a testator distinctly points to land already in mortmain, a direction to build will be construed to mean that an interest in land is to be purchased, and the gift is not good (*k*). And accordingly, in *Mather* v. *Scott* (*l*), where a testator bequeathed a legacy to trustees, with a request that they would entreat the lord of the manor to grant land for building almshouses, Lord *Langdale*, M. R., held that the language of the bequest was not sufficiently expressed to exclude a purchase, and therefore the gift failed. But if the testator has expressly forbidden a purchase, at the same time declaring his expectation or desire that land will be provided from other sources, the bequest is valid: for the statute does not forbid the dedication of land to charity by act inter vivos; on the contrary, it expressly regulates the manner of doing so, and there is nothing to invalidate a bequest of money for building upon land so provided (*m*). A fortiori,] if the testator shows that he means the gift to take effect, whether land be provided or not, the legacy is valid (*n*).

—unless there is an express prohibition to buy land.

Improvement of land already in mortmain allowed.

The bequest of a sum of money to be applied in the erection of buildings on land which is already devoted to charitable purposes (*o*); or in the repair and improvement of buildings appropriated to charity (*p*), is unquestionably valid, as by such gifts no additional land is thrown into mortmain (*q*).

Legacy to be applied in discharging an incumbrance on charity property invalid.

A legacy to be applied in the liquidation of a subsisting incumbrance on real estate, which is already subject to charitable uses, appears to have been considered as not falling within this principle, but as appropriating to charity a new interest in land. Thus, a bequest of a sum of money, to be applied in paying off a mortgage debt on a meeting-house, cannot be supported (*r*); and it matters not that the incumbrance is equitable only (*s*).

[(*k*) See 9 Ves. 544; 6 D. M. & G. 85; 1 Kay & J. 601.

(*l*) 2 Keen, 172.

(*m*) *Philpott* v. *St. George's Hospital*, 2 H. of L. Ca. 338, 27 L. J. Ch. 70, reversing 21 Beav. 134, and overruling *Trye* v. *Corporation of Gloucester*, 14 Beav. 173. See also *Cawood* v. *Thompson*, 1 Sm. & Gif. 409.]

(*n*) *Henshaw* v. *Atkinson*, 3 Mad. 306; but see *Att.-Gen.* v. *Tindall*, 2 Ed. 207.

(*o*) *Glubb* v. *Att.-Gen.*, Amb. 373; *Brodie* v. *Duke of Chandos*, 1 B. C. C. 144, n.; *Att.-Gen.* v. *Bishop of Oxford*, ib.; *Att.-Gen.* v. *Parsons*, 8 Ves. 186; *Att.-Gen.* v. *Munby*, 1 Mer. 327; [*Shaw* v. *Pickthall*, Dan. 92; *Fisher* v. *Brierly*, 29 L. J. Ch. 477, 6 Jur. N. S. 159, 615.]

(*p*) *Harris* v. *Barnes*, Amb. 651; *Att.-Gen.* v. *Chester*, 1 B. C. C. 444.

(*q*) As to the evidence required in these cases, that the land on which the expenditure is to be made has been effectually devoted to charity, vide *Ingleby* v. *Dobson*, 4 Russ. 342; [*Shaw* v. *Pickthall*, Dan. 92.]

(*r*) *Corbyn* v. *French*, 4 Ves. 418. [But debts incurred in respect of a meeting-house are not always a lien on it; and where they are not so, a bequest to enable the debtor to pay them is of course valid, *Bunting* v. *Marriott*, 19 Beav. 163.]

(*s*) *Waterhouse* v. *Holmes*, 2 Sim. 162.

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Legacy founded on a devise which fails, void.

Where a legacy, which, standing alone, would be valid, is founded upon and derives its purpose and object from an illegal devise, it is necessarily involved in the failure of such devise. Thus, if a testator, after devising certain messuages to be converted into almshouses, bequeaths the interest of a sum of money to the occupiers of such houses—as the devise is clearly void, the legacy is equally so (*t*). Or, if a testator devises a messuage to be used as a school-house for the education of poor children, and bequeaths a fund to trustees, with a direction to apply the income in keeping the school-house in repair, and providing a master, the statute, by invalidating the devise of the house, deprives the pecuniary legacy of its object, which consequently fails (*u*); and in some other instances, presenting not quite so simple and obvious an application of the principle, a bequest, valid in itself, has been held to fail, from the impracticability of the general scheme, of which it forms a part (*x*).

Equity will not execute trust though the legacy has been paid.

It is to be observed, that if a legacy, which is directed to be laid out in land, is actually paid, (the party paying it not availing himself of the statute,) and the trustee lays it out accordingly, the Court will not execute the trust (*y*). [But if lands be devised in trust for charity, and have been held and applied accordingly for a long series of years, it will be presumed against the heir, that all proper means have since been taken to dedicate the property effectually to the charity (*z*).]

Contra after lapse of time.

Secret trust for charity.

The statute of the 9th Geo. 2 cannot be evaded by a secret trust, and the heir may compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity (*a*). And such promise, if denied by the devisee, may

(*t*) *Att.-Gen.* v. *Goulding*, 2 B. C. C. 428; *Att.-Gen.* v. *Whitchurch*, 3 Ves. 141; *Limbrey* v. *Gurr*, 6 Mad. 151; *Price* v. *Hathaway*, Ib. 304; [*Smith* v. *Oliver*, 11 Beav. 481; *Att.-Gen.* v. *Hodgson*, 15 Sim. 146.]

(*u*) *Att.-Gen.* v. *Hinxman*, 2 J. & W. 270. In cases the converse of this, namely, where the valid gift is the primary one, and the invalid gift is ancillary and subordinate to it, the former, of course, is not affected by the illegality of the latter; *Blandford* v. *Thackerell*, 4 B. C. C. 394, 2 Ves. jun. 238; [*Att.-Gen.* v. *Stepney*, 10 Ves. 22.]

(*x*) *Grieves* v. *Case*, 2 Cox, 301; *S. C.* 4 B. C. C. 67.

(*y*) *Att.-Gen.* v. *Acland*, 1 R. & My. 243. But the legacy, if paid in mistake, might, it is presumed, be recovered back by the party paying it. It seems that where a legatee is called upon to refund, he is not, in general, liable to interest. (*Gittins* v. *Steele*, 1 Sw. 199.)

[(*z*) *Att.-Gen.* v. *Moor*, 20 Beav. 119.]

(*a*) *Boson* v. *Statham*, 1 Ed. 508; *Muckleston* v. *Brown*, 6 Ves. 52; *Martin* v. *Hatton*, cit. ib. 61; *Stickland* v. *Aldridge*, 9 Ves. 516; *Paine* v. *Hall*, 18 Ves. 475. [So if land be conveyed to trustees for a charitable purpose by deed in other respects conforming to the act, a secret understanding with the grantor to reserve the benefit to himself for his life, will, if proved, invalidate the conveyance, *Fisher* v. *Brierly*, 29 L. J. Ch. 477, 6 Jur. N. S. 159, 615, in which case, however, the evidence failed to show an such understanding; and as to "devices to evade the statute," see *Alexander* v. *Brame*, 7 D. M. & G. 525.]

be proved by evidence *aliunde* (*b*). The trust, by whatever means established, invalidates the devise. This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply. As where a testator, after devising lands by a will duly attested, declares a trust in favour of charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust (*c*). The case would be different, however, if the devisee had prevailed on the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity (*d*), [or under a promise that if the estate were devised to him he would perform the trust (*e*). And if such an assurance or promise, so acted on by the testator, be proved against one of several co-devisees, the whole transaction will be invalidated as completely as it would have been by an assurance or promise proved against all, on the principle that no person can claim an interest under a fraud committed by another (*f*). In a case, however, where the testator, after executing a will containing a simple devise to four persons as tenants in common, communicated to A., one of those persons, his desire that the property should be held on charitable trusts, and A. received the communication in silence; it was held by Sir *W. P. Wood*, V. C., that though A. must be taken by his silence to have accepted the trust, and therefore to be disentitled to any beneficial interest; yet that the other three devisees, to whom no communication had ever been made in the testator's lifetime, of the trust intended by him, were entitled to three fourth parts of the property for their own benefit, and that only one fourth part resulted to the heir-at-law (*g*).]

Effect where trust is declared by separate unattested paper.

Where devise is to several, and trust established against one only.

Marshalling assets is the adoption of this principle: that, where there are two funds and two parties, one of whom has a claim exclusively upon one fund, and the other the liberty of resorting to either, the Court will send the latter party primarily to that fund from which the former is excluded; or, if he should

Assets not marshalled in favour of charity.

(*b*) *Edwards* v. *Pike*, 1 Cox, 17, 1 Ed. 267.

(*c*) *Adlington* v. *Cann*, 3 Atk. 141, 9 Ves. 519; [*Wallgrave* v. *Tebbs*, 2 Kay & J. 313; *Lomax* v. *Ripley*, 3 Sm. & Giff. 48.]

(*d*) See *Adlington* v. *Cann*, 3 Atk. 152.

[(*e*) *Russell* v. *Jackson*, 10 Hare, 204.

(*f*) Ib.

(*g*) *Tee* v. *Ferris*, 2 Kay & J. 357.]

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have actually resorted to their common fund, will allow the other to stand in his place to that extent. The application of this principle has been denied to charities; and, accordingly, where property which *cannot*, is combined, in the same gift, with funds which *can*, be bequeathed for charitable purposes, and the disposition embraces several objects or purposes, some charitable and others not, the Courts hold that the purposes not charitable cannot be thrown exclusively upon that part of the subject of disposition which is incapable by law of being devoted to charity, in order to let in the charitable purposes upon the remainder (*h*).

Thus, if a testator give his real and personal estate to trustees, upon trust to sell and pay his debts and legacies, and to apply the residue for charitable purposes, the Court will not throw the debts and legacies exclusively on the proceeds of the real estate, and the mortgage securities and leaseholds, in order that the charitable bequest may take effect so far as possible; nor, on the other hand, will it direct the debts and legacies to come out of the pure personalty for the purpose of defeating the charitable residuary bequest to the utmost possible extent. Steering a middle course, equity directs the debts and legacies to come out of the whole estate, real and personal, pro ratâ; for instance, supposing the real funds (including the leaseholds and mortgage securities) to constitute two-fifths of the entire property, then two-fifths of these charges would be satisfied out of such real funds, and the remaining three-fifths out of the pure personalty (*i*); and, after bearing the charges in these several proportions, the former would belong to the heir or next of kin (as the case might be), and the latter to the charity-residuary legatee. And, by parity of reasoning, if a testator bequeath pecuniary legacies to charities, and leave a general residue to others, consisting partly of leaseholds or real securities, and

(*h*) *Mogg* v. *Hodges*, 2 Ves. 52, [1 Cox, 9;] *Att.-Gen.* v. *Tyndall*, 2 Ed. 207, Amb. 614; *Foster* v. *Blagden*, Amb. 704; *Middleton* v. *Spicer*, 1 B. C. C. 201; *Att.-Gen.* v. *Earl of Winchelsea*, 3 B. C. C. 373; *Makeham* v. *Hooper*, 4 ib. 153; *Hobson* v. *Blackburn*, 1 Kee. 273; [*Williams* v. *Kershaw*, 5 L. J. Ch. N. S. 84, 5 Cl. & Fin. 111.]

(*i*) *Howse* v. *Chapman*, 4 Ves. 542; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 372; *Curtis* v. *Hutton*, ib. 537; *Currie* v. *Pye*, 17 Ves. 464; *Crosbie* v. *Mayor of Liverpool*, 1 R. & My. 761, n.; see also *Fourdrin* v. *Gowdey*, 3 My. & K. 397; [*Johnson* v. *Woods*, 2 Beav. 409; *Att.-Gen.* v. *Southgate*, 12 Sim. 77; and that too, though the purely personal part of the residue was alone disposed of by the will for the charitable purposes, and the remaining part was left undisposed of, *Edwards* v. *Hall*, 11 Hare, 22.

partly of pure personalty, the legacies will be void pro tanto, i. e. in the proportion which the real funds bear to the entire property, though the pure personalty should be sufficient to pay all the legacies. The proper course, in such case, is to pay the debts and funeral and testamentary expenses, (being all the prior charges to which the general residue was liable,) in the first instance, out of the whole property, pro ratâ (*k*), and then to provide for the pecuniary legacies in like manner; the effect of which is that the charity legacies, so far as this rateable apportionment throws them upon the leaseholds and real securities, are void (*l*).

General conclusion.

According to the principles of the authorities, then, it should seem, that every charitable legacy bequeathed by any testator whose will does not contain the usual clause directing such legacies to be paid exclusively out of the personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void pro tanto; a doctrine which, it is believed, is not generally known to, or acted upon, by executors.

[The effect of this doctrine may sometimes be to render the whole legacy void. Thus, in the case of *Cherry* v. *Mott* (*m*), the testator directed his executors to purchase of the governors of Christ's Hospital a presentation to that charity for a boy, the son of a freeman of the borough of Hertford; the purchase-money to be paid out of his personal estate. The testator's personal estate not being all pure personalty, Sir *C. Pepys*, M. R., was of opinion that the bequest never could take effect; for if the executors had agreed for the purchase at a given sum, that sum must have been raised proportionably out of the two sorts of personalty, and the gift of so much as it was necessary to raise out of the personalty, savouring of the realty, would have been void, and consequently the full purchase-money never could be raised; and the testator's intended gift failed by reason of the impossibility of making the purchase.

Testator may himself marshal his assets.

Where the testator has directed a charity legacy to be paid out of his pure personalty, which, however, is all exhausted by his specialty creditors, the charity may stand in the place of the

[(*k*) In the case of *Robinson* v. *The London Hospital*, 10 Hare, 29, Sir *W. P. Wood*, V. C., decided that, in making the apportionment, the respective values of the real and personal estate are to be taken as they are at the time of the apportionment, and not as they are at the death of the testator, *sed qu.*

(*l*) *Philanthropic Society* v. *Kemp*, 4 Beav. 581; *Sturge* v. *Dimsdale*, 6 Beav. 462; *Cherry* v. *Mott*, 1 My. & Cr. 123; *Briggs* v. *Chamberlain*, 18 Jur. 56.

(*m*) 1 My. & Cr. 123.

[creditors on the real estate (*n*). In such a case, it is the testator himself who has marshalled (so to speak) his own assets, and the Court only prevents the arrangement made by him from being defeated by accidental circumstances. Questions have lately been raised as to what is a sufficient direction in a will to make a charity legacy payable in full, out of the pure personalty only. In the case of *The Philanthropic Society* v. *Kemp* (*o*), the will, after giving charitable and other legacies, directed that the charitable legacies should be paid out of the testatrix's ready money and the proceeds of the sale of her funded property, personal chattels and effects, and not from the proceeds or by sale of her leasehold or real estates; and she charged her leasehold estates, *in addition* to her other personal estate, with the payment of her debts, funeral and testamentary expenses, and of such of the said several pecuniary legacies and bequests thereinbefore mentioned as were not given to charitable uses. Lord *Langdale*, M. R., said, that the leaseholds being given (*qu.* charged) "in addition to," and not in exoneration of the other personal estate, the whole personal estate was subject to the debts, &c., and *all the other legacies;* there must, therefore, be pro ratâ payments: i. e., the debts and legacies not charitable must be paid pro ratâ out of both species of property; thereby defeating the charitable legacies, except so far as the pure personalty was sufficient to satisfy them as well as the rateable proportion of the general legacies (*p*). In the case of *Sturge* v. *Dimsdale* (*q*), Lord *Langdale* seemed to doubt whether a mere direction, "that charitable legacies should be paid exclusively out of such personal estate only as might be legally applicable thereto," would prevent the failure of such legacies pro tanto: it was not, however, necessary to decide the question; and that such a direction is quite sufficient, seems now established by the case of *Robinson* v. *Geldart* (*r*), in which the testator gave several charitable legacies, which he directed to be raised and paid out of such of his ready money, goods, and personal effects, as he could by law charge with the payment of the same. The residue of the pure personalty, after contributing rateably to payment of debts, funeral and testamentary expenses, not being sufficient to pay the charitable legacies in full, the question was whether such residue was to be applied as far as it would go, or whether the legacies were

[(*n*) *Att.-Gen.* v. *Lord Mountmorris*, 1 Dick. 379.

(*o*) 4 Beav. 581.

(*p*) For the charity legacies exceeded the pure personalty, and the debts and other legacies exceeded the rest of the personalty.

(*q*) 6 Beav. 462.

(*r*) 3 Mac. & G. 735, reversing the decision, 3 De G. & S. 499.]

[to fail in the proportion that the personal estate savouring of the realty bore to the whole personal estate. Lord *Truro*, C., held that the pure personalty must all be applied in payment of the charity legacies. He said that in the case of *The Philanthropic Society* v. *Kemp*, the circumstance that the pure personalty was subjected to the payment of debts and legacies to individuals, as well as the personalty savouring of the realty, and the circumstance that the personalty savouring of the realty was insufficient for the payment of the debts and legacies to individuals, constituted two material distinctions between that case and the one before him, in which, as his Lordship then went on to show, the charitable legacies were demonstrative legacies, and consequently the charities, in claiming the whole of the pure personalty, were not claiming to have the assets marshalled, but claiming *a priority of payment* according to the will; and though the former claim would have been denied them, yet to deny the latter would be a complete violation of the testator's intention as to the payment itself, and probably also of the particular or subordinate intention as to the mode of payment. It was not argued in this case, that, by the rule applicable to demonstrative legacies, the pure personalty ought not to have contributed to the payment even of debts and funeral and testamentary expenses, nor can this be explained by saying that as the personalty savouring of the realty was insufficient for payment of the debts and legacies not charitable, therefore, as between the two classes of legatees, both should contribute to the prior charges, for an ordinary demonstrative legacy would not have been thus cut down. In *Tempest* v. *Tempest* (*s*), where the testator, after bequeathing several charitable legacies, directed that they should "be paid in precedence of the other pecuniary legacies thereby bequeathed, out of such part of his personal property not specifically bequeathed as was by law applicable for charitable purposes." Sir *W. P. Wood*, V. C., strictly applied the rule as to demonstrative legacies: but his decision was reversed by Lord *Cranworth*, who decided that the testator's debts, and the funeral and testamentary expenses and costs of the suit were in the first place payable rateably, out of the pure personalty, and the personalty savouring of realty, and that the charitable legacies were payable next in

Remark on *Robinson* v. *Geldart*.

[(*s*) 7 D. M. & G. 470, reversing the decision below, 2 Kay & J. 635. The Lord Chancellor did not lay any stress on the terms of the clause giving precedence over "the other pecuniary legacies."

[order, out of the balance of the pure personalty, in precedence only of the other legacies. The question, then, must be considered one not of demonstration of the fund for payment, but of priority of payment as between the legatees, after providing for prior charges; and therefore in order, as far as possible, to make charitable legacies effectual, the debts, funeral and testamentary expenses, should be expressly and exclusively charged on the personalty savouring of realty (*t*).]

Effect where land is charged as an auxiliary fund.

Where a charitable legacy is charged on real estate as an auxiliary fund in aid of the personalty, (and such, it will be hereafter seen, is always the effect of a mere general charge,) the legacy will be valid or not, and either wholly or in part, according to the event of the personalty proving sufficient for its complete liquidation, or not.

As the validity of a charity legacy depends on its not being to come out of a real fund, the point of construction whether the legacy is payable out of personal or real estate, is sometimes warmly contested on this account; and in the consideration of this question, it scarcely need be observed, no disposition has been manifested by the courts to strain the rules of construction in favour of charity (*u*).

Judicial treatment of act of 9 Geo. 2, c. 36.

Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute of the 9th of George the 2nd. This is abundantly evident from the general tone of the adjudications; but the two points in which it is most strikingly displayed are, first, the holding a gift to charity of the proceeds of the sale of real estate to be absolutely void, instead of giving to the charity legatee the option to take it as money, according to the rule since adopted in the case of a similar gift to an alien (*x*); and, secondly, the refusal of equity to marshal assets in favour of a charity, in conformity to its general principle; that principle being evidently founded on an anxiety to carry out, as far as possible, the intentions of testators. In this solitary case, the intention has been

[(*t*) See Williams' Executors, p. 1234, 5th ed.]

(*u*) See *Leacroft* v. *Maynard*, 1 Ves. jun. 279, ante, p. 172. But where a testator shows by his will that he uses the term "personal estate" as contradistinguished from "leaseholds," occurring in the same bequest, and he afterwards by a codicil directs a charitable legacy to be payable out of his "personal" estate, the expression is considered as used in the same restricted and peculiar sense as in his will; and the legacy is payable out of the pure personalty, and is therefore good. (*Wilson* v. *Thomas*, 3 My. & K. 579.)

(*x*) Ante, pp. 62, 63.

allowed to be subverted by a mere slip or omission of the testator, which the Court had the power of easily correcting by an arrangement of the funds (*y*).

Exception in favour of two English Universities, and Eton, Winchester, and Westminster.

It will be observed, that the act expressly allows gifts to the two English Universities and their colleges, and the three colleges of Eton, Winchester, and Westminster (*z*). It has never been decided whether the proviso extends to colleges founded since the act, as Downing College, Cambridge. Lord *Northington* considered that it was confined to colleges antecedently established (*a*); but Lord *Loughborough* appears to have dissented from this opinion (*b*). It is clear that the statute does not authorize a devise to a college in trust for other charitable ob-

Remarks on policy of stat. 9 Geo. 2, c. 36.

(*y*) After all, however, it deserves consideration, whether the policy which gave birth to the stat. of 9 Geo. 2, c. 36, is adapted to the state of society at the present day, when the current of charitable bounty does not appear to flow in channels calculated to awaken the jealousy, or call for the restraining interference of the legislature. In no instance that has ever been brought to the attention of the writer, in which the vacating operation of the statute has defeated the intention of a testator, has the result been otherwise than mischievous. Testators, who dispose of the bulk of their property to charity, are generally persons who have no other than very distant (and possibly not very deserving) relations; [see, however, 20 Beav. 508;] and it not unfrequently occurs that a considerable part of the property which the law diverts from its destined object (it may be some religious or benevolent institution) is expended in an attempt to discover the person into whose lap it has been thrown. Without intrenching on the salutary enactment which prevents the land of the country from being locked up in perpetuity trusts of this nature (though even this object does not necessarily involve the prohibition of a few feet of ground being given for the erection of a building), might it not be provided that, wherever real estate or the produce of real estate is disposed of in this manner, the property should be sold or converted, and the proceeds only paid over to the charity? in other words, making it compulsory on the charity to accept the produce of the land instead of the land itself, unless the object were of such a nature as to be incapable of being carried into effect otherwise than by an appropriation of land; in which case the devise would still be void. The present state of the law produces much litigation, and many attempts at evasion, as is always the case where the feelings of mankind are not in unison with the provisions of the statute-book. Ingenuity is racked for evasive expedients, and a testator will sometimes rather confide his property to the honour of a stranger, by devising it to the treasurer or other public officer of a charity for his own benefit, and most explicitly discharging him from all constructive or implied trusts, than abandon a scheme to which he is impelled by a conscious rectitude of purpose. A measure facilitating charitable dispositions by will would seem to be especially opportune, now that the legislature has, with the excellent design of arresting the progress of pauperism, made such an alteration in the poor-laws as renders the great body of the poorer classes more dependent than formerly on private benevolence. Perhaps it will be objected that a voluntary prospective provision against poverty and destitution partakes of the vicious principle and mischievous tendency of those laws; but the objection holds good only to a very limited extent. There is a great and obvious difference between the effect of a legal enactment conferring an absolute right, and that, too, on all without distinction of character and conduct, and a provision which selects only the deserving, and cannot be depended on by any. And this objection, whatever be its force, does not apply to institutions whose object it is to supply the moral wants, not to administer to the physical necessities of men.

(*z*) For an instance of such a devise, see 3 Ves. 641.

(*a*) 1 Ed. 16.

(*b*) See *Att.-Gen.* v. *Bowyer*, 3 Ves. 728.

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jects (*c*); but it seems not to be essential that the trust should embrace the whole college; a trust for the benefit of particular members would be within the proviso; and therefore, a devise to the Master and Fellows of Christ's College, in trust that they and their successors should apply the rents for some undergraduate student, has been held to be good (*d*). But the devise must be for collegiate or academical purposes; and a gift to the college, to the intent that an individual member (the senior fellow for the time being) should live in the testator's house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle (*e*).

[It was once decided upon the law as it stood before the statute 9 Geo. 2, that a devise to a college carried the legal as well as the equitable estate (*f*): but the better opinion seems to be, that, according to that law, to which by virtue of the proviso in the statute, such a case is still subject, the devise is good in equity only (*g*).] Lord *Loughborough* appears to have thought, that, if a devise of real estate to a college was refused by the college, as of course it may be, whether the devise be upon trust or otherwise (*h*), it might, as the lands were originally devised to a valid purpose, be executed cy près (*i*).

Exception in respect of Scotland.

The exception made by the act in respect of property in Scotland has been held to apply only to the locality of the lands destined to the trust; precluding, therefore, the devise of lands in England to a Scottish charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to *some* kinds of charity (*k*). It has been held, that the circumstances of the charity being Scotch, and that trustees to be chosen for administering it are to be Scotchmen, do not conclusively show that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute (*l*).

Purchase of lands in Ireland.

So, of course, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good (*m*). [By a late

(*c*) *Att.-Gen.* v. *Tancred*, 1 Ed. 15, 1 W. Bl. 90, Amb. 351; see also *Blandford* v. *Fackerell*, 4 B. C. C. 394, 2 Ves. jun. 238; *Att.-Gen.* v. *Munby*, 1 Mer. 327.

(*d*) *Att.-Gen.* v. *Tancred*, 1 Ed. 10.

(*e*) *Att.-Gen.* v. *Whorwood*, 1 Ves. 534.

[(*f*) *Benet College* v. *Bishop of London*, 2 W. Bl. 1182.

(*g*) *Incorporated Society* v. *Richards*, 1 D. & War. 258, 305.]

(*h*) See 2 Kee. 163.

(*i*) [*Att.-Gen.* v. *Andrew*, 3 Ves. 633.]

(*k*) *Oliphant* v. *Hendrie*, 1 B. C. C. 571; *Curtis* v. *Hutton*, 14 Ves. 537; *Mackintosh* v. *Townsend*, 16 Ves. 330.

(*l*) *Att.-Gen.* v. *Mill*, 4 Russ. 328, 5 Bli. N. S. 593, 2 D. & Cl. 393.

(*m*) See *Campbell* v. *Earl of Radnor*, 1 B. C. C. 272; *Baker* v. *Sutton*, 1 Kee. 234; *Att.-Gen.* v. *Power*, 1 Ba. & Be. 154.

[statute (*n*), however, it is enacted, that any donation, devise, or bequest, whereby any *estate* in lands, tenements or hereditaments in Ireland is conveyed or created for a charitable purpose, must be executed three calendar months before the death of the donor. This enactment does not, however, appear to extend to bequests of money to be laid out in land.]

British Colonies.

The statute 9 Geo. 2, c. 36, does not extend to the British colonies; in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country (*o*).

Custom of London.

[Neither, as it appears, does the statute affect the custom of London, by virtue of which resident freemen were enabled to devise their lands in mortmain (*p*). It is true that the act contains no saving of local customs, as is the case in some other acts of a like nature (*q*); and the exemption has, on that ground, been denied (*r*): but the customs of London being expressly confirmed by Magna Charta (*s*) are entitled to the benefit of the rule, that a special act is not repealed by a general one, except by express words (*t*). However] the custom applies only to lands in London (*u*).

Statutes allowing land to be devoted to particular charities.

The legislature has, in several instances, relaxed in favour of particular objects the restriction on disposing of land to charitable purposes. Thus, by the land tax redemption act (42 Geo. 3, c. 116, s. 50), money may, by will or otherwise, be given to be applied in the redemption of the land tax on hereditaments settled to charitable uses. So, the stat. 43 Geo. 3, c. 107, authorizes the devise of lands to the governors of Queen Anne's Bounty; and again, the stat. 43 Geo. 3, c. 108, empowers persons, by will executed three months before death, to devise lands not exceeding five acres (*x*), or goods and chattels not exceeding

[(*n*) 7 & 8 Vict. c. 97, s. 16. A deed must also be registered within the same period, ib.]

(*o*) Per Sir *W. Grant*, M. R., in *Att.-Gen.* v. *Stewart*, 2 Mer. 141; [see also *Att.-Gen.* v. *Giles*, 5 L. J. N. S. Ch. 44; *Whicker* v. *Hume*, 1 D. M. & G. 506, 14 Beav. 509, 7 H. of L. Ca. 124; *Mayor of Lyons* v. *East India Company*, 1 Moo. P. C. C. 298.

(*p*) 8 Co. Rep. 129 a.

(*q*) See 23 Hen. 8, c. 10, s. 5.

(*r*) Per Sir *R. P. Arden*, M. R., Highmore on Mortmain, p. 127.

(*s*) 9 Hen. 3, c. 9.

(*t*) Jenk. Cent. 3, 120; *London and Blackwall Railway Company* v. *Limehouse District Board of Works*, 3 Kay & J. 123.]

(*u*) *Middleton* v. *Cater*, 4 B. C. C. 409.

[(*x*) See *Fisher* v. *Brierly*, 29 L. J. Ch. 477, 6 Jur. N. S. 159, 615.

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in value 500*l.* (*y*), for erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy of the Church of England may be used, or any mansion-house for the residence of the minister, or any outbuildings, offices, churchyard, or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre (*z*), [and the promotion of these or similar objects has been still further encouraged by an act (*a*) legalizing the devise of lands to or in trust for (*b*) the Ecclesiastical Commissioners, in aid of the endowment and erection of district churches.] The Statute of Mortmain has also been repealed pro tanto in favour of the British Museum (*c*), the Bath Infirmary (*d*), Greenwich Hospital (*e*), the Foundling (*f*), and St. George's Hospitals (*g*), the Royal Naval Asylum (*h*), the Seaman's Hospital Society (*i*), and of some other public institutions (*k*). [But it must be borne in mind that an act of parliament which confers on a corporate body, incorporated for charitable purposes, the right to purchase, take, hold, receive or enjoy lands, does not enable such corporate body to *acquire* land otherwise than in the mode prescribed by the Mortmain Act, the effect of the clause being equivalent only to a licence from the Crown to hold in mortmain (*l*), and not therefore enabling it to take by devise. It will have been seen, from the observations in a former chapter on capacity to take by devise, that charitable corporations were previously to the late Wills Act

Act of Parliament when only equivalent to licence from the Crown.

[(*y*) But not the produce of any quantity of land even to the extent of 500*l.*, *Church Building Society* v. *Coles*, 1 Kay & J. 145, 5 D. M. & G. 324.]

(*z*) See also 55 Geo. 3, c. 147, and 58 Geo. 3, c. 45, s. 33.

[(*a*) 6 & 7 Vict. c. 37, s. 22.

(*b*) *Baldwin* v. *Baldwin*, 22 Beav. 425.]

(*c*) See stat. 5 Geo. 4, c. 39.

(*d*) 19 Geo. 3, c. 23; see *Makeham* v. *Hooper*, 4 B. C. C. 153. The stat. 6 & 7 W. 4, c. 70, which authorizes the appropriation of land, not exceeding half an acre, as a site for the erection of school-rooms for the education of poor children, (even notwithstanding disabilities,) does not apply to dispositions by will. The conveyances are required to be by bargain and sale enrolled.

(*e*) 10 Geo. 4, c. 25, s. 37.

(*f*) 13 Geo. 2, c. 29.

(*g*) 4 Will. 4, c. 38, (local and personal acts.)

(*h*) 51 Geo. 3, c. 105.

(*i*) 3 & 4 Will. 4, c. 9, s. 1.

(*k*) See Shelf. Char. Uses, 49.

[(*l*) *Mogg* v. *Hodges*, 2 Ves. 52; *British Museum* v. *White*, 2 S. & St. 595; this appears to have been overlooked in the late edition of Chitty's Statutes, vol. i. p. 428, where several charitable institutions are stated to be exempted, by special enactment, from the operation of the act of Geo. 2, though they are in fact only empowered *to hold* land; see, for instance, the acts establishing the *Company of Surgeons and Barbers* and the *Marine Society*. See and consider with reference to this point, 13 & 14 Vict. c. 94, s. 23, enabling owners of impropriated tithes to annex the same to the parsonages, &c. of the parishes where they arise, *Denton* v. *Manners*, 25 Beav. 38, 2 De G. & J. 675. See also the Public Libraries Act, 13 & 14 Vict. c. 65, repealing 8 & 9 Vict. c. 43, under which last municipal corporations were enabled to take lands by devise for museums, &c., and also (as was held in *Harrison* v. *Corporation of Southampton*, 2 Sim. & Gif. 387) money bequeathed to them to be laid out in the purchase of lands for museums, &c.

[prevented from taking by devise, not merely under the statute 9 Geo. 2, but were before that statute subjected to such incapacity in common with all other corporations, though having a licence to hold in mortmain. But it has been held, that a devise of lands in Ireland (to which the 9 Geo. 2 does not extend) to a charitable corporation will be considered as a devise for the particular charitable purposes for which such corporation was incorporated; and though such a devise fails as to the legal estate, yet the heir will be decreed to be a trustee for those charitable purposes, and therefore for the corporation (*m*).]

Bequest of personalty to charitable purposes not restrained.

The act of 9 Geo. 2, leaves the disposition of personalty, not consisting of leaseholds or real securities or other chattel interests in land, wholly unrestrained, except where directed to be invested in real estate; so that with this qualification, a man may dispose of his whole personal estate (*n*) to charitable purposes, capable of enduring for ever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favoured in point of construction (*o*); for by a rule peculiar to gifts of this nature, if the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects, which happen to fail, from whatever cause; although, in such cases, the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality or failure of its immediate objects, be carried into effect. Thus, in the case of a gift to the poor in general (*p*), or to charitable uses generally (*q*), or for the advancement of religion, expressed in the most vague and indefinite terms (*r*); or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor (*s*); [or the executor renounces probate (in which case he cannot claim to exercise his discretion) (*t*);] or to such charitable uses as A. shall appoint, and A. dies in the lifetime of the testator (*u*), or neglects or refuses to appoint (*x*); or

Such bequests executed cy près, when.

[(*m*) *Incorporated Society* v. *Richards*, 1 D. & War. 258.]

(*n*) *Anon.* Freem. Ch. Ca. 262; *Baylis* v. *Att.-Gen.*, 2 Atk. 239; *Da Costa* v. *De Pas*, Amb. 228; *S. C.* cit. 7 Ves. 76; 3 Mad. 457.

(*o*) 7 Ves. 490.

(*p*) *Att.-Gen.* v. *Matthews*, 2 Lev. 167; *S. C.* nom. *Frier* v. *Peacock*, Finch, 245; *Att.-Gen.* v. *Rance*, cit. Amb. 422.

(*q*) *Clifford* v. *Francis*, Freem. Ch. Ca. 330; *Att.-Gen.* v. *Herrick*, Amb. 712.

(*r*) *Powerscourt* v. *Powerscourt*, 1 Mol. 616.

(*s*) *White* v. *White*, 1 B. C. C. 12.

[(*t*) *Att.-Gen.* v. *Fletcher*, 5 L. J. N. S. Ch. 75.]

(*u*) *Moggridge* v. *Thackwell*, 1 Ves. jun. 464, 3 B. C. C. 517, 7 Ves. 36, 13 Ves. 416. In this case, and in *Mills* v. *Farmer*, 1 Mer. 55, Lord *Eldon* went very fully into the general doctrine.

[(*x*) *Att.-Gen.* v. *Boultbee*, 2 Ves. jun. 380, 3 Ves. 220.]

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to such charitable uses as the testator himself shall appoint [or has appointed], and he dies without making an appointment (*y*), [or the instrument of appointment cannot be found (*z*);] or where the testator makes a disposition in favour of an object which has no existence (*a*), or which is void in law (*b*), or has become impossible (*c*); or bequeaths to the trustees of a charity who refuse to accept (*d*); or to a particular charity by a description equally applicable to more than one, (and it is wholly uncertain which was intended (*e*)); [or having evinced his intention to give a certain sum in charity, leaves blanks in his will for the names of the charities and the proportion to be allotted to each (*f*);] in these and all such cases, though the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be void for uncertainty, yet the purpose being charity, the Crown as parens patriæ, or the Court of Chancery, will execute it cy près. But where the testator's object is sufficiently defined, and is capable of being carried into effect, it will not be departed from upon a notion of more extended utility (*g*). [Where, however, it appears that the testator had a particular object in view, and had not a general charitable intent, if the object fail the gift will not be applied *cy près*, but will fail altogether (*h*).]

Where the Crown and where the Court administers charity.

With respect to the particular cases in which the Crown, and those in which the Court undertakes this office, the distinction seems to be, that where the bequest is by the intervention of trustees, [even though those trustees die in the testator's lifetime or refuse to act,] it devolves upon the Court (*i*); but where the object is charity without a trust interposed, the direction must

(*y*) Freem. Ch. Ca. 261; *Mills* v. *Farmer*, 1 Mer. 55; [*Commissioners of Ch. Don.* v. *Sullivan*, 1 D. & War. 501.]

(*z*) *Att.-Gen.* v. *Syderfen*, 1 Vern. 224, 7 Ves. 43, n.

(*a*) *Att.-Gen.* v. *City of London*, 3 B. C. C. 171, [1 Ves. jun. 143; *Loscombe* v. *Wintringham*, 13 Beav. 87;] but see *Att.-Gen.* v. *Oglander*, 1 B. C. C. 166.

(*b*) *Att.-Gen.* v. *Whorwood*, 1 Ves. 534; *Da Costa* v. *De Pas*, Amb. 228, 2 Ves. 276, 376, 2 Sw. 487. See 2 J. & W. 308, n.; *S. C. Cary* v. *Abbot*, 7 Ves. 490; [*Att.-Gen.* v. *Vint*, 3 De G. & S. 704;] but see *Att.-Gen.* v. *Goulding*, 2 B. C. C. 428.

(*c*) *Att.-Gen.* v. *Guise*, 2 Vern. 266; [*Hayter* v. *Trego*, 5 Russ. 113; *Att.-Gen.* v. *Ironmongers' Company*, Cr. & Ph. 208, 10 Cl. & Fin. 908; *Att.-Gen.* v. *Glyn*, 12 Sim. 84; *Martin* v. *Maugham*, 14 ib. 230; *Incorporated Society* v. *Price*, 1 J. & Lat. 498.]

(*d*) *Att.-Gen.* v. *Andrew*, 3 Ves. 633; [*Denyer* v. *Druce*, Taml. 32; *Reeve* v. *Att.-Gen.*, 3 Hare, 191.]

(*e*) *Simon* v. *Barber*, 5 Russ. 112; [*Bennet* v. *Hayter*, 2 Beav. 81.]

[(*f*) *Pieschel* v. *Paris*, 2 S. & St. 384; secus, of course, if the total amount applicable to charity be left in blank, *Hartshorne* v. *Nicholson*, 26 Beav. 58.]

(*g*) *Att.-Gen.* v. *Whiteley*, 11 Ves. 241.

[(*h*) *Att.-Gen.* v. *Bishop of Oxford*, 1 B. C. C. 44, n.; *Cherry* v. *Mott*, 1 My. & Cr. 123; *Clark* v. *Taylor*, 1 Drew. 642; *Russell* v. *Kellett*, 3 Sm. & Giff. 264; *Marsh* v. *Means*, 3 Jur. N. S. 790.

(*i*) *Moggridge* v. *Thackwell*, 7 Ves. 36; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Att.-Gen.* v. *Gladstone*, 13 Sim. 7; *Reeve* v. *Att.-Gen.*, 3 Hare, 191.]

be by the sign manual of the Sovereign (*k*). In a modern case (*l*), where there was a bequest to a voluntary charitable society, which existed when the will was made, and also at the death of the testator, but was dissolved before his assets could be administered, it was held that the execution devolved on the Court. Both the Crown and the Court, however, in the exercise of their discretion, alike act upon the principle of adhering as closely as possible to the spirit of the donor's expressed or presumed intention.

Where the Court will pay legacies to a charity without a scheme.

Where a pecuniary legacy is bequeathed absolutely to a corporation existing for only charitable purposes, the Court will direct payment, without requiring that a scheme be settled by the Master for its appropriation (*m*). And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution (*n*). But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts, which the testator has pointed out, the Court will take upon itself to insure the accomplishment of the testator's object, by referring it to the Master to settle a scheme (*o*). [Where the legacy is to a foreign charity the Court will direct it to be paid to the persons appointed by the testator to receive it, and will not take upon itself to settle a scheme (*p*). Nevertheless the Court has jurisdiction to secure a legacy given for charitable purposes by a subject of the Crown, whether in or out of this country, and will sometimes order the fund to be carried to a separate account in Court, and the dividends only paid over to the person named in the will, subject to an account of the mode of its application (*q*).]

It seems that the Court of Chancery discourages the investment of the funds of the charity in the purchase of land, under the 2nd section of the statute 9 Geo. 2 (*r*).

Cy près doctrine not applied to cases within the stat. 9 Geo. 2, c. 36.

It remains to be noticed, that the cy près doctrine does not apply to bequests which are invalidated by the statute in

(*k*) *Att.-Gen.* v. *Fletcher*, 5 L. J. N. S. Ch. 75, *Pepys*, M. R.; *Denyer* v. *Druce*, Taml. 32.

(*l*) *Hayter* v. *Trego*, 5 Russ. 113.

(*m*) *Society for the Propagation of the Gospel in Foreign Parts* v. *Att.-Gen.*, 3 Russ. 142; [*Walsh* v. *Gladstone*, 1 Phil. 290.]

(*n*) See *Wellbeloved* v. *Jones*, 1 S. & St. 43; *Re Barnett*, 29 L. J. Ch. 871.

(*o*) Ib.

[(*p*) *Collyer* v. *Burnett*, Taml. 79; *Milford* v. *Reynolds*, 1 Phil. 194. See *Mayor of Lyons* v. *East India Company*, 1 Moo. P. C. C. 293.

(*q*) *Att.-Gen.* v. *Lepine*, 2 Sw. 181; *Att.-Gen.* v. *Sturge*, 19 Beav. 597.]

(*r*) *Att.-Gen.* v. *Wilson*, 2 Kee. 683.

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question, and therefore a bequest of money to be laid out in land is not executed cy près, i. e. applied to an allowed charitable purpose. [But an express gift over, in case the charitable gift cannot by law take effect, is valid. Lord *Northington*, indeed, once (*s*) decided that the gift over was bad: but in a previous case (*t*), he had held it good, and this determination has been upheld by later decisions (*u*).]

Whether a gift over in case a gift to charity be void is good.

SECTION II.

Rule against Perpetuities.

THE necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in, or dominion over property, will be obvious, if we consider, for a moment, what would be the state of a community in which a considerable proportion of the land and capital was locked up. That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and those restrictions, which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives (*x*), would be baneful to all. It was soon perceived, therefore, that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose, from the intro-

Policy of rule against perpetuities.

Origin of the rule.

[(*s*) *Att.-Gen.* v. *Tyndall*, 2 Ed. 207.
(*t*) *Att.-Gen.* v. *Tancred*, 1 Ed. 10, 1 W. Bl. 90, Amb. 354.
(*u*) *De Themines* v. *De Bonneval*, 5 Russ. 288; *Robinson* v. *Robinson*, 19 Beav. 494; *Carter* v. *Green*, 3 Kay & J. 591; *Warren* v. *Rudall*, 4 ib. 618; and per Lord *Eldon*, *Sibley* v. *Perry*, 7 Ves. 522. The grounds of the decision in *Att.-Gen.* v. *Hodgson*, 15 Sim. 150, show that it is not an authority against the validity of such a gift over. But as to those grounds, see *Warren* v. *Rudall*, 4 Kay & J. 603, stated post, Ch. L.]
(*x*) Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can be no longer enjoyed. "Te teneam moriens," is the dying lord's apostrophe to his manor, for which he is forging these fetters, that seem by restricting the dominion of others, to extend his own.

duction of springing uses and executory devises, which no act of the owner of the preceding estate could defeat, it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. This was effected, not by legislative interference, but by the courts of judicature, who, in this instance, appear to have trodden very closely on the line which divides the judicial from the legislative functions.

Perpetuities, how regarded by the early judges.

The early judges had an extreme repugnance to every disposition of property that savoured of a perpetuity, but the expressions which occasionally fell from them, demonstrative of this feeling, did not afford a specific definition of the monster which the law was stated to "abhor." The effect, however, was to throw such a general suspicion over all executory limitations, as to render the validity of every gift of this nature questionable, until it had been the subject of adjudication. The onus probandi (so to speak) was regarded as lying on those who had to sustain the future gift; and the course which the decisions have taken, has been to affirm the validity of one executory disposition after another, until the rule has settled down to an analogy to the ordinary limitations in strict settlement, i. e. to the allowance of a life or any number of lives in being, and twenty-one years afterwards (*y*).

Period for which the vesting of estates may be suspended.

But though the new modifications of estate consequential on the introduction of uses, first drew attention to the necessity of imposing some restraint of this nature, they did not wholly create that necessity; for, if uses had never existed, some such restriction would have been requisite on executory and future interests in personal estate, analogous to that rule of the common law concerning remainders, which precluded (and still precludes) the giving to an unborn person an estate for life, with remainder to his issue (*z*), or, as it was rather quaintly expressed, the creating of a possibility upon a possibility.

A life or lives in being, and twenty-one years.

For a long time (*a*) it was an undetermined point, whether the period of twenty-one years, which a testator or settlor was permitted to add to a life or lives in being, was an absolute term, or was intended merely to afford an opportunity of postponing

(*y*) In the writer's edition of Powell on Devises (vol. i. p. 389, n.,) the progress of this rule is fully traced.

(*z*) *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 Taunt. 393; *Hayes* v. *Hayes*, 4 Russ. 311; [see also 2 D. M. & G. 170.] But see post.

(*a*) See *Beard* v. *Westcott*, 5 Taunt. 395, 5 B. & Ald. 801, T. & R. 25.

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the interest of an unborn object of gift until his or her majority. This question, after much discussion, was finally set at rest in the case of *Cadell* v. *Palmer* (*b*), in which the House of Lords decided in favour of an executory limitation in the will of Mr. Henry Bengough, of Bristol, to take effect at the period of twenty years after lives in being (*c*), Mr. Baron *Bayley*, after an elaborate examination of the authorities, declared the unanimous opinion of the Judges to be, that the true limit of the rule against perpetuities was "*a life or lives in being, and twenty-one years, without reference to the infancy of any person whatever.*" This important case, however, would still have left a subject for controversy, if the House had contented itself with simply adjudicating in the case before it; but, with a laudable anxiety to close the door to all future discussion, it was proposed to the Judges to consider, whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, *together with the number of months equal to the ordinary or longest period of gestation;* but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère.* The Judges declared their unanimous opinion on this point to be, that such a limitation would be void as too remote, they considering twenty-one years as the limit, and the period of gestation *to be allowed in those cases only, in which the gestation exists.*

Term of twenty-one years allowed absolutely, not merely in reference to infancy.

Allowance of period of gestation.

A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A. (a person of the *male* sex), for life, and after his death to such of his children as shall attain the age of twenty-one years, or indeed, in the case of a devise or bequest simply to the children of A. (a male), who shall attain majority, though not preceded by a life interest; in either case A. may

(*b*) 7 Bli. 202, [1 Cl. & Fin. 372, 10 Bing. 140, 1 Sim. 173, nom. *Bengough* v. *Edridge*.

(*c*) See as to this case Sugd. Law of Prop. 314. The reader will observe that the term of twenty years, and not the full term of twenty-one years, was taken in this case. Probably, it was considered necessary that, as the execution of the ultimate trust involved a conveyance by the trustees to certain uses, a time should be allowed, sufficient in any possible case for completing that conveyance. According to the then law, it might have been necessary to suffer a recovery, which could only be done in term time. At the present time, it would appear unnecessary to make an allowance, even of a day, as there does not seem to be any conveyance which could not be perfected in a day.]

die leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these hypothetical cases, we add the circumstance that A. the parent, were (as of course he might be) an infant en ventre sa mère at the testator's decease, there would be gained a double period for gestation, (namely,) one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mère is considered as a life in being.

Vesting cannot be postponed for a gross term exceeding twenty-one years.

Where the vesting of a gift to unborn persons is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. Thus, in the case of *Palmer* v. *Holford* (*d*), where a testator bequeathed a sum of stock upon trust to raise an accumulated fund, and to transfer such fund unto all and every the child and children of his son C. T. H., who should be living at the expiration of twenty-eight years, to be computed from the testator's decease, except an eldest or only son; and in case no such child should be then living, then to the children then living of J. S., another son; and in default of such child to J. S., if living, and so on to the children of two daughters whom he named, with the like substitution of those daughters; Sir *John Leach*, M. R., said—"The expressed intention of the testator is that all the children of his son C. T. H., other than an eldest son, should take who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children who were unborn at the death of the testator would have been suspended for more than twenty-one years, and the gift, therefore, is too remote and void; and the gifts over not being to take

(*d*) 4 Russ. 403; [and see *Speakman* v. *Speakman*, 8 Hare, 180.

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effect until after the same period, which is too remote, are necessarily void also (*e*)."

The principle of the above case clearly applies where any the most inconsiderable addition is made to the term of twenty-one years; therefore a gift, the vesting of which is postponed for twenty-one years and a day, is void. [The vesting of property may, however, be nominally postponed for any number of years, provided it is ultimately to vest in persons living both at the testator's death and at the time of vesting; for the vesting must take place, if at all, in their lives (*f*).]

An executory devise to arise on an indefinite failure of issue, void,

To the test of the rule, propounded and settled by the highest judicial authority in the case of *Cadell* v. *Palmer*, every gift of real or personal estate, by will or otherwise, must be brought. The application of such test instantly shows that an executory limitation, [as distinguished from a remainder,] to arise on an indefinite failure of issue, of any person living or dead, is void for remoteness (*g*); though it is to be observed, that in this and all other cases, if the executory devise is [collateral or immediately] subsequent to an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all [defeating or] posterior limitations, executory as well as vested, by means of an enrolled conveyance (now substituted for a common recovery), takes the case out of the mischief of, and consequently out of the rule against, perpetuities (*h*). Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another, in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and wear the arms of the testator; or in case another property should at any future time devolve to him or them, or on any other such event, this executory limitation, though it would have been clearly void, if engrafted on an estate in fee-simple, is good as applied to an estate tail (*i*).

—unless engrafted on an estate tail.

[(*e*) It will be perceived that all the gifts over, including the gift to J. S. himself, were held void, though the vesting of that gift being subject to the contingency of J. S. being alive at the expiration of the twenty-eight years, was necessarily confined to a life in being: this was in accordance with the general rule hereafter noticed, that every gift limited after a gift, void for remoteness, is also void.

(*f*) *Lachlan* v. *Reynolds*, 9 Hare, 796.]

(*g*) *Badger* v. *Lloyd*, 1 Salk. 232; *Moore* v. *Parker*, 1 Lord Raym. 37; *Lady Lanesborough* v. *Fox*, Ca. t. Talb. 262; [*Lepine* v. *Ferrard*, 2 R. & My. 378; *Carter* v. *Bentall*, 2 Beav. 551;] but remember stat. 1 Vict. c. 26, s. 29, as to wills made since 1837.

(*h*) *Gulliver* v. *Ashby*, 4 Burr. 1929; [*Att.-Gen.* v. *Milner*, 3 Atk. 111: as to a charge subsequent to an estate tail, *Goodwin* v. *Clark*, 1 Lev. 35; *Faulkner* v. *Daniel*, 3 Hare, 199; *Morse* v. *Ormonde*, 1 Russ. 382; *Bristow* v. *Boothby*, 2 S. & St. 465.]

(*i*) *Nicolls* v. *Sheffield*, 2 B. C. C. 215; *Carr* v. *Earl of Erroll*, 6 East, 58; *Earl of Scarborough* v. *Doe* d. *Saville*, 3 Add. & Ell. 897.

A term of years (like any other estate) may be made expectant by way of remainder on an estate tail; but sometimes it happens that the term is so limited as to render it hard to say whether it is ulterior, or precedent to the estate tail. If the term is precedent to the estate tail, of course it cannot be defeated by the acts of the tenant in tail (*k*): and in such case, if the trusts of the term are not to arise until the failure of issue under the entail, those trusts are necessarily void. As, in *Case* v. *Drosier* (*l*), where a testator devised his estates at M. and T. to trustees for 500 years, upon the trusts after declared, and he then devised the M. estate, subject to the term, to A. for life, with remainder to his sons and daughters in tail, in strict settlement, in the usual manner, with remainder to B. and his sons and daughters, in like manner. He then devised the T. estate in a similar manner, except that B. was put in the place of A. And the testator declared the trusts of the term of 500 years to be, for the purpose (among others) of raising portions for two grand-daughters, payable at twenty-one, *and further portions, in case either A. or B. should die without issue,* and all which were to sink in case they died under age and unmarried. Lord *Langdale,* M. R., thought that the words "without issue" meant without issue who were objects of the prior limitations; but as this might be a remote event, and as there were no means by which the charges would be barred, the trusts could not be supported. "They depend," his Lordship observed, "on a term, and that term is precedent to the estates tail, so that after a recovery by a tenant in tail, there would remain a term and a trust to be performed; a trust which could not be defeated, and a term which cannot be destroyed." [This decision was afterwards affirmed by Lord *Cottenham* (*m*).]

Term of years, whether ulterior or precedent to estate tail.

The question, whether an executory limitation was precedent or subsequent to an estate tail, was much discussed in the case of *Doe* d. *Lumley* v. *Earl of Scarborough* (*n*), where lands were devised to A. for life, with remainder to his first and other sons in tail, remainders over, with a proviso, that if the earldom of S. should descend upon A. or any of his sons, within the period of certain lives, or within the term of twenty-one years after the decease of the survivor, his or their estate should cease, and the lands remain over as if he or they were dead without issue. The

Executory limitation, whether precedent or subsequent.

(*k*) *Eales* v. *Conn*, 4 Sim. 65.

(*l*) 2 Kec. 764; and see Hayes's Introd. vol. 1, p. 135, vol. 2, p. 170, n., 5th ed.

[(*m*) 5 My. & Cr. 246.]

(*n*) 3 Ad. & Ell. 2, 4 Nev. & M. 724.

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eldest son of A. suffered a common recovery, and A. joined in the conveyance for the purpose of making a tenant to the præcipe. The earldom afterwards devolved upon A. It was held in the Exchequer Chamber (*o*) (reversing a decision in B. R.), that the executory limitation was barred; the Court being of opinion, that this was a mere proviso for the cesser of the old estates created by the will to which it applied, so as to accelerate and let in the enjoyment of the remainders over, and not (as had been considered in the Court below) the creation of any *new* estate. The Judges of the Queen's Bench were of opinion that the proviso operated, not by way of determining or defeating the estate tail of the son of A., but antecedently to that estate, by preventing the estate tail from ever taking effect; and that the persons entitled in remainder had two distinct estates, one of which was antecedent, and the other posterior to the estate tail, and consequently, that the former could not be affected by the recovery.

Whether a remainder, which is destructible, can be void for remoteness.

The same species of reasoning by which a remainder or an executory limitation, to arise on the determination of an estate tail, is supported, might seem to have applied to a contingent remainder, which was formerly liable to be destroyed by the act of the owner of the preceding estate of freehold, no estate being interposed for its preservation; but the writer is not aware of any authority for the application of the doctrine to such cases. Thus if freehold lands, of which the legal inheritance was in the testator, had been devised to A. for life, with remainder to his eldest son who should be living at his decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease: A. in his lifetime might have destroyed all the remainders, and the eldest son, after his (A.'s) decease, might have destroyed the ultimate remainder in fee devised to his children, without being amenable either at law or in equity to the persons whose estates were thus destroyed. [It is true indeed that] such ultimate remainder would, nevertheless, have been void; [not, however, it is conceived, under the rule which was the subject of discussion in *Cadell* v. *Palmer*, but under a distinct rule of earlier origin already adverted to, namely, that an estate for life cannot be given to an unborn person with a remainder to his issue, a rule which though nearly the same in result is not identical with that established in *Cadell*

(*o*) 3 Ad. & Ell. 897.

[v. *Palmer*. But now, since the statute 8 & 9 Vict. c. 106, (see sect. 8,) has deprived the owner of the previous estate of freehold of the power of destroying the contingent remainders depending on that estate, it seems clear that the rule in *Cadell* v. *Palmer* has become applicable, and affords an additional reason against the validity of such ultimate remainder.

Effect of 8 & 9 Vict. c. 106.

It may here be observed, that a trust for raising a sum of money may be good, (as if it is to be raised by means of a term to commence after an estate tail,) though the trusts declared of the money when raised may be void for remoteness, in which case the heir of the testator takes it as personal estate (*p*).]

Trust for raising a sum may be good, though the gift of it is void.

The most frequent instances of the transgression of the rule against perpetuities occur in devises or bequests to classes, comprising either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be in esse at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case, the rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth. .

Most frequently occurring cases of remote gifts.

An example of the latter kind is supplied by the case of *Dodd* v. *Wake* (*q*), where a testator bequeathed a sum of 3000*l.* unto and amongst the children of his daughter M. M., the wife of G., "who shall be living at the time the eldest shall live to attain the age of twenty-four years, and the issue of such of the children of his said daughter, as may then happen to be dead leaving issue," per stirpes and not per capita, as tenants in common, and to be paid when and as they should attain twenty-four, but without interest in the meantime. M. M. had three children living at the testator's death; but the question was, whether the bequest was not void for remoteness, inasmuch as all these children might die under twenty-four, and then the legacy could not vest in any child, until the expiration of twenty-four years and upwards after the testator's decease. Sir *L. Shadwell* said—"The testator appears clearly to have intended, that only those children of his daughter should take, who should be alive when the eldest child for the time being should attain the age of twenty-four, and, therefore, the bequest is void for remoteness."

Gifts to an unborn class, to vest after majority.

[(*p*) *Tregonwell* v. *Sydenham*, 3 Dow, 194 (the reason assigned by Lord *Redesdale* for the heir's taking in this case is incorrect; see chapter on Conversion, post); *Burley* v. *Evelyn*, 16 Sim. 290.]

(*q*) 8 Sim. 616; [and see *Boughton* v. *James*, 1 Coll. 26, 1 H. of L. Ca. 406.]

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Distinction in regard to remainders.

It is proper, however, to remark that a limitation, which would as an executory devise be void for remoteness, may be good as a contingent remainder, on account of the necessity, which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate. [Thus, in the case of *Jack* v. *Fetherston* (*r*), estates were limited by settlement to T. S. W. for life, with remainder to his first and other sons in tail male, and for default of such issue male, and in case of issue female only of T. S. W., to T. S. W. in fee, and in case of *failure of issue* of T. S. W., then further limitations were made. It was argued that the ultimate limitations being deferred till a general failure of issue of T. S. W., while the previous estates only embraced his issue male, were too remote; but *Bushe*, C. J., said that this objection was in some degree founded on a misapprehension of Mr. Fearne's meaning, and in not distinguishing *the limitation* from *the event:* the event might be such that it might happen either before or after the future estate was to vest, and yet the possibility it might happen after did not affect the nature of the limitation. Thus we see that the remoteness of the event is immaterial, if the estate is not too remote.

Case of *Jack* v. *Fetherston.*

A remainder may be good though limited upon an event too remote.

Case of *Cole* v. *Sewell.*

In the case of *Cole* v. *Sewell* (*s*) the same question arose as to the validity of estates limited by deed to take effect in case of a general failure of issue by way of remainder after previous estates tail which only embraced a portion of such issue. Sir *E. Sugden*, Lord Chancellor of Ireland, said: "As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event, upon which the contingency depends, happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively

[(*r*) 2 Huds. & Br. 320.

(*s*) 4 D. & War. 1, 2 Con. & L. 344. The latter report gives the judgment in terms somewhat different from the former, which is quoted in the text, because it has undergone the corrections of the learned Judge himself.

[modern rule (I mean of recent introduction, when speaking of the laws of this country,) was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities: but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being and twenty-one years and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect when and if that failure happened. Now the remainder over is in default of issue generally, but it can only take effect when and if there is a failure of issue male, that is, upon the regular determination of the previous estate; there is no distinction in the point of perpetuity between the limitations, either only can take effect at the same period. The simple distinction is, that although the event happen, the latter gift, depending upon the contingency—may never take effect; but that introduces no question of remoteness." The learned Judge has been sometimes supposed to have asserted that successive life estates to unborn persons were good, as being contingent remainders, but such he has declared was not his meaning (*t*). The case was subsequently brought by appeal before the House of Lords (*u*), where the decree of the Lord Chancellor was affirmed. Lord *Cottenham* observed: "It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations

[(*t*) See 4 D. & War. 32; 2 D. M. & G. 170.

(*u*) 2 H. of L. Ca. 186, 12 Jur. 927.

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[and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder it would be barrable (*x*), and the objection therefore would not arise." His Lordship then went on to show that the limitation in question was a remainder limited on a contingency, and therefore good.

Doe v. *Perratt.* A remainder may be good though limited to a person too remote.

In the last two cases remoteness was involved in the event and not in the person; in the case of *Doe* d. *Winter* v. *Perratt* (*y*), the remoteness was in the person. The devise was to I. C. in tail male, with remainder to the first male heir of the branch of R. C.'s family who lived at H. As the branch of R. C.'s family who lived at H. might have consisted for an indefinite time of females only, it is clear that a gift to the first male heir who should come into existence was too remote, had it not been limited by way of contingent remainder, and accordingly being so limited, the House of Lords did not seem to doubt its validity on this ground; the only question was as to who was meant by "first male heir."

Rule as to when a contingent remainder is not too remote.

It is clear from these cases that a contingent remainder, which is not invalidated by the rule before stated, as governing the limitation of successive remainders to unborn persons, can never be invalid, and that it is immaterial that the person to whom, or the event upon which, the remainder is limited, may be unascertained for an indefinite time; for if ascertained during the subsistence of the previous estate, the remainder becomes vested and is good, and if not so ascertained, the remainder fails altogether at the expiration of the previous estate.

A devise of a reversion may be void when a similar devise of a remainder would be good.

The devise of an estate in *reversion* may, it seems, be void for remoteness when a devise of an estate in *remainder* would not. A reversion is, in fact, a present interest, since it carries the services and rent (if any) during the subsistence of the particular estate (*z*); and a devise of it, therefore, contingently on a future event, is like a similar devise of any other estate in possession, an executory limitation which need not vest *eo instanti* that the particular estate determines, and is void if the event be too remote. Thus, in *Bankes* v. *Holme* (*a*), where a settlor, having the reversion in fee expectant on a failure of issue male of his

[(*x*) His Lordship evidently meant "always barrable," which would not *always* have been the case with an executory limitation, *e. g.* when the estates tail had determined, see post, pp. 237, 238.

(*y*) 9 Cl. & Fin. 606.

(*z*) *Preston* on Merger, 246; *Badger* v. *Lloyd*, 1 Ld. Ray. 523; Bac. Uses, 45, 46, cited Sand. Uses, ch. 2, v. 2.

(*a*) 1 Russ. 394, n.; Sugd. Law of Prop. 351; and see *Doe* v. *Fonnereau*, Dougl. 486.

[sons and issue general of his daughters, devised it contingently on there being no child or children of his wife by him begotten, or (as eventually happened) there being such, all of them should die without issue; it was held, that the devise was too remote and void. If the devise in this case had been such as to create a remainder in fee, such remainder could only have taken effect in case the general failure of issue had happened before or simultaneously with the determination of the estates tail to the sons and daughters (*b*), and up to that time would have been barrable, and therefore not too remote; the devise of the reversion on the other hand, though barrable during the subsistence of the estates tail, would not necessarily have always been barrable, since, taking effect as it did by way of executory devise, it must, if held valid, have awaited the time when the issue general failed; an indefinitely long period might thus elapse between that time and the time of the determination of the estates tail, during which the reversion would have descended in fee to the testator's heir, who could not have barred the executory gift, and the rules against perpetuity would have been infringed (*c*).

How far same rule applicable to copyholds.

Contingent remainders of copyhold lands were governed by the same rules as contingent remainders of freeholds, except that the former were not liable to destruction by the owner of the previous estate. The statute 8 & 9 Vict. c. 106, by depriving the owner of a previous estate in freeholds of this power, has removed the only point of difference between contingent remainders in lands of those tenures (*d*).

A different rule applies to contingent limitations by way of remainder in equitable interests.

Contingent remainders (if we can properly so call them, for they are in fact executory interests) of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates. The former do not like the latter necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*e*), and must therefore fail if that contingency be too remote (*f*).

What is the ground of the decision in *Cole* v. *Sewell*.

These considerations may be of use in answering an observation which has been made (*g*) on the doctrine advanced in *Cole* v. *Sewell* (and the same would apply to *Doe* v. *Perratt*), which rules that a contingent remainder limited after an estate tail is

[(*b*) The case would then have been similar to *Cole* v. *Sewell*.

(*c*) *Bristow* v. *Boothby*, 2 S. & St. 465; and see *Morse* v. *Ormonde*, 1 Russ. 382.

(*d*) Fearne, C. R. 320.

(*e*) *Hopkins* v. *Hopkins*, Ca. t. Talb. 44, 1 Atk. 581; *Chapman* v. *Blisset*, Ca. t. Talb. 150.

(*f*) *Monypenny* v. *Dering*, 7 Hare, 568, 590.

(*g*) See the first edition of this work, vol. ii. p. 732.

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[not void on account of the remoteness of the contingency. It is said that it was not necessary to the decision to lay down any such rule, since the remainder was preceded by estates tail, the owners of which might have barred it, and remoteness was thus obviated. But supposing this to have been the ground of the decision, it must have applied equally had the contingent remainder, together with the estates tail, been equitable and not legal interests: for the remainder would then also have been barrable by the owners of the estates tail: and yet if those estates had determined without being barred, the contingent remainder,—since it would not have failed, but would have awaited, in the case of *Cole* v. *Sewell*, for the happening of the event upon which, and in the case of *Doe* v. *Perratt* for the coming into existence of the person to whom, it was limited (a period in either case of indefinite duration), must clearly have been obnoxious to the rule against perpetuities, and therefore void *ab initio*. It is absolutely necessary therefore to assign some reason for the validity of the contingent remainders limited on a remote contingency in the cases of *Cole* v. *Sewell* and *Doe* v. *Perratt*, besides that of their being barrable along with the previous estates tail.

Statute 8 & 9 Vict. c. 106, does not affect these questions.

The validity of remainders limited on a remote contingency does not appear to be affected by the recent act (*h*) to amend the law of real property. Under that act, contingent remainders, which previously to the act would have failed through the determination by forfeiture, surrender or merger of the previous vested estate of freehold by which they were supported, are to take effect, notwithstanding such determination, in the same manner *in all respects as if such determination had not happened;* that is to say, such remainders are not to take effect in any case where they would formerly have failed if the previous estate had determined by any other than one of the modes mentioned in the act; and consequently when the previous estate determines by any of these modes, the contingent remainders depending thereon will be preserved only until the time when the previous estate, if it had not been determined by one of these modes, would have determined in any other manner, and the contingent remainder must then take effect or fail.

Operation of a devise in remainder to a class.

We now come to consider the effect of the doctrine in question upon devises to a class of persons.] If lands of which the

[(*h*) 8 & 9 Vict. c. 106, s. 8.

testator had the legal inheritance to be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, for as soon as any child attains twenty-two in the lifetime of A., the whole remainder vests in him, subject to open and let in such other children as attain twenty-two in A.'s lifetime, and on the death of A. those children alone take who have attained twenty-two, to the exclusion of others who may afterwards attain that age (*i*): and if at the death of A. no child has attained twenty-two, the remainder fails (*k*).

Rule different with respect to equitable interests.

[With respect, however, to equitable interests (and though the authorities extend only to equitable interests by way of remainder in personalty, they must, it is conceived, equally apply to trusts of inheritance (*l*)), a different rule prevails; as has been before stated, they await the period when the class is to be ascertained, and do not necessarily take effect on the determination of the particular estate, and are therefore void when that period is too remote, and] the fact that *some* of the objects eventually composing the class, were actually born within the period allowed by the rule of law, will not render the gift valid, quoad those objects. Thus, in the case of *Leake* v. *Robinson* (*m*), where certain stock and monies were bequeathed to W. R. R. for life, and after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or being a daughter or daughters, attain that age, or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age, or be married as aforesaid, then to the brothers and sisters of the said W. R. R., on their attaining twenty-five, if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. It appeared that five of the brothers and sisters of W. R. R. were born before the testator's death, and it was contended, therefore, that the bequest, though confessedly void as to those born afterwards, was good as to these objects; for that no case had gone the length of deciding, that persons who are capable of taking under a will, should not

Gift of personal estate to a class which may comprise objects too remote, void as to all.

Gift to a class which *may* comprise remote objects, void as to all.

[(*i*) *Mogg* v. *Mogg*, 1 Mer. 654.

(*k*) *Festing* v. *Allen*, 12 M. & Wels. 279; *Alexander* v. *Alexander*, 16 C. B. 59.

(*l*) See *Blagrove* v. *Hancock*, 16 Sim. 371; *Walker* v. *Mower*, 16 Beav. 365, where, however, the trust was executory.]

(*m*) 2 Mer. 363.

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take, merely because they are joined in a bequest with others who are incapable; but Sir *W. Grant*, M. R., held, that the bequest was void as to the whole, observing, with his usual felicity:—"The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular individuals; or, what he has as little in his contemplation, distinct bequests, in each instance, to different classes, namely, to grandchildren living at his death, and to grandchildren born after his death" (*n*).

Where the gift to persons within proper limits fails by being mixed up with a gift to persons not within those limits.

[In a simple case like *Leake* v. *Robinson*, it is easy to see how the gift to those who are within the proper limits is so mixed up with the gift to those who are not, that the whole must fail, for it is clear that unless we wait beyond the allowed period, the precise shares of those within the proper limits could never be ascertained. Other cases have however of late occurred, in which there has been considerable controversy as to what constitutes such a blending of the two gifts as will prevent that to the persons who are within the proper limits from taking effect.

Arnold v. *Congreve.*

Thus, in *Arnold* v. *Congreve* (*o*), the testatrix gave a sum of stock to the eldest son of her son living at her decease, and another sum of stock to her two daughters, in equal shares for their lives, and at their death each one's share to revert to her children; and by a codicil she directed that the grandchildren's share of the stock should be settled upon them for their lives, and afterwards to revert to their children. The testatrix left an eldest son of her son, and also some other grandchildren, children of her daughters, living at the time of her death, whose children therefore might have been objects of gift: but Sir *John Leach*, M. R., while he held that there was by the codicil a valid gift to the children of the eldest son of the son, held also that the

[(*n*) The books abound with cases in which the decision in *Leake* v. *Robinson* has been followed; it will be sufficient to refer the reader to some of them. *Judd* v. *Judd*, 3 Sim. 525; *Newman* v. *Newman*, 10 ib. 51; *Comport* v. *Austen*, 12 ib. 218; *Ring* v. *Hardwick*, 2 Beav. 352; *Griffith* v. *Blunt*, 4 ib. 248; *Bull* v. *Pritchard*, 1 Russ. 213, 5 Hare, 567; *Vawdry* v. *Geddes*, 1 R. & My. 203; *Boreham* v. *Bignall*, 8 Hare, 131; *Southern* v. *Wollaston*, 16 Beav. 166; *Merlin* v. *Blagrave*, 25 Beav. 125; *Pickford* v. *Brown*, 2 Kay & J. 420; *Read* v. *Gooding*, 21 Beav. 478; *Rowland* v. *Tawney*, 26 Beav. 67.

(*o*) 1 R. & My. 205.

[gift by the codicil to the grandchildren, children of the daughters, could not be confined to grandchildren living at her death; therefore the bequests to the children of all the grandchildren were void, and the original gift to the grandchildren remained unaffected by the codicil.

Where the gift to persons within proper limits fails by being mixed up with a gift to persons not within those limits.

In this case there was no such reason as existed in *Leake* v. *Robinson* why the codicil should not have taken effect on the shares of the children of the daughters who were alive at the testator's death, leaving the shares of the other children unaffected, for the amount of all such shares *must* have been ascertained within the life of the surviving daughter, that is, within a life in being, and could not afterwards have been varied: and such would, as we shall see, probably be the decision at the present day.

It is also to be observed, that, though the gift to all the great-grandchildren was contained in the same words, yet some great-grandchildren, namely, grandchildren of the son, were held, reddendo singula singulis, to be entitled, though others, namely, grandchildren of the daughters, were held not entitled.

Griffith v. *Pownall*.

On the other hand, in *Griffith* v. *Pownall* (*p*), A. had a power to appoint, among all the children of B., begotten and to be begotten, and their issue; and in default, to the children equally. All the children that B. ever had (six in number) were born at the time of the creation of the power, and A. appointed that the share which each child of B., begotten and to be begotten, was entitled to in default of appointment, should be held in trust for that child for life, and after its death for its children. Sir *L. Shadwell*, V. C., held the appointment valid. He said that, if the gift be of the bulk of the property amongst a set of persons collectively, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the gift is void *in toto*. That in the case before him the gift was not of the bulk of the fund, but the testator merely directed how the share of such daughter should go after her death. If there had been a seventh or eighth daughter, the gift would have been bad as to their children; nevertheless, the gift to the elder children would have been good. This decision is plainly irreconcileable with *Arnold* v. *Congreve*.

Case of *Greenwood* v. *Roberts*.

The next case is that of *Greenwood* v. *Roberts* (*q*), where the

(*p*) 13 Sim. 393. (*q*) 15 Beav. 92.

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testator bequeathed personal property upon trust, among other things, to pay his brother Thomas an annuity of 200*l.* a year, and after his decease to pay the same to and amongst *such of his children as might be then living* in equal shares during their respective lives, and at the decease of any of them, he ordered, that so much of the principal or capital stock as had been adequate to the payment of the annuity, to which the child so dying had been entitled during his or her life, should be sold, and the produce thereof divided equally amongst the children of him or her so dying, when they should severally attain the age of twenty-one years, their interests to be vested. Thomas survived the testator, and left a son Richard, who was alive at the death of the testator; but it was held by Sir *J. Romilly*, M. R., that the children of Richard could not take. His Honor said, "the gift is, in the first instance, distinctly to a class, namely, to such of the children of his brother Thomas as may be then living, and Richard takes a life interest in that bequest solely in his character of one of those children. The gift over after the decease of those children is not confined to such of the children of his brother as should be alive at the testator's decease, and nothing points to Richard more than any other child of Thomas, who might be born after the death of the testator. I am of opinion that I must, upon the expression used by the testator, treat 'the children of him or her so dying' as another class, and that I cannot, because the testator has directed that on the death of Thomas the fund is to be equally divided between such of his children as shall be then alive, treat the bequest as if it had been a separate set of bequests to each of such children as eventually constituted the class; and therefore, in my opinion, he has given this annuity to a class to be ascertained at a future period, and after the death of each of the persons constituting that class *to another class*, some of whom are prohibited by law from taking, by reason of the rule against perpetuities. If I am correct in this view, the rule in *Leake* v. *Robinson* must apply. I am of opinion that Richard is neither mentioned nor individually described in the will as a person taking (to use Lord *Cottenham's* expression, in *Roberts* v. *Roberts* (*r*),) a separate and individual portion of the annuity bequeathed to Thomas, but that he takes it as one of a class, and that his children intended by the testator to take after his decease, are persons forming part of a class,

[(*r*) 2 Phill. 534.

[some of whom are precluded from taking, and consequently that the gift over after his decease is void."

Where the gift to persons within proper limits fails by being mixed up with a gift to persons not within those limits.

If the ground of this decision was, that the gift to all the grandchildren of Thomas being in one set of words could not be divided up and treated as a separate gift to each set of grandchildren, it may perhaps be supported on the authority of the decision in *Lord Dungannon* v. *Smith* (*s*), to be afterwards referred to. This, however, seems a very narrow ground; as when the whole bequest amounts to a gift to any one or more persons of a share whose amount can be ascertained within the necessary limits of time, it should be treated as a separate gift, the gift being put in its actual form to save repetition (*t*). If, on the other hand, the learned Judge is to be understood according to the apparent meaning of his language, as treating all the grandchildren as one class, and then deciding the question on the authority of *Leake* v. *Robinson*, the case seems calculated to cause a misconception of the meaning, in legal acceptation, of a gift to a class. It is true each grandchild took as one of a class, but they were not all of one class; there were as many separate classes of grandchildren as there were children of Thomas, and the gift to each of these classes was totally independent of the other, its amount being ascertained immediately on the death of Thomas, when the number of his children was known. In ordinary language we say that a number of persons form a class when they can be designated by some general name, as "children," "grandchildren," "nephews;" but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and *who are all to take equally*, the share of each being dependent for its amount upon the ultimate number of persons. Thus a bequest of 1000*l.* to the children of A., the eldest child to take one moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children; in the

Remark on *Greenwood* v. *Roberts*.

What constitutes a gift to a class.

[(*s*) 12 Cl. & Fin. 546. In that case a testator devised leaseholds in trust for his grandson for life, and after his death "to permit such person who for the time being would take by descent as heir male of the body of his said grandson to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years" absolutely, with a gift over "if no such person should live to attain" that age. See *Merlin* v. *Blagrave*, 25 Beav. 125, a similar case.

(*t*) See accordingly *Evers* v. *Challis*, 7 H. of L. Ca. 531, 29 L. J. Q. B. 121, stated post.

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[legal acceptation of the words it is a gift partly to an individual, namely, the eldest child of A., and partly to a class, namely, his younger children. On the other hand, a gift to A., B. and C., and the children of D., share and share alike, may, legally speaking, be a gift to a class (*u*), but yet these persons would not in the ordinary acceptation of the term form a class. Moreover, under a gift to a class, if any of the class take, they take the whole; the subject of gift can never, therefore, be partly disposed of and partly undisposed of; this shows that the grandchildren in *Greenwood* v. *Roberts* did not take as a class, for supposing the gift valid, the children of one child of Thomas would have taken, at the same time that part of the fund would have become undisposed of, if another child of Thomas had never had any children.

Storrs v. *Benbow.*

In *Storrs* v. *Benbow* (*x*), the testator bequeathed 500*l.* to each child that might be born to either of the children of either of his brothers. It was decided by Lord *Cranworth* that the gift was valid in favour of the issue of nephews who were born in the testator's lifetime, and void as to the children of the other nephews. He said it was a mistake to compare the case before him with *Leake* v. *Robinson*, the legacy given to one of the former children could not be bad, because there was a legacy given under a similar (qu. same) description to a person who would not be able to take because the gift would be too remote.

Seaman v. *Wood.*

In *Seaman* v. *Wood* (*y*) the bequest was to the testator's son E. S. for life, and after his decease to such of his children as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, and also such child or children of any son of E. S. who should die under the age of twenty-one years as being males should attain that age, or being females should attain that age or be married, in equal shares as between brothers and sisters, but so that the child or children collectively of any deceased son of E. S. should take only the parent's share. Sir *J. Romilly*, M. R., held, that all the limitations after the life estate were void for remoteness. He said, "If a man gives an estate or a sum of money to all the children of A. and all the grandchildren of B. to be divided between them in equal shares and proportions, and both A. and

[(*u*) *Porter* v. *Fox*, 6 Sim. 485; see *Clark* v. *Phillips*, 17 Jur. 886; *Stanhope's Trusts*, 27 Beav. 201.

(*x*) 3 D. M. & G. 390.

(*y*) 22 Beav. 591.

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[B. survive the testator, I have very little doubt that such a gift would be void for remoteness; for that class which consists of the children of A. and the grandchildren of B. cannot be ascertained until the grandchildren of B. are ascertained. Would the case be varied if the children were to take one-half and the grandchildren the other half (z)? Would that vary the construction of the gift?" It is confidently submitted that it would; as children and grandchildren would not take as one class but in distinct shares, and since under the express terms of this will the children of any deceased son of E. S. were to take only the parent's share, it is clear that the case was one of the latter description.

Cattlin v. *Brown*.

In the subsequent case of *Cattlin* v. *Brown* (a), the devise was to T. B. C. for life, with remainder to all and every his child and children during their natural lives if more than one, and after the decease of any or either of such child or children then the part or share of him, her or them so dying unto his, her or their child or children lawfully begotten, or to be begotten, and to his, her or their heirs as tenants in common. Sir *W. P. Wood*, V. C., decided that T. B. C. having some children born in the lifetime of the testator, the gift to their children was valid though the gift to the other grandchildren failed. The learned Judge, after laying down several acknowledged rules as to the law of perpetuity, said, "In the recent case of *Lord Dungannon* v. *Smith* it was sought in support of the bequest to show that one of the series of persons who might be heirs male of the body of the grandson might take within the prescribed period, and was not therefore within the objection; but the answer was that 'there was no gift to him in terms different from the gift to all others who might be able to bring themselves within the terms of the gift, and that where a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, the one embracing the lawful the other the unlawful objects of his bounty:'" and his Honor subsequently said, that "in *Greenwood* v. *Roberts* the children of the brother who were born, and in esse at the death of the testator, might all have been dead at the death of the brother,

[(z) The words in the report are "if the children were to take one half of what the grandchildren were to take," but this is clearly a misprint.

(a) 11 Hare, 372. See also *Vanderplank* v. *King*, 3 Hare, 1.

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[and the case therefore fell within the rule in *Lord Dungannon* v. *Smith* and *Leake* v. *Robinson*. It was a gift to a class, and all the members of the class might be persons without the limits. The children born at the testator's death might take no interest whatever. On this ground the decision in *Greenwood* v. *Roberts* was no doubt perfectly right." His Honor then proceeded to analyse the gift in the case before him, and to show that after the death of each child of T. B. C. his share was separately given to his issue; consequently that the shares of such of the testator's children as were living at the testator's death were validly given to their issue. "Their shares are therefore not governed by the judgment in the case of *Lord Dungannon* v. *Smith, as might have been the case if the devise had been to the sons of T. B. C. living at his decease,* with remainder to their sons in fee."

But it is submitted that the distinction attempted between *Cattlin* v. *Brown* and *Greenwood* v. *Roberts,* is untenable, and that all the Vice-Chancellor's observations apply equally to *Greenwood* v. *Roberts,* and that the observations quoted by him from *Dungannon* v. *Smith,* also apply equally to both these cases: there was not in the former, more than the latter, a gift to anyone in terms different from the others. The distinction seems at least to have been disregarded by the learned Judge in the very next case on the subject which came before him (*b*).

Webster v. *Boddington.*

But in the meantime the point was again discussed before the Master of the Rolls in the case of *Webster* v. *Boddington* (*c*), where a testator bequeathed his residuary estate to trustees upon trust, during the life of his daughter, Lady Webster, to apply part of the income, not exceeding a stated annual sum, for the maintenance and education of his two grandsons, A. and B., the sons of Lady W., and of all other her children, and their issue respectively, and subject thereto upon trust for Lady W. for life; and after her death "in trust for all and every his said grandsons and other the child and children of his said daughter thereafter to be born (if any) and the issue of such grandsons or other child or children who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or be married, equally to be

[(*b*) *Wilson* v. *Wilson*, 4 Jur. N. S. 1076, 28 L. J. Ch. 95. (*c*) 26 Beav. 128.

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[divided between them, if more than one, share and share alike, such issue taking a parent's share." It was held by Sir *J. Romilly*, that the gift was void for remoteness, being contingent on the legatees attaining twenty-one (or marrying), and this event, so far as it regarded the issue of grandchildren, not necessarily happening within the proper limit. It is true that the issue (*d*) were to take only by substitution and per stirpes; but a child of the daughter born after the testator's death, might have died before the period of distribution leaving issue, which issue might or might not attain the required age, and until it was ascertained whether some one of such issue did attain that age, (a question which might evidently be undetermined for more than a life in being and twenty-one years after), the share of no one of the daughter's children could be ascertained. The Master of the Rolls, referring to the case of *Griffith* v. *Pownall*, said, he not only approved of that decision, but thought it quite consistent with his own decision in *Greenwood* v. *Roberts*. And his Honor is reported to have continued as follows:—"In *Greenwood* v. *Roberts*, the gift was to the children of Thomas, living at his decease, in equal shares, and there was this direction contained in the will. 'And I further direct that if any of the children of my brother Thomas shall, at his decease, be dead and have left issue, such issue shall nevertheless be entitled among them, if more than one, to the same sum of money as they would eventually have been entitled to had their parent outlived them' (*e*). Now the validity of the bequest there could not depend upon the fact whether the children of Thomas who were alive at the date of the will survived Thomas or not, and if they all died leaving children, the children would have to share with the other children of Thomas who were born after the death of the testator but had predeceased Thomas, and this would undoubtedly have been good if the class were to be ascertained at the death of Thomas, *but they took no vested interests until they attained twenty-one*, so that if the children of Thomas who were living at the date of the will died before Thomas and left children who died under twenty-one years leaving remoter issue, it would not be until these remoter issue attained twenty-one that the class would be ascertained or the number of shares ascertained into which the fund would be

[(*d*) Confined to issue of the first degree by the word "parent."

(*e*) "Them" is apparently a misprint for "Thomas."

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[divisible. If at Thomas's death he had no child living, but all his children had died leaving issue and were all infants, and they could not take till twenty-one, they might again have died leaving remoter issue who would not take until twenty-one; so that in point of fact the class was not to be ascertained until a period beyond a life and lives in being and twenty-one years afterwards."

Remark on *Greenwood* v. *Roberts*, and on the judgment in *Webster* v. *Boddington*.

If the effect of the bequest in *Greenwood* v. *Roberts* is here rightly represented it cannot be disputed that it was void for remoteness. But referring to the report of that case (*g*) it does not appear that there was anywhere a gift to the "remoter issue" mentioned in the report of his Honor's judgment: the word "children" is always used in the direct bequest; and in the clause of substitution cited by the Master of the Rolls the word "issue" is explained by the word "parent" to mean children. Moreover it is submitted that notwithstanding the phrase "as and when they shall severally attain the age of twenty-one years," the direct bequest on the death of any one of Thomas's children, of his share to his children (grandchildren of Thomas) was vested in them on their births: for not only was the whole of the intermediate interest given for their benefit but the testator adds, "I give them vested interests therein." The Master of the Rolls added, that "in *Cattlin* v. *Brown*, Vice-Chancellor *Wood* had very carefully considered this case; that he had taken the distinction which he (the M. R.) had already stated, and had expressed his approbation of that case." It appears however by the reports that the point on which the Vice-Chancellor relied as distinguishing *Cattlin* v. *Brown* from *Greenwood* v. *Roberts* was the necessity of the children of Thomas (in the latter case) surviving their father, whereas the Master of the Rolls referred his decision to the fact that the gift was contingent on the legatees attaining twenty-one. Indeed, as we have already seen in the passage cited from the Master of the Rolls' judgment in *Webster* v. *Boddington*, that learned Judge declared that the gift in *Greenwood* v. *Roberts* would have been undoubtedly good if the class were to be ascertained at the death of Thomas. Neither view however, it is submitted, agrees with the reported judgment of the Master of the Rolls in *Greenwood* v. *Roberts*; and as to the distinction taken by the Vice-Chancellor (which is the only one which in fact existed) it appears, as already stated, to have been wholly

[(*g*) 15 Beav. 92.

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[disregarded by him in the case of *Wilson* v. *Wilson* (*h*) presently stated.

But before stating that case there is another part of the judgment of the Master of the Rolls in the case of *Webster* v. *Boddington*, which requires notice, where he said (*i*): "It is manifest in this case, as I observed with reference to the case of *Greenwood* v. *Roberts*, that the validity of the testamentary disposition cannot depend on the fact whether the grandchildren who were alive at the date of the will survived Lady Webster or not: it would be contrary to every principle to allow subsequent events which have occurred to determine the validity of a devise or bequest. It is obvious that it must be good or bad in its inception, and as soon as the will takes effect, viz., on the death of the testator, it takes effect and is a good disposition or not, either in whole or in part; but the number of the class to be ascertained, as they may die leaving children or remoter issue, could not be ascertained until after the death of Lady Webster, nor until it had been ascertained that some of the issue of the class had attained the age." Now it is submitted that these observations, though perfectly applicable to *Webster* v. *Boddington*, are not applicable to *Greenwood* v. *Roberts*. In the latter case, there was no waiting to see whether the sons of Thomas living at the testator's death and their children would come within the proper limits; they were known immediately on the testator's death to be within the proper limits; the waiting was for the purpose of seeing whether the contingency would happen on which they were to take, namely, whether they would survive Thomas; and at the same time the amount of their shares would be ascertained by the number of stocks living at the death of Thomas, and no subsequent failure of any of such stocks could increase the share of any of the other stocks. But in *Webster* v. *Boddington* the shares were not necessarily capable of being ascertained at the death of Lady Webster, for if the issue then representing any stock were then all under age, the gift to that stock might at any subsequent remote period fail, by none of that stock attaining twenty-one, in which case the shares of the other stocks would, under the terms of the bequest, if valid, have been thereby increased, there being, in fact, a class of stocks, the gifts to all of which were mixed up in precisely the same manner

[(*h*) 4 Jur. N. S. 1076, 28 L. J. Ch. 95. (*i*) 26 Beav. 139.

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[as the gift to the children in *Leake* v. *Robinson*, and the gift to the stocks within the limits failed along with the gift to those without the limits. In *Greenwood* v. *Roberts* the gift to each stock was totally independent of the other.

Case of *Wilson* v. *Wilson*.

It remains to state the case of *Wilson* v. *Wilson* (*k*). The bequest there was of a sum of money upon trust to pay the income to the testator's wife during her life, and after her death in trust for the then present and future children of I. L. *who should be living at the death of the testator's wife*, and who should attain the age of twenty-one or marry, in equal shares; and the testator directed that the shares of each daughter should be settled upon trust for her for life, and after her death for her children. Sir *W. P. Wood*, V. C., decided that the trust in favour of a child of a daughter who was living at the death of the testator was valid. He said, "I can conceive no ground why in respect of a child of I. L. in esse at the time of the testator's decease there should not be a direction that her share should be settled on her children. In *Porter* v. *Fox* (*l*) and that class of cases the difficulty arises from there being a gift to a class of persons some of whom can take whilst others cannot. In these cases it cannot be ascertained what is the share of each, and hence the gift is held void as to all. Here, however, the children of each child of I. L. form a separate class, and the share of each class is separately ascertainable."

Remark on *Wilson* v. *Wilson*.

It is singular that after the distinct approval given by the learned Judge in an elaborate and careful judgment to the decision in *Greenwood* v. *Roberts*, he should subsequently come to a contrary conclusion. It is submitted, however, that the case of *Wilson* v. *Wilson* places the matter in the true light, unless it can be considered that the decision turned on the fact that there was, in the first instance, an absolute gift followed by a direction to settle, which seems, however, unimportant (*m*).

What cases are to be taken as governed by *Dungannon* v. *Smith*.

It may be asked, then,—if the decision in *Dungannon* v. *Smith* does not govern such cases as those under consideration, what cases are governed by it? The answer seems to be, that while *Leake* v. *Robinson* governs the cases of gifts to a class, or to several of a class answering cotemporaneously a particular description, and the class at the same time taking collectively, *Dungannon* v. *Smith*

[(*k*) 4 Jur. N. S. 1076, 28 L. J. Ch. 95.

(*l*) 6 Sim. 485.

(*m*) This would seem to be the opinion of the M. R., *Lyddon* v. *Ellison*, 19 Beav. 565. See observations on the cases above discussed, 4 Jur. N. S. pt. 2, pp. 497, 512, 520.

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[governs the cases of gifts to one individual only of a class, or of a series of persons who shall answer a given description, the class or series having a common or similar interest, though only one ever becomes entitled. The latter case does not decide that gifts to distinct classes are, merely because comprised in the same words, so blended that all must take effect or fail together. The bequest was not several gifts, but one gift, not a gift to several persons or classes of persons, but a gift to one individual, so expressed as to be applicable to any one who at the given time came within its terms, namely, "to the first heir male who should attain twenty-one," and it was merely decided that this could not be read as two gifts, namely, "to A. the existing heir male apparent, if he attain twenty-one, and if not, to the first other heir male who shall attain twenty-one." To apply *Dungannon* v. *Smith* to a case like *Greenwood* v. *Roberts* is to say that, because a gift in one set of words in favour of *one* individual who shall answer a given description, cannot be divided up into several alternative contingent gifts to the successive persons who may answer that description, therefore a gift in one set of words, but in distinct shares, to *several* individuals or classes who shall answer a given description, cannot be divided up into several gifts to each individual or class of his share. The latter position evidently cannot be deduced from the former.]

Where the testator has combined with the remote class a living person, in such a manner as to constitute him a member of the class, the gift to him cannot be distinguished from and shares the fate of the other intended objects (*n*). [Some doubt has been thrown on this decision by Sir *J. Stuart*, V. C. "Where," said that learned Judge (*o*), "there is a clear gift to an individual and a gift to a class of persons who are to take along with him, *the individual and each member of the class to take as tenants in common*, what remains to be shown is how, if the class be so described as that the gift to them cannot take effect, the gift to the individual should therefore also fail, any more than if, instead of the gift being to an individual and to a class of persons to take along with him, the gifts were to the individual and any number of other individuals to take with him as tenants in common, as to which other individuals the gift might happen to fail or be given in an effectual manner."

(*n*) *Porter* v. *Fox*, 6 Sim. 485.

[(*o*) *James* v. *Lord Wyndford*, 1 Sm. & Gif. 58, 59; see *Clark* v. *Phillips*, 17 Jur. 886.

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[It seems, however, that in the case put the gift to the individual must, according to the authorities, of necessity fail, because there is no other criterion of the amount of his share than the ultimate number of persons included in the class, and that ultimate number is incapable of ascertainment within legal limits. If the case had been put of a joint tenancy, then, it is conceived, the result would have been in accordance with the learned Judge's dictum; because the gift, so far as it was to others than the individual, being void, the whole fund would accrue to the individual (*p*).

Possible and not actual events are to be considered in judging as to remoteness.

In deciding on the question of remoteness] it is an invariable principle that regard is had to possible and not to actual events, and the fact that the gift might have included objects too remote is fatal to its validity. Thus, a gift to the first son of A., (a living person,) who should acquire some personal qualification not *necessarily* confined to minority, as, for instance, who should marry, or take a degree at college, or obtain a commission in the army, or be ordained, would be void, even though A. should have a son who should happen to answer the required qualification within the life of A. and twenty-one years afterwards. Accordingly, in the early case of *Jee* v. *Audley* (*q*), where a testator bequeathed 1000*l.* to be placed out at interest, which interest he gave to his wife during her life; and at her death he gave the 1000*l.* to his niece Mary Hall, *and the issue of her body*, lawfully begotten, and to be begotten; and *in default of such issue*, he gave it to be equally divided between the daughters *then living* of John Jee and Elizabeth Jee his wife. It was objected, that the limitation to the daughters of John and Elizabeth Jee was void, as being too remote, being to take effect on a general failure of issue of Mary Hall, and was not confined to the daughters living at the death of the testator. On the other side it was said, that, though the late cases had decided that, on a gift to children generally, such children as should be living at the time of the distribution of the fund would be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of J. and E. Jee having children after the testator's death, they being then seventy years old; and if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the

[(*p*) Vide post, Chap. XI.] (*q*) 1 Cox, 324.

testator; that the case which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give effect to words which would totally defeat such intention. But Sir *Lloyd Kenyon*, M. R., observed, that it had been decided by several cases, that, in bequests to children, all those born before the interest vested in possession were entitled. "This," continued his Honor, "being a settled principle, I shall not strain to serve an intention, at the expense of removing the landmarks of the law. It is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed; limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years and nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's* case, to the present; it is grown reverend by age, and is not now to be broken in upon. I am desired to do in this case, something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons at so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case, it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience, to give a latitude to such sort of conjecture. Another thing pressed upon me is, to decide upon the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it were good in its creation, and if it were not, I cannot make it so. Then, must this limitation, if at all, necessarily take place within the limits prescribed by law? The words are, 'in default of such issue, I give the said 1000*l.* to be equally divided between the daughters *then* living of John Jee and Elizabeth his wife.' If it had been to 'daughters now living,' or 'who should be living at the time of my death,' it would have been very good; but, as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison* v. *Airy, and the effect of law on such limitation cannot make any difference in construing such intention.* If, then, this will extended to after-born daughters, is it within the rule of law? most certainly not; because John and Elizabeth Jee might have children born ten years after the testator's death, and then

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Mary Hall might die without issue, fifty years afterwards; in which case it would transgress the rule prescribed."

[In the case of *Hodson* v. *Ball* (*r*), a gift over of a share of any child of the testator, in case of failure of its issue at any time during the life of the child's husband or wife, was held void; since the husband or wife might be a person not born at the testator's death, and might survive the child more than twenty-one years, and the gift over would thus take effect after the expiration of a life and twenty-one years.

Vesting of personal property given in strict settlement must not be deferred till *any* tenant in tail attains twenty-one.

Again, where fee-simple lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon trust to go along with the fee-simple lands, but so as not to vest in *any* tenant in tail till he shall attain the age of twenty-one years; this trust, so far as it is limited in favour of tenants in tail, is void, since by the death of successive tenants in tail under age and leaving issue the vesting of the leaseholds might be deferred beyond the period allowed by law (*s*). Care should therefore be taken that the vesting is only deferred till some tenant in tail *by purchase* attains the age of twenty-one years. Similarly in all cases where under a deed or will a strict settlement is created, and (as is usually done) power is given to the trustees during the minority of any person entitled under the settlement to manage and let the property and receive the rents and profits (*t*), or to cut timber and sell it (*u*), and invest the monies arising thereby in the purchase of other lands to be settled to the same uses, the exercise of these powers must be carefully restricted to the period of the minorities of tenants in in tail *by purchase*, else the powers will be altogether void (*x*).

[(*r*) 14 Sim. 558. See also *Lett* v. *Randall*, 3 Sm. & G. 83.

(*s*) *Lincoln* v. *Newcastle*, 12 Ves. 232, 233; *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 546, 10 Jur. 721, 1 D. & War. 509; *Ibbetson* v. *Ibbetson*, 5 My. & Cr. 26, 10 Sim. 495; *Wainman* v. *Field*, Kay, 507; *Harding* v. *Nott*, 26 L. J. Q. B. 244; compare *Harvey* v. *Harvey*, 5 Beav. 134.

(*t*) *Lade* v. *Holford*, 1 W. Bl. 428, Amb. 479, Fearne, C. R. 530, n.; *Browne* v. *Stoughton*, 14 Sim. 369; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Turvin* v. *Newcombe*, 3 Kay & J. 16.

(*u*) *Ferrand* v. *Wilson*, 4 Hare, 373.

Observations on *Browne* v. *Stoughton*.

(*x*) Mr. Lewis, in the supplement to his work on Perpetuities, doubts the correctness of the decision in *Browne* v. *Stoughton*, conceiving that such trusts are, like executory limitations engrafted on an estate tail, barrable along with the estate tail, and therefore not void for remoteness. But the trustees clearly have an actual estate in the lands, which estate is not subsequent or collateral, but anterior to the estate tail, and the trusts declared cannot therefore be affected by any act of the tenant in tail. This is clear from *Marshall* v. *Holloway*, where there was no term anterior to the estate tail, nor was the destination of the accumulated fund (if made) too remote, being identical with that of the general personalty, the gift of which was held good. The sole ground of the determination therefore was, that the trust for accumulation could not be split or

Rule against perpetuities does not apply to accumulations for payment of debts.

[The invalidity of such trusts admits, however, of one exception, namely, where the fund arising therefrom is to be applied in discharge of incumbrances affecting the estate (*x*), for then they only prescribe a particular mode of paying the incumbrances, which, in case of a mortgage, the incumbrancer himself might adopt by entering into receipt of the rents and profits, and may at any time be put an end to, either by the owner paying the incumbrance, or the incumbrancer enforcing his claim against the corpus of the property; thus there is no restraint on alienation. As the payment of all the debts of a testator can now be enforced out of his real as well as his personal estate, there seems on the principle above noticed no reason at the present day to doubt the validity of a trust for the accumulation for any period, however long, of the income of all or any part of a testator's property, whether real or personal, for the purpose of paying his debts.

[severed, so as to place part before the first estate tail (which would be neither too remote nor barrable), and part after (which would be too remote if it were not barrable.) The whole was an entire limitation, and must stand or fall together, (see *Pickford* v. *Brown*, 2 Kay & J. 426.) If in *Browne* v. *Stoughton* the trust had been barrable along with the estate tail some startling results would follow. Suppose, for instance, that instead of an accumulation being directed during minority, it had been directed during the first twenty-one years after the testator's death to raise money for payment of legacies, it must follow that the tenant in tail, if of full age, could bar the trust, and deprive the legatees of their legacies. The case of *Browne* v. *Stoughton*, cannot therefore be distinguished from that of *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, on the ground that, in the latter, a term was created anterior to the estate tail; indeed Lord *Eldon*, in *Marshall* v. *Holloway*, 2 Sw. 445, expressly said that that made no difference. See also 3 Jur. N. S. Pt. ii. 181. Mr. *Sanders*, the well-known writer on Uses, went even further than Mr. Lewis; in an opinion of his (Sanders on Uses, 5th ed. p. 203, n.), he says, with respect to *Lord Southampton* v. *Marquis of Hertford*, "It is not easy to discover the ground of the decision, but it is to be observed that the term of 1000 years preceded the limitations in tail; and it seems to be inferred that a recovery by tenant in tail, subject to the term, did not destroy the preceding trusts of the term. If this be the case, there is a great fallacy in the inference; for the trusts of a term created for the purposes of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance the trusts of the term. A recovery by tenant in tail would acquire the fee-simple, and render the term attendant on the inheritance, discharged of the trusts for accumulation." The reader will however have seen from the decision in *Case* v. *Drosier* (ante, p. 231), that Mr. *Sanders'* opinion cannot now be taken as a correct view of the law on this point. Another instance of the question whether a limitation can be divided, is furnished by *Attenborough* v. *Attenborough*, 1 Kay & J. 296, where the testator empowered "my trustees," who were in other parts of the power referred to as "my brother James or other my trustees" (James being sole trustee) to advance from time to time any sums not exceeding 5000*l.* for the benefit of the testator's nephew, and Sir *W. P. Wood* seemed to think that if the power had been given generally to any trustees present or future it would have been void, but that it might be read as a power to James or any subsequent trustees and decided that James might exercise it. Compare *Doe* v. *Challis*, post.

(*x*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, see p. 65; *Bateman* v. *Hotchkin*, 10 Beav. 426; *Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363, and see *Bacon* v. *Proctor*, T. & R. 40. In the two first cited cases there was a preceding term, so that it is absolutely necessary to refer them to this special ground. See also *Gilbertson* v. *Richards*, 5 H. & N. 453, in error, 29 L. J. Ex. 213, 6 Jur. N. S. 672.

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Interests taken must be ascertained within proper period.

[It may be added that not only the persons to take, but also the interests to be taken by them, must be such as necessarily are to be ascertained within the proper period (*y*).

Remoteness is to be judged of according to circumstances at the date of testator's death.

Another rule, now generally recognised, is, that in deciding on the question of remoteness, the state of circumstances at the testator's death, and not at the date of his will, is to be regarded. Thus, if a testator should bequeath money upon trust for A. for life, and after his decease, for such of his children as should attain the age of twenty-five, which latter trust would, as we have seen, be void, if the testator were to die in the lifetime of A.; yet if A. should die in the lifetime of the testator, leaving children, whatever their age, the gift would be good, since it must vest or fail within lives in being, that is, during the lives of the children. The decisions on this question are mostly of recent date (*z*).

In the case of *Tregonwell* v. *Sydenham* (*a*), a testator devised an estate D. to A. for life, remainder to his first and other sons in tail male, with remainder to his eldest daughter in tail general, with remainder to trustees for the term of sixty years, upon trust to raise out of the rents of the lands a sum of money, which was to be laid out in the purchase of other lands, to be settled for life on the person who should happen to be then in possession under the limitations in his will contained of his estate at N., with remainder to his issue in strict settlement; and after the said sum of money and expenses should be raised or the determination of the term of sixty years, then the estate of D. was limited to other persons and their issue in strict settlement. When the time arrived for raising and laying out the money, the person who would have been entitled for life to the lands to be purchased was one not in esse at the testator's death, so that the trust failed. Lord *Eldon* observed, that though the trusts had been considered as too remote, it was difficult to say that they were so in all events; as the case had not happened in which they could be carried into effect, the heir-at-law was entitled. He evidently, therefore, thought the trust might have been good, if the tenant for life of the lands to be purchased had been born in the testator's lifetime. Since this expression of opinion, we have the direct de-

[(*y*) *Curtis* v. *Lukin*, 5 Beav. 155.

(*z*) The reader will find in Mr. Lewis's work on Perpetuities, some decisions which are there stated as authorities for the contrary position; but it is conceived that, with the exception perhaps of *Harris* v. *Davis*, noticed hereafter, they can all be referred to different grounds.

(*a*) 3 Dow, 194, 215, stated more fully, post, Chap. XVIII. Sect. 2.

[cisions on this point of Sir *J. Wigram*, V. C. (*b*), Sir *J. Romilly*, M. R. (*c*), and Sir *W. P. Wood*, V. C. (*d*); in addition to which, Sir *W. Grant*, M. R., in *Donn* v. *Penny* (*e*), *Alderson*, B., in *Challis* v. *Doe* (*f*), Lord *St. Leonards*, in *Monypenny* v. *Dering* (*g*), Sir *L. Shadwell*, in *Ibbetson* v. *Ibbetson* (*h*), and all the Judges except Sir *N. Tindal*, C. J., and *Platt*, B., (neither of whom alluded to the point,) in the case of *Dungannon* v. *Smith* (*i*), seemed to take it for granted. This weight of opinion in favour of a construction which always accords with the testator's intention might be considered to remove all doubts upon this head; but in a recent case (*k*), Sir *G. Turner*, V. C., seemed to think the question still unsettled, referring to the case of *Harris* v. *Davis* (*l*), before Sir *J. K. Bruce*, as showing that the circumstances at the date of the will are to be regarded; and certainly the actual decision may be deemed to involve such a conclusion, as also may the decision of the same learned Judge in *Andrew* v. *Andrew* (*m*); the former case was a gift of leaseholds to A., and (as it was held,) the heirs of his body, and if he should die without issue to B.; the latter was a gift of consumable articles to A. for life or until marriage, (in effect an absolute gift by reason of the nature of the subject,) and on death or marriage to B.; A. in the former case died, and in the latter married, in the lifetime of the testator, and it was held in both cases that the gifts lapsed, and B. was not entitled. Clearly, in either case, if the will was to be taken as speaking at the testator's death, B. ought to have been held entitled; but it does not appear, more especially in *Andrew* v. *Andrew*, that this mode of viewing the question was presented to the learned Judge; he seems to have considered the gifts to A. as comprising the whole property in the subject of gift, and the gifts to B. as only carrying what was not previously disposed of to A., which was, in fact, nothing. It is conceived, therefore, that these two cases will not be held to countervail the other authorities above referred to; although coupled with the direct opinion on this question of Sir *G. Turner*, they nevertheless

[(*b*) *Vanderplank* v. *King*, 3 Hare, 17; *Faulkner* v. *Daniel*, ib. 216; *Williams* v. *Teale*, 6 ib. 251.
(*c*) *Peard* v. *Kekewich*, 15 Beav. 173; *Southern* v. *Wollaston*, 16 ib. 166, 276.
(*d*) *Cattlin* v. *Brown*, 11 Hare, 382.
(*e*) 1 Mer. 22, 23.
(*f*) 21 L. J. Q. B. 231.
(*g*) 2 D. M. & G. 170.
(*h*) 10 Sim. 515.
(*i*) 12 Cl. & Fin. 546, 10 Jur. 721.
(*k*) *Rye's Settlement*, 10 Hare, 112.
(*l*) 1 Coll. 416. But see 1 Mer. 22, 23.
(*m*) 1 Coll. 690.]

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[prevent the rule now under consideration from being taken as absolutely settled.]

As to provisions for grandchildren.

A testator is in less danger of transgressing the perpetuity-rule, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children and grandchildren of another, since, in the former case, he has only to avoid protracting the vesting of the grandchildren's shares beyond their ages of twenty-one years, and then the fact of the gift extending to after-born grandchildren would not invalidate it, because all the children of the testator must be in esse at his decease, and *their* children must be born in *their* lifetime, so that they necessarily come into existence during a life in being. On the other hand, a gift embracing the whole range of the unborn grandchildren of another living person would be clearly void, though the shares should be made to vest at majority or even at birth, for the grandfather might have children born after the testator's decease, and as the gift would extend to the children of such after-born children, it would be absolutely void for remoteness, and that, too, according to the principle already laid down, without regard to the fact of there being any such child or not.

Testator *may* mould his disposition according to subsequent events.

Of course a testator may so frame and mould his disposition as to make its validity depend on subsequent events; or, in other words, avail himself of the course of circumstances posterior to the making of his will, in order to get as wide a range of postponement as possible; for instance, he may convert the intended estate tail of a person then unborn, into an estate for life, in case of his happening to come in esse in his (the testator's) lifetime. In all cases of failure under circumstances of this nature, the deficiency is one not of power but of expression; and the question in every instance is, whether the testator has clearly shown an intention to take the most ample range or period of postponement, which subsequent circumstances admit of. A point of this kind was much canvassed under the will of Lord Vere (*n*), who bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c., upon trust to permit his wife to have the use of them during her life, and, upon her death, to permit his son A. B. to have the use of the same goods, &c., for his life, and, upon the decease of the survivor of his (the testator's) wife and son, in trust for such person as should *from time to time* be

(*n*) *Lord Deerhurst* v. *Duke of St. Albans*, 5 Mad. 232; *S. C.* in D. P. nom. *Tollemache* v. *Earl of Coventry*, 2 Cl. & Fin. 611, 8 Bli. 547; compare this case with *Tregonwell* v. *Sydenham*, 3 Dow, 194.

Lord Vere, it being his will that the goods, &c., after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son, (the testator's grandson, who was also living at the death of the testator,) and, upon the death of the grandson, it descended to the testator's great grandson, who was born after the death of the testator. The chief struggle was between the personal representatives of the grandson and those of the great grandson. As the former was born in the testator's lifetime, it was clear, that he *might* have been made legatee for life, with remainder absolutely to the person next in succession, and the question, therefore, was, whether the will authorized such a construction. Sir *J. Leach*, V. C., before whom the case was originally brought, decided in the affirmative; his Honor observed—"He gives to such person as shall from time to time be Lord Vere, because his purpose is, that the enjoyment shall be continued with the title of the family, as far as the rules of law and equity will permit; in other words he gives to such person as shall from time to time be Lord Vere, with a declaration that each Lord Vere, in succession, shall take the use and enjoyment until there be a Lord Vere who cannot, by the rules of law and equity, be confined to the use and enjoyment only (*o*). This declaration, therefore, is nothing more than a legal qualification of the prior general description of his legatees, and the effect is the same as if the will had been in the following form:—'Upon trust for such person as shall from time to time be Lord Vere, it being my intention that the absolute interest shall not vest in any Lord Vere, who may, by the rules of law and equity, be limited to the use and enjoyment only (*p*).' In this view of the case, there is a direct gift, and nothing executory. By the rules of law and equity, every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only (*p*). The son and grandson of the testator were living at his death, and both, therefore, limited to the use and enjoyment only (*p*); but the child who succeeded the grandson

Devise to a person who *might* not answer a certain qualification within allowed period, held void, irrespectively of event.

(*o*) In order to render the several positions in the text consistent with the actual rule of law, we must add in each instance, "*with remainder to the next successor;*" for the legal prohibition is not to the giving a life interest to an unborn person, but to the engrafting on such life interest a remainder over to the issue of such person, or any other unborn person. Vide some remarks on this point, post, p. 262.

(*p*) See last note.

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as Lord Vere and Duke of St. Albans, was not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to the use and enjoyment only (*p*). He took, therefore, an absolute interest, which is now vested in his personal representative."

The case was then brought, by appeal, successively before Lord *Eldon* and Lord *Lyndhurst*, the latter of whom affirmed the judgment of the Vice-Chancellor; but after an elaborate argument in the House of Lords, the decree of the Court below was eventually reversed, on grounds which may be collected from the following remarks of Lord *Brougham*, (then Chancellor) (*q*). "The person," said his Lordship, "who secondly, after the death of the testator, became Lord Vere, (the grandson,) was in esse at the date of the will; but whether he would take, or whether he would ever be Lord Vere, was at the time uncertain. The next life estate, after those named in the will, was not to the person by name, but to the Lord Vere, whoever he might be. It was an attempt to create a new species of limitation in succession, to spring up with the person, contrary to all rule and analogy for restricting the period of tying up or deferring the vesting of estates in fee, or absolutely. Being or coming into esse is a notion familiar to law; but a peer does not, in a legal sense, come into existence. It was argued for the respondent, that it was the same thing as limiting to the son and grandson and great grandson successively, because they must succeed to the inheritances of the dignity in this order. But that view is not quite accurate; for it was not certain that either of them would be Lord Vere. Upon a barony in fee, by writ of summons or creation, the first taker might have a son, and that son might only have two daughters; what person would then take the title? It would be in abeyance; and, until the Crown should please to select one of them to hold the dignity, it would remain in abeyance, and there might be no peer during the lives of the two co-heiresses. In the case put of an abeyance of the title, the Crown might not select either or any of the daughters, and in that case, the title might remain in abeyance for a century; and such an event would demonstrate that the limitation is not partially, but altogether void. It is said, that the case has not happened; but the soundness of the limitation cannot

(*p*) See note (*o*) p. 259.

[(*q*) The reporters seem to differ as to whether Lord *Lyndhurst* concurred in this reversal, see 12 Cl. & Fin. *555*, note.]

depend upon contingencies which may cause it to be good or bad according to the event. Suppose, again, the limitation of this peerage to be by patent. If the eldest son had a brother who would succeed in default of issue of the eldest son, and afterwards commits treason and is attainted; during the life of that son, and so long as there is any issue of that eldest son, the title would remain in abeyance. The title would not be extinct, but would be in the Crown so long as any of his issue should exist (*r*); and, upon failure of the issue of the attainted person, there might again be a Lord Vere. These instances show the novelty of the invention, and the difficulty of giving it complete effect. There is a distinction between limitations upon events known to the law, and such as the testator in this case has made the basis of his limitation. Peerages are not by the hand of nature, but of the creation of the Crown; and their origin and continuance are uncertain. To argue from the fact that the person was in esse at the date of the will who became Lord Vere, is to rely upon an accident. The event might have been otherwise. He would not *ex necessitate* answer the description within the allowed period. A limitation, to be supported, must be definite and certain to the man or to the peer as an individual. It is not allowable to contend, that at one time, and for one purpose, it is to the man, and for another time and purpose to the peer. The estate must be certain, so as within the time to vest in the person described, either in his natural or his politic capacity. In the politic capacity, there was no such Lord Vere in esse, in whom the estate could within that time certainly vest."

Gift to unborn person for life valid.

If the objects of a future gift are within the line prescribed by the rule against perpetuities, of course it is immaterial what is the nature of the interest which such gift confers (*s*). It would be very absurd that persons should be competent to take an estate in fee in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary or terminable interest, (for the larger includes the less,) and yet it would not be difficult to cite dicta, nay, even to adduce a decision (*t*), propounding the doctrine, that a life interest cannot be given to an

(*r*) Plow. 557, as to land.

(*s*) *Cotton* v. *Heath*, 1 Roll. Ab. 612, pl. 3; *Marlborough* v. *Godolphin*, 1 Ed. 415; *Doe* d. *Tooley* v. *Gunnis*, 4 Taunt. 313; *Doe* d. *Liversage* v. *Vaughan*, 1 D. & Ry. 52, 5 B. & Ald. 464; *Ashley* v. *Ashley*, 6 Sim. 358; *Denn* v. *Page*, 3 T. R. 87, n.; *Hay* v. *Earl of Coventry*, 3 T. R. 83; *Foster* v. *Romney*, 11 East, 594; *Bennett* v. *Lowe*, 5 M. & Pay. 485, 7 Bing. 535; *Routledge* v. *Dorril*, 2 Ves. jun. 366; [*Burley* v. *Evelyn*, 16 Sim. 290; and see Fearne, C. R. 503.]

(*t*) *Hayes* v. *Hayes*, 4 Russ. 311; [see as to this case, 6 Hare, 250, 1 Coll. 37.

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unborn person. The fallacy has probably arisen from the terms in which the general rule has been ordinarily laid down, namely, that you cannot give an estate for life to an unborn person, with remainder to his issue, which has been read as two distinct propositions, the one affirming the invalidity of a limitation for life to an unborn person, and the other the invalidity of a limitation to the issue; though in fact, all that is meant to be averred is, that a limitation to the children or issue of an unborn person, [following a gift to such unborn person,] is bad, as it clearly is, since such children or issue may not come in esse until more than twenty-one years after a life in being (*u*). [Taken as containing two separate propositions, the rule is not true in either of its branches, for a remainder of a *legal* estate immediately expectant on a vested estate of freehold may he limited, not only to an unborn person, child of a living person, but to any unborn person whatever, since, in order to take, such unborn person must, as we have seen (*x*), come in esse during the subsistence of the previous estate, that is, of a vested estate for life or in tail, otherwise the contingent remainder to him will fail. Indeed it is clear, from the case of *Cadell* v. *Palmer* (*y*), that even a long succession of estates for life to unborn persons and their issue is valid, if subjected to the restriction, that in order to take they must come into existence during lives in being and twenty-one years afterwards. In the case in question, a devise was held valid which limited successive estates for life to every person who, being in the line of the heirs male of C. B., should come into existence during the period of the lives of twenty-eight living persons and twenty years after the decease of the survivor of them. Under this devise it was possible that five successive generations, all unborn at the decease of the testator, should have taken estates for life, and also (under further gifts in the will not noticed here) that after the decease of the last of the five generations, a sixth generation might have taken an estate tail with re-

As to successive limitations to unborn persons who *must* come in esse within the allowed period.

[(*u*) See 11 Hare, 375.

(*x*) See *Doe* d. *Winter* v. *Perratt*, 9 Cl. & Fin. 606, and ante, p. 236; and remember the distinction there taken between legal and equitable limitations.

(*y*) Ante, p. 228. Lord *St. Leonards* seems to have considered the successive life estates in this case invalid, see Law of Property, p. 324, where he says, "The counsel for the respondents ought to have been required to frame such *legal* limitation as they asserted could be framed, in order to give effect to the testator's intention, and the opinion of the Judges should have been asked on the validity of the limitations." His Lordship therefore would have considered that a limitation to an unborn person for life, with successive remainders for life, to successive generations of his issue who should be born within lives in being, and twenty-one years to be invalid.]

[mainders over. This case, together with that of *Cole* v. *Sewell*, must, it is conceived, establish beyond doubt that no estate, whether legal or equitable, (for the same rule must hold as to both,) whatever be its duration, can be too remote, if either from the legal incidents attaching to it, (as in the case of certain contingent remainders,) or by express provision in the instrument creating it, it must vest or fail within lives in being at the time of creation and twenty-one years afterwards.

These considerations would seem to settle] a point which has not, it is believed, been the subject of positive decision, namely, whether a devise, which either from the nature of the subject of gift, as in the case of a life estate, or from the nature of the qualification superadded to the devise, as in the instance of a gift to children living at the death of the testator, can never extend beyond the period allowed by the rule of law, is good though limited to arise upon an event which might, abstractedly considered, happen after that period, as an indefinite failure of issue; in other words, whether a bequest, in a will made before 1838, if A. shall die without issue, to B. if then living, is to be regarded in precisely the same light as a gift, in case A. shall die without issue living B. Upon principle, it is difficult to perceive any solid difference between the two cases; and the opinion of Mr. *Fearne* (*z*), seems to have been in favour of the validity of the former limitation, though none of the cases cited by this distinguished writer go directly to the point. In *Oakes* v. *Chalfont* (*a*), which is his leading authority, the words for want of such issue evidently pointed at the children who were the objects of the preceding gift, and the bequest over was therefore clearly good, as a simple substituted gift. [Sir *Lloyd Kenyon*, in *Jee* v. *Audley* (*b*), expressly states such a limitation to be good.] Sir *W. Grant*, though at one time he expressed doubts on the subject (*c*), [seems latterly to have been of the same opinion (*d*), and we have the authority of Lord *Brougham* on the same side (*e*).] The question is now of somewhat diminished interest, [since it generally arises on a gift "in default of issue," which words, in wills made since 1837, are not generally to be construed as referring to an indefinite failure of issue; but where the gift is limited on any other event which is too remote, it may still arise under such wills.]

(*z*) C. R. 488, 500, Butler's note.
(*a*) Pollex. 38.
[(*b*) 1 Cox, 326, see ante, p. 252.]
(*c*) *Barlow* v. *Salter*, 17 Ves. 483; see also Sugd. Gilb. Uses, 277, n.
[(*d*) *Massey* v. *Hudson*, 2 Mer. 133.
(*e*) *Campbell* v. *Harding*, 2 R. &. My. 406.]

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As to gifts in remainder expectant on estate for life to unborn person.

As a gift for life to an unborn person is valid, so it is clear is a remainder expectant on such gift, provided it be made to take effect in favour of persons who are competent objects of gift; though here also a fallacy prevails; for it is not uncommon to find it stated in unqualified terms, that, though you may give a life interest to an unborn person, every ulterior gift is necessarily and absolutely void; and some countenance to this doctrine is to be found in the judgment, as reported, of an able Judge (*f*), though the adjudication itself, rightly considered, lends no support to any such doctrine, as the ulterior gift, which was there pronounced to be void, was nothing more than a declaration that the property should go according to the Statute of Distributions; so that the claim of the next of kin, who was held to be entitled, was perfectly consistent with the will, unless, indeed, it applied to the next of kin at the death of the unborn legatee for life, which would have been clearly void, as embracing persons who would not have been ascertainable until more than twenty-one years after a life in being; but for this construction there seems to have been no ground.

Limitations ulterior to a remote devise, void.

It is not to be denied, however, that where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void, though the object of the prior devise should never come into existence. Thus, in the often-cited case of *Proctor* v. *Bishop of Bath and Wells* (*g*), where there was a devise to the first or other son of Thomas Proctor, that should be bred a clergyman, *and be in holy orders*, and to his heirs and assigns; *but if the said T. P. should have no such son*, then to T. M., his heirs and assigns. T. P. died without ever having had any son. As by the canons of the church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of C. P., therefore, held the first devise to be void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect.

So, in *Robinson* v. *Hardcastle* (*h*), where, on the marriage of James Dunn with Dorothy Wright, lands were limited to himself

(*f*) See *Cooke* v. *Bowler*, 2 Kee. 53.
(*g*) 2 H. Bl. 358; see also *Palmer* v. *Holford*, ante, p. 229.
(*h*) 2 B. C. C. 22, 2 T. R. 241, 380, 781.

for life, remainder to such of the children of the marriage, and in such proportions as he should appoint, remainder to the first and other sons in tail, with remainders over. James Dunn, by will, appointed the estate to the eldest son of the marriage for life; remainder to trustees to preserve contingent remainders, remainder to his (the son's) first and other sons in tail, remainder to the daughters in tail, as tenants in common, remainder as to part, to testator's daughter in fee; and as to other part, to the use of another daughter in fee. The appointment to the children of the testator's son being clearly too remote, (the son being unborn at the time of the execution of the deed creating the power,) it was contended, that the effect was the same as if it had never been inserted in the will, and that the remainder in fee was accelerated: but *Buller*, J., observed, that if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall with it; to support the opposite argument, the testator must be considered as intending that if the first use was bad, the subsequent limitation should take place, which would be extraordinary indeed. The Court accordingly certified (it being a case from Chancery) that the devise over was void.

The same principle was followed in *Cambridge* v. *Rous* (*i*), where personal property was bequeathed to A. for life, and after her decease to her children, *when they should attain the age of twenty-seven*, and in the event of her having no *such* children, over; and Sir *W. Grant*, M. R., held the trust for the children to be too remote, and that the limitation over, therefore, was also void.

[Lastly, in the case of *Beard* v. *Westcott* (*k*), a testator devised lands to his grandson, J. J. B., for 99 years, determinable with his life, remainder to his first son (unborn) for 99 years, determinable with his life, remainder to his first son for a like term, and so on; and in case there should be no issue male of the said J. J. B., nor issue of such issue male at the time of his death, or in case there should be issue male at that time, and they should all die before they should respectively attain twenty-one without lawful issue male, then there were similar limitations over to X. and his issue. The case was first sent to the Court of C. P., and they were of opinion that the several gifts after the gift to the unborn son of J. J. B. were void; and so far their opinion was unobjectionable. But they also held, that if the event men-

(*i*) 8 Ves. 12. The case is here stated without the alternative bequest.

[(*k*) 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25.

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[tioned (*l*) arose, the gift over would take effect, the event in question being (as it clearly was) within the legal limits of perpetuity. This decision was not acquiesced in, and a case was sent to the Court of K. B., who held that the gift over was void, and Lord *Eldon* affirmed that decision. "Not (said Lord *St. Leonards* (*m*) on a recent occasion) because it was not within the line of perpetuity, but expressly on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitations would, if they had been alive, have been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take (that is, to take in the interim) was actually in existence, but could not take. This shows," continued his Lordship, "that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid." The foregoing reasoning is clearly applicable as well to an executory gift as to a remainder.]

Distinction where the gift over is to arise on a *double* contingency.

But care should be taken to distinguish between cases such as the preceding, and those in which the gift over is to arise on an *alternative* event, one branch of which is within, and the other is *not* within the prescribed limits; so that the gift over will be valid, or not, according to the event (*n*). [Thus, in the case of *Longhead* v. *Phelps* (*o*), where trusts were declared of a term, in case of the death of A. without leaving issue male, or in case such issue male should die without issue, the Court held it clear that the first contingency having happened the trusts of the term were valid without reference to the other contingency.]

Other instances of alternative limitations good or not *in event.*

In the case of *Leake* v. *Robinson* (*p*), too, certain stock and monies were bequeathed to W. R. R. for life, and, after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or being a daughter or daughters, should attain that age or be married with consent; and in case the said W. R. R. should happen to

[(*l*) That is, the second event mentioned in the proviso. There could be no question as to the validity of the first event; that was clearly good within all the authorities next stated, and, J. J. B. being still alive at the time, it had not become impossible, but the Court of King's Bench seems to have altogether ignored it.

(*m*) In *Monypenny* v. *Dering*, 2 D. M. & G. 182.]

(*n*) See same principle applied to a different species of case, *Sydenham* v. *Tregonwell*, 3 Dow, 194; ante, p. 256.

(*o*) 2 W. Bl. 704.

(*p*) 2 Mer. 363.

die *without leaving issue living at the time of his decease*, or, *leaving such, they should all die before any of them should attain twenty-five* if sons, and if daughters, before they should attain such age or be married as aforesaid, then to the brothers and sisters of W. R. R. on their attaining twenty-five if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. W. R. R. died without leaving issue, and it was not contended, that, *in the circumstances which had happened*, the bequest over to the brothers and sisters was void, in reference to the event on which it was limited; though it was held, that as the bequest to the brothers and sisters included all who were living at the death of W. R. R. (*q*), it was clearly void from the remoteness of the bequest itself. Had W. R. R. left any issue, *the event* also would have been too remote.

[In the case of *Goring* v. *Howard* (*r*), there was a bequest of personal property upon trust for the testator's grandson G. G., and his brothers and sisters equally for their lives, and after the decease of any of the grandchildren to pay his or her share to his or her issue, *if any*, till they attained the age of twenty-five, and then to transfer to them their parent's share equally; and in case any of the grandchildren should die without leaving issue at his or her decease and without having obtained a vested interest, then the share of the grandchild so dying to go to the survivor or survivors, and to be payable and transferable as before mentioned; G. G. died a bachelor, and his brothers and sisters were held entitled to his share of income for their lives, in the alternative that had happened of no child of G. G. being alive at his decease, though the gift to such a child, had there been one, would have been too remote.

The last case to be stated on this point is the much discussed one of *Monypenny* v. *Dering* (*s*), where there was a devise upon trust for P. M. for life, and after his decease upon trust for his first son for life, and after the decease of such first son, "upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue upon trust for all and every other the son and sons of the body of the said P. M., severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue, and *in default of issue of the*

(*q*) Vide ante, p. 239.

[(*r*) 16 Sim. 395; and see *Minter* v. *Wraith*, 13 ib. 52.

(*s*) 2 D. M. & G. 145. See also *Cambridge* v. *Rous*, 25 Beav. 409.

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[*body of P. M., or in case of his not leaving any at his decease,* upon trust for T. M. for life," with remainders over. Lord *St. Leonards* held that the limitation to the unborn son of an unborn son of P. M., being itself void, invalidated the remainders depending upon it (*t*); but that the remainder to T. M., and the subsequent remainders, were good in the alternative event which had happened of P. M. *not leaving any issue at his decease.*

Alternative limitations need not be separately *expressed.*

And where the alternative limitations are distinct and separate in their nature, it makes no difference that they are not each separately expressed in different clauses, but involved in words which apply equally to, and include within them, both limitations. This point, indeed, was otherwise decided by the Court of Exchequer Chamber reversing the decision of the Court of Queen's Bench in the case of *Doe* v. *Challis* (*u*); but the judgment of the inferior Court was eventually restored by the House of Lords. The case was this:—John Dolly devised four houses upon trust for his daughter Elizabeth for her life, and after her decease to such of her children as being sons should attain the age of twenty-three years, or being daughters should attain the age of twenty-one years, equally as tenants in common in fee; and in case all the children of Elizabeth should die, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one, *or if she should have none,* then he devised in trust for his son John and his daughters Sarah and Anne equally for their respective lives, and at their respective deaths he devised the share of the one dying to his or her children who being sons should attain twenty-three, or being daughters should attain twenty-one, as tenants in common in fee; and in case of the death of his son or either of his daughters *without leaving a child who being a son should attain twenty-three, or being a daughter should attain twenty-one,* he devised the third share of the one so dying to the children of the others in the same manner as before. The daughter Elizabeth died in the year 1838 without ever having had a child, and in 1847 Anne died without ever having had a child. Two questions were raised; first, whether the gift over on the death of Elizabeth was good, she never having had a child; and, secondly, whether the gift over on the death of Anne was good, she never having had a child. The Court of

[(*t*) See, as to this, post.

(*u*) 18 Q. B. 244; in error, ib. 231, 16 Jur. 969, 21 L. J. Q. B. 227. See *Burley* v. *Evelyn*, 16 Sim. 290; *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358.

[Queen's Bench decided both questions in the affirmative. In the first case, namely, the gift over to John, Anne and Sarah, they decided (in accordance with the authorities before stated), that if Elizabeth had had a child who had not attained the prescribed age, the gift over would have been void for remoteness, but that in the event which happened of her never having had a child the gift took effect as an alternative contingent remainder. In the second case, namely, the gift over of the share of Anne to the children of John and Sarah, (which was only expressed to take effect on the children of Anne dying under the prescribed age, and not in the event also of *her never having had any children*,) the Judges of the Queen's Bench decided that this also took effect, being of opinion, upon the authority of *Jones* v. *Westcomb* (*x*) and similar cases, that wherever there was a gift over on a class dying within a particular age, it took effect if that class never came into existence. On appeal from this decision in the Exchequer Chamber the propriety of the decision on the first point was admitted; but the decision on the second point was reversed, the Court, without denying the authority of *Jones* v. *Westcomb*, applying the same principle to the splitting of one set of words into two contingencies, that Sir *William Grant*, in *Leake* v. *Robinson*, applied to the splitting of a class. *Alderson*, B., who delivered the judgment of the Court, said, "The true meaning of the devise is, in every event which can happen in which Anne dies leaving no children if male who attain twenty-three, or if female who attain twenty-one, I give the estate over. That is what he says, and that is what he means. He includes all those events in one clause. Some are legal, some are illegal. How is the Court to sever these events, which the testator has expressly joined together, without making a new will? The principle seems, therefore, to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the instant of the testator's death. Do the cases cited affect this principle? On looking over them we find in all of them that *the devise in any event was legal*, and that it was competent for the testator to make it."

Now it must be admitted that little attention was here paid to the rule which requires the interpreter of a will, in construing

[(*x*) Eq. Ca. Abr. 245. See Chap. L.

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[the instrument before him, to lay out of his consideration all question of remoteness or perpetuity. And it is believed to be the first case on record where regard to the rule against perpetuity was allowed to influence the construction so as to defeat and not support the will. Apart from the question of perpetuity, it was admitted that *Jones* v. *Westcomb*, and cases of that class, were full and sufficient authority for construing the will as the Court of Queen's Bench had done; and, accordingly, the case having been carried to the House of Lords, and there argued in presence of the Judges, the case of *Leake* v. *Robinson* was declared to be inapplicable, and the decision of the Exchequer Chamber was reversed (*y*). "No case," said *Wightman*, J., "or authority has been cited to show that where a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may not be divided, though included in one expression; and our opinion does not at all conflict with the authority of *Jee* v. *Audley*, and *Proctor* v. *Bishop of Bath and Wells*, in neither of which cases was it possible for the limitation over to operate as a remainder."]

Clause empowering trustees to protract absolute ownership void.

As the law does not permit to be done indirectly what cannot be effected in a direct manner, the rule which forbids the giving of an estate to the issue of an unborn person, [in remainder on the life of his parent,] equally invalidates a clause in a settlement or will, containing limitations to existing persons for life, with remainder to their issue in tail, empowering trustees, on the birth of each tenant in tail, to revoke the uses, and limit an estate for life to such infant, *with remainder to his issue* (*z*).

Appointee must be competent to have taken immediately from the donor of the power.

It has been already observed, that, in the case of appointments, testamentary or otherwise, under powers of selection or distribution in favour of *defined* classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power (*a*). The test, therefore, by

[(*y*) Nom. *Evers* v. *Challis*, 7 H. of L. Ca. 531, 29 L. J. Q. B. 121. The case *Re Thatcher's Trusts*, 26 Beav. 365, appears to be contrary. But the construction warranted by *Jones* v. *Westcomb* was not mentioned, and the case was supposed to be governed by *Beard* v. *Westcott*, as explained by Lord *St. Leonards*, ante. It differs, however, from that case, because it could not be said that there was a "person to take" (i. e., in the interim) "actually in existence," as there was in *Beard* v. *Westcott*.]

(*z*) *Duke of Marlborough* v. *Earl Godolphin*, 1 Ed. 404. The author of this futile device for evading the rule against perpetuities, was no other than the great John Churchill, the first Duke of Marlborough. Lord Northington's judgment in this case well deserves the reader's perusal.

(*a*) *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781.

which the validity of every such gift must be tried is, to read it as inserted in the deed or will creating the power, in the place of the power. Attention is often called to this doctrine in practice, where a power having been reserved by an antenuptial settlement, to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (like children) necessarily come in esse during the lives of either of the parties then in being, they cannot take under the appointment founded on such settlement (*b*). In order to bring the appointment within the prescribed limit, it must be confined to such issue as shall be born in the lifetime of the marrying parties, or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of *Cadell* v. *Palmer* now allows us to say) of twenty-one years afterwards, unless the vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be protracted beyond the decease of the surviving parent, and the

(*b*) *Bristow* v. *Warde*, 2 Ves. jun. 336; see also *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781. It frequently happens, that a parent, having a power of appointment, is desirous, on the marriage of a child, one of the objects of the power, to make a settlement in favour of such child, and also of the intended husband or wife, and the issue of the marriage. The purpose may be accomplished, if the child is of age and the power authorizes an appointment by deed, by making an absolute appointment in favour of the child; who then, by the same (or more usually by a separate) deed, settles the appointed property upon the several objects of the intended marriage; and in such case it is conceived, that, even if it could be shown that the appointment was made with the express previous understanding that it should be followed by such a settlement, the validity of the appointment would not be affected; though equity certainly is very jealous of all such transactions, and if there is any previous contract for benefiting the donee himself, even though only extending to a loan of the appointed sum, the appointment would clearly be bad. Of course it is desirable, even in making such a settlement as is above suggested, to avoid showing that it was the result of a previous arrangement between the appointor and appointee. If the marrying child is a minor, the appointment might be made in favour of any other child, being adult, who would then make the intended settlement. Where the power in question is exerciseable by will only, the donee's desire to embrace the issue of the appointee, or any other persons who are not objects of the power of course cannot be attained by any such means; and the nearest approach which can be made to the scheme is, in the first instance, to appoint the property to the child absolutely, and then, to enjoin him to execute the desired settlement of the appointed property; and, as an inducement to his doing so, to make it the condition of some *other* benefit which he is to derive under the will.

Suggestion as to settlement of shares appointed under power of selection.

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attainment of majority, [or beyond the period of twenty-one years from the decease of the surviving parent.]

Effect of power and appointment, or one of them, embracing too wide a range of objects.

[So too, although] a power does in terms authorize an appointment to issue only who are born within due limits, [yet] an appointment to a more extensive range of issue would be [totally void if] made to the whole as a class (unless they are to take as joint-tenants) for the shares of the issue who are within the line could not be ascertained (*c*). But] in the converse case, viz. that of the power embracing issue generally, and the appointment being duly restricted to issue within the prescribed boundary, there can be no doubt that the appointment would be good (*d*). But if the power and appointment *both* embrace too wide a range of objects, and the appointment is made to the children or issue as a class, it will, according to the general principle before adverted to, be void in toto; as well as to members of the class who are within, as to those who are not within, the line (*e*).

As to validity of indefinite powers of sale.

At one period it was much doubted, whether a power of sale introduced into a deed or will containing limitations in strict settlement, and which was not in terms restricted in its exercise to the period allowed by law, was valid. The affirmative has now been decided in several instances (*f*); and in the case of *Boyce* v. *Hanning* (*g*), the same rule was applied where the indefinite power occurred in a settlement containing limitations to A. for life, with remainder, subject to a jointure rent-charge, to the children of A. *in fee*, with a cross executory limitation, in case of any of the children dying under age and without issue. These cases seem to have dispelled the alarm which was created by Lord *Eldon's* remarks in *Ware* v. *Polhill* (*h*); and it is observable, that in several of the cases referred to, the validity of the power was considered to be so clear, that a title derived under it was forced upon the acceptance of a purchaser. In practice, it often occurs, that a sale is made under a will which empowers the testator's trustees, and the survivor and the heirs

[(*c*) If their shares are ascertainable without reference to those of the remote issue, the appointment, it seems, will be good *pro tanto*, see 2 Sugd. Pow. 66, 67, 7th ed.

(*d*) *Attenborough* v. *Attenborough*, 1 Kay & J. 296.]

(*e*) *Routledge* v. *Dorril*, 2 Ves. jun. 357; [*Thomas* v. *Thomas*, 44 Sim. 234.]

(*f*) *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Capron*, ib. 138, n.; [*Wallis* v. *Freestone*, 10 ib. 225;] *Waring* v. *Coventry*, 1 My. & K. 249, stated 9 Jarm. Conv. 458; and see 1 Hayes's Introd. 5th ed. 497; [*Cole* v. *Sewell*, 4 D. & War. 32; *Lantsbery* v. *Collier*, 2 Kay & J. 709.]

(*g*) 2 Cr. & J. 334; [see also *Wood* v. *White*, 4 My. & Cr. 482; *Nelson* v. *Callow*, 15 Sim. 353.]

(*h*) 11 Ves. 257; as to which, see some observations, 1 Jarm. Pow. 248, n.

of the survivor, to sell his real estate, (most commonly his copyholds, in order to avoid the necessity of the trustees being admitted previously to a sale,) without any restriction in point of time. In the early case of *Holder* v. *Preston* (*i*), the Court of King's Bench granted a mandamus to compel the lord of a manor to admit the purchaser of copyholds, claiming under the bargain and sale of trustees of a will, whose power was wholly unrestricted, and the validity of which does not appear to have been called in question.

The rule against perpetuities does not hold where the grounds of the rule do not apply.

[Any doubts as to the validity of such powers must be greatly diminished by the consideration that a perpetuity is only obnoxious because it prevents alienation, while a power of sale is expressly created for the purpose of enabling an alienation to be made; the rule against perpetuities does not hold where the reason of the rule does not apply, as is evident from the distinction between powers to appoint among a particular class, and general powers of appointment. Under the former the estates created must, as we have seen, be such as would have been valid if inserted in the instrument creating the power; but no such rule applies to powers of the latter sort, under which the validity of the estates created is to be judged of solely with reference to the time when the power was exercised. Again, in the case of *Christ's Hospital* v. *Grainger* (*k*), where money was in the year 1624 bequeathed to the corporation of Reading, to be by them invested in land, the rents of which were to be applied to certain charitable purposes, and in case of default in duly applying the rents, there was a limitation over for the benefit of Christ's Hospital; the limitation over was in the year 1848, after a lapse of more than 200 years, held to take effect; the property having been originally well devoted to charitable purposes, and having thus become inalienable, the gift over created no restriction on alienation, and did not come within the reason of the rule against perpetuities (*l*).]

(*i*) 2 Wils. 400. The prudent draughtsman, however, will not allow his confidence in the validity of indefinite powers of sale to induce him to omit an express restriction, confining the power to the period prescribed by the rule against perpetuities.

[(*k*) 16 Sim. 83, affirmed 1 M. & Gord. 460.

(*l*) Charitable trusts seem to be the only perpetuities which an individual is clearly permitted to create: *Carne* v. *Long*, 4 Jur. N. S. 474, 6 ib. 639, 27 L. J. Ch. 589, 29 ib. 503: unless it be a trust to keep the testator's tomb or monument in repair (which, as we have seen, is not a charitable trust, ante, p. 194). Sir *L. Shadwell*, V. C., appears to have considered such a trust good (*Willis* v. *Brown*, 2 Jur. 987), but Sir *R. T. Kindersley*, V. C. doubted its validity, (*Lloyd* v. *Lloyd*, 2 Sim. N. S. 264.)]

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Effect of possession only being too remote.

It is, of course, no objection to the validity of a devise, that it postpones the possession beyond the limits prescribed for the vesting of estates; for, in such a case, the doctrine under consideration has no other effect than to vacate the postponement, and thereby accelerate the possession. Thus where (*m*) lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and among all and every the issue, child and children of B., as should be living at the time of the decease of the survivor of A. and B., to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, &c., and if only one, then the whole to such only or surviving child in fee upon attaining the said age; it was contended that the gift to the children was too remote; but the Court of Common Pleas, on a case from Chancery, certified, that the children living at the death of the survivor took "*equitable* estates in fee," (the Court, it should seem, by the terms of the certificate, having lost sight of its incapacity as a Court of law to recognize equitable interests).

Question whether specified age is the period of vesting, or of shares becoming absolute.

It is often, however, a matter of no inconsiderable difficulty from the ambiguity of the testator's language, to determine whether the postponement applies to the vesting or only to the enjoyment; and if the original gift is followed by a clause disposing of the shares of objects dying under the specified age, a further and still more perplexing question arises; namely, whether the vesting is originally deferred until the prescribed age, or the shares are immediately vested, with a liability to be divested; in other words, whether the specified age is the period of vesting or the period of the shares becoming absolute, in case of the objects dying before such age. This question, which is fully discussed in a future chapter (*n*), is most important in reference to the application of the rule against perpetuities, for if the shares are immediately vested, and the remoteness affects

(*m*) *Farmer* v. *Francis*, 9 J. B. Moo. 310, 2 Bing. 151; see also *Murray* v. *Addenbrook*, 4 Russ. 407; [*Jackson* v. *Majoribanks*, 12 Sim. 93; *Milroy* v. *Milroy*, 14 ib. 38; *Greet* v. *Greet*, 5 Beav. 123; *Harrison* v. *Grimwood*, 12 ib. 192.]

(*n*) As these cases are dealt with on the ordinary and general principles of interpretation, which are unsparingly applied without regard to consequences, and the fact of any proposed construction rendering the intended gift void for remoteness is not allowed to exert any influence, [see *Jee* v. *Audley*, 1 Cox, 324; *Speakman* v. *Speakman*, 8 Hare, 120,] it is obvious that the cases referred to in the text have no peculiar connexion with the subject of the present section, but belong rather to Chapter XXV., which treats of the vesting of estates, where, accordingly, they will be found. Vide *Doe* d. *Roake* v. *Nowell*, 1 M. & Sel. 327, 5 Dow, 202; and other cases, post; also *Vawdry* v. *Geddes*, 1 R. & My. 203, ante, *Blease* v. *Burgh*, 2 Beav. 221.

only the clauses of accruer, or other the gifts engrafted on or limited in derogation of the original gift, the effect of the rule is, not to invalidate such original gift, but to render it absolute, by relieving it from the clauses which qualified or divested the interests of its objects.

But though the Courts will not violate the established rules of construction for the sake of bringing a gift within legal limits; yet an anxiety to prevent a testator's dispositive scheme from proving abortive, on account of its remoteness, is plainly discoverable throughout the cases. To this anxiety we may ascribe the rule, which recent cases seem to establish, that where a testator has by his will made an absolute bequest in favour of unborn persons, and has afterwards by a codicil revoked such bequest, and in lieu thereof given to the same legatees life interests only, with remainder to their children, (which substituted bequest of course would be void as to the children,) the codicil may be rejected, and the legatees take the interests originally given them by the will (*o*).

Clauses illegally modifying previous absolute gifts rejected.

And this rejection of qualifying clauses, ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper, and in spite, too, of the principle hereafter discussed, which prefers the posterior of two inconsistent clauses; it being considered, (for this is the ground upon which alone the construction can be defended,) that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one. As in the case of *Carver* v. *Bowles* (*p*), where a testatrix, having under her marriage settlement a power of selection in favour of her children, appointed the settled fund to her five children, two sons and three daughters, absolutely in equal shares; and then proceeded to declare that the one-fifth so appointed to each of her daughters, she did thereby, so far as she lawfully might or could, order and appoint should be held upon trusts for the daughter for her separate and inalienable use for life; and after her decease for her children, and in default of children, subject to her general power of appointment, and in default of appointment, for her next of kin. Sir *John Leach*, M. R., held, that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inopera-

(*o*) *Arnold* v. *Congreve*, 1 R. & My. 209.

(*p*) 2 R. & My. 306; see also *Church* v. *Kemble*, 5 Sim. 525.

tive, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation or alienation (*q*).

So, in the case of *Kampf* v. *Jones* (*r*), where a testatrix having under a settlement a power of selection over a fund in favour of her children or more remote issue, by her will appointed it to her five children in equal shares; and directed that the share of one of those children, a daughter, should be considered a vested interest in her upon attaining twenty-one or marrying with consent; but she directed that the share should be vested in trustees upon trust for the daughter for life, and after her death, for her issue. Lord *Langdale*, M. R., held, on the authority of the last case, that the absolute gift ought to have effect, subject to the limitations which were within the power, and free from the others.

It is to be presumed, (though the fact is not distinctly stated,) that the daughter to whom a life interest was appointed was not in existence at the time of the execution of the settlement, on which ground the appointment to her issue would have been too remote.

Gift absolute, notwithstanding subsequent modifying clause.

Again, in the case of *Ring* v. *Hardwick* (*s*), where a testator gave his residuary personal estate to trustees, upon trust to pay the income to his wife during widowhood, and after her death or second marriage, upon trust to make a division of all his said personal estate between his four children, namely, his two sons A. and B., and his two daughters C. and D., with directions concerning the accumulation of the income, in augmentation of the principal. The testator then, after directing 2000*l.* to be taken out of his sons' shares, to augment the shares of his said two daughters; and, after bequeathing the shares of his sons who should die unmarried and without issue before their shares became payable, to his two daughters, if living at the decease or marriage of his wife, proceeded to declare, that as touching and concerning the shares of his personal estate, which, with the augmentations, would become the property of his daughters, his will

(*q*) The M. R. therefore thought that this restriction took effect; [but Sir *W. P. Wood*, V. C., in *Fry* v. *Capper*, Kay, 163, appeared to think that such a restriction was void as creating a perpetuity. And see *Dickinson* v. *Mort*, 8 Hare, 178; and observations 2 Jur. N. S. Pt. 2, p. 214.]

(*r*) 2 Kee. 756.

(*s*) 2 Beav. 352; [see also *Blacket* v. *Lamb*, 14 Beav. 482; *Harvey* v. *Stracey*, 1 Drew. 73; *Fry* v. *Capper*, Kay, 163; *Stephens* v. *Gadsden*, 20 Beav. 463; *Gerrard* v. *Butler*, ib. 541; *Courtier* v. *Oram*, 21 Beav. 91.]

was, that the same should immediately upon the decease or second marriage of his wife, be invested upon security; and as to the share of C., upon trust to permit her to receive the income during her life, and after her decease, to divide the capital between all the children of C., *to become vested in such children respectively at the age of twenty-five years;* and if any such children should die under that age, their shares to be divided amongst the survivors of such children who should live to attain that age; and if only one such child should live to attain that age, then that the whole of such share and augmentation should belong to such only child upon attaining that age; and if C. should die without leaving any child who should live to attain twenty-five, then over. The testator then declared similar trusts of the share of D.; and the will provided, that in case of the death of C. or D. before the children of either should have attained twenty-five, it should be lawful for the trustees to raise any part of the share of such children for their advancement. Lord *Langdale*, M. R., was of opinion that the gift to the children of C. was void for remoteness, as he did not concur in the argument, which had been much pressed at the bar, that the children took vested interests, subject to be divested in case they should die under the age of twenty-five (*t*). It was true, that, in the clause for advancement, the word "shares" was used, but it meant the shares given to the children who should attain twenty-five. His Lordship thought, however, (and this is the material point in regard to the subject under discussion,) that the prior words of division among the testator's children amounted to an absolute gift to the daughter in the first instance, and that such absolute gift being followed by restrictions which were void, the absolute gift remained in force.

As to implying estates which would be too remote.

Upon the same principle, there is always a disinclination in the Courts to apply those liberal rules of construction, which, in favour of the apparent intention, as collected from the context, operate to raise devises by implication, in the absence of words of positive gift, where the effect of such implication would be to impute to the testator a scheme of disposition at variance with the principle of law, which regulates and restricts the period of vesting (*u*).

Doctrine of cy près, or approximation.

The most striking illustration, however, of the anxiety of the Courts to prevent the total disappointment of the testator's inten-

(*t*) As to this, vide p. 274. post, note (*x*).
(*u*) *Chapman* v. *Brown*, 3 Burr. 1626,

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tion, by the operation of the rule against perpetuities, is afforded by the doctrine of cy près or approximation (as it is called). This doctrine applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended, (the remainder to the issue being, as we have seen, absolutely void,) the doctrine in question gives to the parent the estate tail that was designed for the issue; which estate tail (unless barréd by the parent or his issue being tenant in tail for the time being,) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate. and the latter is therefore sacrificed. The first clear (*x*) authority for the doctrine is the case of *Nicholl* v. *Nicholl* (*y*), where the devise was "to the second son of W. Nicholl (who at the death of the testator had no son) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, in tail male, remainder over." The Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son by executory devise; and, in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate.

Unborn tenant for life made tenant in tail under the cy près doctrine.

So, in *Robinson* v. *Hardcastle* (*z*), where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and, in de-

(*x*) The case of *Humberston* v. *Humberston*, 1 P. W. 332, has usually been considered as a leading authority for the doctrine. A testator directed trustees to convey lands to M. H for life, and then to his first son for life, and so to the first son of that first son for life, &c. This trust was executed by a strict settlement, making the sons born before the death of the testator tenants for life, and those born afterwards, tenants in tail. The trust however, being executory, the Court was authorized to mould the limitations so as to bring them within the established limits, independently of the doctrine in question. (See 2 Sim. 282.) [So also in *Lyddon* v. *Ellison*, 19 Beav. 565, where the property was personal, and the cy près doctrine therefore inapplicable.] The case of *Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1626, 3 B. P. C. Toml. 269, cited Butl. Fea. C. R. 207, n., is also distinguishable, (though the doctrine was much discussed,) as there was an express devise in tail to the unborn son, and the only question was, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good.

(*y*) 2 W. Bl. 1159.

(*z*) 2 T. R. 241, 380, 781.

fault, over. A. by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male, with remainder to his daughters as tenants in common in tail. Mr. Justice *Buller* expressed an opinion that the son, by the application of the cy près doctrine, took an estate tail; but the Court was not called upon to decide the point.

Case of *Pitt* v. *Jackson*.

The case, however, which has carried this doctrine farther than any other, is *Pitt* v. *Jackson*(*a*), where, by a settlement on the marriage of P. W., certain monies were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage, subject to such powers, limitations, and provisoes as P. W. by deed or will should appoint, with remainders over. By will P. W. appointed trust monies to be laid out in real estate, to be conveyed in trust for his daughter M., during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter, as tenants in common in tail*, with remainders over. Sir *Lloyd Kenyon*, M. R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was to effectuate the testator's general intention, to be considered to vest in her an estate tail.

Remarks on the case of *Pitt* v. *Jackson*.

In this case, the nature of the estate appointed to the children differed widely from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In all the preceding cases, the first and other sons were to take *successively*; here, all the children, female as well as male, were to take *concurrently*. The authority of *Pitt* v. *Jackson* [has been often doubted;] even the eminent Judge who decided it, on a subsequent occasion admitted that it went to the outside of the rules of construction: adding, however, that still he did not think it was wrong (*b*); [and it has been recently cited with approbation by Sir *E. Sugden*, in *Stackpoole* v. *Stackpoole* (*c*), and has been followed by Sir *J. Wigram*, V. C., under precisely similar circumstances in *Vanderplank* v. *King* (*d*).

Though doubted;

—it has been recently confirmed.

It will be observed that the cases of *Pitt* v. *Jackson* and *Stackpoole* v. *Stackpoole* show that the doctrine in question

(*a*) 2 B. C. C. 51, cited 2 Ves. jun. 349; see also *Smith* v. *Lord Camelford*, 2 Ves. jun. 698.

(*b*) 1 East, 451.

[(*c*) 4 D. & War. 320.

(*d*) 3 Hare, 1.

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[applies to an execution of a power by will as well as to an ordinary devise.

The converse case of *Pitt* v. *Jackson* does not hold.

The construction in the case of *Pitt* v. *Jackson*, though nominally carrying the property to all the persons intended, yet, by giving them successive estates tail, was almost equivalent to excluding all the class except the first taker; Sir *J. Wigram* apparently taking this view, and thinking that the converse equally held good, considered, in the case of *Monypenny* v. *Dering* (*e*), that the cy près doctrine might be applied, so as to give the first son of P. M. an estate tail, although the property would thereby devolve on the second and other sons of P. M., to whom no interest was expressly given by the will; that the object was to carry out as far as possible the general intention of the testator, and that in doing so, as persons intended to take might be excluded, as in *Pitt* v. *Jackson*, so in the case before him persons not intended to take might be included. Lord *St. Leonards*, however, denied (*f*) that the cy près doctrine could be applied to carry an estate to a class or a portion of a class for whom the testator never intended to provide. He observed that, "for persons for whom the testator did intend to provide, a different provision might indeed be made, as was done in the case of *Pitt* v. *Jackson*; there the estate was intended to go to the children as purchasers as tenants in common, but it was not within the power of the testator to give them that estate, and the Court therefore would not raise it; but it raised an estate, which, though it would not go modo et formâ, as the testator had provided, would go to all the class for whom he intended to provide."

Whether the cy près doctrine can be applied as to some only of a class.

In the case of *Vanderplank* v. *King* (*g*), the question arose, whether the cy près doctrine could be applied to some of a class and not to others. The testator devised lands to his daughter (who was living at his decease) for her life, with remainder to all her children (as it was decided) as tenants in common for their lives, with remainder to the grandchildren per stirpes in tail, with cross remainders between the grandchildren of each stock, and also (as it was held) between each stock of grandchildren. The testator's daughter had several children living at his death, to whom alone estates for life with remainder to their issue could be legally limited; one child named Matilda was born after the

[(*e*) 7 Hare, 568, stated ante, p. 267.
(*f*) *Monypenny* v. *Dering*, 2 D. M. & G. 174, 175.
(*g*) 3 Hare, 1. See also *Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485.

[testator's decease, the remainder to whose issue was void for remoteness, and Sir *J. Wigram*, V. C., decided that the cy près doctrine was to be applied to the share of Matilda, and that she took an estate tail, but that it was not necessary similarly to modify the estates limited in the shares of the other children; Matilda in fact was made to stand in the same position as a single child of hers would have done, under the will and apart from the perpetuity rule, she being dead.

Doctrine of cy près not confined to first set of limitations.

The doctrine in question is not confined to the first set of limitations requiring modification, but is extended to all that follow; thus, in the case of *Hopkins* v. *Hopkins* (*h*), a testator devised lands in trust for I. H. for life, with remainder to S. H., son of I. H. for life, with remainder to the first and other sons of S. H. successively in tail, and for want of such issue, in case I. H. should have any other son or sons, then in trust for all and every of such other son and sons respectively and successively for their respective lives, with like remainders to their several sons successively and respectively as were thereinbefore limited to the issue male of the said S. H., with remainders over. S. H. died in the testator's lifetime without issue, and I. H. never had any other son, so that it was necessary to apply the cy près doctrine to the limitations to his other sons for life, with remainder to their issue, the remainder to such issue being too remote; and as the remainders over were held good, it is clear that it was considered that not only the second, but the third and every other son of I. H. would, under the doctrine in question, have taken an estate tail.]

Doctrine of cy près not to be extended;

Lord *Eldon* has observed, [with respect to the cases on the doctrine of cy près,] that it was not proper to go one step further; for in those cases, in order to serve the general intent and the particular intent they destroy both; [and, accordingly,] it has since been decided, first, That it does not apply to limitations of personal estate (*i*), [nor of a mixed fund (*k*)]; secondly, That it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations (*l*); and, thirdly, That the doctrine is not applicable where the limitation

—where it does not apply.

[(*h*) Co. Lit. 272, a, Butler's note 1, vii. 2, 1 Atk. 581.]

(*i*) *Routledge* v. *Dorril*, 2 Ves. jun. 365; [but see *Mackworth* v. *Hinxman*, 2 Keen, 658.

(*k*) *Boughton* v. *James*, 1 Coll. 44, 1 H. of L. Ca. 406.]

(*l*) *Somerville* v. *Lethbridge*, 6 T. R. 213; *Seaward* v. *Willock*, 5 East, 198; *Beard* v. *Wescott*, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25.

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to the children of the unborn person gives them an estate in fee-*simple*. The last point was decided in the case of *Bristow* v. *Warde* (*m*), where money directed to be laid out in land was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband, in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease, among their children, as they should appoint; it was held to be real estate, and that the husband's appointment (which, if valid, would have the effect of vesting absolute interests in the grandchildren equally, in default of appointment by the children,) was void as to the grandchildren, and could not, as Lord *Loughborough* was of opinion, be executed cy près (*n*).

SECTION III.

For what Period Income may be accumulated.

Old rule fixing extent of prospective accumulation of income.

FORMERLY the rule that fixed the period for which the vesting of property might be suspended, regulated also the power of deferring its enjoyment; it being then permitted to a settlor or testator to create an accumulating trust absorbing the entire income during the full period for which the vesting might be protracted, and whether it was or was not so protracted. And no inconvenience appears to have been felt in allowing so wide a range of accumulation, few persons having availed themselves of the permission to a mischievous extent, until Mr. Thellusson made the extraordinary and well-known disposition of his immense property (*o*), by the operation of which, every child and more remote descendant born or rather procreated in his lifetime, (and which included every individual of those descendants towards whom personal knowledge and intercourse might have been supposed to induce a particular affection,) were excluded from enjoyment, for the purpose of swelling, to a princely magnitude,

(*m*) 2 Ves. jun. 336; [and see *Hale* v. *Pew*, 25 Beav. 335; and it is not admitted in construing a deed, *Brudenell* v. *Elwes*, 7 Ves. 390.]

(*n*) See further, as to the doctrine of cy près, Sugd. Pow. and Fearn. Cont. R. Butl. ed.

(*o*) 4 Ves. 227.

the fortune of some remote and unascertained scions of the stock. The necessity then became apparent, of preventing, by legislative enactment, the repetition of a scheme of disposition fraught with so much mischief and hardship. This led to the stat. 39 & 40 Geo. 3, c. 98, which, after reciting that it was expedient that all dispositions of real or personal estate, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereinafter contained, proceeded to enact, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, for any longer term than *the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mère at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated;* and in every case, where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." Sect. 2 provides, "That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood, upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act

Stat. 39 & 40 Geo. 3, c. 98.

Accumulation restrained, unless for life of settlor, or for twenty-one years, or during minority, &c.

Act not to extend to provisions for debts, or portions for children;

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had not passed." By sect. 3, the act is not to extend to heritable property in Scotland (*p*), nor, by sect. 4, to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing.

—nor to Scotland; nor to prior wills, unless &c.;

[This statute, having been passed just before the Irish Act of Union came into operation, does not extend to Ireland (*q*).

—nor to Ireland.

The 3rd section as to Scotland has since been repealed by the statute 11 & 12 Vict. c. 36, s. 41.

How the period of twenty-one years is to be calculated;

The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death (*r*), and must be a period immediately following his death. Thus, if the accumulation be fixed to commence at a time subsequent to the testator's death, it will necessarily cease when twenty-one years from his death have elapsed, though it may have been in operation only one or two years (*s*); and a testator or settlor is not at liberty to take more than one of the several periods of accumulation mentioned in the statute; for instance, he cannot direct an accumulation for a term of twenty-one years from his decease, and also during the minority of a person entitled under the limitations (*t*).]

—one of the periods only can be taken.

As to accumulation during the minority of an unborn person entitled under the trusts.

The clause which would seem to afford the widest range of accumulation, is that which authorizes it during the minority of any person, who would, if of full age, be entitled, under the trusts, to the income; and who, it will be remembered, might, under the rule of law discussed in the last section, be any person coming into existence during a life in being at the testator's decease. It has been thought, however, that this seemingly important clause is rendered inoperative by the construction put upon it in the case of *Haley* v. *Bannister* (*u*), where the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated, until one of the children of his daughter, born, or to be born, should attain the age of twenty-one, when the whole was to be transferred to such child, and any other child or children who might be then living; the will contained a residuary clause. Sir *J.*

Case of *Haley* v. *Bannister*.

[(*p*) But a direction to invest accumulations in lands in Scotland will not bring the case within s. 3. *Macpherson* v. *Stewart*, 28 L. J. Ch. 177.

(*q*) *Ellis* v. *Maxwell*, 12 Beav. 104.

(*r*) *Gorst* v. *Lowndes*, 11 Sim. 434; *Lester* v. *Garland*, 15 Ves. 248.

(*s*) *Shaw* v. *Rhodes*, 1 My. & Cr. 154; *Webb* v. *Webb*, 2 Beav. 493; *Att.-Gen.* v. *Poulden*, 3 Hare, 555; *Nettleton* v. *Stephenson*, 3 De G. & S. 366.

(*t*) *Wilson* v. *Wilson*, 1 Sim. N. S. 288; *Rosslyn's Trust*, 16 Sim. 391; *Ellis* v. *Maxwell*, 3 Beav. 595.]

(*u*) 4 Mad. 275.

Leach, V. C., said, " The statute prevents an accumulation of interest *during the minority of an unborn child;* but as to the principal, the law remains as before the statute. The excess of accumulation prohibited by the statute would form part of the residue."

[By the words " during the minority of an unborn child," the learned Judge must, it is conceived, have meant " until an unborn child should come of age," which was the case before him : his decision in this view could only be that the *whole* of such period could not be taken, not that that part of it during which the child is in existence and a minor could not be taken alone. However, Lord *Langdale*, M. R., in *Ellis* v. *Maxwell* (*x*) observed, " If the accumulation is permitted only during the minority of a person entitled under the uses of the will, and no time is allowed either before the minority commences or after it has ceased, it does not seem that any thing is added to the permission to accumulate during the minority of a person living at the death of the testator. But taking the words as they are, they do not appear to permit accumulation during a minority, and a time to elapse between the death of the testator and the commencement of the minority;" and after noticing the cases of *Longdon* v. *Simson*, and *Haley* v. *Bannister*, his Lordship continued :—" These cases prevent me from considering, that upon the construction of the act the accumulation would be lawful during the minority of any grandchild born after the death of the testator." The case, like *Longdon* v. *Simson* and *Haley* v. *Bannister*, involved an accumulation not only during the minority of an unborn person, but also until he should be born; and though it has been recently said (*y*), that, in *Haley* v. *Bannister*, Sir *J. Leach* held, that the statute referred only to the minority or successive minorities of persons in existence at the time the will came into effect, and that the same point was affirmed and *extended* in *Ellis* v. *Maxwell*, yet it is clear that the point was not touched by the actual decision in either of those cases, which fell under the ordinary rule that only one of the periods allowed by the statute can be taken. The construction put upon the statute by the dicta cited above virtually strikes out of the act the clause in question, and] seems to place in some peril the accumulating trusts ordinarily introduced into provisions for the maintenance during minority of persons unborn at the testator's

Observations of Lord *Langdale* on *Haley* v. *Bannister*.

Observations of Sir *J. Romilly*.

Its effect upon trusts which, after providing for maintenance, direct accumulation of surplus income.

(*x*) 3 Beav. 596. (*y*) *Bryan* v. *Collins*, 16 Beav. 17.

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decease, which direct the unapplied surplus income from time to time to be added to the principal. Such trusts, however, are distinguishable from the bequest in *Haley* v. *Bannister* in this, that they extend only to the unapplied surplus, and not to the entire income (*z*), and, therefore, approach more closely to the principle of the rule of law, which accumulates the income of minors after providing for maintenance; though they differ from that rule in regard to the ultimate destination of the accumulated fund, which the law gives to the minor himself, but which the express trust commonly attaches to the principal fund; though even this difference is considerably narrowed, where the trustees possess (as they commonly do, and always ought to do) a power of applying the accumulated fund at any subsequent period of minority, which clause would certainly afford a strong argument for taking the trusts in question out of the principle of *Haley* v. *Bannister*, if that case can be supported. Indeed, considering the extreme inconvenience of holding the ordinary accumulating maintenance trusts in favour of unborn persons to be invalid, the Courts would no doubt struggle to avoid such a conclusion.

Trusts embracing too wide an accumulation good pro tanto.

It is well settled, that a trust for accumulation exceeding the statutory limit, is good *pro tanto*. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B., (who had no child at the death of the testator,) and on their attaining twenty-one to be divided among them; Sir *W. Grant*, M. R., held, that the accumulation was good for twenty-one years from the death of the testator, though void for the subsequent period (*a*).

The act does not impliedly make valid trusts for accumulation previously bad.

[But a trust for accumulation which not only exceeds the statutory limits, but also the period allowed by the rule against perpetuities, is, like any other such limitation, void *in toto*, even though it be for a purpose excepted from the operation of the act; for the act does not by the exceptions contained in it impliedly make valid what was previously invalid (*b*).

Accumulation for payment of testator's debts valid, though

An accumulation for the payment of the debts of the testator, as has been before noticed (*c*), only apparently contravenes the

[(*z*) But the act expressly includes partial accumulations.]

(*a*) *Longdon* v. *Simson*, 12 Ves. 295; see also *Griffiths* v. *Vere*, 9 Ves. 127; *Palmer* v. *Holford*, 4 Russ. 403; [*Rosslyn's Trust*, 16 Sim. 391, and cases in this section, passim.

[(*b*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Marshall* v. *Holloway*, 2 Sw. 432; *Browne* v. *Stoughton*, 14 Sim. 369; (as to which cases see ante, p. 254); *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Boughton* v. *James*, 1 Coll. 26, 1 H. of L. Ca. 406.

(*c*) Ante, p. 255.

[rule against perpetuities, and is therefore good, though its duration be unlimited (*d*). And a direction to accumulate until a certain sum be reached, though not in terms limited in duration, and though the accumulations may not amount to the stated sum within the necessary limits of time, is nevertheless good if the total amount to be raised is so disposed of as necessarily to vest absolutely in some person or persons within those limits, since those persons might at any moment after the vesting stop the accumulations and dispose of the fund (*e*). But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which protects a similar provision for payment of the testator's own debts, and is therefore valid by the common law only for the period of a life in being and twenty-one years after. The Thellusson Act leaves this rule untouched, sect. 2 excepting from the operation of the first section "all provisions for payment of debts of any grantor, settlor or devisor, *or other person or persons*" (*f*). And this has been held to include not only debts due at the testator's death but future debts accruing within the period last mentioned (*g*).

to endure longer than a life and twenty-one years;

—but if for payment of the debts of another, good only if within that limit;

—rule not affected by the Thellusson Act.

The exception in the act respecting accumulations for the purpose "of raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under such conveyance, settlement or devise," has created great difficulty. To the first question, what is a "portion," it seems to be agreed that no definite answer can be given, and that the true meaning of the term can only be arrived at approximately by determining what it is not. Lord *Langdale*, M. R., considered (*h*), that accumulations directed for the purpose of being added to the capital fund, followed by a gift of the aggregate fund comprising both capital and accumulation, could not be considered as a provision for raising portions; and Sir *R. T. Kindersley*, V. C., in the case of *Bourne* v. *Buckton* (*i*), and Sir *J. Stuart*, V. C., in the case of *Wildes* v. *Davies* (*k*), concurred in this opinion, and decided accordingly. Again, in *Burt* v. *Sturt* (*l*), where legacies were given to all the

Construction of the exception as to accumulation for children's portions.

Adding accumulations to capital is not a raising of portions.

[(*d*) *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, see p. 65; *Bacon* v. *Proctor*, T. & R. 40; *Bateman* v. *Hotchkin*, 10 Beav. 426.

(*e*) *Oddie* v. *Brown*, 4 De G. & J. 179. And see *Williams* v. *Lewis*, 6 H. of L. Ca. 1013, in which case the amount to be raised *must* have been reached far within the limits.

(*f*) 2 D. M. & G. 498.

(*g*) *Varlo* v. *Faden*, 27 Beav. 255; on app. 29 L. J. Ch. 234.

(*h*) *Eyre* v. *Marsden*, 2 Keen, 573.

(*i*) 2 Sim. N. S. 91.

(*k*) 1 Sm. & G. 475.

(*l*) 10 Hare, 415. See also *Drewett* v. *Pollard*, 27 Beav. 196.

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[testator's children, and the residue was directed to be accumulated during the lives of the children and of the survivor of them, and after the decease of the survivor the whole was to be divided between the grandchildren of the testator then living, Sir *W. P. Wood*, V. C., said it was simply a scheme of the testator for the purpose of accumulating his property into one mass, and handing it over in that mass at the remote period of the death of the survivor of a number of persons whom he had mentioned to two or three or possibly one favoured individual; it did not seem to him that in any sense or upon any rational construction he could call that the raising of a portion for children: in truth it was only the Thellusson scheme arranged in a somewhat less complicated and less extensive shape.

In the case of *Edwards* v. *Tuck* (*m*), Lord *Cranworth*, C., approved of and followed the principle of these decisions. He observed, it could never be said that a direction to accumulate all a person's property, to be handed over to some child or children when they attain twenty-one, could be a direction for raising portions for the child or children; it was not raising a portion; it was giving everything. A portion ordinarily meant a part or share. . . . Children born or unborn were almost always the objects of accumulation. That the legislature meant to stop excessive accumulations for children was quite clear; and, therefore, if every direction for accumulation that was for a child was a portion it would be entirely defeated.

The parent being residuary legatee does make a legacy to a child a portion.

So, in *Jones* v. *Maggs* (*n*), where a legacy was given to be accumulated for a child, and the residue of the personal estate was given to the parent, Sir *G. Turner*, V. C., thought that the gift to the child could not be considered as a portion, though in a certain sense it was raiseable out of the property of the parent; otherwise every legacy given to a child of a residuary legatee must be so construed and the act would be defeated.

Case of *Middleton* v. *Losh*, opposed to foregoing cases.

The case of *Middleton* v. *Losh* (*o*), before Sir *J. Stuart*, V. C., is somewhat opposed to the foregoing decisions. The testatrix bequeathed the sum of 50,000*l.* to trustees upon trust to invest the same and apply a competent part of the income towards the maintenance and support of her son W., and to accumulate the remainder, and after his decease upon trust to divide the capital and accumulations between the children of W., and in case of

[(*m*) 3 D. M. & G. 40.
(*n*) 9 Hare, 605.
(*o*) 1 Sm. & Gif. 61.

[the death of W. without issue the capital and accumulations to sink into the residue of her personal estate, the learned Judge admitting that several decisions afforded countenance to the contrary argument, yet having regard to the wider construction put upon the statute by Lord *St. Leonards*, in *Barrington* v. *Liddell* (*p*), in which he agreed, he thought that the case before him must be held to be within the exception as to portions. He further remarked, that the circumstance of W. being a lunatic would have caused the very accumulation which was objected to as being what the statute intended to prevent. This, it is conceived, can in no case have any influence, since the accumulation rendered necessary in case of lunacy, like that in case of infancy (*q*), is governed by different principles and is not touched by the statute.

Remark on *Middleton* v. *Losh*.

The reader will observe two points in which this case differs from previous decisions. 1. That the accumulations were for making additions to the capital fund, and the aggregate fund so formed was to be divided among the children of W. In this respect the case appears to go beyond the former authorities. 2. That the aggregate fund was not necessarily to go to the children of W., but if all his issue died in his lifetime it was to fall into the residue, so that it was not in all cases a fund for portions. If the learned Judge meant to decide that the accumulation was valid in one event, i. e., if W. left children to take (which though stated to be unlikely, was yet possible), but invalid in the opposite event; then the decision was warranted by the analogous distinction which prevails in the case of alternative gifts, which are remote and consequently void in one event, and not in the other: and is further maintained by the recent decision of Sir *W. P. Wood* in *Clulow's Trust* (*r*), where a fund was directed to be accumulated, and was given to the children of the testator's son (who took an interest under the devise); but if there should be no children, to such persons as the parent should by will appoint: although in the event of there being children, this might have been a provision for their portions, yet as there were none, and the testamentary power of appointment was clearly no "portion" for the parent, the direction to accumulate was held to be within the first section of the act, and invalid after the lapse of twenty-one years from the testator's death.

Accumulation valid or not according to the purpose whereto *in event* it is applicable.

[(*p*) 2 D. M. & G. 480.
(*q*) See 16 Beav. 18.
(*r*) 28 L. J. Ch. 696, 5 Jur. N. S. 1002.

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What are portions within the exception in the act.

[In the case of *Beech* v. *Lord St. Vincent* (*s*), lands were devised to A. for life, with remainder to his first and other sons in tail, with remainders over, and 2000*l.* per annum was directed to be accumulated for twenty-one years during the life of A., and so much longer as A. had any younger children; the accumulations to be held on certain trusts for such younger children. It was twice held that this was an accumulation for raising portions within the exception in the statute. And in the case of *Barrington* v. *Liddell* (*t*), where lands had been settled on the marriage of A. in the usual way, with a term of years for securing (in the events that happened) the sum of 40,000*l.* for younger children's portions; and, subsequently, a testator bequeathed a sum of 15,000*l.* in trust to accumulate during the life of A., until it reached the sum of 40,000*l.*, and then to be applied in satisfaction of the portions; and he gave another sum for building a mansion house on the settled estate; Lord *St. Leonards* held, that this was clearly within the exception, and that the accumulation might continue after the expiration of twenty-one years, computed from the testator's death. This is the first decision that a provision for raising or satisfying portions previously charged or created is within the exception in the statute.

Cases, similar to the two last stated, seem to be the only ones upon which in the present state of the law on this subject an opinion can with any certainty be given.

Whether it avails that the accumulated fund is called a portion.

A distinction has been taken by Sir *L. Shadwell*, V. C., between cases where shares of the accumulated fund are designated by the testator as "portions," and where not (*u*). Sir *R. T. Kindersley*, however, disapproved of this distinction (*v*), as well as of the distinction ascribed to the same Judge that the only *portions* to which the exceptions in the act refers are portions created by some instrument prior to the instrument directing the accumulations. The latter distinction is also opposed to the decisions of Sir *J. K. Bruce*, V. C., and Sir *J. Stuart*, V. C., in *Beech* v. *Lord St. Vincent* (*x*), the opinions of Sir *George Turner*, V. C., and Lord *St. Leonards*, expressed in *Barrington* v. *Liddell* (*y*), and the decision of Sir *John Stuart* in *Middleton* v. *Losh* (*z*).

What interest the parent

The next question is, what is the interest which a parent must

[(*s*) 3 De G. & S. 678; 3 Jur. N. S. 762.
(*t*) 2 D. M. & G. 480.
(*u*) *Halford* v. *Stains*, 16 Sim. 496.
(*v*) *Bourne* v. *Buckton*, 2 Sim. N. S. 96.
(*x*) 3 De G. & S. 678; 3 Jur. N. S. 762.
(*y*) 10 Hare, 429, 431, 2 D. M. & G. 498.
(*z*) 1 Sm. & Gif. 61.

[take under the conveyance, settlement, or devise, in order to render valid an accumulation for portions for his children? May it be an interest of any kind under the conveyance, settlement, or will, or must it be an interest in the *identical* property from which the income directed to be accumulated arises? and must it be a *bonâ fide* substantial interest, or will a merely nominal interest suffice? Sir *J. K. Bruce*, V. C., in *Morgan* v. *Morgan* (*a*), seems to have considered that a specific legacy to a parent would not substantiate an accumulation of the income of a general legacy to the child; but it is not clear that his decision wholly turned upon this point. Sir *George Turner*, V. C., in *Barrington* v. *Liddell* (*b*) considered that the interest of the parent must be an interest in the very fund directed to be accumulated; and of this opinion also seems to have been Sir *R. T. Kindersley*, in *Bourne* v. *Buckton* (*c*). Lord *St. Leonards*, on the other hand, in reversing the decision of Sir *George Turner*, in *Barrington* v. *Liddell* (*d*), denied both these positions, and decided that an interest in any property, under the instrument creating the portions, would be sufficient. This decision met with the approval of Sir *W. P. Wood*, V. C., in *Burt* v. *Sturt* (*e*), and is in accordance with the opinion expressed on this point by Lord *Cranworth*, in *Edwards* v. *Tuck* (*f*). As to the quantum of interest necessary in the parent, Lord *Lyndhurst*, in *Evans* v. *Hellier* (*g*), expressed his opinion, that any interest, however minute, would be sufficient. Lord *Brougham* was inclined to the same opinion; and Lord *St. Leonards*, in *Barrington* v. *Liddell* (*h*), noticed this expression of opinion with approval.

must take under the devise.

Whether the interest of the parent must be substantial.

The destination of the income which the statute releases from accumulation has occasioned much debate. The law on this point, however, now appears pretty well settled, and may be stated as follows:—

Destination of the income released from accumulation.

1. Where there is a present gift in possession, and the direction to accumulate is engrafted upon that gift, the statute, by discharging the property from the superadded trust, has the effect of entitling the donee or successive donees to the immediate income, as if the prior gift had stood alone (*i*).

2. Where the vesting of a contingent interest (*k*), or the pos-

[(*a*) 15 Jur. 319, 20 L. J. Ch. 109.
(*b*) 10 Hare, 435.
(*c*) 2 Sim. N. S. 100, 101.
(*d*) 2 D. M. & G. 500.
(*e*) 10 Hare, 423.
(*f*) 3 D. M. & G. 40.
(*g*) 5 Cl. & Fin. 126.
(*h*) 2 D. M. & G. 505.
(*i*) *Trickey* v. *Trickey*, 3 My. & K. 560; *Chilow's Trust*, 28 L. J. Ch. 696, 5 Jur. N. S. 1002.
(*k*) *Jones* v. *Maggs*, 10 Hare, 605.

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[session of a vested interest (*m*) is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in the one case, or the possession in the other; but where the property is not a residue carries the income in the case of personal property to the residuary legatee (*n*); and in the case of real property, to the residuary devisee, or heir, according as the will does or does not come within the statute 1 Vict. c. 26 (*o*). Where the residue is not given absolutely, but only for life or some other limited interest, the income forms part of the *capital* of the residue, so that the person having such limited interest is only entitled to the income of such income (*p*).

3. Where a residue is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle (*q*), devolve in the case of personal property to the next of kin (*r*), in the case of real property to the heir (*s*), and in the case of a mixed fund to the next of kin and heir respectively (*t*).

4. The income of the accumulations follows the same rule; therefore if the accumulations arise from personal property not being a residue, the income falls into the *capital* of the residue (*u*), so that a tenant for life would only be entitled to the income of such income; and where residuary personalty is directed to be accumulated, the income of the accumulations, of course, goes to the next of kin. Where the accumulations arise from residuary real estate, the accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations (*x*); and it would, of course, follow, that where the accumulations arose from real estate, other than residuary, the residuary devisee would, under the present law,

[(*m*) *Macdonald* v. *Bryce*, 2 Keen, 276; *Eyre* v. *Marsden*, ib. 574; *Ellis* v. *Maxwell*, 3 Beav. 597; *Nettleton* v. *Stephenson*, 3 De G. & S. 366; *Lord Barrington* v. *Liddell*, 10 Hare, 429.

(*n*) *Ellis* v. *Maxwell*, 3 Beav. 587; *Att.-Gen.* v. *Poulden*, 3 Hare, 555; *Jones* v. *Maggs*, 9 ib. 605.

(*o*) *Nettleton* v. *Stephenson*, 3 De G. & S. 366.

(*p*) *Crawley* v. *Crawley*, 7 Sim. 427; *Morgan* v. *Morgan*, 4 De G. & S. 175, 176, 20 L. J. Ch. 441.

(*q*) *Skrymsher* v. *Northcote*, 1 Sw. 566.

(*r*) *Macdonald* v. *Bryce*, 2 Keen, 276; *Pride* v. *Fooks*, 2 Beav. 437; *Elborne* v. *Goode*, 14 Sim. 165; *Wilson* v. *Wilson*, 1 Sim. N. S. 288; *Bourne* v. *Buckton*, 2 ib. 91; *Oddie* v. *Brown*, 4 De G. & J. 179.

(*s*) *Halford* v. *Stains*, 16 Sim. 488; *Wildes* v. *Davies*, 1 Sm. & G. 475.

(*t*) *Eyre* v. *Marsden*, 2 Keen, 564, 4 My. & Cr. 431; *Edwards* v. *Tuck*, 3 D. M. & G. 40; *Burt* v. *Sturt*, 10 Hare, 415.

(*u*) *Crawley* v. *Crawley*, 7 Sim. 427; *O'Neil* v. *Lucas*, 2 Keen, 316; *Morgan* v. *Morgan*, 4 De G. & S. 175, 20 L. J. Ch. 441.

(*x*) *Eyre* v. *Marsden*, 2 Keen, 577; this appears still more plainly from *Fitch* v. *Weber*, 6 Hare, 145; and other similar cases noticed post, which show that the next of kin can take nothing but what is personalty *at the time of the testator's death*.

[be entitled. In the case of *Ellis* v. *Maxwell* (*y*), where the rents of the testator's real estate were directed to *form part of his personal* estate, and the personal estate was directed to be accumulated, it was held that the income of the accumulations went to the residuary legatees. The case turned on the special words of the will.

Nature of the interest which devolves to the heir.

The interest which, by the operation of the statute, results to the heir, will be either a chattel interest, and pass on his death to his executors or administrators (*z*), or an estate of freehold; in which case it will devolve upon his heir, if he died before 1838 (*a*); if after 1837, upon his personal representatives (*b*).]

Trusts whose *effect* is to produce accumulation held to be within the statute.

In applying the statutory provision against accumulation, regard is had to the substance and effect, and not to the form and mere language of an instrument; for, if property be disposed of in such manner as to produce an accumulation of income, for a period exceeding what the statute authorizes, it will not avail that there is an absence of any trust expressly and in terms directed to this object.

As to accumulation under a residuary bequest in favour of unborn persons at majority.

An obvious case of this nature is that of a bequest of a general residue to a class of persons (some of them unborn at the testator's decease), whose shares are not to vest until the age of twenty-one years; for it is to be observed, that as a residuary bequest, to take effect in future, carries not only the bulk or corpus of the property, but also the intermediate income, it follows that the statute is infringed whenever the vesting, or even the distribution, is postponed until a period or event which occurs more than twenty-one years after the testator's decease, without any express application of the income accruing in the interval. [Sir *L. Shadwell* was indeed of opinion that the statute did not affect accumulations which arose from the nature of the gift, but operated merely to strike out of the will so much of a direction to accumulate as exceeded the prescribed limits (*c*); his opinion, however, is clearly opposed to the other authorities upon this question, including one of the highest court of appeal (*d*).

Where there is a contingent gift of a legacy to A. to vest

[(*y*) 12 Beav. 104.

(*z*) *Sewell* v. *Denny*, 10 Beav. 315.

(*a*) *Halford* v. *Stains*, 16 Sim. 488; in *Barrett* v. *Buck*, 12 Jur. 771, the personal representative of the heir was held to take, but as his right was not disputed, the case is scarcely an authority.

(*b*) 1 Vict. c. 26, s. 6.

(*c*) *Elborne* v. *Goode*, 14 Sim. 165; *Corporation of Bridgnorth* v. *Collins*, 15 ib. 538.

(*d*) *Evans* v. *Hellier*, 5 Cl. & Fin. 114; *S. C.* nom. *Shaw* v. *Rhodes*, 1 My. & Cr. 135; *Macdonald* v. *Bryce*, 2 Keen, 276; *Morgan* v. *Morgan*, 20 L. J. Ch. 111, 15 Jur. 319; *Tench* v. *Cheese*, 6 D. M. & G. 641; *Macpherson* v. *Stewart*, 28 L. J. Ch. 177.

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[upon a certain event, and an accumulation is directed in the mean time, and if the event does not happen the legacy and accumulations are given over to B., and at the end of a period greater than twenty-one years (say thirty years) from the testator's death, the happening of the event is first ascertained to be impossible, so that the gift to B. then takes effect in possession, it has been held by Sir *J. K. Bruce*, V. C. (*e*), that B. is to have all the intermediate *income* of the original and accumulated fund between the end of the twenty-one years and the happening of the event; Sir *J. Romilly*, however, in a similar case (*f*), intending to follow this decision, decided that B. is to have *simple interest* on the amount of that fund during the same period.

Whether insurances on lives form a mode of accumulation within the act.

In the late case of *Bassil* v. *Lister* (*g*), Sir *George Turner*, V. C., decided that a direction in a will to apply a sufficient part of the income of the testator's property in keeping up certain policies which he had effected on the lives of his children in their names, and which in case of their marriage he directed to be settled on their wives and children, was not a trust for accumulation within the statute, and was therefore valid beyond the period of twenty-one years from his death. The learned Judge observed, that "It was said in argument that the payment of the income to the Insurance Company was itself an accumulation; that the Company were recipients of the income for the purpose of accumulation; that what was done was the same thing as if the rents were paid to an individual, to accumulate in his hands, and to be paid over at the death of the life insured; and the case was presented to the Court in many similar points of view; but he did not see how the payment of the premiums to the Insurance Company out of the income was an accumulation of the income. The premiums, when paid to the Insurance Company, became part of their general funds, subject to all their expenses; and although it was true that the funds in the hands of the companies did generally produce accumulations, it was impossible to say what accumlations arose from any particular premium. It was said that it was an accumulation as to the estate, because the estate received back a certain sum upon the death of the party whose life was insured; but what the estate received back was not the accumulation of the income, but a sum payable by the office by contract with the testator; and was this an accumulation within the meaning of the statute?

[(*e*) *Morgan* v. *Morgan*, 20 L. J. Ch. 111, 441, 15 Jur. 319.

(*f*) *Bryan* v. *Collins*, 16 Beav. 14.

(*g*) 9 Hare, 177.

[The history of the statute went far to show that it was not, and he thought the language of the enactment confirmed that view. The enactment was, that no person should settle or dispose of real or personal estate, so and in such manner that the rents, profits, income or produce should be accumulated beyond the prescribed periods; and these were words which admitted of a clear, plain, common sense interpretation, as referring to the accumulation of rents, profits and income, quà rents, profits and income. Why was the Court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imported? It was said the Court ought to do so, because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appeared to him to beg the question; for it assumed that what was there called an accumulation, suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute. Much reliance was placed in the argument upon the mischief which might ensue from policies of insurance being resorted to for the purpose of evading the statute, if the dispositions of this will were upheld, but he entertained no apprehension of any such mischief; he thought that settlors and testators, who contemplated accumulations, were far too keen-sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand he saw enormous mischiefs which would arise from the construction for which the petitioner contended. The case before him was but one instance of the difficulties to which such a construction would lead. If it could be supported what was to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually, and the remaining profits are to accumulate and be divided at the end of the terms? What was to be done with policies of insurance on the lives of debtors (*h*)? And how was the case of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with?"

The reasoning of the learned Judge is not very satisfactory; he seems to argue that because of the mode of accumulation adopted the statute did not apply; but the terms of the statute are general, that no person shall "by deed or deeds, &c., or

[(*h*) The statute expressly excepts provisions for the payment of debts of *any* person, see 2 D. M. & G. 498.

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[*otherwise howsoever*, settle or *dispose* of his property so and in such manner" that the income thereof shall be accumulated; it can scarcely therefore be said that the act does not apply because a particular mode of accumulation is resorted to (*i*). To exclude the act, it must be denied that there is any accumulation of income whatever; but it could not be denied, nor did the learned Judge attempt to deny, that effecting an insurance was one mode of accumulation. This answers the objection, that, "though the funds of the company might be accumulated, it would be impossible to say what part of such funds arose from any particular premiums;" an objection which affects only the mode of accumulation. The testator's estate instead of getting back the total amount of premiums with compound interest, a sum varying in amount according to the period during which the premiums have been paid, gets back a *sum certain*, whatever that period be. This sum is not less the result of an accumulation, because it is of certain amount.

The least intelligible ground on which the decision is rested, is, that the sum paid back is in pursuance of a *contract*, and therefore not within the statute; this seems to beg the whole question, since, if there be an accumulation, the statute must reach it, whether it arise under a contract or by will: as was before observed, its terms are general; and a person can no more contract that his income shall be accumulated beyond the prescribed limits, than he could direct by will that it should be so accumulated; indeed, if the statute does not extend to contracts, it does not touch any accumulation made by marriage settlement, for every such settlement is a contract. The question put by the learned Judge as to what would become of partnership agreements for long terms of years, by which a certain sum is to be drawn out and accumulated annually, may, perhaps, be answered by another question, namely, supposing such agreements not to be affected by the act in question, yet what would become of them when considered with respect to the rule against perpetuities? an ordinary trust for accumulation, extending over a long term of years, (that is, as the learned Judge must have meant, more than twenty-one years,) would be void altogether as transgressing the rule against perpetuities (*k*); one of two things, therefore, is clear, either such agreements are not valid, or, if they are valid, they are governed by rules which do not hold good with regard to ordinary

[(*i*) And see the observations of Lord *Cranworth*, 6 D. M. & G. 462.

(*k*) *Palmer* v. *Holford*, ante, p. 229.

[trusts, and, in either case, no argument can be drawn from this source in support of the decision in *Bassil* v. *Lister*. Probably, the partnership agreements in question would be held good on the principle of the decision in *Bateman* v. *Hotchkin* (*l*), before noticed, that an accumulation which is capable at any moment of being put an end to (*m*), can infringe neither the statutory rule against accumulation, nor the common law rule against perpetuities. Lastly, as to the question what would become of settlements of policies of assurance with trusts for keeping them on foot by payment of the premiums, the answer seems to be, that they are either cases where security is given for a debt, or cases of settlement on a marriage, in which one of the settlors is the person during whose life the accumulation is to be made, both of which classes are within the exceptions of the statute under which a direct trust for accumulation would be good; and it is conceived that there is no authority for saying that any other settlement of policies of assurance are good, where a direct trust for accumulation would not also be good.

It will be observed, that the remarks of the learned Judge are irrespective of the fact, that the policies were effected in the testator's lifetime; his decision was, that insurance is not a mode of accumulation affected by the statute, and it would, therefore, have been the same, if the policies had been effected after the testator's death. By giving small conditional legacies, a testator could easily procure persons, after his death, to allow policies to be effected on their lives, in their names, and to assign them to the testator's trustees, than which an easier and cheaper mode of accumulation could not be devised.]

[(*l*) Ante, p. 255. (*m*) See *Downs* v. *Collins*, 6 Hare, 418.]

CHAPTER X.

FROM WHAT PERIOD A WILL SPEAKS.

From what period a will speaks.

For some purposes a will is considered to speak from its date or execution (*a*), and for others from the death of the testator: the former being the period of the inception, and the latter that of the consummation of the instrument. In determining to which of these the language points, it is necessary to distinguish between wills that are subject to the recent act, and those which are regulated by the pre-existing law.

First, with regard to wills made before the year 1838.

Expressions of present time refer to date of will.

It may be stated, as a general rule, that wherever a testator refers to an actually existing state of things, his language is referential to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word "now," or any other expressions pointing at present time.

"Now," how construed.

Thus, a devise to the descendants *now living* of A. has been held to comprise the descendants living at the date of the will, exclusive of such as come into existence between that period and the death of the testator (*b*), and who would, but for this restrictive addition, have been let in (*c*); and the same construction has obtained, even where the word "now" is combined with

Date and execution relatively considered.

(*a*) In this chapter, and indeed throughout the present work, the date and the period of execution are assumed to be identical; which, it is obvious, may not be the case, and then the question would arise—which is to predominate? It is conceived that, for some purposes, the date, and for others the time of execution, would do so. In regard to the will's capacity of operation on real estate, (supposing, of course, the will to be subject to the old law,) the period of the actual execution would be the material fact; but in regard to points of construction, the effect would sometimes, perhaps generally, depend on the date, or the time of *apparent* execution: for instance, if a testator dated his will on the 1st of January, 1830, and executed it on the 1st of June in the same year, a bequest in such will of "all the Three per Cent. Consols now standing in my name," possibly might be held to pass the Consols only of which he was possessed on the 1st of January, and not what he had acquired between the date and execution, and which he held on the 1st of June. [See *Randfield* v. *Randfield*, 6 Jur. N. S. 901, in D. P.]

(*b*) *Crossley* v. *Clare*, Amb. 397, 3 Sw. 320, n. See also *Att.-Gen.* v. *Bury*, 1 Eq. Ca. Ab. 201, pl. 12, 8 Vin. Abr. 328, pl. 2; *Abney* v. *Miller*, 2 Atk. 593; *Blundell* v. *Dunn*, cit. 1 Mad. 433; see also *All Souls' College* v. *Codrington*, 1 P. W. 597; but see *Rowland* v. *Gorsuch*, 2 Cox, 187.

(*c*) As to the construction of gifts to classes, vide Chap. XI. on Lapse, and Chap. XXX. on Devises to Children.

a term which could not have full effect, according to its technical import, unless used prospectively, as in the case of a devise to the heir male of the body of A. "now living," under which the heir apparent of A. living at the date of the will has been held to be entitled; so that the word "heir" was made to surrender its primary and proper signification, in order to give effect to the word "now," with which it stood associated (*d*).

Verbs in present tense.

On the same principle verbs in the present tense have a similar effect in restricting a devise or bequest to the subjects or objects existing at the date of the will, though in some of the cases considerable reluctance appears to have been manifested to carry out this principle, where its effect would be inconveniently to narrow the scope of the will, by excluding any who might be presumed to be intended objects of the testator's bounty.

Thus, in the case of *Wilde* v. *Holtzmeyer* (*e*), Sir *R. P. Arden*, M. R., expressed an opinion that a bequest of "all the property *I am* possessed of" would, if unrestrained by the context, extend to all the testator's personal estate at his death.

So, in the case of *Bridgman* v. *Dove* (*f*), it was held that a charge of all the debts I *have* contracted since 1735, extended to all debts owing by the testatrix at her decease, including those she contracted after the period referred to; [and in *Bland* v. *Lamb* (*g*), the words "I may have forgot many things, if such there is, it is to be thrown into the lump for the benefit of the legatees," were held by Lord *Eldon* to carry the residue at the testator's death.]

Again, in the case of *Ringrose* v. *Bramham* (*h*), Sir *Lloyd Kenyon*, M. R., held that a bequest of 50*l.* "to A.'s children, to every child he *hath* by his wife B.," to be paid to them as they should come of age, spoke at the time the will took effect, so as to let in all the children then living. The circumstances of the case, however, though not expressly adverted to by his Honor, perhaps aided the construction. The testator had directed a sum of money to be placed in the hands of a person until the children came of age, which exceeded the sum which would have been necessary for the purpose if the legacy were confined to the children then in existence. In regard to gifts

Gifts to children.

(*d*) *James* v. *Richardson*, T. Jon. 99, 1 Eq. Ca. Ab. 214, pl. 11, 1 Vent. 334, 2 Lev. 232, Raym. 330, 3 Keb. 832, Poll. 457; [*Burchett* v. *Durdant*, on same will, Skin. 205, 2 Vent. 311, Carth. 154.]

(*e*) 5 Ves. 816.

(*f*) 3 Atk. 201.

[(*g*) 2 J. & W. 399.]

(*h*) 2 Cox, 384.

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to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced the construction, that such cases are to be regarded as sui generis. To this anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children "begotten" extends to children born after the date of the will; and a gift to children "*to be* begotten" includes those antecedently in existence (*i*).

Doctrine as to specific bequests.

To return, however, to the general subject, it may be stated that where a testator, in a will which is regulated by the old law, refers to a specific subject of gift, he is considered as pointing at the state of facts while he is penning the instrument, and not at the time of his decease, even though he may not have used the word "now," or any other adverb emphatically denoting present time. The doctrine relating to the ademption of specific bequests stands upon this principle. Thus, if a testator, before the year 1838, having a leasehold messuage, or a sum of 1000*l.* three per cent. consols, bequeathed "all that my messuage in A.," or "all that sum of 1000*l.* three per cent. consols standing in my name," he is considered as referring to the house or the stock belonging to him when he made his will; and, therefore, if he subsequently disposes of such house or stock, the bequest fails, though he may at his decease happen to be possessed of a messuage or a sum of stock answering to the description in the will. [And the rule was the same where the testator having stock in his possession at the date of his will bequeathed it as "all my stock," and afterwards sold the stock and bought new, or added to the old: in the one case the bequest failed altogether, and in the other comprised only the old stock (*k*).]

Effect of renewal upon bequest of leaseholds.

And a new estate in leasehold property, acquired by a subsequent renewal of the lease or otherwise, is no less out of the reach of a specific disposition of such property, as ordinarily expressed, than an interest in any other property answering to the same locality; it being considered that the testator, when referring to the property in question, had in his contemplation exclusively the specific interest in it of which he was possessed when he made his will, though he has not in terms referred to such interest, but has used expressions descriptive of the corpus

(*i*) Co. Litt. 20 b; [see as to this, post, Chap. XXX.

(*k*) *Cockran* v. *Cockran*, 14 Sim. 248. [See also per *Wood*, V. C., *Goodlad* v. *Burnett*, 1 Kay & J. 347.]

of the property: as in the case of a bequest of "all my tithes and ecclesiastical dues at W. (*l*);" or "the perpetual advowson and disposal of the living or rectory of W. for ever, together with the tithes of all sorts thereof (*m*);" or "all my leasehold estates in the parish of C. (*n*)." In all such cases the renewal of the lease under the old law revoked the bequest, or rather, to speak more accurately, withdrew from its operation the property which was the subject of disposition: in short, effected what is technically called an ademption.

But though the general principle has long been settled, yet questions often arose in consequence of the context of the will affording ground to contend, that the testator intended any after-acquired interest of which he might become possessed by renewal, to pass under the bequest.

Renewed lease passes where benefit of renewal is included.

The renewed lease will pass where the testator includes in the bequest the right of renewal as an accessory to the immediate subject of disposition. And [where the lease of which a bequest is made is vested in a trustee for the testator and is renewed by the trustee, the gift of the property comprised in the lease being in fact a gift of the equitable interest which includes the benefit of renewal, the trust of any renewed term granted to the trustee would pass under such bequest (*o*), and the same principle applies to the case of a lease for lives with a covenant for perpetual renewal (*p*).]

Where (*q*) a testator, who was by his marriage settlement under an obligation to renew the lease of certain property which had been thereby settled, and the beneficial interest whereof was, in default of issue of the marriage, vested in himself, by his will bequeathed the property, describing it as his manor, &c. in L., held by lease from the Dean and Chapter of Windsor, to the trustees of his marriage settlement, upon certain trusts, including among others a trust to perform the covenants contained, as well in the then lease, as in any future leases thereafter to be obtained. Lord *Eldon* (affirming a decree of Sir *J. Leach*, V. C.) was of opinion that, regard being had to the language of the settlement and will, the testator must be considered as dealing with his whole interest and the obligations which existed, and that the devise passed all future renewals as

(*l*) *Rudstone* v. *Anderson*, 2 Ves. 418.
(*m*) *Hone* v. *Medcraft*, 1 B. C. C. 261.
(*n*) *Coppin* v. *Fernyhough*, 2 B. C. C. 291.
[(*o*) *Carte* v. *Carte*, 3 Atk. 174; *Slatter* v. *Noton*, 16 Ves. 200.
(*p*) See *Poole* v. *Coates*, 2 D. &. War. 493, 1 Con. & L. 531, stated ante, p. 147.]
(*q*) *Colgrave* v. *Manby*, 2 Russ. 238; see also 6 Mad. 72.

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well as the term which then subsisted. From the judgment of the Vice-Chancellor in this case, it would appear that he had fallen in with the notion of Lord *Hardwicke*, in *Carte* v. *Carte* (*r*), that a bequest of the testator's interest in leaseholds referred to his interest at the time of his decease. Lord *Eldon*, though he affirmed his Honor's decree, lent no countenance to any such doctrine; which, indeed, is directly encountered by the case of *Slatter* v. *Noton* (*s*), where a bequest by a lessee of her dwelling-house, and all her estate, term, and interest therein, was held not to include a term of years subsequently acquired by the renewal of the lease. It has been decided, however, by Lord *Eldon*, [in *James* v. *Dean* (*t*),] that a bequest of leaseholds "for all the residue of the term and interest I shall have to come therein at my decease," does not refer merely to the residue which might, at the testator's decease, happen to be unexpired of the term which existed at the making of the will, (as considered by Sir *Wm. Grant*, whose decree his Lordship reversed,) but comprises an interest subsequently acquired by renewal. And this seems to accord with the doctrine of *Churchman* v. *Ireland* (*u*), where a devise of all and singular the effects, real and personal, "which I shall die possessed of," was held to refer not merely to the lands then belonging to the testator of which he should die seised, but to all property which the testator might acquire after the execution of his will (*x*).

Whether word referred to present or future interest.

The learned reader will, no doubt, perceive the difference between cases in which a bequest of a term of years is adeemed by the renewal of the lease, and those in which the devise of a freehold estate is revoked by the effect of a conveyance, revesting the estate in the testator, but occasioning an interruption of his seisin (*y*). The ademption in the former case is not, like the revocation in the latter, the consequence of a technical rule of law, acting independently of volition, but is simply the effect of the absence of apparent intention to include the future interest. Accordingly it has been decided, that where a testator, after bequeathing, by a will made before 1838, a chattel lease, assigned it to a trustee for himself, the transaction had no revoking effect upon the prior bequest as to the equitable interest which remained in the testator (*z*), though the legal estate, which was

Difference between freeholds and leaseholds in regard to revoking effect of conveyances.

(*r*) 3 Atk. 174.
(*s*) 16 Ves. 197.
[(*t*) 11 Ves. 383, and 15 Ves. 236.]
(*u*) 1 R. & My. 250, overruling *Back* v. *Kett*, Jac. 534.
(*x*) See also *Thellusson* v. *Woodford*, 13 Ves. 209, 1 Dow, 249.
(*y*) Vide ante, p. 136.
(*z*) See *Woodhouse* v. *Okill*, 8 Sim. 115.

assigned to the trustee, was of course thereby withdrawn from its operation. Still less does the merely taking an assignment of the legal estate (which is the converse case) revoke the bequest (*a*); such an act, indeed, we have seen does not amount to revocation even of a devise of real estate (*b*); though of course, even in the case of a *chattel* lease, the legal estate would not pass by the bequest, unless it contained expressions adequate to comprise any future estate in the property. [Lands held under renewed leases for lives, as we have before seen, fell (previously to 1 Vict. c. 26) under a different rule from those held under renewed leases for years, and could not in any case have passed under a will made before renewal, though such will professed in terms to devise every future interest in the lands (*c*).]

Construction of words referring to an existing individual.

The same principle which governs the construction of expressions descriptive of a specific *subject* of disposition, applies also to the *objects* of gift. Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name who should survive him, such after-born son would not be an object of the gift. [Similarly, a gift to the child, with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favour of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for (*d*).] And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designation (*e*), as in the case of a gift to "my son" simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator.

Gifts to wife how construed.

A question of this nature [may arise on wills made before 1838,

(*a*) *Clough* v. *Clough*, 3 My. & K. 296.

(*b*) Ante, p. 144.

[(*c*) *Marwood* v. *Turner*, 3 P. W. 163.

(*d*) *Foster* v. *Cook*, 3 B. C. C. 346.]

(*e*) This position, however, is advanced with some diffidence, seeing the strong anxiety of the Courts to extend, as much as possible, gifts to children; [see *Perkins* v. *Micklethwaite*, ante, p. 185; and *Thompson* v. *Thompson*,, and *King* v. *Bennett*, post, Chap. XXX. Sect. 7.

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[containing a gift to the wife of the testator (*f*), and on all wills containing a gift to the wife of another person, under] which, on the principle just stated, the individual standing in the conjugal relation at the date of the will, would take, exclusively of any other person who might happen to answer the description at the death of the testator (*g*). Accordingly, by early writers it is laid down (*h*), that if one devise land to the wife of J. S., and J. S. die, and she take to husband J. D., and then the devisor die, she shall take the land; and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife: but the intent is, that she who *was* the wife of J. S. at the time of the making the will should have it, and the person is clear by the description.

But if J. S. had had no wife at the date of the will, it is very doubtful whether a person subsequently becoming such, in the testator's lifetime, could have claimed under the devise, unless the description were applicable to her at the testator's death; she ought, it is conceived, to answer the description at *one* of these periods.

General propositions.

The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following:—First, that a devise or bequest to the wife of A., who was a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under *all* circumstances confined to her; but that, secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator (*i*); and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period.

Whether gifts in remainder are distinguishable.

There seems to be no ground, upon principle, for varying the construction, where the gift to the wife is by way of remainder after the death of the husband; the rule being, that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the

[(*f*) Under the recent act 1 Vict. c. 26, s. 18, the will would be revoked by a second marriage, and the question could not arise. See *Pratt* v. *Mathew*, 22 Beav. 334.]

(*g*) *Niblock* v. *Garratt*, 1 R. & My. 629; [*Bryan's Trust*, 2 Sim. N. S. 103; *Franks* v. *Brooker*, 27 Beav. 635.]

(*h*) 10 Mod. 371; 8 Vin. Abr. 309, tit. Dev. T. b. pl. 2; Plow. 344, a.

[(*i*) See *Lloyd* v. *Davies*, 14 C. B. 76; and see vol. ii. p. 201.]

person sustaining it at the death of the testator. The consequence would be, that in case the person who was wife at the death of the testator, or who subsequently became such, died in the lifetime of her husband the tenant for life, no after-taken wife surviving him would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved (*k*). The doctrine here contended for, however, may appear to be encountered by the case of *Peppin* v. *Bickford* (*l*), where a testator gave to his nephew A. 6,000*l.* to be raised out of his estate, and which he directed should not be paid or payable until the day of his marriage, when it was to be laid out in the purchase of land, to be settled and conveyed to the said A. and his assigns for life, and after his decease, *to and upon the wife of A. for life*, and after her decease, then unto and upon the first son of A. on the body of such wife to be begotten, in tail male, remainder to the other sons successively in tail male, remainder to the daughters as tenants in common in tail, remainder to the testator's brother-in-law B. in fee. A. was unmarried at the date of the will and the death of the testator. He subsequently married a lady, who died in his lifetime without issue. He afterwards married again, and the second wife claimed to be included in the trusts, contending that the estates were to be settled on any after-taken wife of A. and his issue by such wife, in case his first wife should die without issue; and the Court so decided: Lord *Loughborough* said, "If the wife had died within a month after the marriage, there could have been no issue to take the provision: and the legacy of 6,000*l.*, except as to the life interest of the nephew, would have lapsed (qu. failed?). It is impossible to ascribe such an intention to the testator (*m*).

Remarks upon *Peppin* v. *Bickford.*

In this case, the construction must, it is conceived, be referred to the special circumstances of the trust being executory, which authorized the Court to give it a liberal construction, and that, by restricting the trust in favour of the wife to the first person standing in that relation, the limitation to the issue would have been restricted to *her* children, which could hardly be the intention of the testator, who was the husband's relation. [Ac-

Case of *Boreham* v. *Bignall.*

(*k*) See *Driver* d. *Frank* v. *Frank*, 3 M. & Sel. 25, 8 Taunt. 468.

(*l*) 3 Ves. 570.

(*m*) See also *Allanson* v. *Clitheroe*, 1 Ves. 24; Belt's Sup. 24.

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[cordingly, in the recent case of *Boreham* v. *Bignall* (*n*), where the testator desired his trustees to pay an annuity of 100*l.* a year to his nephew, J. B., for his life, or until he should attempt to alienate it or become bankrupt or insolvent, and afterwards to pay the same to his wife as a provision for herself, her husband, and children, during the life of him and his wife and the survivor of them; at the date of the will J. B. was married, he then became insolvent, and subsequently his wife, who survived the testator, died, leaving three children, and he married a second wife. Sir *J. Wigram*, V. C., with great reluctance, decided that the second wife of J. B., who survived him, took no interest in the annuity.

Gift to servants means servants at date of will.

On the same principle, a gift to the testator's servants, simply without adding a condition, "that shall be in his service at his decease," will take effect in favour of the servants at the date of the will, even though they subsequently quit the testator's service, to the exclusion of those who subsequently enter his service (*o*).]

As to general devises and bequests.

Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his capacity; and, accordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other), and as to the personalty, as a disposition of what he might happen to possess at the period of his decease. And the reluctance of the Courts to confine a general bequest of personalty to what the testator possessed of the date of the will, sometimes we have seen (*p*), prevailed against the force of words which might seem so to restrict it. The same principle also was applicable to a general bequest of any particular species of personal property, as of "my furniture and effects," which accordingly was said to embrace property of this description belonging to the testator at his death (*q*).

Gifts to classes.

The will also was held to speak from the death of the testator in reference to gifts to classes, or fluctuating bodies of persons; as to children or descendants, which applied to the persons answering the description at the death of the testator, irrespectively of

[(*n*) 8 Hare, 131.

(*o*) *Parker* v. *Marchant*, 1 Y. & C. C. C. 290.]

(*p*) Vide ante, p. 299.

(*q*) 1 Eq. Ca. Ab. 200, pl. 12. [See also *Banks* v. *Thornton*, 11 Hare, 176, where a bequest of "all the residue of my property which consists of stock" was held to include all stock in the testator's possession at his death.]

those to whom the description was applicable at the date of the will, but who subsequently died in the testator's lifetime.

As to wills under stat. 1 Vict. c. 26, s. 24.

Secondly, it remains to consider how far the preceding doctrines apply to wills, which, being made or republished since the year 1837, are regulated by the recent act, (1 Vict. c. 26,) the 24th section of which provides, "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."

Will in reference to the estate to speak from the death.

This enactment must be viewed in connection with the 3rd section, which enables testators to dispose of all the real and personal estate to which they may be entitled at the time of their death, which, if not so disposed of, would devolve to their general real and personal representatives. Had the latter clause stood alone, it might have been a question whether the legislature, by merely enabling testators to dispose of after-acquired real estate, had so far varied and enlarged the construction of a general devise, as to make it extend beyond the real estate belonging to the testator when he made his will, to which the established rules of construction, no less than the principle which forbad the devise of after-acquired real estate, previously restricted it. Any such question is, of course, now precluded; for by the combined effect of the 3rd and 24th sections of the statute, it is evident that a general devise of real estate (*s*), [or of the testator's real estates in a given county or parish (*t*),] will operate on all the property of that description, to which the testator may happen to be entitled at his decease; and though it seems to have become usual in practice, to extend the devise in express terms to the real estate belonging to the testator at his death, yet this must be considered as a measure of excessive caution, and not as springing from, or sanctioning, any serious doubt as to the construction. Indeed, to hold that a general devise is still confined to real estate belonging to the testator at the date of his will would most inconveniently narrow, and go far towards rendering nugatory, the enactment which declares the will to speak, in regard to the estate (real as well as personal) comprised in it from the death of the testator. [But a general devise of lands in a particular place will, of course, not include lands subsequently

General devise of real estate now extends to property at death.

General devise of lands in particular place.

[(*s*) *O'Toole* v. *Brown*, 3 Ell. & Bl. 572; *Lady Langdale* v. *Briggs*, 3 Sm. & Gif. 246.

(*t*) *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591.

[purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the act is then clearly shown (*u*).]

Application of the new law to specific gifts.

The application of the new principle of construction to specific bequests, however, is attended with more difficulty, and will, in all probability, give rise to much controversy and litigation, before its precise limits and effect are fully established. The case immediately in the contemplation of the legislature, probably, was that of a specific bequest of a renewed leasehold property, which we have seen, under the old law, did not apply to the new estate acquired by a renewal of the lease subsequently to the will; and, also, the case of a bequest of [all the testator's stock of a given description (which we have already seen did not include any additional stock of the same description purchased by the testator after the date of his will); and perhaps also the case of a bequest of] a specific sum of stock in the funds, which, upon the same principle, did not extend to substituted stock subsequently acquired by the testator, though of precisely similar amount. The applicability of the new enactment to the first case cannot be questioned. [It seems equally clear that the second case is also within the rule. And accordingly in *Goodlad* v. *Burnett* (*x*), where the testatrix gave "her New Three-and-a-quarter per Cent. Annuities" to trustees, upon the trusts therein mentioned; and, after making her will, purchased a considerable quantity of stock of that description, in addition to what she possessed at the time of making her will, it was held by Sir *W. P. Wood*, V. C., that the whole was included in the bequest. His Honor's opinion was, that the Wills Act must have some sense given to it, as regarded personal estate: before that act, there was no doubt that, as regarded the general personal estate, the will in most cases spoke from the death, but not in all; and that the present was one in which the bequest would have been confined to the stock in the testatrix's possession at the time of making her will (*y*). It was precisely such a case to which the act would seem to have application; the only question was, did a contrary intention appear by the will? There was nothing to indicate such an intention, except the mere circumstance of the testatrix having described the stock as "*my* Three-and-a-quarter per Cents;" and where, as here, the bequest was generic,—of that which might be increased or diminished, that circumstance was insufficient.

Specific gift of stock, whether includes subsequent purchase.

[(*u*) *Re Farrer*, 8 Ir. Com. L. Rep. 370.

(*x*) 1 Kay & J. 341. See also *Robson's Trust*, 9 W. R. 191; *Drake* v. *Martin*, 23 Beav. 89.

(*y*) Compare *Banks* v. *Thornton*, 11 Hare, 176.

[These observations apply with the same or nearly equal force to the third case mentioned above, of a bequest of a stated sum of the testator's stock, which will probably, when the question arises, be held to apply to substituted stock subsequently acquired.

Bequest of stated sum of stock.

The same principle has been applied to devises of land in the case of *Strevens* v. *Bayley* (*z*), where the testatrix devised to the plaintiff "the lands of Curramore," and devised all the residue of her real estate to the defendant. The townland of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty; and after the date of her will, she purchased the other portion. It was held that the whole townland passed to the plaintiff. *Monahan*, C. J., who delivered the judgment of the Court, considered that the description comprised the whole townland, and, consequently, included all in the townland of which the testatrix was seised at her death.]

Whether devise of lands of C. includes all lands of C. belonging to testator at death.

The new rule of construction, however, [might,] according to the general terms in which the enactment is framed, apply to many cases in which its effect [would] be less decidedly salutary, nay, where it [would,] in all probability, defeat the intention: for example, suppose that a testator, having a house in Grosvenor-square, bequeaths it by the description of his messuage in that square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest might seem to comprise the new acquisition by force of the enactment which makes the will speak from the death. It might even happen that by a strict application to specific gifts, of the principle which makes the will speak from the death, a gift of this nature might be invalidated for uncertainty. For instance, if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and afterwards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such a case, by bringing both the houses within the terms of the description, render the devise void for uncertainty; unless it could be ascertained by extrinsic evidence which of them was intended (*a*). To avoid such a consequence, it might, indeed, be held that the

Effect, where there is more than one subject of gift at the death of testator.

[(*z*) 8 Ir. Law Rep. N. S. 410.] (*a*) As to this, vide post, Chap. XIII.

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fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house; but this is, pro tanto, a departure from the principle of the enactment under consideration; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired: so that, if the extrinsic evidence failed to show which of the two houses was intended, (if, indeed, evidence is admissible in such a case (*b*),) the plurality would be fatal to the devise.

In such case a contrary intention indicated by nature of gift.

[The better construction of the act, however, appears to be, that in such a case the contrary intention there spoken of is sufficiently indicated by the very nature of the gift. "Suppose," said the Vice-Chancellor *Knight Bruce*, in *Emuss* v. *Smith* (*c*), "a man to have a brown horse and bequeath it, and then to sell it and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass?" Accordingly, in that case, where the testator, being possessed of an estate at B., partly freehold and partly leasehold, by his will made before 1838, devised "all that my freehold estate at B. which I purchased of Mr. B.," and made a residuary devise of freehold and leasehold estates. After 1838 he made a codicil, which the Vice-Chancellor held to be a republication of the will, and therefore to bring the will within the act of Victoria; but the codicil did not otherwise affect the above-mentioned gifts. The testator subsequently to the codicil took a conveyance of the fee in the leasehold portion of the estate at B.; the Vice-Chancellor said that upon the assumption that the property formerly leasehold would not pass but for the late act, he was not prepared to say that under the late act it did pass; and he decided that it went to the residuary devisee.

Same principle applicable to real estate.

The same principle is applicable to specific devises of real estate. Therefore, in the case of *Webb* v. *Byng* (*d*), where a testatrix devised "all her Quendon Hall estates," (which was a name which, as appeared by evidence, the testatrix had herself attached to certain property), and afterwards bought other land, consisting chiefly of small additions to what was clearly comprised in the devise, those additions were held not to be included

(*b*) Vide post, Chap. XIII.

[(*c*) 2 De G. & S. 722. See also per *Wood*, V. C., 1 Kay & J. 348, 349; *Blagrove* v. *Coore*, 27 Beav. 138.

(*d*) 1 Kay & J. 580.

[in the devise. "Where," said the Vice-Chancellor, "the whole question is, what is meant by a particular term, and one can only arrive at it by finding that this term is an arbitrary designation, which has acquired a certain meaning in the mind of the testatrix; and I find this property which is here enumerated, to have been called by her by this arbitrary designation, I cannot possibly extend that to other property to which she has not ascribed the arbitrary designation. I cannot find anything which will pass them by force of the new Wills Act."

Where words of specific gift exclusively point to present time.

So where the words describing the subject of gift expressly point to the present time, and are manifestly used with reference to the period when the will is made (*e*), the operation of the act is excluded. Thus, in the case of *Cole* v. *Scott*(*f*), where by will, dated the 29th of April, 1843, the testator, after devising "the house in which I now reside," and also making another devise of the "residue and remainder of my messuages, &c., whereof I am now seised or possessed," also devised and bequeathed "all such manors, &c., as well freehold as copyhold and leasehold, as are now vested in me, or *as to the said leasehold premises shall be vested in me at the time of my death* as trustee or mortgagee," the question was whether after-purchased property passed under the residuary devise; and it was held by Sir *L. Shadwell*, V. C., and on appeal from his decision, by Lord *Cottenham*, C., that the after-purchased property did not pass. The express mention in the last gift of after-acquired leasehold property, contrasted with the word "now," brought the case more evidently within the exception in the act, "where a contrary intention appears by the will," than the word "now" alone would have done; yet it is clear the Lord Chancellor would have come to the same conclusion if the will had not contained the last gift. With reference to the word "now," he said, "it appears to me just the same as if the testator had said, 'all the freehold and leasehold estates of which I am on this 29th of April, 1843, seised or entitled.' If these had been the words, of course there could not have been a doubt, but the words used are in effect the same." His Lordship, however, considered that if the will had had no date, the word "now" must under the act have been referred to the time of death, it is presumed, on the ground that no contrary intention could then appear by the will, and that extrinsic evidence could

Case of *Cole* v. *Scott*.

Remarks on *Cole* v. *Scott*.

[(*e*) See Sugd. Real Prop. Stat., p. 366.

(*f*) 16 Sim. 259, 1 M. & Gord. 518. See also *Douglas* v. *Douglas*, Kay, 400.

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[not be admitted to vary what, on that supposition, and reading the will with reference to the act, appeared quite clear; for otherwise, it is difficult to conceive why in such a case the word "now" might not be taken to mean "on the day I am writing this my will," as well as in the above case to mean "on this 29th day of April;" and on the principles hereafter noticed, that the Court will inform itself of every point known to the testator when he made his will, the day on which he wrote his will might be proved by extrinsic evidence.

Lord *Cottenham's* observations, however, upon the word "now" in that case, have not met with unqualified approval; and it has been repeatedly held, that unless it clearly appears on the face of the will that words importing the present time are used with the intention of limiting the operation of the will to property then in the testator's possession, they will not have that effect: but that a devise of all messuages, lands, &c., of which the testator *is* seised, or a bequest of stock of which he *is* possessed, includes after-acquired real or personal estate (*g*).]

Practical suggestion.

In order to avoid all such questions, a testator should add to his description of property specifically disposed of, [the words "to which I am entitled at the date of my will:" any other expression might possibly be applied to another subject.

Powers of appointment created after date of will are exercised by a residuary gift;

A general power of appointment created after a will, but in the testator's lifetime, will be executed by the will if the will would have operated to execute the power had it been in existence at the date of the will (*h*), and, consequently, under the 27th section of the recent act, a general residuary devise or bequest will operate as an execution of all general powers of appointment given to the testator without reference to the date of their creation. But not of general power of *revocation*. Even where the will is made expressly in exercise of all powers of appointment which the testator has, (specifically referring to the instruments,) yet a power of revocation will not be thereby executed, if the words of the will can be otherwise satisfied. If there were no power but one of revocation and new appointment it would be different (*i*).

—but not powers of revocation.

[(*g*) *Doe* d. *York* v. *Walker*, 12 M. & Wels. 591; *Lady Langdale* v. *Briggs*, 3 Sm. & Gif. 246; *Hepburn* v. *Skirving*, 4 Jur. N. S. 651; and per Sir *J. Romilly*, *Goodfellow* v. *Goodfellow*, 18 Beav. 361.

(*h*) Sugd. R. P. Stat. 370; and see *Carte* v. *Carte*, 3 Atk. 174; *Stillman* v. *Weedon*, 16 Sim. 26; *Cofield* v. *Pollard*, 3 Jur. N. S. 1203.

(*i*) *Pomfret* v. *Perring*, 5 D. M. & G. 775; *Palmer* v. *Newell*, 20 Beav. 38; *Re Merritt*, 1 Sw. & Tr. 112, 4 Jur. N. S. 1192.

[The enactment making a residuary devise or bequest operate as an execution of a power is subject to the proviso that a contrary intention do not appear by the will. The intention cannot be shown aliunde; so that it would seem to be immaterial that the settlement containing the power provides that it shall not be so exercised: the settlor can no more impose upon himself such a restraint, than he can impose upon himself the restraint of exercising the power only by a will attested by three or more witnesses (*k*).]

As to "contrary intention" appearing.

It will be remembered that the enactment which makes the will speak from the death relates to the subject-matter of disposition only, and that it does not in any manner interfere with the construction in regard to the objects of gift (*l*); as to whom, therefore, the doctrines discussed in the present chapter, respecting the period at which the will speaks, or at which the objects are to be ascertained, remain in full force, even under a will the period of whose execution or republication brings it within the new law.

Will does not speak at death, as to objects of gift.

[(*k*) See a similar question under the old law, *Leigh* v. *Norbury*, 13 Ves. 340.

(*l*) *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Violett* v. *Brookman*, 26 L. J. Ch. 308.]

CHAPTER XI.

DOCTRINE OF LAPSE.

General principle respecting lapse.

THE liability of a testamentary gift to failure, [or as it is generally termed lapse,] by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which, not taking effect until the death of the testator, can communicate no benefit to persons who previously die: in like manner as a deed cannot operate in favour of those who are dead at the time of its execution. [Though the term "lapse" is generally applied to failure by death of the object of gift in the testator's lifetime, yet the same effect may be produced by other means, as where there was a gift of consumable articles to A. for life, or so long as she should remain unmarried (equivalent to an absolute gift), it was held, that the marriage of A. in the testator's lifetime caused a result similar to that of her death (*a*) in his lifetime.] The doctrine applies indiscriminately

As to real estate;

to gifts with and gifts without words of limitation. Thus, if a devise be made to A. and his heirs, or (unless the will be regulated by the new law) to A. and the heirs of his body, and A. die in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A. takes no interest in the property, he being included merely in the words of limitation, *i. e.* in the terms which are used to denote the quantity or duration of the estate to be taken by the devisee, through whom alone any interest can flow to such heir (*b*).

—personalty.

Bequests of personal property, of course, are subject to the same rule; and it is observable, that, in applying it to such bequests, a legacy to one, and his executors or administrators, is construed as a mere absolute gift (*c*); for the circumstance that,

[(*a*) *Andrew* v. *Andrew*, 1 Coll. 690.]

(*b*) *Brett* v. *Rigden*, Plow. 345; *Fuller* v. *Fuller*, Cro. El. 422; *Wynn* v. *Wynn*, 3 B. P. C. Toml. 95; [*Hutton* v. *Simpson*, 2 Vern. 722;] see also *Goodright* v. *Wright*, 1 P. W. 397; *Ambrose* v. *Hodgson*, 3 B. P. C. Toml. 416.

(*c*) [*Stone* v. *Evans*, 2 Atk. 86;] *Elliot* v. *Davenport*, 1 P. W. 83, 2 Vern. 521, where the legacy was of a debt, which is liable to lapse equally with gifts in any other form. (*Toplis* v. *Baker*, 2 Cox, 118). It is true that in *Sibthorpe* v. *Moxton*, 1 Ves. 49; *S. C. Sibthorpe* v.

n regard to personalty, words of limitation are not requisite to carry the absolute interest, has been considered as insufficient to denote an intention to make the executors or administrators substituted and independent objects of gift. And where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to let in the representatives of the deceased person (*d*).

Effect of declaration that legacy shall not lapse.

And even a declaration that the devise or bequest shall not lapse, does not per se prevent it from failing by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else (*e*). A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating an intention to substitute the executors or administrators, in the event of the gift to the original legatee failing by lapse (*f*).

Moxom, 3 Atk. 580, Lord *Hardwicke* held that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security (without saying to whom), operated as a release, though the legatee died in the testator's lifetime; his Lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; though he admitted that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland* v. *Adair*, 3 Ves. 231, the words were, "I return A. his bond." A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who lays more stress on the merely verbal distinction between the giving and forgiving of a debt, than seems warranted by the principles of the cases. [In *Izon* v. *Butler*, 2 Price, 34, the words were, "I remit and forgive, &c., and I direct the bond to be delivered up," and it was held that the legacy lapsed by the death of the debtor in the testator's lifetime. *Thomson*, C. B., said he had always been at a loss to understood the distinction between *giving* and *forgiving*. In *South* v. *Williams*, 12 Sim. 566, where the testator directed a balance of debts due from A., and property bequeathed to A.'s wife to be struck, and the surplus to be paid to or secured by the legatee, Sir *L. Shadwell* thought A. was released from the debts, though his wife died in the lifetime of the testator; compare *Davis* v. *Elmes*, 1 Beav. 131. In *Williamson* v. *Naylor*, 3 Y. & C. 208, it was decided that shares of a residue given to certain creditors under a composition deed (in which there was no release by the creditors), in proportion to their debts, did not lapse by the deaths of the creditors in the lifetime of the testator; a similar decision was made in *Phillips* v. *Phillips*, 3 Hare, 281. It is different where the debt has been released, *Coppin* v. *Coppin*, 2 P. Wms. 295; and the same would probably be held where there was a covenant not to sue, see *Golds* v. *Greenfield*, 2 Sm. & Gif. 476, but where the testator who had been bankrupt and had obtained his certificate, desired that all the creditors of his estate should be paid in full, and directed his executors to pay to the official assignee a sufficient sum for that purpose, it was held that, though the debts were barred by the certificate, the gift was not liable to lapse, the intention being to discharge the moral duty not only to benefit the creditors individually, *In Re Sowerby's Trust*, 2 Kay & J. 630; *Turner* v. *Martin*, 7 D. M. & G. 429, cor. L. C. on same will.]

Effect of death of debtor upon clause forgiving debts.

(*d*) *Maybank* v. *Brooks*, 1 B. C. C. 84.

[(*e*) *Johnson* v. *Johnson*, 4 Beav. 318; *Pickering* v, *Stamford*, 3 Ves. 493; *Underwood* v. *Wing*, 4 D. M. & G. 633.]

(*f*) *Sibley* v. *Cooke*, 3 Atk. 572.

CHAPTER XI.

Cases of substitution.

[Where the bequest is to A., and, *in case of his death*, "to his executors or administrators," or "to his legal personal representatives," there can, of course, be no doubt that the gift does not fail (*g*); the only question then is, who are the persons to take beneficially, a point which will be treated of hereafter. But where there was a direction to pay legacies within six months, and a gift to the children of the legatee, in case of the legatee's death, *not having received* his legacy, it was held, nevertheless, that the legacy lapsed by his death in the testator's lifetime (*h*).

Lapse of gift on contingency.

The doctrine of lapse is properly extended to the cases of gifts on contingency. Thus, if the gift be to A., but on the happening of a certain event to B., if A. dies in the lifetime of the testator, and the event on which B. is to take does not happen, a lapse occurs, although B. survives the testator (*i*).

Gift by A. to uses of B's will.

Again, it is clear, that if A. survive B., and devise an estate to the uses declared by B.'s will, a devisee under B.'s will must also survive A., in order to take under A.'s will (*h*).]

Lapse prevented by survivorship among joint-tenants.

Where there is a devise or bequest to a plurality of persons as joint-tenants, (*i. e.* who are not made tenants in common (*l*),) no lapse can occur unless *all* the objects die in the testator's lifetime; because as joint-tenants take per my et tout, or, as it has been expressed, "each is a taker of the whole, but not wholly and solely (*m*)," any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to A. and B., or personal property be bequeathed to A. and B., and A. die in the testator's lifetime, B., in the event of his surviving the testator, will take the whole (*n*). And the same consequence would ensue if the gift failed from any other cause (*o*); while it is equally clear that if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object would not have entitled the other to the whole by the mere effect of survivorship (*p*).

Doctrine in reference to gifts to classes.

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be as-

[(*g*) *Long* v. *Watkinson*, 17 Beav. 471; *Hinchliffe* v. *Westwood*, 2 De G. & S. 216; *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76. See post, Chap. XXIX.

(*h*) *Smith* v. *Oliver*, 11 Beav. 494.

(*i*) *Humberstone* v. *Stanton*, 1 V. & B. 385; *Doo* v. *Brabant*, 3 B. C. C. 393, 4 T. R. 706; *Williams* v. *Jones*, 1 Russ. 517.

(*k*) *Culsha* v. *Cheese*, 7 Hare, 245.]

(*l*) See Chap. XXXII.

(*m*) Cart. 4.

(*n*) *Davis* v. *Kemp*, Cart. 4, 5, Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628.

(*o*) *Humphrey* v. *Tayleur*, Amb. 136; *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* d. *Gastrell* v. *Smith*, 4 East, 419.

(*p*) *Page* v. *Page*, 2 P. W. 489.

certained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths (*q*); and the rule is the same where the gift is to the children of a person actually dead at the date of the will, [or to the present born children of a person, in either of] which cases, it is to be observed, there is this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase; the possibility of any addition by future births being [in the former case] precluded by the death of the parent, [and in the latter by the express words (*r*).]

Gift to executors as a class.

A gift to executors has sometimes been construed as a gift to a class, and as such carrying the entire subject of gift to the individuals composing the class, *i. e.* sustaining the office, at the death of the testator, though made tenants in common, in exclusion of any who die in the testator's lifetime. Such has been adjudged to be the effect of a bequest "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them (*s*)."

(*q*) *Doe* d. *Stewart* v. *Sheffield*, 13 East, 526; [*Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; and compare *Cort* v. *Winder*, 1 Coll. 320.]

(*r*) *Viner* v. *Francis*, 2 B. C. C. 658, 2 Cox, 190; [*Leigh* v. *Leigh*, 17 Beav. 605.]

(*s*) *Knight* v. *Gould*, 2 My. & K. 295; but in *Barber* v. *Barber*, 3 My. & C. 688, where a testator bequeathed one moiety of the residue of his property, in a certain event which happened, to his executors therein named; and in another event (including the former), which also happened, he directed that the entire property should "devolve to [four persons, naming them,] to be divided betwixt them in equal proportions, and their heirs for ever;" and added, "which last-mentioned four persons I also appoint as my executors, to see that every thing is duly executed and performed according to my will and desire therein." The testator appointed two other persons as additional executors, and at the foot of his will wrote as follows:— "it must be understood to be my will and intention, that if either or more than one of my executors shall refuse to accept the trust and act as executor, then I annul totally my bequest of my property to every such person as shall refuse to take the trusts upon himself." One of the executors having renounced the trusts, his share was claimed by the other three, who contended that the four executors to whom the gift was made were to be considered as a class, and that the three who proved constituted the class; but Lord *Cottenham*, after a full examination of the authorities, held that the share lapsed to the next of kin, inasmuch as the gift was not to executors described as such, but to individuals nominatim, though appointed executors; and his Lordship considered it as analogous to a gift to B., C., and D., children of A., as tenants in common, which, of course,

Gift to executors nominatim, and not as a class.

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Distinction where class is ascertainable by some event which occurs in testator's lifetime.

If, however, the objects are to be ascertained at some period or event which happens in the testator's lifetime, [it seems formerly to have been considered that] the subsequent decease of any member or members of the class in such lifetime would occasion the lapse of their shares, in the same manner as if the gift had been originally made in favour of the individuals answering the description. Such certainly was the opinion of Sir *R. P. Arden*, M. R., in the case of *Allen* v. *Callow* (*t*); but the point did not arise, and the propriety of the construction seems questionable, for it is difficult to perceive why the throwing into the description of children an additional ingredient, by requiring them to be living at a given period, should vary in other respects the construction applicable to the gift; [accordingly, in the case of *Lee* v. *Pain* (*u*), where the gift was to M. for life, and after his decease to his children living at his decease, equally between them, and M. died in the lifetime of the testatrix, leaving three children surviving, one of whom also died in the lifetime of the testatrix, Sir *J. Wigram*, V. C., decided that the children living at the death of M. took as a class, and that there was no lapse; and his decision has been followed in other cases (*x*). Such a gift] is not the less a gift to a class because a special qualification is superadded; and the fact that the event which regulates the qualification occurs in the testator's lifetime, and therefore precludes future accessions to the class, has no farther influence upon the construction than the death in the testator's lifetime of a person whose children are simply objects of gift, which we have seen does not prevent its being considered as a gift to a class, and as such comprising the objects living at the death of the testator. Had the Courts held that, in order to attract the rule of construction peculiar to classes, it was essential that the class should be susceptible of increase as well as diminution, there would

would not be a gift to children as a class, [see *Bain* v. *Lescher*, 11 Sim. 397], so as to entitle such of the legatees as might be living at the death of the testator. And with respect to the moiety which was given, in the first instance, to the "executors" simply as such, his Lordship considered that this was qualified and explained by the subsequent clause, and indeed, unless so construed, it would carry the half, not to the four, but to the six executors; [and see *Page* v. *Page*, 2 P. W. 489.]

(*t*) 3 Ves. 289; see also *Ackerman* v. *Burrows*, 3 V. & B. 54, where the testator addressed a letter, (which was adjudged to be testamentary), to his mother and sisters, in which he desired that, in a certain event, his property might be divided amongst them. Sir *William Grant*, M. R., held that the share of a sister who died in the testator's lifetime lapsed; but a case so peculiar, and apparently decided upon its particular circumstances, throws very little light on the general principle.

[(*u*) 4 Hare, 250.

(*x*) *Leigh* v. *Leigh*, 17 Beav. 605; *Cruse* v. *Nowell*, 4 Drew. 215.]

have been something like a principle to proceed upon; but the distinction between a gift to the children of A., who dies in the testator's lifetime, and a gift to the children of A. living at the decease of B., a person who dies in the testator's lifetime, seems to be purely arbitrary.

Gift to next of kin or relations.

It is not clear what would be the effect of a gift to certain other classes of persons, as to the next of kin or relations as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in every case where such a gift has occurred, (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator,) the bequest seems to have contained no words which could operate to sever the joint tenancy (*y*). [In the case of *Ham's Trusts* (*z*), though there were words which severed the joint tenancy, yet there were other words which prevented the legatees from taking as a class; Sir *R. T. Kindersley*, V. C., however expressed an opinion that without the latter words the gift would have been a gift to a class, and have taken effect in favour of those only who survived the testator.]

Devises of legal or beneficial ownership only.

Where the devise which lapses comprises the legal or beneficial ownership only, of course its failure creates a vacancy in the disposition merely to that extent. Thus, if a testator devise lands to the use of A. in fee, in trust for B. in fee, and A. die in the testator's lifetime, the legal estate comprised in the lapsed devise to A. devolves to the testator's heir, (or, if the will has been made or republished since 1837, and contains a residuary devise, then to the residuary devisee,) charged with a trust in favour of B., whose equitable interest under the devise is not affected by the death of his trustee. An example of the converse case is afforded by the case of *Doe* d. *Shelley* v. *Edlin* (*a*), where a testator gave (inter alia) to A. his real estates, to hold to A., his heirs, executors, administrators, and assigns, upon trust to receive the rents and profits thereof, and pay the same to B. for her life, for her separate use, free from the control of her husband; and after the decease of B., upon trust to convey the real estates to such uses and in such manner as B. by deed or will should appoint. B. died in the testator's lifetime. It was

(*y*) *Bridge* v. *Abbott*, 3 B. C. C. 224; *Vaux* v. *Henderson*, 1 J. & W. 388, n.

[(*z*) 2 Sim. N. S. 106; see this case stated post, Chap. XXIX.]

(*a*) 4 Ad. & Ell. 582.

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held, nevertheless, that the legal inheritance passed to A. under the devise. Lord *Denman* suggested a doubt whether the doctrine would apply to a case in which the trustee had no duty to perform, as in the case of a devise to the use of A. in fee in trust for B. It seems difficult to discover any solid ground for distinguishing such cases.

Lapse of devise of charged property.

And here it may be noticed that where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if Blackacre be devised to A. and his heirs, charged with or on condition that he pay 50*l.* a year, or the sum of 500*l.*, to B., and it happens that A. dies in the testator's lifetime, his (the testator's) heir at law (or his residuary devisee, if the will is subject to the new law,) will take the estate charged with the annuity or legacy in question (*b*). This principle is strongly exemplified in the case of *Oke* v. *Heath* (*c*), in which a person having a power of appointment over a sum of money, by will appointed a less sum (part of the fund in question) to A.; and in consideration thereof A. was to pay to his mother an annuity of 100*l.* during her life for her separate use, and to enter into a bond, with a penalty, for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A. died in the testatrix's lifetime, yet the mother was held to be entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee.

Destination of a lapsed specific sum charged on real estate.

In the converse case, namely, where the person for whom the money is to be raised dies in the testator's lifetime, it is more difficult to determine the destination of the lapsed interest, the question being then embarrassed by the conflicting claims of the devisee of the lands charged, and of the heir of the testator: the former contending that the charge has become extinct for his benefit; and the latter, that the lapsed sum is to be regarded as real estate undisposed of by the will.

Rule as to contingent charges.

This, at least, is clear, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee (*d*). As in the case of a devise of land to A., charged with a legacy to

(*b*) *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Worley*, 2 Atk. 605.

(*c*) 1 Ves. 135.

(*d*) *Att.-Gen.* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60; [*Re Cooper's Trusts*, 23 L. J. Ch. 25, 4 D. M. & G. 757; [but such a gift as that in *Att.-Gen.* v. *Milner* would now be held to be vested.

B., provided B. attain the age of twenty-one, as to which Lord *Eldon* (*e*) has observed, "The devise is absolute as to A., unless B. attain the age of twenty-one: if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in, because the whole is absolutely given to the devisee; but a gift which fails must clearly be intended, upon the failure of the condition, to be for the benefit of the devisee." It would of course be immaterial, in such case, whether the death of the legatee during minority occurred in the testator's lifetime or afterwards.

—Where liable to failure by death, though not expressly contingent.

Where a legacy, payable in futuro, though not expressly contingent, is bequeathed in such a manner as that it would fail by the death of the legatee before the time of payment, (and such is always the rule where the postponement is referable to the circumstances of the legatee, and is not made for the convenience of the estate,) the case evidently falls within the principle of Lord *Eldon's* reasoning; and, consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

Charges absolute in event.

It is to be observed, also, that a legacy which, though originally made contingent, becomes absolute by the effect of events in the testator's lifetime, (subject, of course, to a liability to failure by lapse,) is to be regarded, in applying the doctrine in question, in precisely the same light as if it were originally absolute. Thus, if land be devised, charged with a specific sum to A., on condition of his attaining the age of twenty-one years, and A. do attain that age, and subsequently die in the testator's lifetime, the gift receives the same construction as if it had not originally been made conditional on his attaining the prescribed age.

General doctrine as to the destination of sums payable out of land.

With respect to the general question, as to the destination of sums charged on real estate, which lapse by the event of the legatee dying in the testator's lifetime, no direct authority can be adduced; but as there seems not to be any solid distinction between such cases and those in which the gift of the specific sum is void ab initio, recourse is naturally had to the cases on this point, which supply much matter for comment. The principle as between the heir and devisee of the land is, in the words

(*e*) In *Tregonwell* v. *Sydenham*, 3 Dow, 210.

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of a late eminent Judge (*f*), that if the devise "to a particular person, or for a particular purpose, is to be considered as intended by the testator as an exception from the gift to the residuary devisee, the heir takes the benefit of the failure" (*g*). If it is to be considered as intended by the testator to be a charge only on the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure.

Decisions in favour of the heir.

The following are the decisions in favour of the heir.

Arnold v. *Chapman*.

In *Arnold* v. *Chapman* (*h*) a testator devised a copyhold estate to Chapman, he causing to be paid to his executors the sum of 1000*l.*; and, after payment of debts and legacies, he devised all the remainder of his estate to the Foundling Hospital. As the bequest of the 1000*l.* to the Hospital was void, a question arose whether it should go to the heir, or sink for the benefit of the devisee. Lord *Hardwicke* held that the heir was entitled by way of resulting trust, observing, "As this charge is well made on the estate, but not well disposed of, by reason of the act, it must be considered as between the heir and the Hospital, [qu. devisee?] as part of the real estate undisposed of, and must be for his benefit."

Grosvenor v. *Hallam*.

In the next case, of *Grosvenor* v. *Hallam* (*i*), a testator devised to his executors and their heirs a messuage in Ipswich, subject to the annual payments, making together 10*l.*, thereinafter given and for ever charged thereon, and all other his real estate, in trust to be sold, directing the monies arising from the sale, and his personal estate, to be distributed as therein mentioned. The testator then gave the 10*l.* a-year to charity. Lord *Camden* held that the heir was entitled. "The rule as to real estate is," said his Lordship, "that where the intention of a testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event. If he had said, 'I give my estates over and above the rent-charge,' it would have been more plain: it is the same thing as if he had so expressed himself. The rent-charge is severed for ever from the devise, which he gives to the residuary legatees."

Bland v. *Wilkins*.

So in *Bland* v. *Wilkins* (*k*), before Sir *Thomas Sewell*, where

(*f*) Vide Sir *John Leach's* judgment in *Cooke* v. *Stationers' Company*, 3 My. & K. 264.

[(*g*) As in cases where lands are directed to be sold, and the produce divided, *Page* v. *Leapingwell*, 18 Ves. 463; *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Jones* v. *Mitchell*, 1 S. & St. 290; see also *Cruse* v. *Barley*, 3 P. W. 20; and *Collins* v. *Wakeman*, 2 Ves. jun. 683. As to *Cooke* v. *Stationers' Company*, 3 My. & K. 262, see judgment of Sir *W. P. Wood*, V. C., in *Re Cooper's Trusts*, 23 L. J. Ch. 29, n.]

(*h*) 1 Ves. 108.

(*i*) Amb. 643, 1 B. C. C. 61, n.

(*k*) In 1782, cited 1 B. C. C. 61.

lands were given to E. N. in fee, upon condition that her executors or administrators should pay 10*l.* to a charity. His Honor held that the 10*l.* should go to the heir, as part of the produce of the land undisposed of.

Henchman Attorney-General.

The authority of *Arnold* v. *Chapman*, and the consequent superiority of the heir's claim, was recognized by Sir *John Leach* in the case of *Henchman* v. *Att.-Gen.* (*l*); though ultimately the Lord Chancellor held the charge to be extinct for the benefit of the devisee of the land, yet the adjudication on the appeal was founded on special circumstances, and did not touch the general doctrine.

Observations on *Arnold* v. *Chapman* and *Grosvenor* v. *Hallam.*

[It will be observed that in *Arnold* v. *Chapman*, and *Henchman* v. *Att.-Gen.* the gift of the money to the executors was good, and might, as Lord *Hardwicke* observed, be wanted for debts, and, in this view, was well severed from the estate, and not merely a charge upon it (*m*). In the case of *Grosvenor* v. *Hallam*, the annual payments were expressly treated as exceptions, and not charges. In the case of *Bland* v. *Wilkins*, the grounds of the determination are not known. None of these cases, there-

(*l*) 2 S. & St. 498. A testator devised certain copyhold lands to W. H., his heirs and assigns, upon condition that he within one month after the decease of the testator, paid to his (the testator's) executors a sum of 2000*l.*, which he desired should be taken as part of his personal estate, and disposed of in the same manner; and, after giving certain legacies, he disposed of the residue of his personal estate, including the 2000*l.*, in favour of charities. The testator died without customary heir or next of kin, and the question was, whether the 2000*l.* belonged to the devisee, the lord of the manor, or the Crown. Sir *J. Leach*, V. C., considered the case of *Arnold* v. *Chapman* to be a decisive authority against the devisee; and that the lord of the manor could not be entitled to it, as he takes only propter defectum tenentis, and here he had a tenant, and had received his fine upon admittance. His Honor observed, that, if there had been next of kin, a question might have been raised, whether the testator did or did not intend that this sum of 2000*l.* should have all the same qualities as if it had been personal estate at his death. There being no next of kin, the Crown took, by force of its prerogative, if real estate, because there was no customary heir; if personalty, because there was no next of kin. The question was brought by appeal before Lord *Brougham*, [3 My. & K. 485,] who considered that, though the Crown might take personalty as bona vacantia, it could not take real estate except by escheat; which had no place here, because copyholds must escheat (if at all) to the lord. He thought that it was not material whether the sum was considered to be excepted out of the devise, and therefore devolving to the heir, as in *Arnold* v. *Chapman*, or as a charge upon it, and therefore failing for the benefit of the devisee of the land, as in *Jackson* v. *Hurlock*; because, as there was no heir, and as neither the lord (he having a tenant to perform his services), nor the Crown could take by escheat, and as the holding it to be personalty was out of the question, his Lordship considered that the cestui que trust had failed, and that the devisee of the land had the benefit of the extinction of the charge by the necessity of the case. His Lordship observed, too, that the money could not be raised by the aid of the Court, who, though it would assist the heir if there had been one, would not have lent itself to the Crown.

Case of *Henchman* v. *Attorney-General.*

[(*m*) But see *Tucker* v. *Kayess*, 4 Kay & J. 339.]

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[fore, are authorities that the benefit of a *charge*, the gift of which is void *ab initio*, falls to the heir.

We now come to the cases where the decision was in favour of the devisee of the land, all of which will, it is conceived, be found to be cases of mere charges.]

Decisions in favour of the devisee of the land so charged.

Jackson v. *Hurlock*.

Thus, in *Jackson* v. *Hurlock* (*n*), A. devised to B. and her heirs certain manors, charged with the payment of any sum not exceeding 10,000*l.* to such persons as he, by any letter or writing to be left with her, should appoint. By a writing so left, he charged on the estate (int. al.) several sums to charitable and superstitious uses, amounting to about 6000*l.* Lord *Northington* held that these void legacies must sink into the estate, for the benefit of the devisee. It had been argued at the bar, he said, upon a mistake, as if the testator had intended, at all events, to take 10,000*l.* out of the estate; whereas he meant the reverse. A sum not exceeding 10,000*l.* had put a charge upon the estate which could not take place.

Barrington v. *Hereford*.

So, in the case of *Barrington* v. *Hereford*, decided by Lord *Bathurst;* which, according to a very short statement by a reporter of a subsequent period (*o*), seems to have been a bequest of 1000*l.* to be laid out in land, in trust for B., charged with an annual sum to a charity. It is said that the M. R. gave it (i. e. the annual sum) to the residuary legatee, but that the Chancellor decided in favour of the specific devisee, as arising out of the estate. Sir *R. P. Arden*, M. R., in *Kennell* v. *Abbott* (*p*), said, "that Lord *Bathurst* first thought the heir entitled, upon the cases of *Cruse* v. *Barley* (*q*), and *Arnold* v. *Chapman;* but afterwards his Lordship changed his opinion, *and it is now perfectly settled*, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate."

Baker v. *Hall*.

So, in *Baker* v. *Hall* (*r*), where a testator gave to the minister or clergyman of a certain parish, *for ever*, an annuity or rent-charge of 35*l.*, to be issuing out of a certain messuage, &c., for a charitable purpose, with a power of distress. He then devised the premises, (*subject* to the annuity,) upon certain trusts; and devised all the residue of his real and personal estate not thereinbefore disposed of, upon other trusts. The question was, whether the annuity, the devise of which was void, went to the residuary

(*n*) Amb. 487, better reported 2 Ed. 263.
(*o*) 1 Bro. C. C. 61.
(*p*) 4 Ves. 811.
(*q*) 3 P. W. 20, stated post.
(*r*) 12 Ves. 497.

devisee, or to the specific devisee of the lands. Sir *William Grant* said, that the testator appeared to have *expressly excepted the annuity out of the residue of his estate;* and could never have had it in contemplation that it should go, in any event, to the residuary devisee; and he decided that it sunk for the benefit of the specific devisee. [It will be observed, that the annuity was not an exception out of the estate out of which it was to issue: that estate was devised subject to it; in other words it was a mere charge. According to the law, as settled at the present day, there could not be a doubt that the residuary devisee would have no claim, for the authorities(*s*) clearly show that a declaration of trust in favour of a charity avoids the devise of the legal estate; a rent-charge, therefore, devised as in the above case, never could have existence, and consequently could not form the subject of claim by any person (*t*).

Cooke v. *Stationers' Company.*

In the case of *Cooke* v. *The Stationers' Company*(*u*), Sir *J. Leach*, M. R., distinguished between a charge and an exception; and being of opinion, that the legacy, in the case before him, was a charge, held that the devisee was entitled. He observed, that the devise being upon condition to pay the legacies made no difference, being no more than a charge of the legacies; consequently the case of *Bland* v. *Wilkins* (*x*) must be considered as overruled.

Ridgway v. *Woodhouse.*

So, in the case of *Ridgway* v. *Woodhouse*(*y*), where a testator devised real estate in trust for his wife for her life; but in case his wife's sister should reside with her, he directed his trustees to retain out of the rents 100*l.* for every day of such residence, and pay the same to a charity. Lord *Langdale*, M. R., said: "The direction to pay to the charity is void, and consequently the direction to retain, so far as it was intended to operate for the benefit of the charity, was also void, and had no effect; and that purpose failing, I think the direction to retain must fail altogether."

Re Cooper's Trusts.

The point under consideration was much discussed in the recent case of *Re Cooper's Trusts*(*z*), in which the distinction above taken, between an exception and a charge, was treated as

[(*s*) Ante, p. 206.

(*t*) The remark in the text also applies to Lord *Eldon's* observations, 3 Dow, 215, 216. If the trust of the term had been to raise money for charity, the term itself would have been void, and the estate discharged.

(*u*) 3 My. & K. 262.

(*x*) Ante, p. 322.

(*y*) 7 Beav. 437.

(*z*) 23 L. J. Ch. 25, 4 D. M. & G. 757. See also *Carter* v. *Haswell*, 3 Jur. N. S. 788, 26 L. J. Ch. 576; *Tucker* v. *Kayess*, 4 Kay & J. 339; *Sutcliffe* v. *Cole*, 3 Drew. 135.

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[settled; the question was, to which head the gift before the Court was to be considered as belonging; this question is generally difficult of solution, but the cases above quoted, and particularly the judgment of Sir *W. P. Wood*, V. C., in the last case, will form some guide to the reader.

Whether bequest of money to A. and the heirs of his body, remainder to B., lapses by death of A.

Where personal property is bequeathed to A. and the heirs of his body; and in case of failure of issue of A., then to B., (which, as is well settled, is an absolute gift to A., if he survive the testator,) it is undetermined whether, if A. die without issue in the lifetime of the testator, the gift to B. will take effect. If we consider that the gift to A., if he survive the testator, is absolute only because the gift to B. is too remote, then, it would seem, since questions of remoteness are to be considered with regard to the state of facts at the death of the testator, and not at the date of his will (*a*), that the gift to B. is not open to the objection of remoteness, and is therefore good. In the case of *Brown* v. *Higgs* (*b*), Lord *Alvanley* seemed to entertain no doubt that the gift to B. would take effect, whether A. died without issue or not; but in *Harris* v. *Davis* (*c*), Sir *J. K. Bruce*, V. C., thought such a gift bad.]

Stat. 1 Vict. c. 26, s. 25. Real estate comprised in lapsed or void devises included in residuary devise.

The doctrine of lapse has been modified by the recent act in three important particulars. First, by s. 25, which provides, "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."

Under this enactment, the gift of a sum forming an exception out of real estate to a person who dies in the testator's lifetime, or the gift of which is void ab initio, [will enure for the benefit of the residuary devisee.] If, however, the will does not contain an operative residuary devise, or the sum [excepted] affects the property comprised in the residuary devise, [such sum falls to the heir. Of course, the act has no bearing on the question whether the sum be an exception or simply a charge; nor does it] apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency, is defeated by the

[(*a*) Ante, p. 256.
(*b*) 4 Ves. 717; and see *Mackinnon* v. *Peach*, 2 Keen, 555; *Donn* v. *Penny*, 1 Mer. 22, 23.
(*c*) 1 Coll. 416.

failure of the event, (whether it be the decease of the object before a certain age, or otherwise,) and not by lapse.

1 Vict. c. 26, s. 32. Devises in tail not to lapse if devisee leaves issue.

The next alteration in regard to lapse relates to devises in tail, as to which s. 32 provides, "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 should appear in the will."

Sect. 33. Gift to testator's child or other descendant who leaves issue not to lapse.

The third and remaining alteration concerns gifts to the children or other issue of the testator, as to which the 33rd section declares, "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."

Remarks upon 1 Vict. c. 26, ss. 32 & 33.

It will be observed that the words "such issue," occurring in the 32nd section, admit of application either to the issue inheritable under the entail, surviving the deceased devisee, or the issue inheritable under the entail generally, whether living at the death of the devisee or not. According to the latter construction, if there be issue living at the death of the devisee or legatee, and also issue living at the death of the testator, the requisition of the statute is satisfied, though the *same* issue should not exist at both periods. Thus, if lands be devised to A. in tail, who dies in the testator's lifetime, leaving an only child, and such child afterwards die in the testator's lifetime, leaving issue who, or any of whom, survive the testator, the devise would, it is conceived, be preserved from lapse. In the 33rd section, however, there is more difficulty in adopting a similar construction; for in this clause the words "such issue" would seem in strict construction to apply exclusively to the issue living at the death of the devisee or legatee. But here, also, a liberal construction [has been] adopted (*d*), by considering the word "issue" to be used

Whether same issue must be living at death of devisee and of testator.

[(*d*) *Re Parker*, 1 Sw. & Tr. 523, 6 Jur. N. S. 354. But see Sugd. R. P. Stat. 384, pl. 49.

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as nomen collectivum, namely, as including every generation of issue, and not merely as designating the particular individual or individuals living at the death of the legatee; so that the existence of any person belonging to the same *line* of issue at the death of the testator will suffice to prevent the lapse.

Enactment does not apply where gift does not lapse, but property passes over to another.

Of course the application of both the enactments in question is excluded where the devise in tail or the gift to the testator's child or issue is expressly made contingent on the event of the devisee or legatee surviving the testator; for in such a case to let in the heir in tail under the 32nd section would be something more than substitution: it would be to give the property to the heir in tail in an event upon which the testator has not devised it to the ancestor; and in such a case to hold the child or other descendant of the testator to be entitled under the 33rd section, would be in direct opposition to the language of the will. Nor, it is conceived, does the statute touch the case of a gift to one of several persons as joint tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no "lapse," to prevent which is the avowed object of both the clauses under consideration. The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, the entire property will, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator's lifetime leaving issue who survive him (*e*). As gifts to the testator's children as a class are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation.

Under sect. 33, issue of child dying in testator's lifetime not substituted.

The reader will perceive that the 33rd section does not substitute the surviving issue for the original devisee or legatee; but makes the gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator, [and whether it happened before (*f*) or after (*g*) the date of the will, though not if it happened before the act came into operation (*h*).] The sub-

[(*e*) *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, 1 Johns. 210.

(*f*) *Mower* v. *Orr*, 7 Hare, 473; *Winter* v. *Winter*, 5 Hare, 306; *Wisden* v. *Wisden*, 2 Sm. & Gif. 396; *Barkworth* v. *Young*, 4 Drew. 1.

(*g*) *Johnson* v. *Johnson*, 3 Hare, 157; *Skinner* v. *Ogle*, 4 No. Cas. 74, 9 Jur. 432.

(*h*) *Wild* v. *Reynolds*, 5 No. Cas. 1; *Winter* v. *Winter*, 5 Hare, 314.

ject of gift, therefore, will, to all intents and purposes, constitute the disposable property of the deceased donee, and as such [will either devolve on his representatives (*i*) or] follow the dispositions of his will so far as that will, according as it may be regulated by the new or the old law, is capable of disposing and does dispose of after-acquired property (*k*). Hence occurs this rather novel result, that it cannot be predicted of any will of a deceased person, whose parent or any more remote ancestor is living, what may be the extent of property which it will eventually comprise, and no final distribution can be made pending this possibility of accession.

The 33rd section does not apply to gifts under a power of appointment.

[It has been decided that the section in question does not prevent the lapse of property appointed by will under a power to appoint in favour of particular objects, where, by the instrument creating the power, the property is disposed of in default of any appointment being made (*l*): but that it does prevent lapse where the power is general, although there may be a disposition in default of appointment (*m*).]

[(*i*) *Winter* v. *Winter*, *Wisden* v. *Wisden*, supra.

(*k*) *Mower* v. *Orr*, *Johnson* v. *Johnson*, supra.

(*l*) *Griffiths* v. *Gale*, 12 Sim. 327, 354.

(*m*) *Eccles* v. *Cheyne*, 2 Kay & J. 676.]

CHAPTER XII.

GIFTS WHEN VOID FOR UNCERTAINTY.

I. *General Doctrine.*
II. *Uncertainty as to Subject of Disposition.*
III. *Uncertainty as to Objects of Gift.*
IV. *Effect of Mistake in Locality or Occupancy of Lands, and of Misnomer generally as to Subjects or Objects.*
V. *What Words sufficient to create a Trust.*

Indulgence shown to testators in the construction of wills.

I.—In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error (*a*), nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together (*b*); but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than would suffice to exclude the claim of the next of kin as the successor to the personalty; for though undoubtedly, on

(*a*) See 3 Keb. pl. 49, 23; [*Henniker* v. *Henniker*, 12 Jur. 618; but see *Jackson* v. *Craig*, 20 L. J. Ch. 204, 15 Jur. 811; *Baker* v. *Newton*, 2 Beav. 112; *Langley* v. *Thomas*, 6 D. M. & G. 645.

(*b*) See *Minshull* v. *Minshull*, 1 Atk. 410.]

some points, a difference of construction has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favour towards the claims of the heir and next of kin.

In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly; which is owing probably, in part, to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the Courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases (*c*), in which a gift has been held to be void for uncertainty, the principle whereof has not been recognised in later times.

To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal.

Uncertainty as to subject of gift.

Gift of "all" held too indefinite.

II.—A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition, is afforded by the early case of *Bowman* v. *Milbanke* (*d*), where the words, "I give all to my mother, all to my mother," were adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word "all" referred.

In the case of *Mohun* v. *Mohun* (*e*), the will consisted merely of these words: "I leave and bequeath to all my grandchildren, and share and share alike." By a codicil the testator appointed certain persons to be trustees for his grandchildren and nieces: Sir *Thomas Plumer*, M. R., held that this was too uncertain to create a devise. It had been contended, that the whole difficulty would be removed by the transposition of the word "all," which, in its present situation, was without effect, the word "grand-

(*c*) *Pride* v. *Atwicke*, 1 Keb. 692, 754, 773; *Price* v. *Warren*, Skinn. 266, 2 Eq. Ca. Ab. 356, pl. 2.

(*d*) 1 Lev. 130, Sid. 191, T. Raym. 97; but in another early case (*Taylor* v. *Webb*, Styles, 301, 307, 319; *S. C.* nom. *Marret* v. *Sly*, 2 Sid. 75), the words, "I make my cousin, Giles Bridges, *my sole heir*, and my executor," were held to constitute the cousin devisee in fee of the testator's lands: it being observed, that the testator not only made him his heir, but his executor also; and if he should not have the lands, the word "heir" was nugatory, for, by being executor only, he should have the goods. The word "heir" was said to imply two things: first, that he should have the lands; secondly, that he should have them in fee-simple.

(*e*) 1 Sw. 201.

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children" including all who correspond to that description; but his Honor observed, that there was uncertainty both in the subject and object of the bequest, and the Court could not transpose words for the purpose of giving a meaning to instruments that had none.

Remark as to transposition of words.

To authorize the transposition of words, it is clearly not enough (as hereafter shown (*f*)) that they are inoperative in their actual position: they must be inconsistent with the context. In the case just stated the word "all," though silent where the testator had placed it, was not repugnant; and it is observable that the transposition of the word "all," even if justifiable, would not, according to the case of *Bowman* v. *Milbanke*, have supplied a definite subject of disposition.

Gift of an indefinite part void;

Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty. On this principle, a bequest of "*some* of my best linen" (*g*), [or "of a handsome gratuity to each of my executors" (*h*),] has been held void.

—except where the will furnishes grounds for estimating the amount.

[But a distinction seems to be taken when the will furnishes some ground on which to estimate the amount intended to be bequeathed. Thus, in *Jackson* v. *Hamilton* (*i*), where the testator directed his trustees to retain a reasonable sum of money *to remunerate them for their trouble*, it was referred to the master to ascertain what would be a reasonable sum. So, also, where the bequest is for the maintenance, support and education of an infant, or for the maintenance and support of an adult person, although no amount be specified, the Court of Chancery will take upon itself to determine the amount to be applied for that purpose (*k*). And a bequest of "3000*l.* or thereabouts," to be raised by accumulating annual income, has been held good: the words "or thereabouts" being considered as used only to meet the difficulty which would arise in accumulating up to the exact limit, and to render any little excess, occasioned by the addition of an entire dividend, subject to the same disposition as the specified sum (*l*). A bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the

Bequest for maintenance, &c. of an infant or adult good, though no sum specified.

Where the amount is differently stated.

[(*f*) Chap. XVI. Sect. 2.]
(*g*) *Peck* v. *Halsey*, 2 P. W. 387.
[(*h*) *Jubber* v. *Jubber*, 9 Sim. 503.
(*i*) 3 J. & Lat. 702.
(*k*) *Broad* v. *Bevan*, 1 Russ. 511, n.; *Pride* v. *Fooks*, 2 Beav. 430; *Kilvington* v. *Gray*, 10 Sim. 293; *Batt* v. *Anns*, 11 L. J. Ch. 52; *Thorp* v. *Owen*, 2 Hare, 610; *Pedrotti's Will*, 27 Beav. 583; and see 1 Sim. N. S. 103, and other cases noticed along with the above, post.
(*l*) *Oddie* v. *Brown*, 4 De G. & J. 179, diss. Sir *J. K. Bruce*, L. J.

[will, if the Court can collect that one statement was evidently a mistake, even though the mistake be contained in the very words of gift (*m*).]

Uncertainty as to the share the devisee is to take.

An instance of uncertainty in the subject of gift occurred in the case of *Jones* d. *Henry* v. *Hancock*, which underwent much discussion (*n*). The testator devised lands to his daughter, Ann Henry, for life, with remainder to her first and other sons in tail male, remainder to his other daughter Frances. The devise to Ann was upon condition that she married a man possessed of a property at least equal to, if not greater than, the one he left her. The testator then proceeded as follows: "And if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over, and be given up to my second daughter Frances Henry, to whom, in that case, I bequeath it." It was held by the House of Lords, that the devise over was void for uncertainty, as the specific portion or share so given over did not appear in the will itself. On delivering the opinion of the Judges, *Gibbs*, C. J., said, "The will gives over an uncertain part, not specifying the lands if to be held in severalty; or, if this should be considered as an undivided portion in the whole, it cannot be discovered from the will what that portion is. It has hardly been contended, that anything was given over in severalty; but it was contended, with more colour, that the person to take the excess, beyond the husband's property, would be tenant in common with Ann, of a moiety or some other given share. It is impossible to put the case upon any other ground than this: A portion is given over, and it cannot be a portion to be held in severalty. The only way then is, that the person to take the excess shall have some undivided portion of the whole; and if the devise defines what that interest is, it will be sufficient to give its objects the benefit of it. But we think that the devise does not define any specific interest which the object of it can take. The only ground upon which this can be contended to be a tenancy in common, which supposes some specific share, is, that it may be left to a jury to decide according to the values. The inconvenience and confusion which would result from this is obvious: different juries would set different values on the respective properties of

In what the uncertainty consists.

[(*m*) *Philipps* v. *Chamberlaine*, 4 Ves. 50.]

(*n*) 4 Dow, 145. See *Gibbon* v. *Harmer*, 2 Roll. Rep. 425; *Hoffman* v. *Hankey*, 3 My. & K. 376, post; [*Rickards* v. *Rickards*, 2 Y. & C. (C. C.) 419.]

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the husband and wife: and the valuation must be made too at the period of the marriage, and at any distance of time a jury might be called upon to say what was the value of the property. It would not only be difficult, but in some cases impossible, to ascertain the value in this way. Our opinion, however, does not rest on the inconvenience and confusion, but on the principle of law, that such a devise is not sufficient to create a tenancy in common. If it were so, it must be upon the marriage of Ann; and all the consequences of a tenancy in common must then have taken place." "They must have been capable of being separately sued in all real actions, and in actions of ejectment, a modern proceeding which has come in the place of real actions. Now, in every real action, though we do not know from the writ, it must appear in the declaration what is the specific interest in question, how the title is derived, and what the precise interest is; but here there is no such thing. At the time of Ann's marriage it could not be collected from the will what the specific interest was. If they were in the situation of tenants in common, see how they could answer: A creditor, who has a demand against one of them, institutes his suit, and proceeds to get the lands by *elegit*. He has judgment for a moiety of the share, and the sheriff is directed to deliver a moiety. But the share must appear in order to enable the sheriff to deliver the moiety; and no case has ever occurred, where the difficulty has been cast on the sheriff to ascertain the share. And there is no instance of a tenancy in common, where the extent of the interest could not be ascertained from the instrument creating it. This difficulty, too, presents itself: Tenants in common have each a right to a writ of partition. The writ does not state the share, but in the declaration the precise interest is stated."

Unless the specific interest or share is distinctly pointed out, devise not sufficient to create a tenancy in common.

[But a devise to two persons in such shares as should be determined by (blank), would make them tenants in common in equal shares (*o*). On the same principle an equal division is made where the donee of a power of distribution fails to exercise the power (*p*); or where the gift consists of a general direction that the legatees should "participate" (*q*).]

Devise in shares to be determined by person omitted to be named.

And (*r*) where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the tes-

Gift of part of a larger quantity not uncer-

[(*o*) *Robinson* v. *Wheelwright*, 21 Beav. 214.

(*p*) *Salusbury* v. *Denton*, 3 Kay & J. 529.

(*q*) *Liddard* v. *Liddard*, 6 Jur. N. S. 439. See also *Greville* v. *Greville*, 27 Beav. 594.]

(*r*) *Peck* v. *Halsey*, 2 P. W. 387.

tator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which means the subject of the gift is reducible to certainty; and id certum est quod certum reddi potest is a settled rule in the construction of wills. Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect (*s*).

tain, where devisee is entitled to select.

So, if a testator devise a messuage, and ten acres of land surrounding it, part of a larger number of acres, the choice of such ten acres is in the devisee (*t*).

[So, where a testator bequeaths so much of his property (or of his property of a particular nature) as the legatee may select, the legatee may make his own selection; but as it is evident that some selection is intended, the donee cannot take the whole, though to what extent short of that is not very clear (*u*)].

Gift of so much as legatee shall select.

But, if a testator having two closes called Whiteacre, devises (not one of his closes, but) his *close* called Whiteacre, this does not entitle the devisee to take either of the closes at his pleasure, but the uncertainty as to which is intended, renders the devise void (*x*); [and if he make a general devise of all except the close called Whiteacre, there being two of that name, the exception is uncertain, and the general devise will be read as if it contained no exception (*y*); but where a testator bequeathed all his property in the Austrian and Russian funds, "and also that vested in *a Swedish* mortgage," the testator having several Swedish mortgages, they were all held to pass (*z*). A bequest of a sum not exceeding 100*l.* (*a*), or of 50*l.* or 100*l.* (*b*), will be construed in a manner most beneficial to the legatee, and is, therefore, a good gift of the whole 100*l.*]

A bequest of what shall remain or be left at the decease of

Expressions

(*s*) *Grace Marshall's case*, Dy. 281, a.n., 8 Vin. Abr. 48, pl. 11.

(*t*) See *Hobson* v. *Blackburn*, 1 My. & K. 574; [*Jacques* v. *Chambers*, 2 Coll. 441; *Duckmanton* v. *Duckmanton*, 5 H. & N. 219.

(*u*) *Kennedy* v. *Kennedy*, 10 Hare, 438. But a power to feme covert to appoint by will "any part of testator's residue," implies no selection, and the donee may appoint the whole, *Cooke* v. *Farrand*, 7 Taunt. 122.]

(*x*) *Richardson* v. *Watson*, 4 B. & Ad. 798; but evidence is admissible to remove such an ambiguity; see next Chapter.

[(*y*) *Blundell* v. *Gladstone*, 14 Sim. 83, better reported 8 Jur. 301. The decree was afterwards reversed, 3 M. & Gord. 692, on the ground that one of the two properties bearing the same name was vested in the testator as trustee; and, therefore, it was to be presumed that the other was the one included in the particular devise.

(*z*) *Richards* v. *Patteson*, 15 Sim. 501.

(*a*) *Thompson* v. *Thompson*, 1 Coll. 395; *Cope* v. *Wilmot*, 1 Coll. 396, n.; *Gough* v. *Bult*, 16 Sim. 45.

(*b*) *Seale* v. *Seale*, 1 P. W. 290; and see *Haggar* v. *Neatby*, Kay, 379.]

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which have been held too indefinite.

the prior *legatee* (*c*), [or of what the legatee is possessed of at the time of death (*d*), or of what he does not want (*e*), or what he can transfer (*f*), or what he can save out of his yearly income (*g*), or of what remains undisposed of, or is not disposed of by deed or will (*h*), or of the "bulk" of certain property (*i*), or a gift over of the whole legacy in case of the death of the prior legatee intestate (*k*), is void for uncertainty.]

Whether the same rule holds as to specific chattels.

Some of these cases certainly had special circumstances, and the indefiniteness seems not to have been invariably considered to be such as to invalidate the gift (*l*). At all events expressions of this nature are capable of explanation, where the property, or part of it consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. [Neither would there be any uncertainty as to the subject of the gift over in any bequest of specific chattels capable of identification. The point, however, is unimportant; for the gift over would be void on another ground, namely, its repugnancy to the prior gift (*m*).

But where] property (whatever be its nature (*n*)) is expressly limited to the first taker for life, such expressions have not been held to render the ultimate gift void, comprising as they then do the whole corpus.

Gift of what remains at the decease of A. good where A. takes for life only.

Thus, in *Cooper* v. *Williams* (*o*), the testator gave personal property to his wife for life, and what she had left at her death to his next of kin, and it seems to have been thought that the gift over was good.

[Again, in the case of *Constable* v. *Bull* (*p*), there was a devise

(*c*) [*Bland* v. *Bland*, 2 Cox, 349;] *Wynne* v. *Hawkins*, 1 B. C. C. 179; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205.

[(*d*) *Att.-Gen.* v. *Hall*, 1 J. & W. 158, n., 2 Cox, 355; *Pope* v. *Pope*, 10 Sim. 1.

(*e*) *Sprange* v. *Barnard*, 2 B. C. C. 587; *Hudson* v. *Bryant*, 1 Coll. 681; it seems that *Upwell* v. *Halsey*, 1 P. W. 651, cannot now be considered law; see per Lord *Loughborough*, 2 Ves. jun. 532, and per Sir *E. Sugden*, 1 Ll. & G. 298.

(*f*) *Flint* v. *Hughes*, 6 Beav. 342.

(*g*) *Cowman* v. *Harrison*, 17 Jur. 313, 22 L. J. Ch. 993.

(*h*) *Bourn* v. *Gibbs*, 1 R. & My. 614; *Ross* v. *Ross*, 1 J. & W. 154; *Bull* v. *Kingston*, 1 Mer. 314; *Grey* v. *Montague*, 2 Ed. 205, 3 B. P. C. Toml. 315; *Phillips* v. *Eastwood*, 1 Ll. & G. 270; *Watkins* v. *Williams*, 3 M. & Gord. 622; *Re Yalden*, 1 D. M. & G. 53; *Bowes* v. *Goslett*, 27 L. J. Ch. 249, 4 Jur. N. S. 17; but see *Borton* v. *Borton*, 16 Sim. 552.

(*i*) *Palmer* v. *Simmonds*, 2 Drew. 221.

(*k*) *Cuthbert* v. *Purrier*, Jac. 415; *Green* v. *Harvey*, 1 Hare, 428; *Eade* v. *Eade*, 5 Mad. 118; *Lightbourne* v. *Gill*, 3 B. P. C. Toml. 250.]

(*l*) *Duhamel* v. *Ardovin*, 2 Ves. 162; *Hands* v. *Hands*, 1 T. R. 437, n.

[(*m*) See post, Chap. XXVII.

(*n*) Except "consumable" articles, see *Andrew* v. *Andrew*, 1 Coll. 690.]

(*o*) Pre. Ch. 71, pl. 64.

[(*p*) 3 De G. & S. 411; see also *Borton* v. *Borton*, 16 Sim. 552; but see *Flint* v. *Hughes*, 6 Beav. 342.]

[and bequest of all the testator's real and personal estate to his wife for her sole and separate use and benefit, "*and at the decease of my wife whatever remains* of my said estate and effects to go" to certain other persons. The V. C. said, the only question seemed to be whether the words "whatever remains of" had the effect of preventing the gift to the widow from being construed as a gift of a life interest, for that without those words the subsequent bequests would have the effect of so reducing the interest given to the widow. He seemed to think those words had not that effect, and decided that the second gift was valid. It must be observed that this construction gave no effect to the words "whatever remains of."

Similarly] in *Gibbs* v. *Tait* (*q*), where a testator bequeathed a residue to his wife and her assigns, and directed her to apply the interest and proceeds thereof for her own use and benefit, and after her decease or marriage he gave what should be remaining of *such residuary monies* to other persons, no objection seems to have been advanced to the validity of the gift on the ground of uncertainty.

Gibbs v. *Tait.*

If the gift of *what shall be left* is preceded by a power of disposition or appropriation reserved to a trustee or prior legatee in favour of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power. As in the case of *Surman* v. *Surman* (*r*), where a testator bequeathed his personal estate to his wife for life or widowhood, with a power to her to apply the same to her own benefit and the maintenance of A. and B. during minority; and at her decease or second marriage, he gave the same, *or so much as should then remain*, to certain persons; this was held to be a good bequest of the personal estate unapplied to the prescribed purposes.

Gift of what shall be left preceded by a power of disposition.

Surman v. *Surman.*

[So, in the case of *Lancashire* v. *Lancashire* (*s*), a testator devised all his real and personal estate to trustees, and directed them to apply the income for the maintenance of A. till she attained the age of twenty-one or married, and then to convey and settle such part as they should think proper on A. for life, with remainder to her children, with remainder, in default of children, to B. in fee; and as to such part or parts of the trust

Lancashire v. *Lancashire.*

(*q*) 8 Sim. 132.

(*r*) 5 Mad. 123: [*Scott* v. *Josselyn*, 26 Beav. 174; *Sanderson's Trust*, 3 Kay & J. 497; but see *Gude* v. *Worthington*, 3 De G. & S. 389, which seems contra, but the grounds of the decision do not appear.

(*s*) 2 Phil. 657, 1 De G. & S. 288.

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[estate as his trustees should not think proper to settle as aforesaid, upon trust to convey, assign and transfer the same to A. absolutely. A. died before the trustees made any settlement, and Lord *Cottenham*, C., affirming the decision of Sir *J. K. Bruce*, V. C., held, that the power to make a settlement had determined, and that the heir of A. was entitled to the whole of the real property to the exclusion of B. And the same principle would seem to apply where the power is general, to appoint whomsoever the donee may choose (*t*).

Distinction between a gift of the *whole* except an unascertained part and a gift of the remainder after deducting the unascertained part.

It will be observed, that in these cases the words seemed or were considered to provide for carrying over everything that was not disposed of under the power, and, consequently nothing having been disposed of, the ultimate limitation carried the whole subject of gift. The next two cases, however, seem to show that if the words are such as to point to a division into parts, and to amount to a gift of the individual parts, then, if one of the parts cannot be ascertained, the legatee of the other part is necessarily disappointed, since his part is undetermined, and the words are not sufficient to carry the whole to him.

Jerningham v. *Herbert.*

Thus, in the case of *Jerningham* v. *Herbert* (*u*), the testatrix gave to A. such of her jewels as should at her decease be deposited with Messrs. R., and gave the rest of her jewels to B. At her decease there were no jewels deposited with Messrs. R., and Sir *J. Leach*, M. R., said that the will contained no present gift of the jewels, but referred to a future act to be done by the testatrix in order to complete her gift, and that act being prevented, the intended gift wholly failed. Again, in the case of *Boyce* v. *Boyce* (*x*), where the testator devised certain houses in S. to trustees upon trust for his wife for life, and after her decease upon trust to convey to his daughter M. in fee 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. having died in the testator's lifetime, Sir *L. Shadwell*, V. C., said it was only a gift of the houses that should remain, *provided* M. should choose one of them, that no choice had been or indeed could have been made by M., and therefore the gift in favour of C. failed.

Whether a gift of the residue of a fund after

Where the bequest is of that part of a given fund which remains after providing for an object illegal or unattainable, and

[(*t*) See *Cooke* v. *Farrand*, 7 Taunt. 122, 2 Marsh. 431; *Calvert* v. *Johnston*, 3 Kay & J. 559, 560.]

(*u*) 4 Russ. 388.

(*x*) 16 Sim. 476.

providing for an object illegal or unattainable is void.

[the exact amount to be laid out on which is not specified, it does not seem clear whether the gift is void for uncertainty, or whether the Court will take upon itself to determine what would have been the proper amount to be expended had the object been legal or attainable. In the case of *Chapman* v. *Brown* (*y*), the testatrix, after giving some legacies, gave all the residue of her real and personal estate to her executors to be applied for the purpose of building or purchasing a chapel where her executors should think it was most wanted, and if any overplus should remain from purchasing or building the same, she directed it to be applied for certain other purposes mentioned in her will. The bequest for the chapel being void, Sir *W. Grant*, M. R., declared that the gift of the overplus was void also, since the amount could not be ascertained. "He thought it impossible to frame any direction that would enable the master to form any idea as to what would have been proper to expend upon the chapel. If the testatrix had pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there, but the gift in question was so entirely indefinite, it was quite uncertain what the residue would have been." So, in *Attorney-General* v. *Hinxman* (*z*), there was a devise of a house to be used as a school for poor persons of the parish of W.; the executors were directed to put the house in repair, and a sum of money was bequeathed to be invested in stock in the name of the minister, churchwarden and overseers, who were to apply the dividends for the purposes of the school, and to apply the surplus, if any, after payment of the expenses of the school, among poor parishioners of W., as they the trustees should think fit. The devise of the house for the school being void, and the first trust declared of the stock having consequently failed, Sir *Thomas Plumer* decided that the gift of the residue of the surplus dividends, being unascertainable, was void. It must be observed that this was precisely the case in which Sir *W. Grant* suggested that the bequest might be good, the school being in a particular parish where the probable attendance might be ascertained. The same observation applies to the case of *Limbrey* v. *Gurr* (*a*), where there was a bequest of what should remain of a sum of 7,000*l.* after providing for the testator's funeral expenses and

Chapman v. *Brown*.

Att.-Gen. v. *Hinxman*.

Limbrey v. *Gurr*.

[(*y*) 6 Ves. 404.

(*z*) 2 J. & W. 270; and see *Att.-Gen.* v. *Davies*, 9 Ves. 535; *Att.-Gen.* v. *Goulding*, 2 B. C. C. 428.

(*a*) 6 Mad. 151.

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[a monument, and the building of eight almshouses on a particular piece of ground, and a further bequest of what should remain of the income of a sum of 8,000*l.*, after making certain stated payments to the poor persons in the almshouses, purchasing a quartern loaf for twenty other poor persons, and keeping the almshouses in repair. Sir *John Leach* held that the residue of each sum was unascertainable, by reason of the gifts to the prior objects failing, and the gift of such residue therefore void. On the other hand, in *Mitford* v. *Reynolds* (*b*) the testator, after several bequests, directed the purchase of a particular piece of land, and the construction of a vault for the bodies of himself and his parents and sister, and of a monument, the expense of which purchase and construction was to be met and provided for from the surplus property after payment of the legacies. He then made a general residuary bequest, which Lord *Lyndhurst*, C., declared valid, even if the bequest for the erection of the monument was illegal (which it was not then necessary to decide) or incapable of being applied by reason of the owner of the land refusing to sell it, as afterwards happened (*c*). His Lordship, after noticing the remarks of Sir *W. Grant* before stated, said "he thought the difficulties which existed in the case of *Chapman* v. *Brown* had no existence in the case before him. The place was defined, the very spot pointed out, and the extent required for the purchase; there was no difficulty in directing a reference to the Master for the purpose of ascertaining what would be a proper sum to carry that intention of the testator into effect. That sum being once ascertained, would be deducted from the residue, the amount of which would then be rendered certain." Great as may be the weight due to the judgment of the Lord Chancellor, yet there are circumstances which impair the authority of this decision. In the first place the decision was premature; and though the Chancellor said the money for the monument was payable out of the residue, because it was payable out of the surplus after payment of debts and legacies, yet in a subsequent stage of the cause (*c*) Sir *L. Shadwell* decided that the residue bequeathed was a residue formed after providing for the debts, legacies and *monument*, and consequently the money which would have been devoted to the monument sunk into the

Mitford v. *Reynolds.*

[(*b*) 1 Phil. 185, 706. (*c*) 16 Sim. 105.

[residue, as in the case of any other void bequest (*d*). In *Chapman* v. *Brown*, it was a gift of part of the residue itself that was void. Secondly, the cases of *Chapman* v. *Brown* and *Attorney-General* v. *Hinxman* were both treated as authorities that a distinction is to be taken where a particular locality is pointed at, while, in fact, the latter of those cases ignored any such distinction.

Adnam v. *Cole.*

However, the course suggested by Sir *W. Grant*, and pursued by Lord *Lyndhurst* is supported by the case of *Adnam* v. *Cole* (*e*), where a testator directed his trustees to lay out the residue of money arising from the sale of land in building such a monument to his memory as they should think fit, *and* in building an organ gallery in the parish church at L——; and Lord *Langdale*, M. R., referred it to the Master to ascertain in what proportion the residue ought to be divided between these two objects.

Gift good as to part though amount of the other part unascertained.

Ford v. *Fowler.*

We may here refer to a case where a gift was held good as to part, though the quantum of the other part was unascertained. In the case of *Ford* v. *Fowler* (*f*), the testator recommended (which word was considered equivalent to direct) F. and his wife to settle a sum which he had bequeathed to the latter, "together with such sum of money of his (F.'s) own as F. shall choose, for the benefit of his wife and children. Lord *Langdale*, M. R., said that there being a certainty as to that which was in the testator's power, the trust as to that did not fail because the testator expressed a wish as to something over which he had no power.]

Uncertainty as to object of gift.

III. Uncertainty in regard to the *objects* of gift arises either from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take, and then left it in doubt which of them he intended to select as the object or objects of his bounty. Examples of both kinds will be found in the sequel. It has been often laid down that if a devise be to *one* of the sons of J. S., (he having several sons (*g*),) the devise is void for uncertainty, and cannot

[(*d*) See *Reynolds* v. *Kortright*, 18 Beav. 417.

(*e*) 6 Beav. 353. See also *Cramp* v. *Playfoot*, 4 Kay & J. 479, where the correctness of such a course seems to be recognized.

(*f*) 3 Beav. 146.]

(*g*) But if the uncertainty arises from this extrinsic fact, it would be removable by parol evidence. (Vide next Chapter.) The uncertainty in such case, however, would seem rather to be apparent

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be made good (*h*). And if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest (*i*). [So where the devise was "to the testator's brother and sister's family," and the testator had two sisters; the devise was held void (*k*); and a bequest "to and amongst my nephews and nieces John and Nanny" (followed by a blank), or to such of them as should be living at the death of "the tenant of life," was held void for uncertainty, because although by using the plural number, "nephews and nieces," the testator showed he meant to include more than one of each sex, yet by his apparent intention to name those whom he intended for legatees, it was made doubtful whether he meant to include all (*l*).

Blank left for names.

Gift to class except a person not named.

But a gift to a class, with the exception of one person of the class, who is not named, or cannot be ascertained, is not void, but takes effect in favour of the whole class (*m*). And where a testator, after devising property to his daughter A. in fee, and if she die under twenty-five without leaving any children, then over, gave other property on trust to be conveyed equally amongst *such* children of A., the context not showing what limit was intended to be put on the class of children; it was held, that all took (*n*). So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all (*o*); and a bequest to the children of A., including who the illegitimate of A., was held, on the same principle, to include no illegitimate child of A. (*p*)]

Devise to three, "the one to be heir to the other."

Again, where one having (*q*) three sons, J., E., and W., and lands in three counties, devised the lands in A. to J., the lands in B. to E., and the lands in C. to W.; and added, that if any of his said sons died, then *the one of them to be heir unto the*

on the face of the will, the terms of which suppose the existence of more than one son, and moreover show that the testator had not determined which of them to make the object of his bounty. [See Wigr. Wills, p. 180, *Ashburner* v. *Wilson*, 17 Sim. 204.]

(*h*) See *Strode* v. *Lady Falkland*, 3 Ch. Rep. 183, 2 Vern. 624, 625; T. Raym. 82.

(*i*) *Webb's case*, 1 Roll. Ab. 609, (D) 1; et vid. *Scrope's case*, infra.

[(*k*) *Doe* d. *Hayter* v. *Joinville*, 3 East, 172; and see *Doe* d. *Smith* v. *Fleming*, 2 C. M. & R. 638.

(*l*) *Greig* v. *Martin*, 5 Jur. N. S. 329. See however the cases Chap. XXX., s. 4.

(*m*) *Illingworth* v *Cooke*, 9 Hare, 37.

(*n*) *Hope* v. *Potter*, 3 Kay & J. 206.

(*o*) *Campbell* v *Bouskell*, 27 Beav. 325. The word "aforesaid" was thus rejected, the M. R. preferring that course to construing the gift as made to nephews and nieces by mistake for grandchildren, who were previously named.

(*p*) *Mason* v. *Bateson*, 26 Beav. 404.]

(*q*) *Wood* v. *Ingersole*, 1 Bulst. 61; *S. C.*, but ill reported, Cro. Jac. 260; see also Pollexf. 482; *Hill* and *Baker's case*, cited 1 Bulst. 63; and see Saville, 92, 93.

other. A., the eldest son having died, the land devised to him was claimed by the other two; but the Court (the Chief Justice doubting) decided that nothing passed by the clause in question, as it was not certain what issue should have it. Some stress was laid on the fact that the original devise conferred only an estate for life.

On the other hand, where (*r*) the testator devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre, in tail; and further willed that, in case any of his said sons should die without issue, *the survivor to be each other's heir*. The eldest son died without issue; and the question was, whether one or both the surviving brothers should have Blackacre? And the Court, on the first hearing of the case, was in great doubt; but it was afterwards holden that the surviving brothers were joint tenants; and, although the word "survivor" was in the singular number, yet, in sense, upon the whole matter it should be taken and construed as for the plural number: (survivor should be each other's heir) *i. e.* each survivor, *i. e.* all the survivors.

An instance of a bequest held void for uncertainty on account of the vague use of the word "survivors" occurs in a modern case (*s*), where the words were, "I give to my executors the sum of 1000*l.* upon trust to be invested in the funds of the Bank of England, *during the lives of the survivors or survivor*, for the widows of John Sayce and Thomas Draper, to be divided between them, share and share alike." It was contended for the two legatees that the words "survivors or survivor" applied to the executors, and did not affect the gift to the widows, who, therefore, were absolutely entitled; but Sir *J. Leach*, M. R., observed that it was impossible to put any rational construction upon the bequest, which, therefore, was void for uncertainty.

Gift to several alternatively.

Uncertainty is sometimes produced by the mention of several objects alternatively, as in the case of a gift to A. *or* B. (*t*).

In the early case of *Beal* v. *Wyman* (*u*), where a question

(*r*) *Hambledon* v. *Hambledon*, 1 Leon. 262; Saville, 92, 93, Cro. Eliz. 164, Owen, 25; see also Brook, title Devise, pl. 38.

(*s*) *Hoffman* v. *Hankey*, 3 My. & K. 376. Although the similarity of expression seemed, in some degree, to connect this with the preceding case, yet it rather belongs to the class of cases in which bequests have been held to be void on account of the uncertainty as to the extent of interest the gift was intended to comprise.

(*t*) In the case of a gift to several persons alternatively, there is a fatal uncertainty unless the secondly named person can be considered as intended to be substituted for the first in some event, or unless the word "or" can be changed into "and," which has been often vexata quæstio. (See Chap. XVI.)

(*u*) Styles, 240, 2 Danv. 514, pl. 4; [and see *Marwood* v. *Darrell*, Lee's Ca. t. Hard. 91.]

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arose on these words, viz. "I give and bequeath one half of my lands to my wife, and, after her death, I give all my lands to the heirs males of any of my sons *or* next of kin;" it was contended that the words "heirs males of any" of his sons were words certain enough to create an estate, for it was all one as if he had said, "to the heirs males of all his sons, if they have heirs males, or to those who have heirs males (*x*);" and the words, "or to the next of kin," were also certain enough, being joined with the preceding words, and should be meant to the next of kin and their heirs males, if his sons had no heirs males; for in a will, if there be words to express the meaning of a testator, it is sufficient though the words be not apt. On the other side, it was argued that this devise was void; for it appeared not what heir male should have the land, whether the heir male of his son or the heir male of his next of kin, for the words were disjunctive; and the Court seems to have inclined to this opinion, but how the case was ultimately disposed of does not appear.

To "heirs males of any of my sons or next of kin."

So, in the case of *Lowndes* v. *Stone* (*y*), where a testator, by an unattested will, gave the remainder of his estate to his next of kin *or* heir at law. The personalty was claimed by the next of kin and the heir respectively; the latter contending that the testator used the term "heir at law" as explanatory of the former expression meaning "such next of kin as shall be my heir at law." Lord *Loughborough*:—"You have a fair retort upon each other. On the one side, it is contended that 'next of kin' means 'heir at law;' on the other, that 'heir at law' means 'next of kin.' It must be distributed according to the statute."

To "next of kin or heir at law."

Again, in *Waite* v. *Templer* (*z*), where a testator, resident in India, bequeathed a share of his personalty to A., "who resided at L. when I left England, *or* to his heirs, executors, administrators, or assigns for ever;" Sir *L. Shadwell*, V. C., held that A., having died in the testator's lifetime, the legacy failed, his Honor being of opinion that the additional words were too uncertain to create a substitutional gift.

To A. "or his heirs, executors, administrators, or assigns."

Uncertainty sometimes arises from property being devised to the same uses as the testator's *other* estates, of which there are several, that are devised to different uses (*a*). It may also be

Reference to uses of *other* estates, there being more than one.

(*x*) Such, it is probable, would now be held to be the construction of this devise. The other question, on the words "sons *or* next of kin," is more difficult. Probably they would be construed as meaning "my sons, or such other persons as may happen to be my next of kin."

(*y*) 4 Ves. 649. And see 7 Sim. 363.

(*z*) 2 Sim. 524; see also *Stone* v. *Evans*, 2 Atk. 86.

(*a*) *Leslie* v. *Duke of Devonshire*, 2 B. C. C. 187.

occasioned by the testator's apparent misapprehension of the law regulating the devolution of property; as in the case of *Thomas* v. *Thomas* (*b*), where a testator, after charging his real and personal estate with the payment of his debts, and giving it to his wife during widowhood, after her decease or marriage willed that all his real and personal estate "be divided *according to the Statute of Distributions in that case made and provided;*" and it was held that the real estate did not pass to the next of kin under this clause, the Court thinking it not clear that the testator intended the real estate to be distributed according to the Statute of Distributions regarding personalty, but that he must have referred to some statute which he supposed applied to real estate.

Id certum est quod certum reddi potest, is a rule no less applicable to the *objects* than (as we have seen) it is to the *subjects* of disposition; and, therefore, it is no objection to a gift that it is so framed as to make the objects dependent upon some extrinsic circumstance, though it be an act performed, or even *to be* performed, by the testator himself in his lifetime. As in the case of *Stubbs* v. *Sargon* (*c*), where a testatrix directed her trustees to dispose of and divide the proceeds of certain property unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her said business, in such shares and proportions as her said trustees should think fit and deem advisable. It was objected that the gift was void for uncertainty; but it appearing that the testatrix was, at the date of her will, in partnership with certain persons, to some of whom, conjunctively with another person, she, on the dissolution of such partnership, disposed of her business, Lord *Langdale*, M. R., [and on appeal, Lord *Cottenham*,] held that these latter persons were those among whom the trustees were to divide the property in such shares as they might deem advisable.

No objection that devisee is to be ascertained by future act of testator.

In many cases devises to several persons successively have been contended to be void on account of the uncertainty respecting the order in which the objects are to take (*d*). Where the devise is to several specified individuals in succession, the obvious rule is, to hold them to be entitled in the order in which their names occur. If it be to a class of persons, (constituted

Gift to several successively.

(*b*) 3 B. & Cr. 825.
(*c*) 2 Kee. 258, 3 My. & Cr. 507.
(*d*) See an instance of a limitation in a deed held to be void on account of uncertainty of this nature, *Windsmore* v. *Hobard*, Hob. 313.

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such in virtue of birth (*e*),) as to children, sons, or brothers (*f*), then priority according to seniority of age may be presumed to be intended. And the circumstance of a condition being imposed on the devisees has been held not to vary the order in which they are successively entitled.

Thus, where (*g*) a testator devised to A. and his brothers successively, but not to be entered on or enjoyed until one month after their marriages, it was held that the devise was not (as contended) void for uncertainty; for as the testator named A. first, *who was the eldest* son, the word "successively" implied that the estate was to go to his next brother after him; and the Court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, if the second son had married before the eldest, yet he could not have taken.

[On the other hand, in the case of *Thomason* v. *Moses* (*h*), where the bequest was of the interest of a sum of money to the testator's father for life, then to his brother for life, and then to be continued to the testator's next nearest heir and so on, and neither the father nor the brother was the testator's heir, the gift of the fund after the death of the brother was held void for uncertainty.]

Construction of very obscure will.

In the case of *Prestwidge* v. *Groombridge* (*i*), the Court was called upon to put a construction upon some very blind words, which, had the case occurred a century ago, would probably have been held to be too uncertain to create a gift. The testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews, George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business, and added, "In the event of the elder boys George and Charles (both or either of them) being settled before this will comes in force, I provide *that the next boy* (*James or Henry*) *have the benefit, and so on.*" George and Charles survived the testatrix, but died under twenty-one. The residue was claimed by James, as being, in the event which had happened, solely entitled.

(*e*) This qualification, though it may sound strangely, seems requisite in order to exclude from the position in the text gifts to some other classes, such as executors; as to which vide ante, p. 317.

(*f*) *Ongley* v. *Peale*, 2 Ld. Raym. 1312, 2 Eq. Ca. Ab. 358, pl. 8; [*Young* v. *Sheppard*, 10 Beav. 207.

(*g*) *Ongley* v. *Peale*, supra.

(*h*) 5 Beav. 77.]

(*i*) 6 Sim. 171.

Henry claimed to participate; and the next of kin also put in a claim to the residue as undisposed of. Sir *L. Shadwell*, V. C., held James and Henry to be entitled. The intention of the testatrix, he considered, was to make a provision out of the fund for two of her brother's sons; and if the provision failed as to either George or Charles, that James should be supported out of it; and if it failed as to both, Henry also should be supported out of it.

In the case of *Powell* v. *Davies* (*k*), where M. devised a freehold estate to A. for life, and, after his decease, to be equally divided into four parts, between one child of A., one child of B., one child of C., and one child of D., for them to receive the rents and divide the money between them; and it was his desire that the estate should never be sold out of the family, provided that if A., C. and D. should never have lawful children, his desire was that their parts should go to the next of kin. At the date of the will, B. had one child born, and the others were unmarried; but after the testator's death, each of them had several children. It was held that the devise was not void for uncertainty, but that the eldest child, whether male or female, of each of the four persons, took a vested estate. Lord *Langdale* considered that the absence of a devise over of the share of S.B., who had one child, indicated the testator's intention that the existing child should take that share, and that in each instance the eldest or only child should be entitled, [since the share vested in him immediately on his birth, and thereupon the gift over failed.

Charitable legacies not void for uncertainty of object.

It must be remembered, that, with respect to charities gifts may be good, which, with respect to individuals, would be void. We have seen that charitable bequests are not void for uncertainty in the object; and where there are two charities of the same name, the legacy will be divided between them, if it cannot be ascertained which was the intended object (*l*). In the case of individuals, the gift would be void for uncertainty. In one case, however, the gift was to the first cousins of the testator, children of his father's brother, of the name of C.: the father had two brothers of the name of C., both of whom had children; and the gift was held to take effect in favour of the children of both

(*k*) 1 Beav. 532, [and see *Ashburner* v. *Wilson*, 17 Sim. 204.]

[(*l*) *Waller* v. *Childs*, Amb. 524; *Bennett* v. *Hayter*, 2 Beav. 81; and see *Simon* v. *Barber*, 5 Russ. 112, where, though the legacy was not held void, the principle of dividing it does not seem to have been acted upon.

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[brothers (*m*). The decision seems opposed to all the other authorities on this subject.

However, where a testator bequeathed "to the surgeon and resident apothecary of the Dispensary at B." 19*l.* 19*s.* each, *or any who may hold the like situations at my decease*, and it appeared there was no apothecary, but two surgeons and a dispenser, those persons were each held entitled to a legacy of the specified amount, although in other bequests the testator had used the word surgeons in the plural. But it was probably thought that the plural words given above showed the intention to be to confer on the office, not on any person or persons (*n*).

Where there are in the *same* testamentary paper gifts to each of two objects, one of which does not exist, it will be considered that the objects are not identical, and one gift will fail, though either gift standing alone would have been a good gift to the existing object (*o*).]

All particulars in description of subject-matter of disposition need not be correct.

IV.—It is clearly not essential to the validity of a devise that all the particulars which the testator has included in his description of the subject or object of gift should be accurate. There need only be enough of correspondence to afford the means of identifying both (*p*). Thus, the devise of a house or field, described by name, is not rendered uncertain by its being mentioned to be in the occupation of a person who is not the occupier; for as the property was adequately described in the first instance, this erroneous and unnecessary addition does not vitiate the devise (*q*). And even if it should turn out that part only of the house or field so named was in the occupation of the person designated by the testator as the occupant, the whole nevertheless would pass (*r*).

Mistake in locality of lands.

A reference to occupancy often comes in aid of a defect or error in the locality, and vice versâ. Thus, a devise of "my lands at Bramstead, in the county of *Surrey*, in the occupation of John Ashley," has been held to pass lands in the occupation of John Ashley, at Bramstead, in the county of *Hants* (*s*). Even

[(*m*) *Hare* v. *Cartridge*, 13 Sim. 167.

(*n*) *Ellis* v. *Bartrum*, 25 Beav. 109; see also *Re Hussey's Charities*.

(*o*) *Lee* v. *Pain*, 4 Hare, 254; see also *Douglas* v. *Fellows*, Kay, 114.

(*p*) See *Purchase* v. *Shallis*, 2 H. & Tw. 354, 14 Jur. 403, 19 L. J. Ch. 518; *Howard* v. *Conway*, 1 Coll. 87; *Stephens* v. *Powys*, 1 De G. & J. 24.]

(*q*) *Blague* v. *Gold*, Cro. Car. 447, 473; *Thompson* v. *Tonson*, And. 188, 2 Leon. 120.

(*r*) *Chamberlaine* v. *Turner*, Cro. Car. 129.

(*s*) *Hastead* v. *Searle*, 1 Ld. Raym. 728.

without the reference to the occupancy, however, in this instance the description would have been sufficient, for the misnomer of the county in which a parish is situate produces no uncertainty, unless the testator should happen to have property answering to the description in a parish of that name in more than one county (*t*).

It has even been held that a devise of houses and lands lying in the *parish* of Billing, and in a street called Brook-street, is a good devise of lands in Billing-*street*, the testator having no lands in the parish of Billing (*u*).

Leasehold will pass as "freehold."

So it is clear that a leasehold estate will pass under the description of freehold, where the reference to its name or local situation, and the fact of the testator having no freehold estate answering thereto, leave no doubt of the identity (*x*); and vice versâ (*y*).

It has been adjudged, too, that under a devise of buildings in a specified street, houses situate in a lane contiguous to, and opening into, that street pass, for want of a subject more nearly answering to the description (*z*).

In description of objects all particulars need not be correct.

The same principles of construction, of course, apply to objects of gift. It is sufficient, therefore, that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial; and this whether the object of the gift be a corporation or an individual. Thus, a devise "to the mayor, jurats, and town-council of the ancient town of Rye," has been held to be good, though they were incorporated by the name of "the mayor, jurats, and commonalty (*a*)." A bequest "to the fellows and demies of Magdalen College, Oxford," however, has been decided not adequately to designate Magdalen College, whose corporate name or style is, "The president and scholars of St. Mary Magdalen (*b*)." [But in the case of *Queen's College* v.

Misnomer of corporations.

(*t*) See *Owens* v. *Bean*, Finch, 395; *Brown* v. *Longley*, 2 Eq. Ca. Ab. 416, pl. 14.

(*u*) Brownl. 131, 8 Vin. Ab. 277, pl. 7.

(*x*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366.

(*y*) *Day* v. *Trig*, 1 P. W. 286, post; *Doe* d. *Dunning* v. *Lord Cranstown*, 7 M. & Wels. 1.

(*z*) *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ald. 407, post; but observe that these cases were before the recent act, the effect of which on such questions of construction is remarked upon post, Chap. XIII.; [see also *Baddeley* v. *Gingell*, 1 Exch. 319, where houses in an enclosed yard opening into a street, were held to be houses "within the street," so as to be liable to be rated under an Act of Parliament imposing a rate upon "houses within the street."]

(*a*) *Att.-Gen.* v. *Corporation of Rye*, 1 J. B. Moo. 267, 7 Taunt. 546. See also Fitz. Dev. 27, Dalison, 78, s. 8; 10 Rep. 57; *Foster* v. *Walter*, Cro. Eliz. 106, 2 Leon. 165. But as to gifts to corporations, vide ante, p. 58.

(*b*) *Att.-Gen.* v. *Sibthorp*, 2 R. & My. 107.

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[*Sutton* (*c*), where money was bequeathed to the provost and *fellows* of Queen's College, Oxford, to purchase books to be added to the library, the proper name of the corporation being "the provost and *scholars*, &c.:" the corporation was held to be entitled principally on the ground that the library belonged to the body corporate, who were, therefore, the proper persons to make additions to it. And where a bequest to "the Westminster Hospital, Charing Cross," was claimed by the Westminster Hospital in Broad Sanctuary, and also by the Royal Ophthalmic Hospital, and by the Charing Cross Hospital, Agar-street, Strand, the latter was held entitled, as being nearest to the locality mentioned, and as being a general hospital: the testator, when he intended to give to a hospital of a special character, having so named it (*d*).

General rule as to name.

As a general rule, it may be stated, that *veritas nominis tollit errorem demonstrationis;* and, therefore, where there is a person to answer the name, it will be immaterial that any further description does not precisely apply.] Thus, a bequest to C. M. S. and C. E., legitimate son and daughter of C. S., was held to be a good bequest to persons of those names, though they turned out to be illegitimate, in consequence of an anterior marriage of their father being established (*e*); [and the rule will not be varied by circumstances raising a strong presumption short of judicial certainty (*f*) that the name was mistaken (*g*). It seems also immaterial that, besides a wrong description, one of the names of the legatee is omitted, as where the gift was to John N., *second* son of William *Strangways* N., rector of S., it was held that John Rice N., *third* son of William *Robert* N., rector of S., was entitled (*h*).

Misnomer of individuals.

But *nihil facit error nominis cum de corpore constat* (*i*); and there may be cases in which the description is such as to lead to an irresistible inference that the person named was not the person in the testator's mind.] Thus, where (*k*) the devise being

[(*c*) 12 Sim. 521.

(*d*) *Bradshaw* v. *Thomson*, 2 Y. & C. C. C. 295; and see *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Smith* v. *Ruger*, 5 Jur. N. S. 905.]

(*e*) *Standen* v. *Standen*, 2 Ves. jun. 589, 6 B. P. C. Toml. 193; [and see *Doe* d. *Gaines* v. *Rouse*, 5 C. B. 442; *Giles* v. *Giles*, 1 Keen, 685; *Ford* v. *Batley*, 23 L. J. Ch. 225; *Pratt* v. *Mathew*, 22 Beav. 334.

(*f*) As to judicial certainty, see Wigram on Wills, p. 99.

(*g*) *Del Mare* v. *Rebello*, 3 B. C. C. 447; *Holmes* v. *Custance*, 12 Ves. 279; *Daubeny* v. *Coghlan*, 12 Sim. 507; *Hodgson* v. *Clarke*, 1 Giff. 139, reversed on appeal, see Table of Cases, ad fin. ib.

(*h*) *Pryce* v. *Newbolt*, 14 Sim. 354; and see *Bernasconi* v. *Atkinson*, 10 Hare, 345.

(*i*) 11 Rep. 21 a.]

(*k*) *Pitcairne* v. *Brase*, Finch, 403: see also *Gynes* v. *Hemsley*, 1 Freem. 293; *Rivers' case*, 1 Atk. 410.

to *William Pitcairne, eldest son of Charles Pitcairne*, it was insisted that the eldest son had no title, because his name was not William, but Andrew; nevertheless the Court was of opinion that the words were sufficient to point him out with certainty.

James entitled under gift to John.

So (*l*) under a bequest to "*John* and Benedict, sons of John Sweet," a son named *James* (there being no John) was held to be entitled. It was proved, too, that the testator used to call him Jackey; but Lord *Hardwicke* appears to have thought this evidence unnecessary to establish his title.

Edward, written by mistake for Samuel.

Again, where (*m*) a testator gave an annuity to his brother *Edward* Parsons for life, and, after his decease, the same to go equally among his (E. P.'s) children, "by his present wife;" and at the date of the will, the testator had no brother except one named *Samuel*, who had a wife and children; but four or five years before, he had a brother named Edward, who, as well as his wife, was then dead, which fact was known to the testator, who, by the same will, gave legacies to his children. The testator had been in the habit of calling his brother Samuel, Edward and Ned. Lord *Loughborough*, without argument, held the children of Samuel to be entitled.

Charles, by mistake for Richard.

In another case (*n*), a bequest to "the Rev. *Charles* Smith, of Stapleton Tawney, clerk," was held to apply to a gentleman answering the other parts of the description, but whose name was *Richard;* though it was suggested that the person intended was Charles Smith of Romford, an officer in the army, but who, it appeared, was dead at the date of the will, and that the testator had been informed of the fact. If the other part of the description, as well as the name, had corresponded with those of the deceased Charles Smith, and the testator could have been ignorant of his death, it would have been difficult to sustain the claim of Richard (*o*).

Other instances of mistake in christian name.

So where (*p*) a testator bequeathed to his six grandchildren (*q*) by their christian names, but the name of Ann, one of them, was repeated, and that of Elizabeth, another, omitted, it was held that Elizabeth should take the share mistakenly given to Ann by the repetition of her name.

Again, where (*r*) a testator gave to his *namesake Thomas*

(*l*) *Dowset* v. *Sweet*, Amb. 175.

(*m*) *Parsons* v. *Parsons*, 1 Ves. jun. 266.

(*n*) *Smith* v. *Coney*, 6 Ves. 42; see *Holmes* v. *Custance*, 12 Ves. 279; [*In re Feltham's Trust*, 1 Kay & J. 528.

(*o*) *Drake* v. *Drake*, 25 Beav. 642.]

(*p*) *Garth* v. *Meyrick*, 1 B. C. C. 30.

(*q*) As to gift to a specified number of children, vide post, Chap. XXX.

(*r*) *Stockdale* v. *Bushby*, G. Coop. 229, 19 Ves. 381.

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Stockdale, the second son of his brother John Stockdale, the second son, though not named *Thomas*, was held to be entitled, there being no son of that name. The error in the name here was remarkable, as the testator, in describing the legatee as his own namesake, had his attention particularly drawn to the name.

So, under a devise to "Mary Cook, wife of — Cook (*s*)," a married woman named Elizabeth Cook was held to be entitled, on evidence showing that the testator had no other relative of the name of Cook, and that she was the person intended. In this case the additional description was very slight, it merely showed the devisee to be a married woman.

[So, where there was a gift to *Clare Hannah*, the wife of A., whose wife was named *Hannah* only, but who had an infant daughter, named *Clare Hannah*, it was held that the testator could not have had an infant in view when he gave a legacy to a wife, and that therefore the wife was entitled to the legacy (*t*). And where both the name and description are almost entirely inapplicable, the general purpose of the testator, collected from the circumstances, will sometimes point out the object: as where there was a gift to the children of *Elizabeth*, the natural *daughter* of the testator's servant, *Elizabeth, a single woman*. The servant Elizabeth was a *married* woman, who had an illegitimate *son John*, who had died leaving children, and a legitimate daughter Margaret, and it was held that the children of John were entitled, the circumstances being such as to lead to the inference, that the children of the illegitimate child of the servant Elizabeth, without reference to name or sex, were the objects of the testator's bounty (*u*).

Similarly, under a gift to each of the four sons of A., who had three sons and a daughter, the daughter was held to take (*x*).

Where there is no person of the name, resort must of course be had to the description in the will.

Uncertainty avoided by position of name in will.

The position in the will of the name of a legatee may sometimes prevent uncertainty. Thus, in *Fox* v. *Collins* (*y*), where legacies

(*s*) *Doe* d. *Cook* v. *Danvers*, 7 East, 299.

[(*t*) *Adams* v. *Jones*, 9 Hare, 485; and see *Lee* v. *Pain*, 4 Hare, 253; in *Bristow* v. *Bristow*, 5 Beav. 291, where after a gift to four children of my *cousin* A., a gift to the *remaining* three children of my uncle A. (there being an uncle A. who had three children, and a cousin A., who had seven children), was held to be a gift to the remaining three children of the cousin, and not to the three children of the uncle, even though the uncle had in one sense three remaining children, one out of four having died.

(*u*) *Ryall* v. *Hannam*, 10 Beav. 537; and see *Rickit's Trust*, 11 Hare, 299.

(*x*) *Lane* v. *Green*, 4 De G. & S. 239.

(*y*) 2 Ed. 107.

[were given to S. C., A. C., of St. Ives, and S. B., and then a legacy to A. C., of Hereford, and others, and the residue was given "to the said S. C., A. C., and S. B., it was held, that under the last gift A. C., of St. Ives, was entitled, partly on the ground that the word "said" applied to the three persons taken together, and that in the previous part of the will A. C., of St. Ives, was named between S. C. and S. B.]

In cases of this kind, however, it not unfrequently happens that part of the description applies to one person and part to another (*z*); and then the gift necessarily fails for uncertainty, unless the ambiguity can be removed by parol evidence [of the surrounding circumstances. Direct evidence of the testator's intention appears from the cases cited in the next chapter to be inadmissible.

Case of indefinite reference to locality.

Where the objects of gift are described by reference to locality, there must be some certain local boundary. Thus, a gift to persons in hospitals, in the vicinity of C., has been held void for uncertainty, as to what should be said to be in the vicinity of C. (*a*).

Where only one claimant.

Of the cases cited, some have been cases of competition between two or more claimants, and in others, only one claimant has appeared. In the latter cases there is considerably less difficulty than in the former (*b*); and it appears that where there is no person of precisely the name, the maxim—*Veritas nominis tollit errorem descriptionis*—will not extend to entitle the person more nearly answering to the name, but who does not answer the other part of the description, to the exclusion of a competing claimant who does. Thus, where the gift was to the "*second* son of Edward Weld, of Lulworth, for life, and there was among other subsequent remainders, a remainder to the first and other sons of each brother, except *the eldest*, of Edward Weld, and also a remainder to Lady S., *one of the sisters* of Edward Weld: the facts were, that there was no Edward Weld, of Lulworth, but there was a Joseph Weld of that place, who had three sons and an elder brother, and a sister, Lady S., and there was an Edward Joseph Weld, of the same place (son of Joseph Weld), who had *no children or elder brother, and no sister named Lady S.*; and it was decided that the second son of Joseph, who

(*z*) See *Doe* v. *Uthwaite*, 3 Moore, 304, 8 Taunt. 306, 3 B. & Ald. 632. [See also *In re Feltham's Trust*, 1 Kay & J. 528.

(*a*) *Flint* v. *Warren*, 15 Sim. 626.

(*b*) Similarly with regard to two subjects, see *Smith* v. *Armstrong*, 6 D. M. & G. 150.

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[perfectly answered the description, and not of Edward Joseph, who partly answered the name, was the person designated to take the first estate for life under the description of the second son of Edward (*c*).

Where one answers both name and description he will take, notwithstanding improbability.

But where both name and description correctly describe one person, the improbability of a bequest will of course not deprive him of it in favour of another, who answers the description and (if the will were to be made afresh) has greater probability on his side, but is of a different name (*d*).]

Effect where trust is created, but the object uncertain.

V. Sometimes a testator distinctly shows an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit of the person or persons on whom the law, in the absence of disposition, casts it: in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.

As in the case of *Stubbs* v. *Sargon* (*e*), where a testatrix indorsed a promissory note for 2,000*l.* to Mrs. Sargon, which she accompanied with a letter, declaring the note to have been given to Mrs. Sargon for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to *either branch of her* (the testatrix's) *family*, any portion of the principal or interest, as she might consider the most prudent; and, in the event of the death of Mrs. Sargon, by that bequest the testatrix empowered her to dispose of the said sum and interest by deed or will, to those or either branch of her family she might consider most deserving; and that to enable her (Mrs. Sargon) to have the sole use and power of the said sum of 2,000*l.* due by the above note of hand, she had specially indorsed the same in her favour. Lord *Langdale*, M. R., was of opinion, that the promissory note was not indorsed and delivered to Mrs. Sargon for her own absolute use, but for the purpose of the money secured by it being disposed of by her to such parts or members of the testatrix's family as were intended to be thereby

[(*c*) *Blundell* v. *Gladstone*, 12 Sim. 467, 1 Phil. 279, 1 H. of L. Ca. 778.

(*d*) *Mostyn* v. *Mostyn*, 5 H. of L. Ca. 155, 23 L. J. Ch. 925. The second of the two christian names (John Henry) was omitted; but as the testator had done the like in other cases, the statement above given is virtually correct; and see further as to the omission of one of several christian names, *Stringer* v. *Gardiner*, 27 Beav. 35, 4 De G. & J. 468.]

(*e*) 2 Kee. 255; see also *Harland* v. *Trigg*, 1 B. C. C. 142; *Robinson* v. *Waddelow*, 8 Sim. 134, stated post. See also cases stated ante, pp. 195, 196.

designated. Unfortunately, the letter was so expressed, that the objects could not be ascertained; and the trust being too indefinite for the Court to act upon, the 2,000*l.* must be treated as part of the testatrix's personal estate. On appeal, Lord *Cottenham* was of the same opinion (*f*).

Corporation of Gloucester v. *Wood*.

[In the case of *Corporation of Gloucester* v. *Wood* (*g*), one of several testamentary papers contained the following words: "In a codicil to my will, I gave to the corporation of Gloucester 140,000*l.* In this I wish that my executors would give 60,000*l.* more to them, for the same purpose as I have before named." No codicil or testamentary paper containing any gift to the corporation could be found, and it was decided by Sir *J. Wigram* that neither the legacy of 140,000*l.* or 60,000*l.* could be supported as a gift to the corporation for their own use, (though he admitted that a gift to A. "for a purpose" may sometimes be equivalent to a gift to A. absolutely,) nor on the ground that gifts to corporations were usually for charitable purposes could the legacies be supported as general charitable legacies; it was still possible that the intended purposes might have been the benefit of individuals; and that therefore the purposes of the gift being uncertain, the corporation were trustees for the residuary legatees. This decision was affirmed by the House of Lords (*h*).

It sometimes happens that the words attached to the gift specify no object whatever to which it is to be applied, but merely imply that the donee should dispose of it; and the gift is then considered absolute in him (*i*).

Gift to three persons equally subject to any disposition the testator might make.

Again, where (*k*) a testator bequeathed personalty to three persons as joint tenants on certain trusts, and then devised and bequeathed the residue of his real and personal estate to the same three persons as tenants in common, "subject nevertheless to such disposition thereof or of any part thereof as he *might* by any deed or writing duly executed thereafter direct." It was held by Sir *W. P. Wood*, V. C., that the three devisees were entitled to the residue for their own benefit. He thought the gift to them as tenants in common was unusual and improbable if they were meant to take as trustees, and the testator did not say absolutely he intended to make a further disposition, but

[(*f*) 3 My. & Cr. 507.
(*g*) 3 Hare, 131.
(*h*) 1 H. of L. Ca. 272; and see *Briggs* v. *Penny*, 3 De Gex & S. 3 M. & Gord. 546.
(*i*) *Gibbs* v. *Rumsey*, 2 V. & B. 294.
(*k*) *Fenton* v. *Hankins*, 9 W. R. 300.

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[only that he *might* do so; which showed that he had not made up his mind whether he ever would do so or not.

Where gift in trust though discretional.

But if the gift be clearly "in trust," though such trust be entirely at the discretion of the donee, and would, apart from those words, authorize an application of the property for his own benefit, the beneficial interest will result to the heir or next of kin (*l*).]

Words of recommendation, wish, or entreaty create a trust.

Technical language, of course, is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled, that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favour such expressions are used; provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter (*m*) and the object or objects of the intended trust.

Thus, in the case of *Massey* v. *Sherman* (*n*), where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children, as the wife should appoint.

So, in the case of *Pierson* v. *Garnet* (*o*), where a testator gave his residuary personal estate, in trust for A. for life, subject to certain annuities, and after payment of the annuities, the testator gave the residue to A., his executors, administrators, and assigns, adding, "and it is my dying *request* to the said A., that if he shall die without leaving issue living at his death, the said A. do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper;" it was held by Sir *L. Kenyon*, M. R., and afterwards by Lord *Thurlow*, C., that the effect of the will was to create a trust for the descendants in the described event.

Again, in the case of *Malim* v. *Keighley* (*p*), where a testator, in certain events and subject to certain trusts, bequeathed the

[(*l*) *Fowler* v. *Garlike*, 1 R. & My. 232.

(*m*) See *Re Pinckard's Trust*, 4 Jur. N. S. 1041, 27 L. J. Ch. 422; *Reeves* v. *Baker*, 18 Beav. 373; *Macnab* v. *Whitbread*, 17 ib. 299; *Smith* v. *Smith*, 2 Jur. N. S. 967.]

(*n*) Amb. 520; [*S. C.* nom. *Macey* v. *Shurmer*, 1 Atk. 389.] See also *Wynne* v. *Hawkins*, 1 B. C. C. 179; [*Parsons* v. *Baker*, 18 Ves. 476; *Malone* v. *O'Connor*, 2 Ll. & Go. 465.]

(*o*) 2 B. C. C. 38, 226; [and see *Re O'Bierne*, 1 J. & Lat. 352.]

(*p*) 2 Ves. jun. 333, 529; see also *Paul* v. *Compton*, 8 Ves. 380; [*Ford* v. *Fowler*, 3 Beav. 146; *Knott* v. *Cottee*, 2 Phil. 192; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590; under the circumstances in *Meggison* v. *Moore*, 2 Ves. jun. 630, "recommend" was held not to create a trust.]

What precatory words create a trust.

residue of his personal estate to his surviving daughter, and such bequest was followed by these words; "hereby *recommending* to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A., and my nephew I., desiring that his reputed daughter C. may be considered as one of his children." The surviving daughter died without exercising the power, and Sir *R. P. Arden*, M. R., held, that a trust was created in favour of the children of the daughter and nephew, [and his decision was affirmed by Lord *Loughborough*.]

So, in the case of *Birch* v. *Wade* (*q*), where a testator after giving the residue of his real and personal estate in trust for his wife for life, and then in trust for other persons for life, and after disposing of two-thirds absolutely added, "It is my will and desire, that the other third part of the principal of my estate and effects be left entirely at the disposal of my dear and loving wife among such of her relations as she may think proper." The wife died without making any disposition, and Sir *W. Grant*, M. R., considered it to be clear that the testator intended his wife's relations to have the benefit of the disposition. Her next of kin at her death, therefore, were held to be entitled (*r*).

Prevost v. *Clarke*.

So, in the case of *Prevost* v. *Clarke* (*s*), a testatrix gave the residue of her property equally between her sons and daughter; and, after directing the share of the daughter to be invested in public securities, &c., added, "Convinced of the high sense of honour, the probity and affection of my son-in-law, E. C., I intreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease to my children and grandchildren the share of my property I have bestowed on her." Sir *J. Leach*, V. C., was clearly of opinion that these words created a contingent trust (subject to the power of selection) in favour of the children and grandchildren.

Pilkington v. *Boughey*.

[Again, in the case of *Pilkington* v. *Boughey* (*t*), the testator, after reciting that he had purchased an estate for a particular charitable purpose, devised it upon such trusts as certain

(*q*) 3 V. & B. 198.

(*r*) See also *Brest* v. *Offley*, 1 Ch. Rep. 246; *Eales* v. *England*, Pre. Ch. 202; *Harding* v. *Glyn*, 1 Atk. 469; *Earl of Bute* v. *Stuart*, 2 Ed. 87, 1 B. P. C. Toml. 476; *Wright* v. *Atkins*, 19 Ves. 299, [Cooper, 111, reversed in D. P. Sugd. Law of Prop. 377;] *Cary* v. *Cary*, 2 Scho. & L. 189; *Forbes* v. *Ball*, 3 Mer. 441; *Horwood* v. *West*, 1 S. & St. 387.

(*s*) 2 Mad. 458.

[(*t*) 12 Sim. 114.

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[persons should in her, his, or their discretion, direct or appoint, but he trusted that they would exercise such power in doing such charitable acts as they knew he would most approve of. It was held that a gift for charity was clearly pointed out, so that a trust would have attached for that purpose, if the purpose had been legal.

Foley v. *Parry.*

In the case of *Foley* v. *Parry* (*u*), the testator gave property to his wife for life, with remainder to his nephew for life, and then stated it to be his particular wish and request, that his wife and *another person*, who took nothing under the will, should superintend and take care of the education of the nephew, so as to fit him for any respectable employment; and it was decided by Lord *Brougham* (*u*), affirming the decision of Sir *L. Shadwell* (*x*), that the nephew was entitled to be educated and maintained out of the income of the property given to the widow till he attained the age of twenty-one.

Other cases of doubtful words creating a trust.

Having thus noticed some of the principal cases on this subject, it will be sufficient to refer to the other decisions, by saying that trusts, or powers in the nature of trusts, have been considered to be created by the following expressions:—"I desire him to give (*y*);" "I hereby request (*z*);" "empower and authorize her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my nearest family (*a*);" "advise him to settle (*b*);" "my dear daughters, is, that you do give my granddaughter 1000*l.*, this is my last wish (*c*);" "require and entreat (*d*);" "trusting that he will preserve the same, so that after his decease it may go and be equally divided, &c. (*e*);" "under the conviction that she will dispose, &c. (*f*);" "to apply the same (*g*);" and by a direction to trustees to convey to the eldest son at twenty-one, "but so that the settlor's wish and desire may be observed, which is hereby declared, that the other children may be allowed to participate (*h*)."

[(*u*) 2 My. & K. 188.

(*x*) 5 Sim. 138.

(*y*) *Mason* v. *Limbury*, cited in *Vernon* v. *Vernon*, Amb. 4.

(*z*) *Nowlan* v. *Nelligan*, 1 B. C. C. 489.

(*a*) *Griffiths* v. *Evan*, 5 Beav. 241. The devise to the donee of the power was in tail. If it had been in fee, a trust would scarcely have been created without the word "confiding;" see *Brook* v. *Brook*, 3 Sm. & Gif. 280; *Alexander* v. *Alexander*, 2 Jur. N. S. 898.

(*b*) *Parker* v. *Bolton*, 5 L. J. N. S. Ch. 98.

(*c*) *Hinxman* v. *Poynder*, 5 Sim. 546.

(*d*) *Taylor* v. *George*, 2 V. & B. 378.

(*e*) *Baker* v. *Mosley*, 12 Jur. 740.

(*f*) *Barnes* v. *Grant*, 26 L. J. Ch. 92, 2 Jur. N. S. 1127.

(*g*) *Salusbury* v. *Denton*, 3 Kay & J. 529.

(*h*) *Liddard* v. *Liddard*, 6 Jur. N. S. 439.

Doubtful expressions explained by context.

[But any of these expressions may be deprived of their effect by a context showing that no trust was intended; as if a testator, after settling a fund on his daughters and their children, by codicil revokes that bequest on account of the inconvenience of having the money tied up, and leaves the property "to be disposed of by the husbands for the good of their families:" no trust will be created in favour of the wives and children; otherwise the inconvenience complained of would continue (*i*).

Certainty of object on face of will not required if testator supposed there was certainty.

It is to be observed, that the rule requiring certainty in the object of the intended trust does not mean, that in order to create a trust it must appear with certainty to the devisee, or to the Court, who were the objects for whom the testator intended it; but only that it should be made clear that *the testator supposed* the object to be ascertained, or ascertainable, by the terms of the will. The question, is the devisee or legatee a beneficiary or a trustee, obviously depends on this other question, what did the testator mean: and as words of imperative trust will, to promote the testator's intention, prevent the devisee or legatee from taking the property for his own use, though no beneficiary be pointed out; so precatory words will be equally efficacious where the intention to create some trust appears by the will. The sole difference between the two cases is, that where there are formal words properly applicable to the creation of a trust, the intention is immediately apparent: whereas, in ascertaining whether the precatory words import merely a recommendation on the part of the testator of that which he thinks will be a reasonable exercise of discretion on the part of the donee (leaving it, however, to the donee to exercise his own discretion), or whether they import a definite imperative direction to him as to his mode of dealing with the property, the Court will be guided by the consideration whether the amount he is requested to give is certain or uncertain, and whether the objects to be selected are certain or uncertain; and if there is a total absence of explicit direction as to the quantum to be given, or as to the objects to be selected by the donee of the property, then the Court will infer from the circumstances of the testator having used precatory words expressive only of hope, desire or request, instead of the formal words usual for the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as sugges-

[(*i*) *Alexander* v. *Alexander*, 2 Jur. N. S. 898.

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[tions on the part of the testator, for the guidance of the donee in the distribution of the property; the testator, placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion (*k*).

Where the gift is for A.'s *absolute* use, subsequent precatory words have no effect.

It seems to be now established that there is a distinction where the words of gift are such as expressly to point to an *absolute* enjoyment by the donee himself, and that in such case subsequent words of request, recommendation or the like will not generally operate to affix a trust on the prior absolute gift (*l*).]

Meredith v. *Heneage.*

Thus, in *Meredith* v. *Heneage* (*m*), where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, "*unfettered and unlimited*," in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof, she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate together and entire to such of his said father's heirs as she might think best deserved her preference: it was held in the House of Lords, affirming a decree in the Exchequer, that the wife was absolutely entitled for her own benefit, Lord *Eldon* considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord *Redesdale*) on the words "unfettered and unlimited." Lord *Eldon* also adverted to the great difficulty of reconciling the testator's direction that the estate should go "entire" with his direction respecting its "distribution."

Wood v. *Cox.*

So, in the case of *Wood* v. *Cox* (*n*), a testatrix gave all her estate, real and personal, unto Sir G. M. Cox (and Thomas Wilson, their), his heirs, executors and assigns, "*for his and their own use and benefit* for ever, trusting and wholly confiding in his honour that he will act in strict conformity to my wishes." And she appointed Sir G. Cox and Wilson executors. On the same day the testatrix executed a testamentary paper, by which she gave several annuities and legacies (among others a legacy of 100*l.* to her father, who was her sole next of kin), and which

[(*k*) Per Sir *W. P. Wood*, *Bernard* v. *Minshull*, 1 Johns. 287.

(*l*) Compare *Bonser* v. *Kinnear*, 2 Gif. 195, where the gift was to the wife, "for her own use and benefit, *she maintaining* the children," and held a trust for the children.]

(*m*) 1 Sim. 542, 10 Pri. 306.

(*n*) 1 Keen, 317.

concluded with the following words in the testatrix's handwriting: "Such is the will of Sarah Crompton." The words "and Thomas Wilson their," originally written in the will, were obliterated by the direction of the testatrix. Lord *Langdale*, M. R., held that Sir G. Cox was a trustee for the next of kin, [but his decision was reversed by Lord *Cottenham* (*o*), who said that to make Sir George Cox a trustee of the whole property, the words "for his own use and benefit" must be expunged from the will, or, by reason of some irresistible evidence derived from other parts of the testamentary disposition, treated as if they had never been inserted, *a construction which nothing but absolute necessity could justify.*

Winch v. *Brutton*.

Again, in *Winch* v. *Brutton* (*p*), where the gift was to the testator's wife "for her own use, benefit and disposal absolutely, nevertheless I earnestly conjure, &c.:" Sir *L. Shadwell*, V. C., in deciding that no trust was created, laid stress on the words of gift as negativing a trust. A like stress was laid on similar words in *Bardswell* v. *Bardswell* (*q*), decided by the same Judge, which case, however, contained the additional element of uncertainty as to the quantum of gift, and cannot therefore be considered a complete authority on this point.

Johnston v. *Rowlands*.

In *Johnston* v. *Rowlands* (*r*), the gift was to the testator's wife, to be disposed of "by her will *in such way as she shall think proper*," but he recommended her to dispose of it in a particular manner. Sir *J. Knight Bruce*, V. C., said, "That the word 'recommend' may amount to a command in a particular instrument, and may create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation, of an interpretation consistent with the *legal and equitable power* of the person recommended to depart from the recommendation." The Vice-Chancellor thought that no trust was created, it is presumed by reason of the words "in such way as she shall think proper."

Williams v. *Williams*.

In *Williams* v. *Williams* (*s*), where the testator by his will bequeathed property to his wife *absolutely for her own use and benefit*, and subsequently in a letter to her, wrote as follows: "I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish

[(*o*) 2 My. & Cr. 684.
(*p*) 14 Sim. 379.
(*q*) 9 Sim. 319; and see *White* v. *Briggs*, 15 Sim. 33; *Fox* v. *Fox*, 27 Beav. 301.
(*r*) 2 De G. & S. 356.
(*s*) 1 Sim. N. S. 358; and see *Green* v. *Marsden*, 1 Drew. 646.

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[that you should enjoy everything in my power to give, using your judgment where to dispose of it amongst your children when you can no longer enjoy it yourself, but I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." It was held by Lord *Cranworth*, V. C., that the words of the codicil could not operate to cut down the absolute interest given to the wife. However, the main ground of his Lordship's decision was the uncertainty as to the objects to whom the precatory words referred.

Webb v. *Wools*, the principle recognized.

In the subsequent case of *Webb* v. *Wools* (*t*), the distinction seems to have been expressly recognized by Sir *R. T. Kindersley*, V. C. The gift was "to J., her executors, administrators and assigns, *to and for her and their own use and benefit*, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." The Vice-Chancellor said that if he put on the latter part of the sentence a construction which would have the effect of creating a trust for the benefit of the children, he should make the two branches of the sentence contradictory; but he might fairly say that the latter part was not introduced for the purpose of creating any trust, but merely for the purpose of declaring that, giving all his property to J. for her own use and benefit, he reposes full confidence that she will dispose of it for the benefit of herself and children, without imposing any obligation which the Court could enforce.

Ware v. *Mallard*, *contra*.

It only remains to notice the recent case of *Ware* v. *Mallard* (*u*), where the testator devised and bequeathed all his real and personal property to his wife, her *heirs, executors, administrators or assigns, to and for her sole use and benefit*, in full confidence that she would in every respect appropriate and apply the same unto and for the benefit of all his children. Sir *J. Parker*, V. C., decided that the widow took *a life estate* with a power of appointment among the children. If effect was to be given to the words "in full confidence, &c." as creating a trust, it is difficult to conceive how the widow could have taken any beneficial interest whatever: and on the other hand, if effect was not to be given to these words, the widow must have taken abso-

[(*t*) 2 Sim. N. S. 267.

(*u*) 21 L. J. Ch. 355, 16 Jur. 492; see also *Gully* v. *Cregoe*, 24 Beav. 185, where the words, "having confidence that she will *hereafter* dispose of, &c." gave more reason for allowing the widow a life interest. See cases, post, vol. ii. p. 374, et seq.

[lutely. It may perhaps be conjectured that the actual decision was induced by the consideration that the words "sole use" meant "separate use," and were intended merely to exclude the right of a husband; but in *Green* v. *Marsden* (*x*), Sir *R. T. Kindersley*, V. C. did not so interpret them. Where, however, the words used clearly point to such exclusion, it seems that further force will not be attributed to them. Thus, in the case of *Cholmondeley* v. *Cholmondeley* (*y*), where the gift was to a married woman, "to *be hers* independent of any husband," a subsequent recommendation in favour of her children was held to create a trust.]

Whether "sole use" means "separate use."

If the testator's language amounts merely to a general expression of goodwill towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds, "I have no doubt but A. B. (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest (*z*).

Mere expressions of kindness not sufficient.

And the same construction has prevailed in some instances in which the indefiniteness was of a less palpable character, as where a testator gave leasehold estates at S. to his brother J. H. for ever, "hoping he will continue them in the family (*a*)."

But where the testator ordered and directed his son J. (to whom he gave all his real and personal estate) to take care and provide for his (the testator's) daughter A., during her life—Sir *T. Plumer*, M. R., was of opinion that the daughter was entitled to have a provision made for her out of the residue, in addition to an annuity of 5*l.* which was bequeathed to her (*b*).

Recent cases suggest a doubt whether such words would now receive a similar construction, for the Courts seem to be sensible that they have gone far enough in investing with the efficacy of a trust loose expressions of this nature, which, it is probable, are rarely intended to have such an operation. Accordingly we find, of late, a more strict and uniform requisition of definiteness in regard to both the subject-matter and objects of the intended trust, than can be traced in some of the earlier adjudications.

Thus, in the case of *Curtis* v. *Rippon* (*c*), where a testator gave all his real and personal estate to his wife, trusting that she would, in love to the children committed to her care, make such

Instances of words being too indefinite to create a trust.

[(*x*) 1 Drew. 646.

(*y*) 14 Sim. 590; see also *Stubbs* v. *Sargon*, 2 Keen, 255, 3 My. & Cr. 513.]

(*z*) *Buggens* v. *Yeates*, 8 Vin. Ab. 72, pl. 27.

(*a*) *Harland* v. *Trigg*, 1 B. C. C. 142.

(*b*) *Broad* v. *Bevan*, 1 Russ. 511, n.

(*c*) 5 Mad. 434.

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use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor—Sir *J. Leach*, V. C., held the wife to be absolutely entitled, the testator's intention evidently being to leave the children dependent on her.

So, in the case of *Abraham* v. *Alman* (*d*), where a will contained the following passage: "I do likewise will and bequeath to my only son J. the sum of 60*l.* sterling per year for ever; also to provide for the two daughters of my child H. E., namely, S. E. and E. E., and the remainder of my property to the two children of my daughter S. A."—Lord *Gifford*, M. R., held that the words in question did not create a trust on the 60*l.* a-year, or the remainder of the property bequeathed to the children of S. A.; the former was a distinct, independent bequest; and it was not clear that the testator intended to make a provision for the daughters of H. E., out of the latter; the Court had no means of determining what that provision was to be, [or in what manner or out of what fund to be made.]

Again, in the case of *Sale* v. *Moore* (*e*), where a testator bequeathed the remainder of what he should die possessed of, after payment of debts and legacies, to his dear wife, adding, "recommending to her, and not doubting, as she has no relations of her own family, but that *she will consider my near relations*, should she survive me, as I should consider them myself in case I should survive her." In a preceding part of the will, the testator had assigned as a reason for his not leaving his brother and sister anything, that they were provided for, and that he could not do so without taking from his wife's property, who was more in need of it—Sir *A. Hart*, V. C., held that the effect of the whole was, that no trust for the relations was created.

So, in the case of *Hoy* v. *Master* (*f*), where a testator willed the whole of his property to his wife for life, and that, after her decease, one-third should devolve to his beloved daughter M., and that the other two-thirds should be at the sole and entire disposal of his said wife, L. B.; "trusting that, should she not marry again and have other children, her affection for our joint offspring, the said M. B., would induce her to make her said daughter her principal heir." The wife did not marry again, and disposed of her property to a stranger; whereupon it was

(*d*) 1 Russ. 509.
(*e*) 1 Sim. 534; [see also *Reeves* v. *Baker*, 18 Beav. 373.]
(*f*) 6 Sim. 568.

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claimed by the daughter, on the ground that the wife had a life interest only, with a power of appointment in favour of the children of any future marriage, with an alternative trust for the daughter absolutely. But Sir *L. Shadwell* held that the wife took the two-thirds absolutely.

Again, in the case of *Lechmere* v. *Lavie* (*g*), where a testatrix made a codicil to her will in the following words:—"I hope none of my children will accuse me of partiality, in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but, in case of their marrying, I have divided it amongst all my children. If they die single, of course *they will leave what they have amongst their brothers and sisters, or their children.*" Sir *J. Leach*, M. R., considered that these words were not intended to create an obligation upon the two eldest daughters, as they applied not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gave by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount.

It is submitted, however, that the uncertainty in regard to the subject of gift arose, not from the testatrix having combined in the trust with her own property that of her daughters themselves, which she could not dispose of (*h*), but from the absence of any clear indication of intention that the trust was to affect all the property which the daughters derived from the testatrix. The expression "what they have" would seem to imply that the legatees might dispose of, as absolute owners, any part they chose, and that the trust should apply only to what remained. This brings the case within the principle of *Wynne* v. *Hawkins* (*i*), where a testator bequeathed what he should leave behind him to his wife, "not doubting that she would dispose of *what should be left*, at her death, to their two grandchildren." Lord *Thurlow* said that the words "not doubting" would be strong enough; but that where, in point of intent, it was uncertain what property was to be given, and to whom, the words were not sufficient, because it was doubtful what the confidence was which the testator had reposed; and, where that did not appear, the scale leaned

(*g*) 2 My. & K. 197.

[(*h*) As to this, see *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1, 12.]

(*i*) 1 Bro. C. C. 179. As to cases of this class, vide ante, pp. 335, 336.

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to the presumption that he meant to give the whole to the first taker.

So, in the case of *Horwood* v. *West* (*m*), where a testator recommended his wife to give by her will what *she* should die possessed of under his will in a certain manner—Sir *J. Leach*, V. C., assumed, that if these words had been uncontrolled by the context, the trust must have been void for uncertainty; but he thought that it was evident, from a direction in the will to the wife to secure to herself, on a second marriage, whatever she should possess by virtue of his will, that the testator intended the trust in question to be co-extensive with such direction, i. e. to extend to all the property the wife derived from the testator.

It should be observed, however, in regard to the objection of uncertainty, that the preceding cases, though frequently referred to as if they were the subject of a peculiar rule, merely require, in common with all others, that the intention of the testator should be manifested with sufficient certainty to enable the Court to act judicially upon it (*l*).

And lastly, in the case of *Ex parte Payne* (*m*), where a testor, after devising the property in question to his daughter in fee, proceeded to declare that the estate was intended as some reward for her attention to him, and was kept separate from the other interests she would take under his will as a testimony thereof. And he directed his daughter to keep the premises in good repair; and in case she should marry, he strongly recommended her to execute a settlement of the estate, and thereby to vest the same in trustees, to be chosen by her, for the use of herself for life; with remainder to her husband for life; with remainder to the children she might happen to have, *or to such other uses as his daughter should think proper*, to the intent that the said estate, in the event of her marriage, might be effectually protected and secured. The question, on petition, was, whether the daughter (who was unmarried) could make a good title to the devised property in fee. It was contended for her that she could, for that neither the persons to take nor the estates them-

(*k*) 1 Sim. & St. 387.

[(*l*) As to what words constitute a sufficient certainty, see *Huskisson* v. *Bridge*, 15 Jur. 738, *K. Bruce*, V. C.; *Young* v. *Martin*, 2 Y. & C. C. C. 582.]

(*m*) 2 Y. & C. 636; see also *Knight* v. *Knight*, 3 Beav. 148; [*S. C.* nom. *Knight* v. *Boughton*, 11 Cl. & Fin. 513, 8 Jur. 923; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1, (in which great reliance was placed on the fact that the approbation of the devisee was required to the conduct of the persons claiming as cestuis que trust; the force of which circumstance must, however, depend on circumstances, *Bonser* v. *Kinnear*, 2 Gif. 195;) *Quayle* v. *Davidson*, 12 Moo. P. C. C. 268; *Maud* v. *Maud*, 27 Beav. 615; but see *Malone* v. *O'Connor*, 2 Ll. & Go. 465.

selves were certain; and that, even if the daughter married, she might limit the estates to such uses as she thought proper: and of this opinion was Lord *Abinger*, C. B.

It will be observed, that in all these cases the consequence of holding the expressions to be too vague for the creation of a trust was, that the devisee or legatee retained the property for his or her own benefit; and in this respect these cases stand distinguished from those (*n*) in which there was considered to be sufficient indication of the testator's intention to create a trust, though the objects of it were uncertain: a state of things which, of course, lets in the claim of the heir or next of kin to the beneficial ownership. In such cases there is no uncertainty as to the intention to create a trust, but merely as to the objects; in the other class of cases it is uncertain whether any trust is intended to be created.

Whether a gift, being for a purpose, the purpose is obligatory.

Where the purpose is the benefit of donee alone, the gift is absolute.

[We are next to consider whether in cases where words are added, expressing a purpose for which the gift is made, such purpose is to considered obligatory. Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring (*o*), or an annuity (*p*), or a house (*q*), or to set him up in business (*r*), or for his maintenance and education (*s*), or to bind him apprentice (*t*), or towards the printing of a book, the profits on which are to be for his benefit (*u*), the legatee may claim the money without applying it or binding himself to apply it to

[(*n*) *Stubbs* v. *Sargon*, *Fowler* v. *Garlike*, *Corporation of Gloucester* v. *Wood*, *Briggs* v. *Penny*, ante, p. 354, *et seq.*

(*o*) *Apreece* v. *Apreece*, 1 V. & B. 364.

(*p*) *Dawson* v. *Hearn*, 1 R. & My. 606; *Ford* v. *Batley*, 17 Beav. 303; *Re Browne's Will*, 27 Beav. 324. It makes no difference whether it be a bequest of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount, *Yates* v. *Compton*, 2 P. W. 308.

(*q*) *Knox* v. *Hotham*, 15 Sim. 82.

(*r*) *Gough* v. *Bult*, 16 Sim. 45.

(*s*) *Webb* v. *Kelly*, 9 Sim. 472; *Younghusband* v. *Gisborne*, 1 Coll. 400; *Presant* v. *Goodwin*, 1 Sw. & Tr. 544, 29 L. J. Prob. 115. It follows that if the legatee die before receiving his legacy, his representative is entitled, *Bayne* v. *Crowther*, 20 Beav. 400. But see *Twopeny* v. *Peyton*, 10 Sim. 487.

(*t*) *Barlow* v. *Grant*, 1 Vern. 255; *Nevill* v. *Nevill*, 2 ib. 431; but see *Woolridge* v. *Stone*, 4 L. J. O. S. Ch. 56; see further, *Barton* v. *Cook*, 5 Ves. 461; *Leche* v. *Kilmorey*, T. & R. 207; *Att.-Gen.* v. *Haberdashers' Company*, 1 My. & K. 420; *Lewes* v. *Lewes*, 16 Sim. 266; *Noel* v. *Jones*, ib. 309; in *Lockhart* v. *Hardy*, 9 Beav. 379, a legacy to a devisee to pay off a mortgage debt on the estate devised to him was held good, though the mortgage was foreclosed in the testator's lifetime. And see *Earl of Lonsdale* v. *Countess Berchtoldt*, 3 Kay & J. 185.

(*u*) *Re Skinner's Trusts*, 1 Johns. & H. 102, in which it was a question of some difficulty, whether the principal object of the bequest was the benefit of the person named, or the publication of the testator's opinions.

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[the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money (*x*).

Principle of the cases.

These cases rest on the principle that a Court of Equity will not compel that to be done which the legatee may undo the next moment, as by selling the house or giving up the business: and we shall hereafter see (*y*), that the same principle applies where the nature of the property is directed to be changed, for the donee may claim it in its original state; but of course, in such case, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all, as if the house when purchased was to be conveyed to or settled on two or more persons.

Where interest of legatee is left to discretion of trustees.

But where the amount to be applied for the benefit of the legatee is left to be fixed at the discretion of trustees, the legatee has no right to any more than the trustees in their discretion will allow. Thus, where real and personal estate was given to trustees upon trust to apply the whole *or any part* of the rents and annual income towards the maintenance of A., and the trustees applied a part only, and then A. died; it was held, that his representatives were not entitled to the surplus rents and income (*z*). And in a case where a testator authorized his trustees to apply any sum not exceeding a stated amount in the purchase of church preferment for A., and A. died before any sum had been so applied; it was held, that the gift failed; a discretion was vested in the trustees as to the amount of the legacy, and as to the mode and occasion of raising it, and A. could not in his lifetime have claimed payment of it to himself (*a*).

Where the purpose not for benefit of donee alone three constructions.

Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee, three constructions obtain, according to the different circumstances of the case. The purpose may be so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the *quantum* of benefit to be communicated to the other persons, provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory and not operate to abridge the previous ab-

[(*x*) *Stokes* v. *Cheek*, 29 L. J. Ch. 922.

(*y*) Chap. XIX. post.

(*z*) *In re Sanderson's Trust*, 3 Kay & J. 497. Compare *Beevor* v. *Partridge*, 11 Sim. 229. If the whole income is needed for maintenance the result is the same as if there were an absolute trust, *Rudland* v. *Crozier*, 2 De G. & J. 143.

(*a*) *Cowper* v. *Mantell*, 22 Beav. 231.

[solute gift to the primary donee. In the following cases, illustrating these distinctions, the decisions will be found on examination of the reports to turn in many instances on minute circumstances, which it would require too much space to particularize; and some cases will be found almost irreconcileable with others: the preponderance, however, seems to lean in favour of giving the primary donee a discretion which he must honestly exercise, or in default, subject himself to the control of the Court of Chancery.

First construction, cases of complete trust.

1. As to the cases in which a complete trust is created. A gift to A., to dispose of among her children (*b*), or for bringing up her children (*c*), gives A. no interest, but creates a complete trust for the children. And in *Taylor* v. *Bacon* (*d*), where the testator bequeathed the dividends of stock to R., the wife of his son G., for the benefit of his son G., of herself and of their children, and after the decease of G., the stock to remain in trust for the benefit of R. and her children during her lifetime, if she should remain a widow; it was held that the wife was a trustee of the interest for herself, her husband and children.

In *Jubber* v. *Jubber* (*e*), the bequest was to the testator's wife for the benefit of herself and her unmarried children, that they may be comfortably provided for as long as my wife may remain in this life, with a bequest over upon her death. The widow and unmarried daughters were held to be entitled in equal shares to the income during the widow's life, whether as joint-tenants or tenants in common was not decided. In *Wetherell* v. *Wilson* (*f*), the testatrix, under a general power, bequeathed a sum of stock in trust for her children at twenty-one or marriage, and directed the trustees, in the meantime, to pay the interest of the fund to her husband, in order the better to enable him to maintain the children of the marriage, until their shares should become assignable to them. Lord *Langdale* decided that the husband took nothing beneficially, but was bound to apply the income for the benefit of the children. In *Wilson* v. *Maddison* (*g*), the testator bequeathed "to A. W., with her little girl and two little boys, for their joint maintenance,—their mother to have the care of bringing them up to the best of her power, till they are able

[(*b*) *Blakeney* v. *Blakeney*, 6 Sim. 52.
(*c*) *Pilcher* v. *Randall*, 9 Weekly Rep. 251, V. C. *Wood*.
(*d*) 8 Sim. 100; see also *Chambers* v. *Atkins*, 1 S. & St. 382; *Fowler* v. *Hunter*, 3 Y. & Jerv. 506; *In re Camac's Trust*, 12 Jur. 470; *Barnes* v. *Grant*, 26 L. J. Ch. 92.
(*e*) 9 Sim. 503.
(*f*) 1 Keen, 80.
(*g*) 2 Y. & C. C. C. 372.

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[to do for themselves,—30*l.* a-year, to be paid to the said mother, as above, half-yearly, as may best suit;" and it was held that the four persons were constituted joint-tenants, and that while three were minors, the fourth, being an adult, should receive the annuity for their maintenance (*h*).

Secondly, cases in which there is a discretion liable to be controlled.

2. As to the cases in which the Court has considered the primary donee to have a discretion liable to be controlled, if not honestly exercised (*i*). In *Hamley* v. *Gilbert* (*k*), the residue was given to E. G. H., to be laid out and expended by her at her discretion, for or towards the education of her son F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son or to any other person whatever for the disposal or application of such residue or any part thereof. It was held that E. G. H. was absolutely entitled to the residue, subject to a trust, to apply a part to the education of her son *during his minority* (*l*), and was referred to the master to inquire what would be a sufficient sum to be appropriated for that purpose. In *Gilbert* v. *Bennett* (*m*), the testator bequeathed all his property to his wife and two other persons in trust, to pay the income to his wife for the education and support of his children by her; but none of his property was to be disposed of, but the income arising therefrom to be applied as above, to their maintenance and support, and advancement in life and support of his children; and after her death, he gave the property to be divided among his children. The Vice-Chancellor said, the natural construction of the will was, that the testator intended the whole of the income to be paid to his wife for her life, and to impose on her the burden of maintaining and educating the children out of it. In *Hadow* v. *Hadow* (*n*), *Leach* v. *Leach* (*o*), *Browne* v. *Paull* (*p*), and *Longmore* v. *Elcum* (*q*), words nearly similar received the same construction. It appears, as the result of these authorities, that where the interest of the children's

[(*h*) See also *Re Harris*, 7 Exch. 344.

(*i*) The mode and extent of interference exercised by the Court depend on the will in each case. See *Castle* v. *Castle*, 1 De G. & J. 352.

(*k*) Jac. 354.

(*l*) As to the confinement of the trust to minority, see *Gardiner* v. *Barber*, 2 Eq. Rep. 888, overruling *Soames* v. *Martin*, 10 Sim. 287, contra. But where the income of a fund is to be applied for the maintenance or education of the legatee during the life of A. or during any other specified period, the trust does not cease on the legatee attaining majority or dying in A.'s lifetime; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; *Bayne* v. *Crowther*, 20 Beav. 400; *Brocklebank* v. *Johnson*, ib. 211, 212. So even where the trust is for maintenance, education, and *bringing up*, *Badham* v. *Mee*, 1 R. & My. 631. As to cesser of the trust on marriage of a daughter, see *Camden* v. *Benson*, cit. 8 Beav. 350; *Bowden* v. *Laing*, 14 Sim. 113.

(*m*) 10 Sim. 371.

(*n*) 9 Sim. 438.

(*o*) 13 Sim. 304.

(*p*) 1 Sim. N. S. 92; see also *Bowden* v. *Laing*, 14 Sim. 113.

(*q*) 2 Y. & C. C. C. 363.

[legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed upon him of maintaining and educating the children (*r*); and that a contrary intention is not indicated by a direction, that in case of the parent's death, other trustees should make the application of the fund, in which case, however, such trustees would take nothing beneficially (*s*).

Result of the authorities.

In *Crockett* v. *Crockett* (*t*), where the testator directed that all his property should be at the disposal of his wife for herself and children, it was unnecessary to decide what were the precise interests of the mother and children, but Lord *Cottenham* was of opinion that she was either a trustee with a large discretion as to the application of the fund, or had a power in favour of the children, subject to a life estate in herself. The former construction would have been the more consistent with the previous authorities, but the latter has been more favoured in recent cases, slight expressions being laid hold of in support of it; as in *Gully* v. *Cregoe* (*u*), where the words were "having confidence that she (i. e. the widow) will *hereafter* dispose of" &c., and in *Hart* v. *Tribe* (*x*) where the will contained a recommendation not to diminish the principal but to vest it in government or freehold securities.

Crockett v. *Crockett.*

In *Raikes* v. *Ward* (*y*), the gift was to the testator's wife, "to the intent she may dispose of the same for the benefit of herself and our children in such manner as she may deem most advantageous." The Court, in deciding against the claim of the children to an absolute interest, said, it could not deprive the widow of the honest exercise of the discretion which the testator had vested in her, or refuse its assistance to inquire into or sanction any reasonable arrangements which she might desire to make. Expressions somewhat similar to those found in the last two cases have received the same construction in the cases of *Conolly* v. *Farrell* (*z*), *Woods* v. *Woods* (*a*), and *Costabadie* v. *Costabadie* (*b*).

Raikes v. *Ward.*

Other cases.

[(*r*) Per Lord *Cranworth*, 1 Sim. N. S. 103.

(*s*) Ib. 105.

(*t*) 2 Phil. 553, reversing the decision, 5 Hare, 326, which seems to have proceeded on some misapprehension of the decree, 1 Hare, 451.

(*u*) 24 Beav. 185.

(*x*) 18 Beav. 215. And see *Ware* v. *Mallard*, ante, p. 362; and vol. ii. pp. 374, *et seq.*

(*y*) 1 Hare, 445.

(*z*) 8 Beav. 347.

(*a*) 1 My. & Cr. 401.

(*b*) 6 Hare, 410; and see *Cowman* v. *Harrison*, 10 Hare, 234; *Smith* v. *Smith*, 2 Jur. N. S. 967.

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The donee has been allowed to receive the legacy without his interest being declared.

[In several cases (*c*) the Court has held the donee entitled to receive the legacy or dispose of the property devised or bequeathed and receive the proceeds, without saying whether he was absolutely entitled or bound honestly to exercise a discretionary trust. In such cases it was merely decided that there was no absolute trust.

Thirdly, where primary donee held absolutely entitled.

3. Lastly, as to cases where the primary donee was held to be absolutely entitled.

Brown v. *Casamajor.*

In *Brown* v. *Casamajor* (*d*), a legacy was given to a father, the better to enable him to provide for his younger children. The father consented to secure the principal for the benefit of his younger children, but the Court, on his petition, held him entitled to the past arrears of interest. The report suggests no reason for this decision, but that which appears to be the reasonable one, viz., that the legacy was originally absolute to the father, and remained so except so far as his consent to settle it had deprived him of his interest.

Hammond v. *Neame.*

Again, in *Hammond* v. *Neame* (*e*) there was a gift to a trustee of a sum of stock, upon trust to pay the income to the testator's niece, "for and towards the maintenance, education and bringing up of all and every her children, until he, she or they shall attain twenty-one; and then the stock was given equally among them. The daughter having *no children at the testator's death*, it was held that she was entitled to the interest of the stock.]

Benson v. *Whittam.*

So, in *Benson* v. *Whittam* (*f*), a testator bequeathed certain annuities to be paid out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the dividends to his brother A., (to enable him to assist such of the children of the testator's deceased brother F. as he might find deserving of encouragement,) to be paid to the several persons as they became due. Sir *L. Shadwell*, V. C., decided that the words in the parenthesis did not raise any trust in favour of the children of F.; they merely expressed the motive or cause of the gift, and his Honor commented on other passages which corroborated this conclusion.

Thorp v. *Owen.*

[In *Thorp* v. *Owen* (*g*), the testator desired that everything should remain in its present position during the lifetime of his wife, and after her decease gave his real and personal property

[(*c*) *Cooper* v. *Thornton*, 3 B. C. C. 96; *Robinson* v. *Tickell*, 8 Ves. 142; *Woods* v. *Woods*, 1 My. & Cr. 401; *Wood* v. *Richardson*, 4 Beav. 174; *Pratt* v. *Church*, ib. 177.

(*d*) 4 Ves. 498.

(*e*) 1 Sw. 35.]

(*f*) 5 Sim. 22.

[(*g*) 2 Hare, 607.

[to other persons, and then added, "I give the above devise to my wife, that she may support herself and her children according to her discretion and for that purpose." Sir *J. Wigram*, V. C., decided that the widow took absolutely for her life. He said, "The cases should be considered under two heads; first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund or part of the fund in the hands of the legatee (*h*). A legacy to A., the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this Court; and again, a legacy to A., the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction. It is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, rightly laid down by the Vice-Chancellor in *Benson* v. *Whittam*; and the cases of *Andrews* v. *Partington*, *Brown* v. *Casamajor*, and *Hammond* v. *Neame*, illustrate the same principle. At the same time, a legacy to a parent, upon trust to be by him applied, or in trust for the maintenance and education of his children, will certainly give the children a right, in a Court of Equity, to enforce their natural claims against the parent in respect of the fund on which the trust is declared." And again, subsequently (*i*), the Vice-Chancellor said, "If you give property to persons to accomplish an object, *increasing their funds*, so that they might be better able to do it, that is, in point of fact, a gift to them, and there is no trust which others can enforce." This is an important distinction, clear in principle, but often difficult of application.

Bequest to A. to maintain B.

In *Biddles* v. *Biddles* (*k*), under a gift to A., to bring up and maintain B., A. was held to be absolutely entitled. Sir *J. Romilly*, M. R., has even gone so far, in a case (*l*) where the testator bequeathed a sum of money to trustees, in trust after the death of his daughter M., to pay the dividends to her husband during his life, "nevertheless *to be by him applied* for or towards the maintenance, education or benefit of the children of M.," as to hold that no trust was created in favour of the children,

[(*h*) This second head has in the text been split into two divisions.

(*i*) Page 614.

(*k*) 16 Sim. 1; see also *Berkeley* v. *Swinburne*, 6 Sim. 613; *Oakes* v. *Strachy*, 13 Sim. 414; *Leigh*, v. *Leigh*, 12 Jur. 907; *Jones* v. *Greatwood*, 16 Beav. 528; *Hart* v. *Tribe*, 18 Beav. 215 (as to the 100*l.*); *Wheeler* v. *Smith*, 1 Giff. 300.

(*l*) *Byne* v. *Blackburn*, 26 Beav. 41.

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[and that A. was entitled absolutely for his life; on the ground that if the testator had intended A. to be merely a trustee, he would not have made the bequest in the first instance to other trustees; and that where there is a gift to a parent, coupled with a direction that he shall perform certain parental duties, (which are legal obligations as regards a father, but are merely moral obligations in the case of a mother,) it is a gift to and a beneficial interest in the person to whom it is made (*m*). But with regard to the first reason, it may be observed that nothing is more common in trusts for the maintenance of children, than to direct the trustees to pay the money over to the children's guardian, to be by him applied for their benefit; and with regard to the second reason, it proves too much. On the whole the case appears to go beyond the previous authorities, and to be scarcely reconcileable with some of them.]

Remarks upon the cases.

Such, then, is the long train of decisions arising from the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation, and those which are intended merely to inculcate the discharge of a moral duty, [or point out the motive of the gift.] At one period the Courts seem to have been so astute in detecting an intention to create a trust when wrapped in the disguise of vague and ambiguous expressions, as almost to take from a testator the power of intimating a wish without creating an obligation, unless, indeed, by the use of words distinctly negativing the contrary construction. But though a sounder principle now prevails, the practitioner will perceive, in the state of the authorities, the strongest incentive to caution in the employment of words which may give rise to a question of this nature. If a trust is intended to be created, this should be done in clear and explicit terms; and if not, any request or exhortation which the testator may choose to introduce, should be accompanied by a declaration, that no trust or legal obligation is intended to be imposed.

Sometimes a testator's recommendation in favour of a third person is not of a nature to create a simple absolute trust for his benefit, but has for its object the placing or continuance of such person in some office or capacity connected with the property

[(*m*) The M. R. cited a dictum of *Wigram*, V. C., in support of this position: but without referring to any reported case. From some of the expressions cited by the M. R. it might indeed have been inferred that he referred to *Thorp* v. *Owen*, but in that case the V. C. puts in direct contrast with each other the case of a gift to a wife "to be applied" in the maintenance of the children, and a gift to her "that she may be able" to maintain the children, 2 Hare, 616.]

that is the subject of disposition, involving the performance of a certain duty. As where a testator directs that the tenants of the devised property shall be allowed to continue in its occupation, either with or without a condition or restriction as to rent, cultivation, &c.

Direction to permit tenants to continue in occupation.

As in the case of *Tibbits* v. *Tibbits* (*n*), where a testator made a devise to his son, recommending him to continue his cousins A. and B. "in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," it was held to be a trust for the cousins, who had been tenants at will.

Effect of a direction to a devisee to employ a particular steward.

It has been much discussed whether a direction or injunction to employ a particular agent or steward, imposes on the devisee an obligation in the nature of a trust in favour of the person so named, subject, of course, to the implied condition to faithfully discharge the duties of the office. [Thus, in *Hibbert* v. *Hibbert* (*o*), the testator, whose only real estates were in Jamaica, *directed* that his friend H. should be appointed receiver of his real and personal estates, adding that he made this appointment for the sake of benefiting H. in a pecuniary point of view. Sir *W. Grant*, M. R., held that H. was entitled to be receiver, agent and consignee for the Jamaica estates, upon his personal recognizance, without (as would have been required if he had not been appointed by the testator) giving the usual security.]

Hibbert v. *Hibbert.*

So, in *Williams* v. *Corbet* (*p*), where a testator devised his estates to trustees upon trust to let the same, and apply the rents in paying off certain incumbrances, and appointed A. to be auditor of the accounts during the execution of the trusts, and *directed* the trustees to pay him the usual annual remuneration. Sir *L. Shadwell*, V. C., held that the trustees were not justified in removing A. from the office, there being no imputation on his conduct, for that he had as much right to be the auditor as any one of the devisees had to the estates.

Williams v. *Corbet.*

[On the other hand] in the case of *Lawless* v. *Shaw* (*q*), where a testator, after devising his estates charged with certain annuities to his friend William Shaw (then aged twenty years) for life, with remainders over in strict settlement, and after bequeathing to his friend and agent B. E. Lawless 100*l.* as a

Lawless v. *Shaw.*

(*n*) 19 Ves. 656. [Compare *Quayle* v. *Davidson*, 12 Moo. P. C. C. 268.
(*o*) 3 Mer. 681.]
(*p*) 8 Sim. 349.
(*q*) 1 Ll. & Go. 154.

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token of the testator's esteem for him, and after directing his executors to pay his agent 150*l.*, to be distributed among the poor of his estates, declared it to be his particular desire that his executors, whilst acting in the management of all or any of his affairs, as also his friend William Shaw, when he should enter into the receipt of the rents of his estates, should continue Lawless in the receipt and management thereof, and likewise should employ and retain him in the agency and management of lands to be purchased in pursuance of the will, at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estate fully to his satisfaction. The testator also bequeathed to his friend and agent Mr. Lawless 150*l.* to purchase a monumental tablet. Soon after the testator's decease, Mr. Shaw, the devisee for life, dismissed Mr. Lawless from his office as land-agent, but without impeaching his character or capacity. Lawless filed a bill against Shaw, claiming to be reinstated, which was dismissed by Lord *Plunket;* whose decree, however, was upon a rehearing reversed by his successor. After reading the clause of the will applicable to Lawless, the Chancellor (Sir *E. Sugden*) inquired, "Is that a simple recommendation to continue him in an office removeable at pleasure, and which the devisee may put an end to the next hour? or, is it a direction to continue him against the will of the devisee, subject of course to the conditions implied, that he conduct himself honestly and faithfully in the discharge of his duty, and continue competent both in mind and body? Does it mean that the agency should be of the same character, and that he was to be continued in the same manner as he was employed by the testator himself, that is, removeable at pleasure?" His Lordship then proceeded to show at some length that it was clearly imperative on the trustees to employ Lawless during Shaw's minority. "Now if it was," he continued, "imperative on the trustees to employ him during the minority, can I draw a distinction and say, that a different right was given by the same words to Shaw from that given to the trustees, particularly in a will where, as I have pointed out, the testator knew how to distinguish the powers which he gave, according to the persons by whom and the period at which they were to be exercised? If imperative on the trustees, it was equally so on Shaw, when he succeeded to the estate. If you look at the language of the clause there can be no doubt as to the intention. It is in substance this: I have found him a faithful agent to myself, and it

is my particular desire that you retain him in the management of the estate, and I will leave no doubt as to the fees he is to receive. The word 'continue' is used in the first part of the clause, and in the second the words 'retain and employ.' These are strong words importing a continuance and endurance, as long as he conducts himself properly. In the preceding clause there is an absolute gift of 150*l.* for charity, and a direction that it should be paid to Lawless, to be by him distributed. Can any one doubt that that is imperative? though merely a direction, it is nevertheless just as binding as the gift itself of the money to the poor. This is followed by the clause in question, 'and it is also my particular desire,' &c.; these words, in connexion with the gift in the preceding clause, import a gift also to Lawless himself: then it is said Shaw is made tenant for life, and can you cut down his life estate? To this I answer, I leave him as I find him. The testator employed this gentleman to receive his rents, and desired his devisee to continue him; this is in the nature of a condition imposed on the tenant for life, and therefore the person who takes the estate must perform the condition. It is said that this was intended for Shaw's benefit. It may be so, but not exclusively; I have no means of forming a judgment whether it was or was not. I cannot say whether the testator may not have intended a benefit to the estate itself; he certainly did, so far as he made it imperative upon the trustees to employ Lawless during the minority. A very young man was about to step into possession of an estate; the testator, therefore, might wisely say, 'I will take care to have a faithful agent employed for the benefit of the estate itself; I will at the same time make the office a reward to a tried agent for his past exertions.' Then it is said, Suppose the testator recommended the devisee to employ a particular baker or tailor; well, suppose the testator did make such a condition in clear express terms, for it would not be implied; *a man may devise an estate under any condition he pleases, provided it is not an illegal one.*"

Direction to employ steward held to be imperative.

[The decision of Sir *E. Sugden* was, however, reversed, and that of Lord *Plunket* established by the House of Lords (*r*), on the ground that a gift of an estate to one person is inconsistent with a direction that another should have the management of it. The Lord Chancellor (*Cottenham*) said, "If Lawless's title is what it has been argued to be, he has an equitable charge on the legal

Shaw v. *Lawless* in D. P. reversing decision below.

[(*r*) *Lawless* v. *Shaw*, 5 Cl. & Fin. 129.

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[estate of Shaw; and as he is to have the usual fees of 5*l.* per cent., the result would be that Lawless would not only be an equitable incumbrancer to that amount, but would have a right to manage and direct the estate, and would have full power over the conduct of the property. If so, the testator must have intended that Shaw, to whom he gave the estate for life, should not have the direction of his own estate; for the two powers of direction and management are inconsistent with each other. He must be taken on this view of the case to have intended that the legal devisee for life should not have the management, but that the equitable incumbrancer on the real estate should have the control and management of the property. But the trustees of the will are, during a considerable part of the time, to have not only the management of the estate which the testator devised, but are authorized and directed to lay out part of the personalty, the residue, in the purchase of other lands. If Lawless is the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one-twentieth part of the residue. He might file a bill in Chancery, in order to control the application of the residue and claim to be absolutely interested in what he is entitled to receive, namely, this one-twentieth part." The observation as to Lawless being entitled to one-twentieth share of the residue seems scarcely applicable, for he had in fact, at the utmost, only a per centage on the rents *as a salary* for performing a duty, and that only so long as he performed it properly and obeyed his employer (*s*). The due yearly performance of that duty was, therefore, a condition precedent to his right to receive his yearly per centage, and such a right to a per centage of the receipts could scarcely be converted into a right to a *like* per centage of the capital.

Finden v. *Stephens.*

In the subsequent case of *Finden* v. *Stephens* (*t*), before Lord *Cottenham*, the same question arose, but the circumstances were rather stronger against the receiver; and, though it was not necessary to decide the point, the learned Judge expressed himself of the same opinion as in *Lawless* v. *Shaw*.]

[(*s*) See 1 Ll. & G. 172. (*t*) 2 Phil. 142.]

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PAROL EVIDENCE, HOW FAR ADMISSIBLE.

As the law requires wills both of real and personal estate (with an inconsiderable exception (*a*)) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, [vary,] add to, or [subtract from] the contents of such will (*b*); and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will ab origine should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury.

Parol evidence inadmissible to control will.

Thus (among many instances) (*c*), in the case of *Strode* v. *Lady Faukland* (*d*), letters and oral declarations of the testator being offered to prove the intention to include a reversion in the words, "All other my lands, tenements, and hereditaments, out of settlement," it was unanimously agreed by the Lord Chancellor (*Cowper*), Lord Chief Justice, and M. R., that this kind of evi-

Letters and oral declarations of testator rejected.

(*a*) Ante, pp. 91, 92.

[(*b*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 64, 65; Wigram on Wills, 5; 2 Ph. Ev. 350; *Lowfield* v. *Stoneham*, 2 Stra. 1261.]

(*c*) *Cheney's case*, 5 Rep. 68; *Vernon's case*, 4 Rep. 4; *Lawrence* v. *Dodwell*, 1 Ld. Raym. 438; *Bertie* v. *Falkland*, 1 Salk. 232; *Gowers* v. *Moor*, 2 Vern. 98; *Bennett* v. *Davis*, 2 P. W. 316; *Parsons* v. *Lanoe*, 1 Ves. 189; *Ulrich* v. *Litchfield*, 2 Atk. 374; [*Parmiter* v. *Parmiter*, 1 Johns. & H. 135.]

(*d*) 3 Ch. Rep. 98.

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dence could not be admitted, for that where a will was doubtful and uncertain, it must receive its construction from the words of the will itself; and no parol proof or declaration ought to be admitted out of the will to ascertain it.

Evidence of person who drew the will rejected.

So, in the case of *Brown* v. *Selwin* (*e*), (which is a leading authority,) where the testator having bequeathed the residue of his personal estate to two persons, whom he appointed his executors, and one of whom was indebted to him by bond, it was attempted to be proved by the evidence of the person who drew the will, that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so, under the impression that the appointment of the obligor to be one of the executors extinguished the debt—Lord *Talbot* held the evidence to be inadmissible; and his decree was affirmed in the House of Lords.

Case of *Lord Walpole* v. *Earl of Cholmondeley*.

Again, in the case of *Lord Walpole* v. *Earl of Cholmondeley* (*f*), where it appeared that the testator, the Earl of Orford, made a will in 1752, whereby he devised his real estate to certain limitations. In 1756 he made another will, altering those limitations; but in neither of these wills did the testator bequeath his personalty, appoint executors, or make any provision for the payment of his debts. In 1776 he sent for his attorney, to make a codicil for these purposes; and, on the attorney telling him he should want his will, his Lordship sent him for it to his steward, who gave him the will of 1752. The other will appears not to have been in his custody. The attorney then drew the codicil, which recited generally, that by his last will and testament, *dated 25th November*, 1752, the testator had devised his real estate to certain uses, but had not charged the same with the payment of his debts or legacies, or disposed of his personal estate, or appointed any executors; and he declared that writing to be a codicil *to his* SAID *last will*, and to be accepted and taken as part thereof, and revoked the same so far only as it was incompatible with the codicil; and he subjected all his estates to the payment of his debts, the legacies thereinafter bequeathed, and his funeral expenses, gave several legacies, and appointed executors. The codicil was duly executed. The parol evidence also went to show, that when the testator made the will of 1756,

Express republication of antecedent will not controlled by parol evidence.

(*e*) Cas. t. Talb. 240, 3 B. P. C. Toml. 607.

(*f*) 7 T. R. 138, 3 Ves. 402; [*Re Chapman*, 8 Jur. 902, 1 Rob. 1; *Payne* v. *Trappes*, 1 Rob. 583, 11 Jur. 854; but in *Quincey* v. *Quincey*, ib. 111, 5 No. Cas. 154, where the earlier will, in terms referred to, had been *destroyed*, evidence of the mistake was admitted.]

he told one of the witnesses that he and his great-uncle (to whom the property was thereby limited for life, with remainder to his sons in strict settlement) had made reciprocal limitations in favour of each other's families, in case of failure of issue of either of them. And it appeared further, that when he made the codicil of 1776, he expressed no intention of altering the limitations of the real estate, further than by subjecting it to his debts, legacies, and funeral expenses. The question was, whether this evidence could be received to control the operation of that codicil, which had, by republishing the recited will of 1752, revoked that of 1756 (*g*). The Court of Common Pleas, and afterwards the Court of King's Bench, on a writ of error, held the evidence to be inadmissible. It had been argued, that the evidence raised a latent ambiguity on the words "last will, dated 1752," by showing that that will was not the last will; and that though the expression "*last will*" was generally used in a technical sense, it was sometimes used in the strict and literal sense, and, therefore, evidence should be admitted to show in what sense it was used by the devisor; but Lord *Kenyon* observed, that neither of those instruments was a will, properly so called, until the death of the devisor: both were ambulatory until that time, and either of them was capable of being destroyed or set up by the devisor. "Supposing," continued his Lordship, "Lord Orford had said to the attorney, 'I have two wills in the steward's hands, desire him to send me the last will,' and the steward had, by mistake, sent him the first, and that mistake had been shown by parol evidence, there would have been a latent ambiguity; and it seems to me (though the opinion is extra-judicial), that that ambiguity might have been explained by other parol evidence, on the same principle as in the instance of cancelling a will, where parol evidence is admitted to show *quo animo* the act was done; or as in the case of a child's destroying a deed."

Remark upon *Lord Walpole* v. *Earl of Cholmondeley.*

It will be observed, that in the two cases suggested by Lord *Kenyon*, the alleged revoking act is from its nature susceptible of, and indeed requires, this species of explanation. The same observation would have applied to the case then before the Court, if the revocation had consisted in the act of the steward sending the wrong will; but as this evidently was not the case, the revocation being wholly produced by the fact of the will being re-

(*g*) Ante, p. 175.

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ferred to in the codicil, it was clearly impossible, upon the principle adopted in this case, to admit parol evidence of the actual intention to control the revoking effect of the codicil.

Devise inadvertently omitted cannot be supplied.

A fortiori parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.

Thus, in the much discussed case of *The Earl of Newburgh* v. *Countess of Newburgh* (*h*), where a testator gave instructions to his solicitor to prepare a will, by which his wife was to take an estate for life in lands in the counties of Sussex and Gloucester. The solicitor prepared the draft, and laid it before a conveyancer to settle, by whom, it appeared, that the word "Gloucester" had inadvertently been struck out, and the person who made the fair copy of the settled draft changed the word "counties" into "county;" and the will, therefore, omitted altogether the estate for life in the lands in the county of Gloucester. When the will was executed, the abstract of the will, (which agreed with the instructions given by the testator,) and not the will itself, was read to the testator, so that the mistake remained undiscovered. The widow filed a bill, praying to have the will corrected on this evidence; but Sir *John Leach*, V. C., refused it, because, admitting it to be clearly made out that the mistake existed, the Court had no authority to correct the will, according to the intention. The will, executed with that omission, was certainly not the will of the devisor; and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the Court could not, for that reason, set up the intention of the testator, which by mistake he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds, in all cases where a testator failed to comply with the statute by mistake or accident. His Honor added, that he was willing to direct an issue, whether this was the will of the testator as to

(*h*) 5 Mad. 364; in the case of *Langston* v. *Langston*, 8 Bligh, 167, 2 Cl. & Fin. 194, a nice question of construction arose, in consequence of the omission of a line by the person copying the will for signature; and Lord *Brougham* called for and inspected the draft, with a view of informing himself of this fact, in spite of the protestations of the appellant's counsel. Its inadmissibility, however, was admitted by his Lordship, who, in his judgment, emphatically disclaimed all reliance on or influence from the information derived from this source. Perhaps, however, the principle which excludes such evidence was somewhat infringed by the inspection of the draft will, even with the disclaimer; for in such cases who can venture to affirm that his mind has not received a bias, by allowing the inadmissible evidence to have access to it?

the Gloucester estate; and upon this issue the evidence tendered would be admissible. (The reporter states that a case was cited at the bar, on the authority of Lord C. B. *Richards*, in which Lord *Eldon* had sent it to the jury upon the same description of facts.) No such issue was asked (*i*). The case was afterwards reheard before the Vice-Chancellor, when it was suggested, as the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had at first written, but afterwards struck through with a pen; but which had been copied by mistake in the fair will: and it was contended, therefore, that there ought to be an issue, to try whether those words so introduced by mistake were part of the will. The Vice-Chancellor thought that, if such a case had been originally made, they would have been entitled to such an issue; but that, as it was opposed to the allegations on the record, he could not entertain it. The case was carried to the House of Lords, where the question, whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word "Gloucester" had been inserted in the will, was submitted to the Judges, who declared their unanimous opinion to be, that the evidence was not admissible (*k*).

The distinction suggested in the Court below is very important. It seems to amount to this: that though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by showing that he used them under mistake or misapprehension, nor to supply words which he has not used, yet that you may, upon an issue devisavit vel non, prove that clauses or expressions have been inadvertently introduced into the will, contrary to the testator's intention and instructions, or, in other words, that a part of the executed instrument is not his will. In support of this doctrine may be adduced the case of *Hippesley* v. *Homer* (*l*), where a testator, having, by his will dated in 1800, devised his estate to certain limitations, by a codicil made in 1804, after empowering one of the devisees for life to make a jointure, and charge portions for children, made certain variations in the limitations in the will, and gave certain

Clause improperly introduced into will may be rejected on issue devisavit vel non.

[(*i*) See Sugd. Law of Prop. p. 206.]

(*k*) 1 M. & Sc. 352. [See Wms. Exec. p. 295; *Wade* v. *Nazer*, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627.]

(*l*) T. & R. 48, n. [See also *Powell* v. *Mouchett*, 6 Mad. 216; *Lord Trimlestown* v. *D'Alton*, 1 D. & Cl. 85; *Lord Guillamore* v. *O'Grady*, 2 Jo. & Lat. 210; *Re Davy*, 1 Sw. & Tr. 262; 29 L. J. Prob. 161; 5 Jur. N. S. 252.]

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additional powers of management to his trustees. The bill alleged, that the testator executed the codicil upon the representation and in the belief that it contained nothing but powers to the devisee for life to make a jointure and charge portions for children, and prayed that it might be set aside. The facts charged were admitted by the answer. Issues were directed—First, as to whether the testator did, by a paper writing, purporting to be a codicil to his will, devise in manner following: (Then follow the words of the codicil, by which only the powers of jointuring and charging portions were conferred). Secondly, whether the testator did, by the said codicil, devise in manner following: (Here was set forth the remaining part of the codicil). The jury found that the part of the codicil which was the subject of the second issue did not constitute the will of the testator; and that the part of the codicil which was the subject of the first issue did constitute the will of the testator. Whereupon the Court (not being able to direct the instrument to be delivered up, as part of it was good,) declared that so much of the codicil as did not constitute the will of the testator was void.

Rule in cases of fraud.

Parol evidence is also admissible for the purpose of counteracting fraud; for to reject it in such case would be to make a rule, whose main object is to prevent injustice, instrumental in producing it. As in the case of *Doe* d. *Small* v. *Allen* (*m*), where it appeared that the testator, upon being pressed by some persons to execute a second will, inquired if it were the same as the former; and being told that *it was*, executed the will, which turned out to be different. The Court of King's Bench held that evidence of these facts ought to have been received. "I agree," said Lord *Kenyon*, "that the contents of a will are not to be explained by parol evidence; but, notwithstanding the Statute of Frauds, evidence may be given to show that a will was obtained by fraud; and the effect of the evidence offered in this case was to show that one paper was obtruded on the testator for another which he intended to execute." [And as a charge of fraud may be supported, so it may be rebutted by evidence of this nature. Thus, in *Doe* v. *Hardy* (*n*), where the defence to a claim under a codicil to the testator's will was, that the codicil was a forgery; an objection was made to the receipt of evidence offered by the plaintiff of declarations by the testator, that he intended the lessor of the plaintiff should have the property. But *Littledale*, J.,

One will surreptitiously obtruded for another.

(*m*) 8 T. R. 147. [(*n*) 1 Moo. & R. 525.]

[thought the declarations of the testator were admissible to show his intentions where the defence was either fraud, circumvention, or forgery.]

Promise by heir or devisee to testator enforced.

Another illustration of the principle [stated by Lord *Kenyon*] occurs in the case suggested by Lord *Eldon* in *Stickland* v. *Aldridge* (*o*), "of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt equity would compel the heir to discover whether he did make such promise. So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, equity would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*"

And it is clear that, in such a case, (and this, indeed, is the point which is chiefly material here,) if the trust were denied by the heir or devisee, it might be proved aliunde (*p*).

Parol evidence admissible to repel a resulting trust.

It seems, too, that parol evidence is admissible for the purpose of rebutting a resulting trust; as in such case, it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed, (for that would be to control the written will,) but against a mere equity arising by implication of law (*q*).

On the same principle, parol evidence was, under the old law, admissible to support the claim of an executor (now taken away by stat. 1 Will. 4, c. 40) to the undisposed-of residue of a testator's personal estate, against the presumption in favour of the next of kin, created by a legacy to the executor (*r*). Such evidence may also be adduced to repel the presumption against double portions; in other words, to show that a legacy by a parent to his child was intended not to be (as the general rule would make it) a satisfaction of a portion previously due to such child by the testator, or that a subsequent advancement to the child was not to be (as it would, according to the general doctrine) a satisfaction [entire or partial, according to its amount (*s*),]

(*o*) 9 Ves. 519. See also *Drakeford* v. *Wilkes*, 3 Atk. 539.

(*p*) See *Oldham* v. *Litchfield*, 2 Vern. 506; [*Podmore* v. *Gunning*, 7 Sim. 644; *Tee* v. *Ferris*, 2 Kay & J. 357; *Chester* v. *Urwick*, 23 Beav. 407; *Proby* v. *Landor*, 6 Jur. N. S. 1278.]

(*q*) *Mallabar* v. *Mallabar*, Cas. t. Talb. 79.

(*r*) See 1 Rop. Leg. by White, 337. [Secus since the Act, *Love* v. *Gaze*, 8 Beav. 474.

(*s*) *Pym* v. *Lockyer*, 5 My. & C. 29.]

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of a legacy to such child (*t*). [In all these cases, where parol evidence is admissible to repel the presumption, counter-evidence is also admissible in support of it; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill-founded (*u*). But evidence in support of the presumption is not admissible, unless evidence to rebut it has been first admitted; still less is evidence admissible to create a presumption not raised by the law; in the former case it is unnecessary (*x*); and in both cases its effect would be to contradict the apparent meaning of the will (*y*).] It is clear, also, that parol evidence is admissible to prove the fact that the testator intended to place himself in loco parentis towards a legatee, who was not his child (*z*); [or to prove the fact and nature of a transaction which has taken place after the date of the will, and from which the court may infer the total or partial ademption of a legacy. And for this purpose parol declarations of the testator's intentions are admissible; since the rule which would exclude them, if the intention had been committed to writing, does not apply (*a*).]

Construction not to be influenced by parol evidence of actual intention.

Returning, however, to the general rule, it is clear that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution (which, as we shall presently see, forms a proper subject of inquiry,) will admit of. No word or phrase in the will can be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly (*b*), much less on that particular occasion (*c*),

(*t*) 1 Rop. Leg. by White, 338.

[(*u*) *Kirk* v. *Eddowes*, 3 Hare, 517.

(*x*) *Kirk* v. *Eddowes*, 3 Hare, 520; *White* v. *Williams*, 3 V. & B. 72.

(*y*) *Hall* v. *Hill*, 1 D. & War. 94; *Lee* v. *Pain*, 4 Hare, 216; *Palmer* v. *Newell*, 20 Beav. 39.]

(*z*) *Powys* v. *Manfield*, 3 My. & C. 359.

[(*a*) *Rosewell* v. *Bennett*, 3 Atk. 77; *Kirk* v. *Eddowes*, 3 Hare, 509; *Twining* v. *Powell*, 2 Coll. 262; *Whateley* v. *Spooner*, 3 Kay & J. 542.

(*b*) See per *Parke*, B., *Shore* v. *Wilson*, 9 Cl. & Fin. 558; *Crosley* v. *Clare*, 3 Swanst. 320, n.

(*c*) *Mounsey* v. *Blamire*, 4 Russ. 384; *Green* v. *Howard*, 1 B. C. C. 31; *Strode* v. *Russell*, 2 Vern. 625; *Barrow* v. *Methold*, 1 Jur. N. S. 994.] Observe that this position supposes the existence of an appropriate subject or object; otherwise it should seem evidence would be admissible of the testator having commonly described the object (and why not the subject also?) by the terms used

used the words or phrase in a sense peculiar to himself, or even in any general or popular sense, as distinguished from its strict and primary import.

"Copyhold" not extended to freeholds by parol evidence.

Thus, in the case of *Doe* d. *Brown* v. *Brown* (*d*), it was held that a devise of *copyhold* lands could not be extended to freeholds, by the production of evidence showing that the testator had so described them in a deed executed by him, the will itself furnishing no distinct indication that the testator meant to give what was conveyed by the deed, and there being copyhold lands to satisfy the devise.

[And in the case of *Stringer* v. *Gardiner* (*e*), where a testator bequeathed a legacy "to his niece Elizabeth Stringer," and it appeared that at the date of his will he had no niece of that name living, but had a great-great-niece named Elizabeth Jane Stringer (the grand-daughter of a niece Elizabeth Stringer, who, as the testator knew, had long since died); evidence was offered to show that the bequest was copied by mistake from a previous will, executed before the death of Elizabeth Stringer; but this was rejected.]

Extent of "estate at Ashton" not enlarged by extrinsic evidence.

So, in the case of *Doe* d. *Chichester* v. *Oxenden* (*f*), (which is a leading authority,) where a testator devised his "estate at Ashton, in the county of Devon;" and evidence was adduced to show that the testator was accustomed to distinguish by the appellation of his "Ashton estate" the whole of his maternal estate, including property in several contiguous parishes; the Court of Common Pleas, notwithstanding this evidence, held that only the premises in the manor of Ashton passed; Sir *James Mansfield* observing, that this would give the will an effectual operation, and herein the case differed from all others in which such evidence had been received: for in them, without it, the devise would have had no operation; and it was, he said, safer

in the will. *Beaumont* v. *Fell*, 1 P. W. 425, post; [*Douglas* v. *Fellows*, Kay, 118.]

(*d*) 11 East, 441. See *Hughes* v. *Turner*, 3 My. & K. 666, where Sir *C. Pepys*, M. R., held that a revoked will could not be looked at for the purpose of influencing the construction of the subsequent unrevoked instrument. [See also *M'Leroth* v. *Bacon*, 5 Ves. 165; *Randall* v. *Daniel*, 24 Beav. 193. But in *Feltham's Trusts*, 1 Kay & J. 532, on a bequest to "Thomas Turner, of Regency Square, Brighton," the facts being that there was a James Turner, of Regency Square, Surgeon, and a Rev. Thomas Turner, of Daventry, both nephews of testatrix's husband; an old will containing a bequest to "Thomas Turner, of Regency Square, Brighton, Surgeon," was admitted in evidence, as any other paper, writing or oral declaration by the testatrix might have been, to show that the description in the actual will (which was not strictly applicable to either claimant,) erred in the name and not in the description. "But," said the V. C., "I cannot rely on the circumstance that she therein (i. e. in the old will) gave him a legacy."

(*e*) 27 Beav. 35, 4 De G. & J. 468.]

(*f*) 3 Taunt. 147.

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not to go beyond the line. And this decision was affirmed, on the unanimous opinion of the Judges, by the House of Lords (*g*).

Not admissible to affect construction of words of locality.

This case seems to have settled a point which had been left in some doubt by a case in the Common Pleas, on the will of Mr. Whitbread (*h*), (the father of the eminent brewer and politician,) in which the Judges of that Court were equally divided on the question, whether the words "estates at Lushill, and Hearne, and Buckland," were so descriptive of locality as to preclude the admission of extrinsic evidence that the testator intended to use them in any other sense. The evidence offered in this case was nearly the same as that in *Doe* v. *Oxenden*, namely, that under the description of the Hearne estate the testator intended to include lands in Hearne and several other parishes, the whole forming a distinct purchase made by him. The principle of *Doe* v. *Oxenden* has been since repeatedly recognized. Thus, in the case of *Doe* d. *Browne* v. *Greening* (*i*), the Court of King's Bench, on its authority, rejected evidence offered to show that, under a devise of lands "*at* Coscomb," it was intended to include lands *near* Coscomb.

Construction of words not varied by evidence of actual intention.

So, in *Doe* d. *Tyrrel* v. *Lyford* (*k*), where the testator devised lands at Sutton Wick, in the parish of Sutton Courtney, *which he purchased of S.*, the same Court would not allow it to be proved by extrinsic evidence that he intended to include certain pieces of ground not in the hamlet of Sutton Wick, but parcel of the estate purchased of S., and in the parish of Sutton Courtney. ["For in devises the rule of construction is, to make use of all the words, and not of part, and therefore where a testator dies seised of property which exactly corresponds with every part of the description given in the devise, we are not at liberty to resort to extrinsic evidence in order to show that he intended to pass other property which answers that description only in part" (*l*), that is to say, we may not for the sake of including property inaccurately described by the words as they stand, reject words which find an appropriate subject for application in other property.]

[(*g*) 4 Dow, 65.]
(*h*) *Whitbread* v. *May*, 2 B. & P. 593.
(*i*) 3 M. & Sel. 171. [See also *Evans* v. *Angell*, 26 Beav. 202.]
(*k*) 4 M. & Sel. 550.
[(*l*) Per *Bayley*, J., *Doe* v. *Lyford*, 4 M. & Sel. 558. See also per *Parke*, J., *Doe* d. *Ashford* v. *Bower*, 3 B. & Ad. 453; *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 227. As to the case of *Collison* v. *Girling*, 4 My. & C. 63, 9 Cl. & Fin. 88, see Wigram on Wills, 43 and 48, n., 4th ed.]

Again, in *Doe* d. *Preedy* v. *Holtom* (*m*), where a testator devised to A. his messuage or tenement in Swalcliffe, wherein he (the testator) then resided, with the offices, outhouses, barns, stables, *and other edifices and buildings, yards and gardens to the same adjoining*, and all the several closes or inclosed grounds, pieces and parcels of ground, called and known by the several names of "Cow-house," &c., with the appurtenances, part of the farm and lands then in his own occupation, &c. And he devised to B. all other his hereditaments in Swalcliffe (except what he had before devised to A.). The question was, whether the devise to A. comprised two cottages adjoining the messuage in which the testator resided, and which he had separated therefrom by a stone wall, and let off to tenants. It was held, that the cottages in question, though not in the testator's own occupation, passed under the devise to A. (it being considered that the devise was not confined to what was in the testator's own occupation,) and that evidence of the testator's intention, orally declared at the time of giving instructions for and executing his will, that the cottages should be included in the devise to B., was inadmissible.

Position of relative pronouns not to be varied by parol evidence.

And it may not, perhaps, be quite superfluous to observe, that relative pronouns, which have no independent force or signification, but whose effect depends wholly upon the position which they occupy in the instrument, cannot, by means of parol evidence, be shifted, so as to relate to a different antecedent. Thus, in the case of *Castledon* v. *Turner* (*n*), where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, viz. his wife and his niece, and, in the latter part of the will, a particular estate was devised to "her" for and during her natural life—Lord *Hardwicke* refused to receive parol evidence for the purpose of showing to which of the two women "her" referred; his Lordship thinking that the offering it was an attempt contrary to the principles of the Court, because it would tend to put it in the power of witnesses to make wills for testators. And his Lordship held, that, though "her" was a relative term, it related to the wife, upon the ground that, throughout the will, in other places, "her" seemed to relate to the wife (*o*).

(*m*) 5 Nev. & M. 391, 4 Ad. & Ell. 76.
[(*n*) 3 Atk. 257.]
(*o*) Parol evidence is also inadmissible for the purpose of raising a case of election. See *Clementson* v. *Gandy*, 1 Kee. 309, post, Chapter XIV.

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Words may be diverted from their primary acceptation by inconsistency of context.

If, however, the context of the will presents an obstacle to the construing of the terms of description in their strict and most appropriate sense, a foundation is thereby laid for the admission of evidence showing that they are susceptible of some more popular interpretation, which will reconcile them with, and give full scope and effect to, such seemingly repugnant context.

To this principle, it is conceived, may be referred the important and much-discussed case of *Doe* d. *Beach* v. *Earl of Jersey* (*p*), where a testatrix, after reciting a power reserved to her by her settlement, on her marriage with G. V. P., devised, subject to the estate for life of her husband therein, *all that her Briton Ferry estate*, with all the *manors*, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consisted. In a subsequent part she added: "Also I give my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan," &c. [A claim was laid under this devise to certain lands which were neither in the parish of Briton Ferry nor in the county of Glamorgan, but in a parish in the county of Brecon. It appeared by special verdict that the Glamorganshire lands contained 30,000 acres, part whereof consisted of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish; and that the Brecon lands contained 4,000 acres: that there were six advowsons, of which the advowson of the parish of Briton Ferry was one, and one manor, and one undivided sixth of another manor in Glamorgan, *and that there was no manor of Briton Ferry*. Objections were made to the reception of certain evidence, consisting of old account-books, in which was the following entry: "Briton Ferry Estate in the county of Brecon;" and of proof that the lands in question, together with the other property, had all gone by the name of the Briton Ferry estate. *Abbott*, C. J., delivered the opinion of the Judges, namely, that the words "all that my Briton Ferry estate, with all the manors, &c." found in the will of this testatrix, in which mention also was made of "her Penlline Castle estate," denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry (*q*), and *conse-*

Devise of the *Briton Ferry Estate.*

(*p*) 1 B. & Ald. 550, and 3 B. & Cr. 870.

[(*q*) The same case had previously been before the Court of King's Bench on a somewhat different point; and there *Bayley*, J., said it was clear that the de-

[*quently* that a question arising upon any particular tenement was properly a question of parcel or no parcel, and they therefore thought the several matters offered to be proved and given in evidence on the part of the defendant were admissible and ought to have been received. However,] on account of an imperfection in the special verdict, the House of Lords awarded a venire de novo.

Words "thereunto belonging."

[So, in the case of *Doe* d. *Gore* v. *Langton* (*r*), it was contended that the words "thereunto belonging" must be taken in their primary sense, the consequence of which would be to exclude the lands in question by reason of the words being correctly applicable in every particular to other lands. But the Court of King's Bench thought that it was to be collected from the face of the will itself, that the testator had not used the disputed words in their primary sense (*s*), and held that extrinsic evidence was therefore admissible to show in what sense he had used them. Lord *Tenterden*, C. J., in delivering the judgment of the Court said, "The extrinsic facts in this case leave no room to doubt that the testator intended his newly-acquired property to pass by his will as part of his Barrow estate; but, nevertheless, it cannot pass unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention, and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with and give effect to that intention."]

As to translating or deciphering peculiar characters,

—and explaining local or technical terms.

And here it may be observed, that if a testator make his will in a foreign language, or introduce therein certain terms or characters which are not understood by the Court, recourse may be had to persons conversant with the subject, for the purpose of translating the will, or deciphering the characters (*t*). [And where the testator makes use of words which in their ordinary sense are

[vise could not be confined to that part of the estate which was within the parish of Briton Ferry, for the testatrix spoke of manors and advowsons, and in that part of the estate there was no manor and only one advowson: the devise, therefore, must extend to the whole of the Briton Ferry estate. 1 B. & Ald. 558.

(*r*) Stated post, Chap. XXIV.

(*s*) 2 B. & Ad. 693.]

(*t*) *Masters* v. *Masters*, 1 P. W. 421; *Norman* v. *Morrell*, 4 Ves. 769; [*Kell* v. *Charmer*, 23 Beav. 195; *Clayton* v. *Lord Nugent*, 13 M. & W. 206, per *Alderson*, B.;] *Goblet* v. *Beechey*, 3 Sim. 24, 2 R. & My. 624; Wigram on Extrinsic Evidence, Append. *S. C.* In the last case the question was, whether the word "mod." occurring in the codicil to the will of a sculptor, applied to his models. The opinions of sculptors and persons skilled in handwriting differed on this point; and the ultimate conclusion of the Chancellor (Lord *Brougham*) was, that the formal bequest in the will could not be revoked by an imperfectly-expressed and doubtful word introduced into the codicil. An attempt was made to explain the testator's meaning by the evidence of a person who attested his will; but this, of course, was inadmissible.

Meaning of contraction used by testator.

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[intelligible, but which are used by a certain class of persons to whom the testator belonged (*u*), or in a certain locality where he dwelt (*x*), in a peculiar sense, parol evidence may be given to show the *fact* of such usage; unless it also appears on the face of the will that the testator used the word in its ordinary sense. Generally speaking, for instance, evidence would be admissible to show that the word *close* meant the same thing as farm in the country where the property was situate; but if the testator has in another part of the will used the word *closes* (in the plural), it is manifest that he has used the word *close* in its ordinary sense as denoting an *inclosure;* and then such evidence is not admissible; for that would be to contradict the words of the will (*y*).

Nicknames.

Again, the testator may have habitually called certain persons by peculiar or nicknames, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, just as if his will were written in cypher or in a foreign language (*z*). Of the admission of such evidence the case of *Lee* v. *Pain* (*a*) presents one of the most recent examples. There a testatrix, by a codicil dated in 1836, "had bequeathed to Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." The legacies were claimed by Mrs. and Miss Washbourne, the widow and daughter of Mr. D. Washbourne, who had been a dissenting minister at H. The evidence proved that Mrs. Washbourne was the daughter of Mr. Bowden, who died leaving a widow, which latter died in 1820; that the testatrix had been intimately acquainted with Mr. Bowden, and with the claimants, whom she had been in the habit of calling by the name of Bowden, and, on the mistake being pointed out, had acknowledged it. Sir *J. Wigram*, V. C., held, that the evidence was admissible, and, there being no other Mrs. and Miss Bowden, decreed the legacies to the claimants (*b*).]

[(*u*) *Clayton* v. *Gregson*, 5 Ad. & Ell. 302; *Shore* v. *Wilson*, 9 Cl. & Fin. 525.

(*x*) Per *Parke*, B., *Richardson* v. *Watson*, as reported 1 Nev. & M. 575; *Smith* v. *Wilson*, 3 B. & Ad. 728; *Anstee* v. *Nelms*, 1 Hurl. & Nor. 225. The decision in the last case appears to be properly referable to this ground; but some of the remarks of the learned Judges, especially of *Bramwell*, B., are scarcely reconcileable with the established doctrines respecting the admission of parol evidence.

(*y*) *Richardson* v. *Watson*, 4 B. & Ad. 799, 1 Nev. & Man. 575. See Wigr. Wills, pl. 119.

(*z*) Per Lord *Abinger*, C. B., *Doe* v. *Hiscocks*, 5 M. & Wels. 368.

(*a*) 4 Hare, 251.

(*b*) See also *Beaumont* v. *Fell*, 2 P. W. 141; and perhaps to this principle may be referred *Masters* v. *Masters*, 1 P. W. 425; *Abbott* v. *Massie*, 3 Ves. 148; see also Wigr. Wills, pl. 65, and n.

State of facts at the date of will proper to be regarded.

Though it is (as we have seen) the will itself (and not the intention, as elsewhere collected) which constitutes the real and only subject to be *expounded*, yet, in performing this office, a court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret (*c*); and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language, without (to borrow the words of an elegant writer) allowing "conjectural interpretation to usurp the place of judicial exposition (*d*)." Thus, if it appears (and of course it can only appear by extrinsic evidence), that there is no subject or object answering to the description in the will, strictly and literally construed, but that there is a subject or object precisely answering to such description, interpreted according to the popular and less appropriate sense of the words, the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered through the present treatise. It may be discerned in the rule (hereafter treated of) which reads a general devise of lands as extending to leaseholds, where the testator had no freeholds on which it could operate: and also in the rule (likewise discussed in the sequel) which reads such a devise as an appointment under a power, where it would otherwise be nugatory for want of property of the testator, strictly so called, on which to operate, though neither of these questions can now arise under a will made or republished since 1837. The principle is further exemplified in those cases

[(*c*) *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771, per *Parke*, J.; *Smith* v. *Doe* d. *Lord Jersey*, 2 Br. & B. 553, 5 B. & Ald. 387, per *Bayley*, J.; *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; *Guy* v. *Sharp*, 1 My. & K. 602, per Lord *Brougham*; *Att.-Gen.* v. *Drummond*, 1 Dr. & War. 367, per *Sugden*, C.; *Shore* v. *Wilson*, 9 Cl. & Fin. 555, per *Parke*, B.; *Doe* d. *Thomas* v. *Beynon*, 12 Ad. & Ell. 431; *Blundell* v. *Gladstone*, 3 Mac. & G. 692; *Phillips* v. *Barker*, 1 Sm. & Gif. 583, Wigr. Wills. Prop. V. But in *Pilcher* v. *Hole*, 7 Sim. 210, the Vice-Chancellor said he could not look at the price of stocks for the purpose of putting a construction on a will. How far it may be assumed that a testator, when he makes his will has the material circumstances in his mind, see *Hopwood* v. *Hopwood*, 22 Beav. 494, 495; *Herbert's Trusts*, 1 Johns. & H. 121. If he shows by the will that he has taken a mistaken view of the circumstances, that view must govern the construction; see *Hannam* v. *Sims*, 2 De G. & J. 151.]

(*d*) Vide Wigram on Ambiguities in Wills and the Admissibility of Parol Evidence, 2nd ed. 75; a work which should be perused by every person who wishes to acquire an intimate acquaintance with this intricate subject.

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in which a devise of lands at a given place has been extended to property not strictly answering to the locality, because there is none which does precisely correspond to it (*e*), or in which an [apparently] specific bequest of stock in the public funds has been held to [authorize payment of the legacy out of the general personal estate,] the testator having no such stock when he penned the bequest (*f*). [And although, in general, evidence as to the amount or state of the testator's property is inadmissible to influence the construction of the will (*g*); yet when it appears upon the face of the will that the testator is estimating the amount of his property and its adequacy to the payments he directs (*h*), or he inaccurately or imperfectly describes the subject of gift, as a particular denomination of stock (*i*), so as to make the interpretation of the words of the will in their primary sense impossible, and especially if the bequests be *primâ facie* specific (*k*), (which is a substantive ground for resorting to extrinsic evidence (*l*),) in all such cases evidence of the nature here alluded to is admissible.] Again, we discover traces of the doctrine in the rule (also hereafter discussed) which construes a gift to the children of a *deceased* person, or the children "*now* born" of a living person, as comprising illegitimate children; there being no legitimate child to supply the gift with a more appropriate object. And lastly, in the rule which reads a devise or bequest to apply to a person

(*e*) *Doe* v. *Roberts*, 5 B. & Ald. 407; [see *Baddeley* v. *Gingell*, 1 Exch. 319;] but learn the limits of this doctrine from *Miller* v. *Travers*, 1 M. & Scott, 342, 8 Bing. 244.

[(*f*) *Selwood* v. *Mildmay*, 3 Ves. 306; see, on this much-discussed case, *Miller* v. *Travers*, ubi sup. (where *Tindal*, C. J., refers it to the head "falsa demonstratio non nocet.") In *Lingdren* v. *Lingdren*, 9 Beav. 358, Lord *Langdale*, M. R., followed it, and said of it, "The absence of the fund purported to be given showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held that the legatees were entitled to payment out of the general personal estate." See also Wigram, Wills, pp. 102, 103, 164, 167; *Auther* v. *Auther*, 13 Sim. 422, where the Vice-Chancellor took the context for his sole guide. If in another part of the will the testator correctly described the subject, the inference that he meant to include it in the incorrect description would be rebutted, *Waters* v. *Wood*, 5 De G. & S. 717.

(*g*) See as to personal property, *Stephenson* v. *Heathcote*, 1 Ed. 38; *Cave* v. *Cave*, 2 Ed. 144; *Sibley* v. *Perry*, 7 Ves. 532; *Lord Inchiquin* v. *French*, Amb. 40, and post, Chap. XX. s. 5; as to real estate, *Judd* v. *Pratt*, 13 Ves. 174, per *Sutton*, B.; *Doe* v. *Dring*, 2 M. & Sel. 455, 456, per *Le Blanc*, J.; *Doe* v. *Buckner*, 6 T. R. 613; *Davenport* v. *Coltman*, 12 Sim. 605; *Tennent* v. *Tennent*, 1 Jo. & Lat. 384.

(*h*) *Barksdale* v. *Gilliatt*, 1 Sw. 565; see also *Colpoys* v. *Colpoys*, Jac. 451, 457.

(*i*) *Fonnereau* v. *Poyntz*, 1 B. C. C. 472; *Att.-Gen.* v. *Grote*, 3 Mer. 316, 2 R. & My. 699; *Colpoys* v. *Colpoys*, Jac. 451. And see *Hatch* v. *Hatch*, 20 Beav. 105, where a gift of the "next avoidance" of a living, was construed the next which the testator had power to devise.

(*k*) *Att.-Gen.* v. *Grote*, 2 R. & My. 699.

(*l*) *Sayer* v. *Sayer*, 7 Hare, 380, 3 Mac. & G. 607; *Boys* v. *Williams*, 3 Sim. 563, 2 R. & My. 689; *Horwood* v. *Griffith*, 4 D. M. & G. 708.

or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them (*m*). In these instances and many more which might be adduced, the application of the rules of construction evidently depends on and is governed by the state of extrinsic facts (*n*).

State of facts at date of will, when not to influence construction.

It would be dangerous, however, to place this statement of the doctrine in the hands of the reader, unaccompanied by a caution against the mistaken application of it to gifts comprising a subject or object, or a class of objects, which, by the rules of construction, is to be ascertained at the death of the testator, or at any other period posterior to the date of the will. In such cases, it would be manifestly improper to admit the state of facts existing when the will is made to have any influence upon the construction, for instance, since a residuary bequest comprehends all the personal property of which the testator is possessed at the time of his decease, the absence of any given species of property, or of any property whatever, at the date of the will, to satisfy such bequest ought not, in the slightest degree, to affect its construction; by extending the bequest to property not strictly belonging to the testator, or over which he has not any power of disposition. On the same principle, if a testator bequeaths all the stock of a particular denomination, of which he may be possessed at the time of his decease, no argument is supplied for extending the bequest to stock of any other denomination by the circumstance that the testator had at the making of the will no stock answering to the description. Again, as a devise or bequest to the children of a living person as a class will comprise all who come in esse before the death of the testator, the fact of there being no child properly so called, i. e. no legitimate child, at the date of the will, raises no necessary inference that the testator had in his contemplation then existing illegitimate children (*o*). [And in every case it must be remembered, that, whatever the surrounding circumstances, it is still the will that is to be construed. In the words of an eminent Judge (*p*), "when the Court has possession of all the facts which it is entitled to know, they will

[(*m*) *King's College Hospital* v. *Wheildon*, 18 Beav. 33.]

(*n*) Observe that, in all the above cases, the parol evidence is not adduced to show that the testator actually intended the devise to have the operation which is given to it, but merely to supply facts from which the Court infers such to be the intention; and this inference would not be allowed to be controlled by the production of evidence showing that the construction thus put on the will is at variance with the testator's real intention. [See *Stringer* v. *Gardiner*, 27 Beav. 35, 4 De G. & J. 468; and ante, p. 387.

(*o*) Post, Chap. XXXI.; and see *Doe* d. *Allen* v. *Allen*, 12 Ad. & Ell. 451.

(*p*) Per Sir *E. Sugden*, C., *Att.-Gen.* v. *Drummond*, 1 D. & War. 367.

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[only enable the Court to put a construction on the instrument consistent with the words; and the Judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear."]

Effect of recent enactment on the cases under consideration.

And it is material to observe, that the recent enactment, which (we have seen) makes the will speak as to both real and personal estate, from the death of the testator, will tend greatly to narrow the practical range of the rule which authorizes the application of words to a less appropriate subject, on account of the non-existence of one, strictly and in all particulars answering to those words. If, therefore, a testator, by a will made or republished since 1837, should devise all his lands in the parish of A., the fact of his *then* not having lands in that parish will supply a much less forcible and conclusive argument than heretofore, for holding the words to apply to lands in a contiguous parish, seeing that a testator not only *may* extend his devise to after-acquired estates, but that a devise is to be construed as speaking at his death, unless the contrary appears; so that the testator may have contemplated, and is to be presumed to have contemplated, the future acquisition of lands in the parish in question, to satisfy the terms of the devise in their strict and proper acceptation (*q*).

Parol evidence admissible to show what is comprised within a given description.

Of course, parol evidence is admissible (and that, without intrenching on the doctrine of *Doe* v. *Oxenden*,) in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact. Thus, if a testator devise the house he lives in (*r*), or his farm called Blackacre (*s*), or the lands which he purchased of A., parol evidence must be adduced to show what house was occupied by the testator, what farm is called Blackacre, or what lands were purchased of A.; such evidence being essential for the purpose of ascertaining the actual subject of disposition. The distinction obviously is, that although evidence dehors the will is not admissible, to show that the testator used his terms of description in any peculiar or extraordinary sense, yet it may be adduced to ascertain what the description properly comprehends.

Of this principle we have a useful example in the case of *Sanford* v. *Raikes* (*t*), decided by Sir *William Grant*, a Judge

[(*q*) See on this point *Lake* v. *Currie*, 2 D. M. & G. 536; *Nelson* v. *Hopkins*, 21 L. J. Ch. 410; and ante, pp. 307, *et seq.*]

(*r*) *Doe* d. *Clements* v. *Collins*, 2 T. R. 498.

(*s*) *Goodtitle* v. *Southern*, 1 M. & Sel. 299; see also *Buck* d. *Whalley* v. *Newton*, 1 B. & P. 53.

(*t*) 1 Mer. 646.

whose exposition of the principles of law was ever marked by a perspicuity, and felicity of illustration, peculiarly his own. A testator, by codicil, devised in these words, "I give the house in Seymour Place, which I have given a memorandum of agreement to purchase, (and which is to be paid for out of timber, which I have ordered to be cut down,) to the Rev. John Sanford." It happened that the testator had shortly before entered into an agreement to purchase the house in question for 7,350*l.*, and had, two days after that contract, given an order in writing to his steward, to cut down timber on a particular estate, to the amount of 10,000*l.* One of the objections made by the heir to this devise was, that the codicil did not refer to any particular timber, and could not be made good by evidence aliunde; and reliance was placed upon the cases deciding that a will to incorporate another instrument must so describe it, that the Court could be under no mistake. But the M. R. conclusively answered this reasoning. "I had always understood," he observed, "that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact; and through that medium, to ascertain the subject of the devise. I do not know what this has to do with cases where there is a reference to some paper, which is to make part of the will. There it may be considered that the will itself must specify the paper that is to be incorporated into it. Here, the question is not upon the devise, but upon the subject of it. Nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised. Where there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given, until it is shown by extrinsic evidence, what estate it was that was purchased of A., or what was in the occupation of B. In this case, the direction, with regard to payment for the house, amounted in effect to a devise of so much of the produce of the timber ordered to be cut down, as should be sufficient to pay for the house. What is there in the fact here referred to, namely, an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence, than such a one as I have alluded to? The moment it is shown that it was a given number of trees growing in such a place, or 10,000*l.* worth in value of the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is

Reference to an extrinsic document.

rendered as certain, as if the number, value, or situation of the trees, had been specified in the will."

So, in *Ongley* v. *Chambers* (*u*), where a testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging, with their and every of their rights, members and appurtenances; it was held, that lands, and a messuage (in addition to the parsonage house) in the same parish, which had been acquired by the owners of the rectory about two centuries ago, and had been uniformly demised and occupied with it since that period, and had been so purchased by and conveyed to the devisor, passed: Lord *Gifford*, C. J., observed, that the expression was "messuages;" whereas, strictly speaking, there was but one messuage belonging to the rectory, namely, the parsonage-house. The having recourse to the leases and other extrinsic evidence, to show what lands had been usually enjoyed with the rectory, was objected to, on the authority of *Doe* v. *Brown*, and the class of cases before stated; but the distinction between the cases is obvious. Here it was a question of parcel or no parcel, the description referred to the fact, and it was governed by the same principle as the case suggested by Sir *W. Grant*, of a devise of lands in the occupation of A.

Remark on *Ongley* v. *Chambers*.

[In a recent case (*x*), a testator, who had purchased a house and lands, which, together, were generally called and known as the "Ashford Hall estate," devised as follows:—"As it is my wish and desire, that all my estate in Shropshire, called Ashford Hall, should be sold, I do, therefore, give and devise the same unto" A. and B., "in trust to sell, &c." Parol evidence was admitted to show what was included by the term "my estate called Ashford Hall." The distinction between this case and *Doe* v. *Oxenden* was clearly pointed out by the Lord Chancellor. "If a testator," said the learned Judge, "describes lands in a particular parish, or in a particular locality, you cannot go into evidence to show he meant, by the general appellation, to include something out of it. You cannot do that without contradicting the terms used. Here is a term which includes more or less land, according to what was meant by the term used, and all we are

Devise of "my estate called A."

(*u*) 8 J. B. Moo. 665, 1 Bing. 483.

[(*x*) *Man* v. *Ricketts*, 7 Beav. 93, 1 H. of L. Ca. 472, nom. *Ricketts* v. *Turquand*; see also *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 680; *Doe* v. *Jersey*, 1 B. & Ald. 550, 3 B. & Cr. 870; *Goodtitle* v. *Southern*, 1 M. & Sel. 299; *Purchase* v. *Shallis*, 2 H. & Tw. 354; *Webb* v. *Byng*, 1 Kay & J. 580; *Gauntlett* v. *Carter*, 17 Beav. 586; *Ross* v. *Veal*, 1 Jur. N. S. 751; *Harrison* v. *Hyde*, 4 H. & N. 805.

[in search of is the particular meaning of the expression which is used." The distinction between a devise of "my estate *of* Ashton," and a devise of "my estate *called* Ashford Hall," is, upon the words, not very perceptible. But as the word *of* was held to be equivalent to the word *at*, the cases are, by that means, more easily referrible to the opposite principles which governed them, and which are in themselves clear enough.]

Sufficient if testator provide means of ascertaining the object of gift.

Upon the same principle, of course, it is not essential to the validity of a gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, id certum est quod certum reddi potest. Nor is it material that the description makes the objects of gifts to depend upon circumstances or acts of persons which are future and contingent, or even [to a certain extent] upon the future acts of the testator himself. [If, indeed, we accede to the reasoning of Lord *Cottenham*, in the case of *Stubbs* v. *Sargon* (*y*), it would seem that a bequest might be made to depend on any future act of the testator himself; but it is plain that there must be some limitation in this respect, for the writing of a paper pointing out the name of the devisee would certainly be an act of the testator, and yet to admit such a paper, if unattested, as evidence, would be in direct contravention of the law which requires that a will and codicil shall be attested in a particular manner.] It was decided in *Stubbs* v. *Sargon*, that a devise in favour of the persons who might be partners of the testatrix or to whom she might sell her business was valid. [It has been before observed, that, as it depended on the act of another person as well as of the testatrix who should be her devisee, the decision itself is not an authority, that a devise may be made to depend on any future act of the testator solely, though the grounds for the decision appear to go that length.

Rule as to patent and latent ambiguities, how far conclusive in deciding on admissibility of evidence.

The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity (*z*). And this ambiguity being raised by

[(*y*) 3 My. & Cr. 507. See observations on this case, ante, p. 87.

(*z*) Bacon's Maxims, Reg. 23.

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[parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will (*a*), while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used (*b*). It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, because the ambiguity complained of has been raised by the extrinsic facts, is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is to be removed; for the former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers; and, therefore, it lies within the strict limits of exposition, which it cannot be denied that the latter transgresses (*c*). To render the ground tenable, it must be taken to support the proposition only so far as it asserts, that, if an ambiguity is introduced into an otherwise unambiguous will by parol evidence of the state of the testator's family, or other circumstances, that ambiguity may be removed by further evidence *of the same nature* (*d*). But in admitting this interpretation of the rule, all distinction between patent and latent ambiguities is lost, for in *every* case the Judge by whom a will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity, it is true, may not be explained by any other kind of evidence, and so far the first branch of the canon is undoubtedly true (*e*). But by our hypothesis to this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion either that the distinction taken by

[(*a*) *Doe* d. *Gord* v. *Needs*, 2 M. & Wels. 129; *Doe* d. *Smith* v. *Jersey*, 2 B. & B. 553; *Fonnereau* v. *Poyntz*, 1 B. C. C. 472; *Colpoys* v. *Colpoys*, Jac. 451, Wigr. Wills, 65, 66, 178, whence the views expressed in the text have been adopted.

(*b*) See cases, ante, p. 379, n. (*c*).

(*c*) See Wigr. Wills, 121; and per Sir *J. Romilly*, M. R., *Stringer* v. *Gardiner*, 27 Beav. 38.

(*d*) Per *Alderson*, B., 13 M. & Wels. 204.

(*e*) *Cheney's case*, 5 Rep. 68 b; *Castledon* v. *Turner*, 3 Atk. 257; *Clayton* v. *Lord Nugent*, 13 M. & Wels. 200; *Strode* v. *Russell*, 2 Vern. 625.

[the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases.

It remains for us to see in what cases, if any, such evidence is admissible. Suppose then that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised] an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable. The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. [Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible] to clear up the ambiguity, by pointing out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description. [Of this nature are the examples given by Lord *Bacon*, in illustration of the maxim, "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur;" and are styled by him cases of equivocation (*f*).]

Effect where there are two subjects or objects answering to description.

Thus, where a testator devises his manor of Dale, and it is found that he had at the date of his will two manors, North Dale and South Dale, evidence may be adduced to show which of them was intended (*g*). Again, if a testator, having two closes in the occupation of A., devises all that his close in A.'s occupation, evidence is admissible to prove which of the two closes he meant to devise.

The same principle, of course, is applicable (and it has been most frequently applied) to the objects of a devise. Thus, in *Lord Cheyney's case* (*h*), it was resolved that if a man have two sons, both baptized by the name of John, and, conceiving that the elder (who had been long absent) is dead, devise his lands, by his will in writing, to his son John, generally, and in truth the elder is living; in this case the younger son may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his

[(*f*) See, as to the meaning of the word *ambiguity*, Wigr. Wills, pl. 210; Cic. Q. Tusc. III. 9.]

(*g*) See 1 M. & Sc. 343.

(*h*) 5 Rep. 68 b.

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son John the younger; for, observes Lord *Coke*, no inconvenience can arise, if an averment in such case be taken (*i*); because he who sees such will, ought at his peril to inquire which John the testator intended; which may easily be known by him who wrote the will, and others who were privy to his intent.

Evidence admitted to show which of two persons answering to the name was intended.

So, in the case of *Jones* v. *Newman* (*k*), where a testatrix devised to John Cluer of Calcot. There were two persons, father and son, of that name, and evidence was admitted to show which was intended. One of them had subsequently died in the testatrix's lifetime; but, of course, that could not influence the construction. [So, where a testator bequeathed a legacy to "W. R., his farming man," and it appeared he had two farming men of that name, evidence of the testator's declarations in favour of one of them was admitted (*l*).]

Declarations of testator admitted.

Again, in the case of *Doe* d. *Morgan* v. *Morgan* (*m*), where a testator devised certain property to his nephew Morgan Morgan, and then in the same will devised other property to his nephew Morgan Morgan, *of the village of Mothvey*. It appeared that the testator had two nephews of this name, one of whom lived at Mothvey, and the other elsewhere; it was contended that as the first devise was to Morgan Morgan simpliciter, and the second devise to Morgan Morgan of Mothvey, it was to be presumed that the testator in making this distinction had different persons in his contemplation, and that, this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the Court held that evidence of the testator's oral declarations, made at the time of the will, was admissible.

[In the case of *Doe* d. *Gord* v. *Needs* (*n*), there was a devise to George Gord, the son of *John* Gord; another to George Gord, the son of *George* Gord; and a third to *George Gord, the son of Gord*. The Court of Exchequer held, that evidence of the testator's declarations, that he intended George Gord, the son of *George* Gord, to take the property devised to George Gord, the son of Gord, was admissible: that it was clear the testator had selected a particular object of his bounty; though if there had

(*i*) But the effect of the doctrine is to render it necessary to the completeness of a title derived under a devisee, that it should be ascertained that there is not more than one person answering to the description; but this is seldom attended to in practice, unless some discrepancy occurs between the terms of the will and the actual name or addition of the claimant.

(*k*) W. Bl. 60.

[(*l*) *Reynolds* v. *Whelan*, 16 L. J. Ch. 434.

(*m*) 1 Cr. & M. 235.

[(*n*) 2 M. & Wels. 129. See also *Phillips* v. *Barker*, 1 Sm. & Gif. 583.

[been a blank before the name of Gord the father, that might have made a difference: that if there had been no mention in the will of any *other* George Gord, the son of a Gord, evidence of the testator's declarations would undoubtedly have been admissible, upon the authorities, which were all characterised by the fact that the words of the will *did* describe the object or subject intended, and the evidence of the testator's declarations had not the effect of varying the instrument in any way whatever; it only enabled the Court to reject one of the subjects or objects to which the description applied, and to determine which of the two the devisor understood to be signified by the description which he used in the will: that the mention in other parts of the will of two persons, each answering the description of George the son of Gord, had no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: and that though the claimant under the devise in question was more perfectly and fully described in another part of the will, still he was correctly, however imperfectly, described by that devise.

In the case of *Doe* d. *Allen* v. *Allen* (*o*), a testatrix devised her land to her brother T. A. for his life, and after his decease to John A., grandson of her said brother T. A., his heirs and assigns, charged, nevertheless, with the bequest of 100*l.* to each and every of the brothers and sisters of the said John A. At the time of making the will, there were two grandsons of T. A., each named John; but one of them, the lessor of the plaintiff, had brothers and sisters; the other, the defendant, had none: it was held, that the bequest to the brothers and sisters of the said John A. did not contain a description of the devisee, so as to exclude extrinsic evidence in favour of the defendant's claim, as it would have applied to after-born brothers and sisters; and that a declaration by the testatrix, of her intention in the defendant's favour, was admissible.]

Contra, where ground for preferring either is afforded by the will;

On the other hand, in the case of *Doe* d. *Westlake* v. *Westlake* (*p*), where the devise was unto "Matthew Westlake my brother, and to Simon Westlake my brother's son;" and it appeared by the evidence, that the testator had three brothers, Thomas, Richard,

[(*o*) 12 Ad. & Ell. 451. In *Bennett* v. *Marshall*, 2 Kay & J. 740, the case of two persons, one with several christian names, the other with one only, that one being identical with the first christian name of the former, was considered to be the same as the case of two persons bearing the same name. It is not stated however what was the nature of the parol evidence admitted.]

(*p*) 4 B. & Ald. 57; [and see *Douglas* v. *Fellows*, Kay, 114.

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and Matthew, each of whom had a son named Simon; Thomas and Richard were mentioned in previous parts of the will: the Court of King's Bench held, (and that in perfect consistency with the preceding cases (*q*),) that the fact of there being several brothers' sons named Simon did not raise a latent ambiguity, so as to let in evidence of oral declarations made by the testator respecting his intention; it being clear, on the face of the will, that the nephew intended was the son of Matthew. "My brother's son" evidently meant the son of that brother who was then particularly in his mind.

—or by surrounding circumstances.

[And the result would doubtless be the same where the evidence of surrounding circumstances disclosed grounds for the testator preferring one person to another of the same name (*r*).]

To "my brother," &c., the fact being that testator has several brothers.

There seems to be no doubt, though it has never been distinctly decided, that the principle of the preceding cases applies to a devise to a person sustaining a given character, as "to my brother, son," &c., without specification of name; so that if the fact should happen to be, that there were more persons than one to whom the description applied, parol evidence would be admissible to show which of them was the intended object of gift; for, as the uncertainty does not appear until the parol evidence discloses the plurality of persons answering to the terms of the will, it seems to be an instance of that [kind of] ambiguitas latens, [to remove which evidence of intention is permitted (*s*).] In several reported cases, indeed, devises of this kind have failed, on account of the uncertainty of the object; but in none of them does parol evidence appear to have been offered to remove the ambiguity.

Thus, in *Dowset* v. *Sweet* (*t*), a bequest to the son and daughter of W. W. was held to be void as to the son, on account of there being more than one. So, in *Doe* d. *Hayter* v. *Joinville* (*u*), one of the grounds on which the devise to the testator's "brother and sister's family" failed was, that there were children of two sisters of the testator, one living and one dead, and it did not appear which of them was intended.

Where part of

Sometimes it happens that one part of the description applies

[(*q*) See Wigram, Wills, pl. 144.

(*r*) *Jefferies* v. *Michell*, 20 Beav. 15.

(*s*) See acc. per Lord *Thurlow*, 1 Ves. jun. 415; and note the difference between this case and that of a gift to "*one of* the sons, brothers, &c. of A.," 2 Vern. 625. But a devise "to one of my cousin A.'s daughters that shall marry with a Norton within 15 years" has been held to mean the daughter who shall *first* marry a Norton, and consequently a good devise, *Bate* v. *Amherst*, T. Raym, 82. See also *Ashburner* v. *Wilson*, 17 Sim. 204.]

(*t*) Amb. 175.

(*u*) 3 East, 172.

description applies to each of several persons, and part to neither, evidence admitted.

to each of several claimants in common, and another part to neither of them; as in the case of *Careless* v. *Careless* (*x*), where the bequest was to "Robert Careless my nephew, the son of Joseph Careless." It appeared by the evidence that the testator had no brother named Joseph, but he had two brothers, John and Thomas, both mentioned in the will, each of whom had a son named Robert. These nephews were the respective claimants; Thomas's son relying on the fact, that in other parts of his will the testator had described Robert, the son of John, in a different manner, sometimes calling him his nephew Robert simply, without any further designation, and sometimes rightly Robert the son of John. By the parol evidence which was adduced on both sides, it appeared that the testator was intimately acquainted with John's son Robert, but that Thomas's son lived at a distance, and was almost unknown to him, the testator having been introduced to him but once; and it was even doubtful whether the testator knew that his brother Thomas had a son of that name. Sir *W. Grant* held, that, as the ambiguity was created by facts dehors the will, parol evidence was admissible; and the presumption upon the evidence was, that the testator intended that nephew whom he knew best, and with whose name it is certain he was acquainted. "Supposing, however," said the M. R., "that this inaccurate description should be taken therefore to apply to the plaintiff (John's son), the testator has not always applied to him the same description, but has sometimes called him his nephew Robert, generally, and sometimes rightly, Robert the son of his brother John; and thence it is argued, that as it is plain he knew the plaintiff by his right description, so it cannot be imagined that he inserted a wrong description, intending it should apply to him. But it must be observed, that the claim of the plaintiff to the property given by the general description of the testator's nephew Robert, is not disputed, though it is in words equally ambiguous with this which is disputed. This amounts to an admission on the part of the defendant, to the full extent of what the plaintiff would establish by his evidence. Then it is not pretended that the testator could have meant any body but one of his two brothers, John and Thomas, by the description of Joseph Careless; nor can it be supposed that he was in fact ignorant of the names of his brothers. It was therefore a mere slip of the pen; and then what name did he intend

(*x*) 1 Mer. 384.

to write? Not Thomas, for then it must have been brought newly to his mind that he had two nephews of the name of Robert, to one of whom he had already given as the son of John; and the necessity of distinguishing between them would in that case have induced him to describe the other accurately. If he had only one of his nephews in his mind, during the whole time that he was making his will, it is natural to conceive that such a mistake might have been made by mere inattention; but as actual ignorance is out of the question, such a mistake would not be reconcileable with the supposition, that the testator at all thought of his other nephew Robert, so as to bring into his mind the necessity of marking which of the two he intended. During the time that he was making his will, therefore, he forgot (if indeed he ever knew) that he had any nephew called Robert besides the plaintiff."

Again, in the case of *Still* v. *Hoste* (*y*), a testator bequeathed a legacy to *Sophia* Still, daughter of Peter Still. Still had two daughters only, Selina and Mary Anne; and [the evidence of the attorney who made the will and of another person, proving that Selina was the person meant, was admitted.] It is clear that if Selina had been the only daughter, her claim might have been supported on the terms of the will without the aid of extrinsic evidence.

[So, in the case of *Price* v. *Page* (*z*), where a testator gave a legacy to —— Price, the son of —— Price. The report states that the plaintiff was the only person who claimed the legacy, but the executors raised the question whether the father of the plaintiff, to whom the description was equally applicable, was not intended. Evidence was admitted and relied on by Sir *R. P. Arden*, M. R., that the testator had said that he had or would provide for the plaintiff, and that he had left him something by his will.

Of the three cases last cited, it was sai by Lord *Abinger*, C. B. (*a*), that they did not materially differ from the class immediately preceding. That they differed indeed in this, that the equivocal description was not entirely accurate (*b*); but they agreed in its being (although inaccurate) equally applicable to each claimant; and that they all concurred in this, that the inac-

(*y*) 6 Mad. 192.
[(*z*) 4 Ves. 679.
(*a*) In *Doe* v. *Hiscocks*, 5 M. & Wels. 370.
(*b*) Legal certainty, not perfect accuracy, is required, see Wigr. Wills, pl. 186.

[curate part of the description was either, as in *Price* v. *Page*, a mere blank, or, as in the other two cases, applicable to no person at all. That these, therefore, might fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seemed to be receivable.

Effect where part of description applies to one person and part to another;

There is yet another class of cases in which it has been made a question, whether evidence of the nature now under consideration can be legally admitted, namely, where the description in the will, taken altogether, answers to no person or thing, but part of it applies to one, and part to another. Cases are to be met with, supporting the conclusion, that a testator's declarations are admissible to show which of the imperfectly-described persons or things he intended to be the object or subject of the gift (*c*).

—in such a case evidence of intention inadmissible.

But in the] case of *Doe* d. *Hiscocks* v. *Hiscocks* (*d*), where part of the description in the will applied to one person and part to another, the Court of Exchequer rejected evidence of the testator's declarations, at the time of giving instructions for his will, respecting his actual intention. The devise was to the testator's son John H. for life, and on his decease to his (testator's) grandson John H., eldest son of the said John H. for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married; he had by his first wife one son, Simon; by his second wife an eldest son John, and other younger children, sons and daughters. It was held, that evidence of the instructions given by the testator for his will and of his declarations after its execution was not admissible to show which of these two grandsons was intended by the description in the will. Lord *Abinger*, in [delivering the judgment of the Court, reviewed most of the principal cases on this subject. In the opinion of that Court there was but one case, in which evidence was admissible of the testator's declarations, of the instructions given for his will, and other circumstances of the like nature, which were not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. That case was where the meaning of the testator's words was

[(*c*) *Thomas* d. *Evans* v. *Thomas*, 6 T. R. 678; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; in *Doe* d. *Chevalier* v. *Uthwaite*, 8 Taunt. 306, 3 Moo. 304; *S. C.* in B. R., 3 B. & Ald. 632, sometimes cited in support of the same doctrine, it does not appear that any declarations by the testator were offered in evidence. The case seems to have been ultimately compromised; see per Lord *Brougham*, 1 H. of L. Ca. 797.

(*d*) 5 M. & Wels. 363.

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[neither ambiguous nor obscure, and where the devise was, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arose as to which of the two or more persons or things, *each answering the words in the will*, the testator intended to express. Though it was clear he meant one only, both were equally denoted by the words, whence there arose an "equivocation," and evidence of previous intention might be received to solve this latent ambiguity; for the intention showed what he meant to do; and when you knew that, you immediately perceived that he had done it by the words he had used, and which in their ordinary sense might properly bear that construction. It appeared to them that in all other cases parol evidence of what was the testator's intention ought to be excluded. This case is generally considered to have settled the law upon this subject (*e*), and to decide that "the only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application to each of several subjects."

Declarations need not be cotemporaneous with will.

In the case of *Doe* v. *Allen* (*f*), the declarations admitted as evidence had been made by the testatrix ten months after the date of her will, and were objected to on that account. Lord *Denman*, C. J., concluded the judgment of the Court by saying, that "none of the cases which were referred to in the books to show that declarations cotemporaneous with the will were alone to be received, established such a distinction. Neither had any argument been adduced which convinced the Court that those subsequent to the will ought to be excluded wherever any evidence of declarations could be received. They might have more or less weight according to the time and circumstances under which they were made, but their admissibility depended entirely on other considerations." The same remarks would apply to declarations made before the will (*g*).

Bequest not applied to another, there being an object answering the description.

It was stated in a former page that evidence of all the *material* facts of the case was admissible to assist in the exposition of the will. And this statement was necessarily qualified by the insertion of the word *material*, because though the rules specially ap-

[(*e*) Williams' Exec. 990; Wigr. Wills, 184, 2 Phil. Ev. 10th ed.; *Blundell* v. *Gladstone*, 11 Sim. 467, 470, 1 Phil. 282; *Thomson* v. *Hempenstall*, 1 Rob. 783, 13 Jur. 814; *Bernasconi* v. *Atkinson*, 10 Hare, 348. In the case however of *In re Blackman*, 16 Beav. 377, the rule was transgressed.

(*f*) 12 Ad. & El. 455; Wigr. on Wills, 162.

(*g*) *Langham* v. *Sandford*, 19 Ves. 649; 2 Tayl. Evid. 783; 2 Phil. Evid. 291, n. (2); Lord *Kenyon's* dictum, *Thomas* v. *Thomas*, 6 T. R. 677, seems therefore to be overruled.

[plicable to the subject now under consideration, may not raise any peculiar obstacle to the admission of evidence tendered in support of a given fact; yet if that fact, supposing it to be proved, ought not to influence the construction of the will, the evidence in support of it is immaterial, and therefore inadmissible. Thus it is a well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation; and that, although the most conclusive evidence of intention to use them in some popular or secondary sense be tendered (*h*). Therefore a person, to whom the terms of the description are imperfectly applicable, may not by parol evidence of facts, tending to prove an intention in his favour, support his claim against another person exactly or more nearly answering to all the particulars in the description.]

Thus, in *Delmare* v. *Robello* (*i*), where a testator in 1785 bequeathed the residue of his estate, in trust to pay the interest for life to all the children of his two sisters, *Reyne* and *Estrella;* in case of the death of any, their issue to have their respective shares, with benefit of survivorship for want of issue. The testator died in 1789, leaving three sisters: *Reyne*, who was never married, but in 1757 changed her profession of religion from the Jewish to the Roman Catholic persuasion, and became a professed nun, and was baptized by the name of *Maria Hieronyma*, and lived at Genoa; and Estrella and *Rebecca, who were married*, and lived at Leghorn. Rebecca had several children, who set up a claim, on the ground that the testator intended *Rebecca* when he named *Reyne*. Parol evidence [of the *circumstances* as well as of testator's declarations] in support of this claim was rejected by Lord *Thurlow*, who suggested that Maria Hieronyma might have changed her mind, and have escaped into this country, and have married and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, *inasmuch as there was a sister answering to the name in the will;* for he considered that the assumption of the conventual name did not prevent the applicability of the former name: it was a part of the profession, and was not meant for the rest of the world; the former name, therefore, continued, and by that such persons were always spoken of.

So, in *Andrews* v. *Dobson* (*k*), where the bequest was to "James, Evidence not

[(*h*) Wigr. Wills, Prop. II. supra, 386. And see *Horwood* v. *Griffith*, 4 D. M. & G. 708.]

(*i*) 1 Ves. jun. 412.

(*k*) 1 Cox, 425.

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admissible to exclude a person answering to description.

son of Thomas Andrews, of Eastcheap, printer." There was no person of the name of Thomas Andrews in Eastcheap, but there was James Andrews, a printer, who lived there: he had one son, named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The son by the first wife claimed the legacy, insisting that the testator meant "Thomas, the son of James," instead of "James, the son of Thomas;" [and prayed some inquiry respecting these circumstances:] but Sir *Lloyd Kenyon*, M. R., said, that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet he thought this was beyond all precedent, and dismissed the bill.

In this case there could have been no doubt as to the identity of the *father;* but the difficulty was in admitting the claim of a son of a *different* name, there being a son of *the same* name.

Again, in *Holmes* v. *Custance* (*l*), where there was a legacy to the children of *Robert* Holmes, "late of Norwich, but now of London." It appeared that, at the date of the will, the testator had no relative named *Robert*, but that a person of this name, [who was related to the testator, and] had gone from Norwich to London, at the age of fourteen or sixteen, had died in London, a few years before, leaving a child. It was contended that the legacy did not apply to the child of this person, but to the children of *George* Holmes, who was a relative of the testator, had been formerly of Norwich, and was then resident in London, and had several children, some of whom were in habits of intimacy with the testator; but Sir *W. Grant* held that the description was not so inapplicable to Robert, as to let in evidence that George was the person intended; that the sense of "late" was not 'recently' but 'formerly;' and as to his being dead at the time, that the testator might not have known or might have forgotten it, he being at a distance.

[And in *Wilson* v. *Squire* (*m*), where a testator bequeathed a legacy to "The London Orphan Society in the City Road," and it appeared that there was no institution precisely answering this description, but there was one in the City Road called the Orphan Working School, which claimed the legacy: evidence was tendered that there was a society called the London Orphan

(*l*) 12 Ves. 279; see also *Doe* v. *Westlake*, 4 B. & Ald. 57, ante, p. 403.

[(*m*) 1 Y. & C. C. C. 654.

[Asylum at Clapton, and that the testator was many years a subscriber to it, and in his lifetime avowed his intention of leaving it a legacy; but Sir *J. Knight Bruce* held, that the Orphan Working School was sufficiently described by the will, and therefore that none of the evidence was admissible.

The case of *Maybank* v. *Brooks* (*n*) presents a good example of the rule applied to a different species of case. A testator bequeathed a legacy to A., his executors, administrators and assigns:" A. was dead at the date of the will, which, however, took no notice of the fact: but the personal representative of A. claimed the legacy, insisting that the terms of the bequest made it transmissible, and in support of his claim, proposed to read (amongst other) evidence of the testator's knowledge that A. was dead; but Lord *Thurlow* rejected it, saying, "The only fact to which evidence is afforded is, that the death of A. was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible: that could not be from a legatee who had been dead several years." . . . . . "I must accordingly decree the legacy to be lapsed" (*o*).]

Evidence of intention inadmissible to support claim of one to whom no part of description applies.

And even where no person actually answers to *any* part of the description in the will, it would seem, upon principle, to be impossible to admit parol evidence ["of intention"] in support of the claim of one to whom the description is in every respect inapplicable: [for the will ought to be made in writing; and if the testator's intention cannot be made to appear by the writing, *explained by the circumstances*, there is no will (*p*).]

Thus, Sir *John Strange* (*q*), in citing a case where the executor constituted in a will was, "my nephew Robert New," which in the engrossing was written "Nune," and parol evidence was admitted, and thereupon New was declared the person meant, observed, that this would hardly have done, if it had not have been for the relative words "my nephew," and its appearing that New was the testator's nephew, and that he had no such nephew as Robert Nune.

Same rule as to subject of gift.

[And in the case of *Miller* v. *Travers* (*r*), where a testator devised all his freehold and real estates whatsoever, situate in the *county of Limerick*, and in the city of Limerick, to trustees and

[(*n*) 1 B. C. C. 84.
(*o*) See as to this, ante, p. 314.
(*p*) Per Lord *Abinger*, *Doe* v. *Hiscocks*, 5 M. & Wels. 369.]
(*q*) *Hampshire* v. *Pierce*, 2 Ves. 218.
[(*r*) 8 Bing. 244, 1 M. & Sc. 342. The judgment of *Tindal*, C. J., contains a full and able examination of the authorities. [See also *Okeden* v. *Clifden*, 2 Russ. 309; *In re The Clergy Society*, 2 Kay & J. 615.]

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[their heirs. At the time of making his will, the testator had no real estate in the *county* of Limerick, but he had considerable real estates in the *county of Clare:* and it was held by Lord *Brougham,* L. C., assisted by *Tindal,* C. J., and Lord *Lyndhurst,* C. B., that evidence to prove that the testator *intended* his estates in the county of Clare to pass by the devise, and that the word *Limerick* was inserted by mistake instead of *Clare,* was not admissible.]

In some cases, however, this rule seems to have been departed from. Thus, in the case of *Masters* v. *Masters* (*s*), where a legacy of 200*l.* to "Mrs. *Sawyer,*" was claimed by a Mrs. *Swapper,* it was referred to the Master to inquire whether she was the person intended.

Christian and surname both wrong;

So, in the case of *Beaumont* v. *Fell* (*t*), (which has been often cited,) parol evidence was admitted to correct both the *christian* and *surname* of a legatee, who was no otherwise described than by name. The circumstances were peculiar. A testator bequeathed 500*l.* to *Catherine Earnley,* which was claimed by a person whose name was *Gertrude Yardley.* It appeared that there was no such person as Catherine Earnley; that the testator's voice, when he made his will, was hardly intelligible; that the testator usually called the legatee Gatty, which the scrivener, who took instructions for the will, might easily mistake for Katty, and that he, not understanding well who this legatee was, or what was her name, was referred by the testator to J. S. and his wife, to inform him farther, who afterwards declared that Gertrude Yardley was the person. The Master of the Rolls admitted the evidence, and accordingly held this person to be entitled. Being a personal legacy, he considered it to be quite different from a devise of land; for he said as legacies were governed by the rules of the civil canon law originally, so shall it be after the making of the Statute of Frauds, provided it be a will in writing.

—and yet claimant held to be entitled.

Observations upon *Beaumont* v. *Fell.*

It may be questioned, whether there is much weight in this distinction. The Statute of Frauds put an end to nuncupative wills, as well of personal as of real estate, except in certain cases; superadding only, in regard to devises of freehold estates, the requisition of an attestation by three witnesses. In both

(*s*) 1 P. W. 425.

(*t*) 2 P. W. 141, 2 Eq. Ca. Ab. 366, pl. 8. ["I take *Beaumont* v. *Fell* no longer to be law; I take it to have been overruled by *Miller* v. *Travers,*" per Lord *Brougham, Mostyn* v. *Mostyn,* 5 H. of L. Ca. 168.]

cases the will must be in writing, and in both the objection to admitting evidence to contradict or alter that will appears to apply with equal force. We should pause therefore in acting on *Beaumont* v. *Fell* as an authority beyond its peculiar circumstances, unsupported as it is by any subsequent decision, admitting evidence to ascertain both the christian and surname, without the aid of any additional description. The case seems to have been generally considered as decided on the circumstance of the nickname: but even with regard to this the variation was not inconsiderable.

Total blanks for names not to be supplied.

But though, as we have seen, cases may be adduced in which legacies have been decreed to persons to whom not any part of the description in the will applies, yet in no instance has a total blank for the name been filled up by parol evidence (*u*). In such cases, indeed, there is no certain intent on the face of the will to give to *any* person: the testator may not have definitively resolved in whose favour to bequeath the projected legacy (*x*). The effect of partial or imperfect descriptions, however, has often come under consideration.

In the case of *Hunt* v. *Hort* (*y*), where the bequest was to Lady , Lord *Thurlow* considered it as equivalent to a total blank, and, therefore, that the name could not be supplied by parol evidence.

But in *Abbot* v. *Massie* (*z*), where the bequest was to Mr. and Mrs. G., Lord *Loughborough* directed an inquiry as to who Mrs. G. was.

Of course, if there had been more than one person answering to the imperfect description in the will, and the evidence had failed to point out which of them was the intended object of the testator's bounty, the bequest would, in both the preceding cases, have been void for uncertainty.

Evidence sometimes admissible, though immaterial.

[At the conclusion of his judgment in the case of *Blundell* v. *Gladstone*, the Vice-Chancellor said he decided the case upon the words of the will, coupled with that evidence only, which had been given as to the state of the Weld family at the date of the will, *and which he thought was the only part of the evidence which ought to be received* (*a*). But besides that evidence there was parol evidence (*b*) of the testator having, both before and after

[(*u*) *Baylis* v. *Att.-Gen.*, 2 Atk. 239; *Ulrich* v. *Litchfield*, ib. 372.

(*x*) Per *Parke*, B., *Doe* v. *Needs*, 2 M. & Wels. 139.]

(*y*) 3 B. C. C. 311; see also 1 M. & Sc. 351.

(*z*) 3 Ves. 148; [as to this case see ante, p. 392, n.

(*a*) 11 Sim. 488.

(*b*) Ib. 470.

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[making his will, and even after correction of his mistake, repeatedly called the possessor of Lulworth by the name of *Edward* Weld. This evidence had been received in the Master's office, and in delivering the opinion of the Judges in the House of Lords (where the suit was carried), *Parke*, B., said, they thought it was rightly received (*c*). Hence it is to be inferred that evidence (to which, upon the principles discussed in this chapter, there is *per se* no objection) of facts connected with the case, and which may by possibility influence the construction of the will, is admissible, although it is ultimately found to be immaterial (*d*).]

[(*c*) 1 H. of L. Ca. 778, nom. *Camoys* v. *Blundell*.

(*d*) See also *Lowe* v. *Lord Huntingtower*, 4 Russ. 532, n.; *Sayer* v. *Sayer*, 7 Hare, 381, Wigr. Wills, pl. 103; ante, pp. 408, 409.]

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ELECTION.

THE doctrine of election may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights. Doctrine of election, what.

An anonymous case in Gilb. Cas. in Eq. (*a*), furnishes a simple illustration of the principle. A. seised of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee-simple acre to his eldest son, who was issue in tail, and the entailed acre to his youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord *Cowper* said, "The devise of the fee acre to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son shall have an equivalent out of the fee acre." And his Lordship decreed the same accordingly. [This case is the more remarkable, as showing the length to which the doctrine

(*a*) 15; see also Pre. Ch. 351; Belt's Suppl. to Ves. 250; 1 Ves. 234; 1 B. P. C. Toml. 300; 3 Ib. 167; Amb. 388, 1 Ed. 532; 3 B. C. C. 316; 4 B. C. C. 21; *S. C.* 1 Ves. jun. 514; 4 B. C. C. 38; 1 Ves. jun. 534; 2 Ves. jun. 367; Ib. 693; Ib. 544; 3 Ves. 191; Ib. 384; 5 Ves. 515; 9 Ves. 369; 13 Ves. 224; 1 Dow, 249; 2 V. & B. 187; 2 Mer. 86; 1 Sw. 359; Ib. 409; [3 Russ. 278; 4 Y. & C. 18; 2 Drew. 93.]

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[of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election (*b*).]

Does not extend to derivative claims.

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the curtesy, in respect of an estate of inheritance taken by his wife, in opposition to a will, under which he has accepted benefits, without affecting his title to those benefits (*c*); [and one coheiress electing to take under a will may retain a share which has descended to her by the death of a deceased coheiress, although bound to give up her own original share (*d*).

Nor prevent a legatee of two properties rejecting one and accepting the other;

Nor in general does the doctrine of election apply to prevent a devisee of two properties, one beneficial, the other burdensome, accepting the first and repudiating the latter (*e*), although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself; as where the repudiated gift comprises shares in a company which, after the testator's death, fails, and is wound up, the shareholders being called on to contribute (*f*), or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair (*g*).

—unless a contrary intention appears.

But the question is one of intention, and, therefore, where a testator bequeathed an annuity to A., and also a leasehold house held at a rack rent beyond its value, Sir *J. Leach*, M. R., thinking that the plain intention of the testator was that his estate should no longer be subject to the rent of the leasehold house, held that the legatee must take both bequests or neither (*h*).]

Does apply to reversionary interests.

The doctrine of election clearly applies as well to [contingent as to vested rights (*i*), and to] reversionary and remote as well as to immediate interests (*k*). Lord *Hardwicke*, indeed, at one

[(*b*) See *Schroder* v. *Schroder*, Kay, 584—586.]

(*c*) *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544, 3 Ves. 384.

[(*d*) *Wilson* v. *Wilson*, 1 De G. & S. 152; but see post as to this case.

(*e*) *Andrew* v. *Trinity Hall*, 9 Ves. 525.

(*f*) *Moffett* v. *Bates*, 3 Sm. & Gif. 468.

(*g*) *Warren* v. *Rudall*, 1 Johns. & H. 1.

(*h*) *Talbot* v. *Earl of Radnor*, 3 My. & K. 254.

(*i*) Per Lord *Loughborough*, 2 Ves. jun. 696, 697.]

(*k*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Wilson* v. *Lord John Townshend*, 2 Ves. jun. 697.

time seems to have thought that it did not extend to a remainder expectant on an estate tail (*l*); but the notion stands upon no intelligible principle, and is inconsistent with his Lordship's own decision in *Graves* v. *Forman* (*m*), in which he would not allow an heir at law to whom an estate for life in remainder after an estate tail was devised, to take it without giving up a copyhold disposed of to another, but upon which the will could not (in the then state of the law) operate, for want of a previous surrender. The heir it seems (strangely enough) elected to take the estate for life in remainder, and eventually got nothing; the tenant in tail having acquired the fee-simple by suffering a common recovery.

Immaterial whether testator is acquainted with his want of title.

It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition, that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him (*n*). This seems to result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great Judge has observed,) "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another (*o*)."

Whether principle of doctrine is compensation or forfeiture.

A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him in toto, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation (*p*); interrupted, certainly, by

(*l*) *Bor* v. *Bor*, 3 B. P. C. Toml. 178, n.

(*m*) Cited 3 Ves. 67; [see *Mahon* v. *Morgan*, 6 Ir. Jur. 173.]

(*n*) *Whistler* v. *Webster*, 2 Ves. jun. 370; *Thellusson* v. *Woodford*, 13 Id. 221; *Welby* v. *Welby*, 2 V. & B. 199, overruling *Cull* v. *Showell*, Amb. 727, unless decided on the ground of the great lapse of time, which seems probable.

(*o*) See Sir *R. P. Arden's* judgment in *Whistler* v. *Webster*, 2 Ves. jun. 370.

(*p*) *Webster* v. *Mitford*, 2 Eq. Ca. Ab. 363, stated from Reg. Lib. 1 Sw. 449; *Bor* v. *Bor*, 3 B. P. C. Toml. 167; *Ardesoife* v. *Bennett*, 2 Dick. 463; *Lewis* v. *King*, 2 B. C. C. 600; *Freke* v. *Lord Barrington*, 3 B. C. C. 284; *Blake* v. *Bunbury*, 1 Ves. jun. 523; *Whistler* v. *Webster*, 2 Ves. jun. 372; *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 560; *Ward* v. *Baugh*, 4 Ves. 627; *Dashwood* v. *Peyton*, 18 Ves. 49; *Welby* v. *Welby*, 2 V. & B. 190; (see these cases stated in Mr. *Swanston's* note to *Gretton* v. *Haward*, 1 Sw. 433; [*Tibbitts* v. *Tibbitts*, Jac. 317.]

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some dicta (*q*), [and by an express decision of Lord *Langdale* (*r*),] in favour of the doctrine of forfeiture. In the case of *Green* v. *Green* (*s*), Lord *Eldon* is generally supposed to have used expressions indicating a similar opinion. His Lordship, however, expressly admits the cases to have decided that the party electing against a *will* was not bound to give up more than was enough to make satisfaction for that which was intended for another; and when his Lordship states the contrary doctrine, it is with reference to the case before him, which arose upon *a deed*, "in which," he observed, "as it is a contract, it is very difficult to say that compensation only is to be made (*t*)." The doctrine of compensation was also subsequently recognized by the same high authority in the House of Lords, in *Kerr* v. *Wauchope* (*u*), as well as in the earlier and much-discussed case of *Lord Rancliffe* v. *Parkyns* (*x*); and [was recently accepted by Sir *W. P. Wood*, V. C. (*y*), as the settled doctrine of the Court.]

Personal competency to express intention requisite;

In order to raise a case of election, there must be a *personal* competency on the part of the author of the attempted disposition, as the doctrine is founded on intention, which supposes such competency.

Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will (*z*). And though the disability of coverture

(*q*) *Cowper* v. *Scott*, 3 P. W. 119; *Cookes* v. *Hellier*, 1 Ves. 235; *Morris* v. *Burroughs*, 1 Atk. 404; *Villareal* v. *Lord Galway*, 1 B. C. C. 292, n.; *Wilson* v. *Townshend*, 2 Ves. jun. 697; *Wilson* v. *Mount*, 3 Ves. 194; *Broome* v. *Monck*, 10 Ves. 609; *Thellusson* v. *Woodford*, 13 Ves. 220.

[(*r*) *Greenwood* v. *Penny*, 12 Beav. 406.]

(*s*) 2 Mer. 86.

(*t*) 19 Ves. 668.

(*u*) 1 Bligh, 1.

(*x*) 6 Dow, 149.

(*y*) [*Schroder* v. *Schroder*, Kay, 578.] But 1 Roper's Husband and Wife, by Jacob, 556, n. is contrary; and the writer understands that other eminent equity lawyers concur in Mr. Jacob's views; [see also Sugden, Pow. vol. 2, p. 145, 7th ed., where the doctrine of forfeiture seems also favoured. But besides the general leaning of Courts of Equity against forfeiture, there is, with regard to real estate, the further argument that the person to elect has the legal estate in both subjects, whence it might he held that the disappointed donee, seeking equity, should not, by insisting on forfeiture, claim a benefit of larger value than the testator intended for him, but must be satisfied with compensation. The question is not very likely to arise, unless with respect to some specific property which the owner wishes to retain, and the Courts might then with some reason act upon the supposition that the owner retains it because it is the most valuable, and not permit him to aver the contrary. Thus, in effect, forfeiture would be incurred. If the doctrine of forfeiture should be established on any other ground than this, it seems very difficult to contend that the surplus beyond what is sufficient to compensate the disappointed donee does not go to the heir or residuary legatee, or devisee, or next of kin, as the case may be.]

(*z*) *Hearle* v. *Greenbank*, 1 Ves. 298.

As to infants and femes covertes.

is, in some respects, distinguishable from and less absolute than that of infancy, (a feme coverte having, it is said, a disposing mind, but not a disposing power, while an infant has neither the one nor the other,) yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If, therefore, a feme coverte, having a testamentary power, makes an appointment by will in favour of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right (*a*).

Heir when put to his election.

It formerly happened, (and may still occur under a will which is regulated by the old law,) that a testator, by a will sufficient in point of execution to pass personal estate, but not adequately attested for the devise of freehold estate, devised such estate away from the heir, to whom, by the same will, he bequeathed a legacy. In such cases the heir is allowed to disappoint the testator's attempted disposition, by claiming the estate in virtue of his title by descent, and, at the same time, take his legacy, on the ground that the want of a due execution precludes all judicial recognition of the fact of the testator having intended to devise freehold estates; and, therefore, the will cannot be read as a disposition of such estates for the purpose even of raising a case of election against the heir (*b*). [However well settled this rule may be, it seems to have been transgressed in the late case of *Wilson* v. *Wilson* (*c*), in which the testator, by an unattested will made in 1837, gave a freehold and also a leasehold house to his nephew, on condition that he joined with another devisee under the will, who disclaimed, in the purchase of certain annuities, including a life annuity of 100*l.* a-year, for (as it was ultimately decided) the eldest of the testator's three daughters and co-heiresses-at-law. Sir *J. Knight Bruce*, V. C., decided that a moiety of the annuities must be provided for out of the disclaimed estate, and the other moiety out of the leasehold bequeathed to the nephew, but that the *eldest co-heiress* electing to have the annuity paid to her must give up to the nephew her

(*a*) *Rich* v. *Cockell*, 9 Ves. 370; [as to the capability of a married woman to elect, see *Frank* v. *Frank*, 3 My. & Cr. 171; *Wall* v. *Wall*, 15 Sim. 513; *Wilson* v. *Townshend*, 2 Ves. jun. 693.]

(*b*) *Hearle* v. *Greenbank*, 1 Ves. 298, 3 Atk. 697, 716; *Carey* v. *Askew*, 1 Cox, 241; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Brodie* v. *Barry*, 2 V. & B. 127; *Gardiner* v. *Fell*, 1 J. & W. 22.

[(*c*) 1 De G. & S. 152.

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[share of the freehold house attempted to be devised to him. It is conceived that this decision was grounded on the supposition, that the claims of the co-heiress to the moiety of the annuity and also to the part of the property on which the testator intended to charge it were inconsistent; but to this it seems sufficient to answer in the language of Lord *Alvanley*, that though the Judge cannot read the will without the charge, yet he could say, for the statute enabled him to say, that if a man by will unattested charges both real and personal estate with an annuity, he never meant to charge the real at all (*d*), and the will should therefore have been read as if the leasehold solely had been charged.] If, however, the legacy to the heir is bequeathed upon the express condition that he shall confirm the devise, the case is otherwise: the heir then is not permitted to accept the benefit conferred upon him by the will, without performing the condition which the testator has expressly annexed to the enjoyment of his bounty (*e*).

Effect of recent statute on doctrine.

Of course this question cannot now arise under wills made or republished since the year 1837, which, if sufficiently executed for the bequest of a personal legacy, will also be effectual to dispose of freehold estate.

Nor is this the only instance in which the recent enactments have tended to narrow the practical range of the doctrine under consideration; for now that the devising power extends to after-acquired real estate, it can no longer be a question (as formerly (*f*),) whether the testator has, by attempting to dispose of the real estate to which he may be entitled at his decease, raised a case of election against the heir in respect of such pro-

[(*d*) *Buckridge* v. *Ingram*, 2 Ves. jun. 665, cited by Lord *Eldon*, 8 Ves. 500.]

(*e*) *Boughton* v. *Boughton*, 2 Ves. 12.

(*f*) See *Churchman* v. *Ireland*, 4 Sim. 529, [1 R. & My. 250; *Tennant* v. *Tennant*, 2 Ll. & G. 516; *Schroder* v. *Schroder*, Kay 578, 24 L. J. Ch. 510. In the last case the testator, (who died before the act 3 & 4 Will. 4, c. 106, s. 3, came into operation,) after making his will, which purported to devise his after-acquired real estates, contracted to buy a certain estate, and then made a codicil directing his trustees to complete the purchase, and hold the estate on the trusts of the will, which were partly in favour of the heir; afterwards the codicil was revoked by a conveyance to uses to bar dower in the testator's favour, (see ante, p. 145,) and it was held that the heir must elect. But it was questioned by the V. C., whether if a testator, before 1838, devised estate A., which he had contracted to buy, *to one person*, and estate B., with all other estates which he might subsequently acquire to *another*, and gave benefits to his heir, and afterwards took a conveyance of estate A. to uses to bar dower in his own favour and acquired other estates, whether the heir was bound to elect; for there was no intention to give estate A. to the devisee of B., and the whole doctrine of election proceeded so entirely on the ground of intention, that perhaps the heir might be entitled to retain the estate against both devisees, neither of whom would have a better right against him than the other.

perty. [Even before the late act of 1 Vict., the heir was held not to be put to his election in cases of revocation by alteration of estate (*g*).

In what cases a Scotch heir is put to an election by English will.

Nearly allied to the cases last noticed, are those where the testator being entitled to heritable property in Scotland, which does not pass by will, affects by will in the English form to devise such property away from the Scotch heir, at the same time giving him property in England. It seems now well settled that in such cases, if the English will purports to give the Scotch property either by name or under the general denomination of property in Scotland, the Scotch heir is put to his election (*h*), while, on the other hand, a devise only in general terms of all the testator's property whatsoever and wheresoever is held to refer only to such property as he has power to give by the will, and the Scotch heir may claim both by descent and under the will (*i*); the first proposition also seems to apply where the disposition is in the Scotch form, but not sufficient to pass lands in England away from the English heir (*k*), and it is presumed the latter proposition would be held to apply also, as the doctrine of *approbate* and *reprobate* in Scotland, and of election in England, seem to be identical (*l*).

Where an election is raised by a power to appoint to particular objects.

It is clear that the doctrine of election is applicable to cases of appointment under a power, so that if one having a special power, by his will, gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, the former will be obliged to elect in favour of the latter (*m*).

None, where absolute appointment is attempted to be modified in favour of strangers.

But in cases where the appointment is made to the objects of the power absolutely, and the donee superadds a proviso or condition, "*so far as he lawfully or equitably may*," in favour of strangers to the power, though the proviso is void, it has been held that no case of election arises (*n*). And in *Blacket* v.

[(*g*) *Plowden* v. *Hyde*, 2 Sim. N. S. 171; *Tennant* v. *Tennant*, 2 Ll. & Go. 516; 2 Sugd. Pow. 146, 147, 7th ed.

(*h*) *Brodie* v. *Barry*, 2 V. & B. 127; *Reynolds* v. *Torin*, 1 Russ. 129; *M'Call* v. *M'Call*, 1 Dru. 283.

(*i*) *Johnson* v. *Telford*, 1 R. & My. 244; *Allen* v. *Anderson*, 5 Hare, 163; *Maxwell* v. *Maxwell*, 16 Beav. 106, 2 D. M. & G. 705.

(*k*) *Dundas* v. *Dundas*, 2 D. & Cl. 349. The Scotch Courts therefore, unlike the English Courts, will read against the English heir an instrument imperfectly executed according to the Statute of Frauds, so as to put him to an election, and in like manner the English Courts (treating the Scotch heir differently from the English heir) will read against the Scotch heir an instrument insufficient according to the law of Scotland to disinherit him.

(*l*) 2 D. & Cl. 352, 1 Bligh, 21, 16 Beav. 107.

(*m*) *Whistler* v. *Webster*, 2 Ves. jun. 370; and see *Fearon* v. *Fearon*, 3 Ir. Ch. Rep. 19; *Reid* v. *Reid*, 25 Beav. 469.

(*n*) *Carver* v. *Bowles*, 2 R. & My. 301; *Church* v. *Kemble*, 5 Sim. 525.

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[*Lamb* (*o*), this construction was extended to a case where the testator after appointing the fund, "requested the appointees" (without the qualifying words "so far as he lawfully could") "to leave their respective shares" to persons not objects of the power. This decision, indeed, was questioned by *Blackburne*, (C. Ir.) in a very similar case (*p*), where he held that the qualification in question was essential to the decision in *Carver* v. *Bowles* (*q*). But in *Woolridge* v. *Woolridge* (*r*), it was held by Sir *W. P. Wood*, V. C., that the principle of *Carver* v. *Bowles* was this,—that where there is an absolute appointment by will in favour of an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it, for all purposes; i. e., not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee, but also so far as they might otherwise have been relied upon as raising a case of election. And accordingly his Honor held in the case before him, though there were no such qualifying expressions as above noticed, that no case of election was raised.

There must be an actual disposition of property belonging to the person who is to be put to his election;

Again, where one, having a testamentary power of appointment over a fund which in default of appointment belongs to A., makes his will and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) on B., and gives A. certain benefits by his will; A. is not put to his election, since by taking both he disappoints no actual disposition of the testator: all that can be said is that the testator was mistaken (*s*).

—and also property of the *testator* to compensate the devisee disappointed by an election to take against the will.

A case of election arises wherever a testator, whether under a power or not, attempts to devise property which belongs to one person to another, and gives to the former property of his, the testator's: but there must be some free disposable property given to the person who is put to his election, which, if he elects to take his own property in spite of the will, may be laid hold of to compensate the disappointed devisees. The doctrine is therefore inapplicable where the will deals only with property subject to special powers of appointment. Thus, where a man had an exclusive power of appointing an estate to his

[(*o*) 14 Beav. 482.
(*p*) *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26.
(*q*) 2 R. & My. 301.
(*r*) 1 Johns. 63.
(*s*) *Langslow* v. *Langslow*, 21 Beav. 552; and post, Chap. XVII.

[children and grandchildren, and an exclusive power of appointing a fund to his children only; and appointed the estate to some of his children, and the fund to his children and to a grandchild. It was held that the children were not compellable to elect either to give effect to the appointment of a share in the fund to the grandchild or reject the estate appointed to them under the first power (*t*).]

Not applicable to creditors.

The doctrine of election has been held not to apply to creditors; and, therefore, where a testator appropriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favour of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former (*u*). And where a testator devised for payment of debts certain lands, (including some which were not his own, but belonged to his son,) the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors (*x*). Here, again, the recent alteration in the law interferes to a certain extent with the doctrine of election, the act of 3 & 4 Will. 4, c. 104, having made real estates of every description assets for the payment of debts.

Whether parol evidence is admissible.

At one period it was doubted whether evidence dehors the instrument was admissible for the purpose of showing that a testator considered that to be his own which did not actually belong to him, or was not under his disposing power. In the well-known case of *Pulteney* v. *Darlington* (*y*), rent-rolls and steward's accounts were admitted to prove that the testator dealt as absolute owner with lands of which he was only tenant in tail, and, consequently, that he must have intended them to pass under a general devise of his real estate, so as to impose election on the heir in tail, to whom, by the same will, a benefit was given, though the testator had a large estate of his own, to which the words were applicable (*z*).

Lord Commissioner *Eyre*, however, in *Blake* v. *Bunbury* (*a*),

[(*t*) *Re Fowler's Trusts*, 27 Beav. 362.]

(*u*) *Kidney* v. *Coussmaker*, 12 Ves. 136; see also *Clarke* v. *Guise*, 2 Ves. 617.

(*x*) *Deg* v. *Deg*, 2 P. W. 412.

(*y*) 2 Ves. jun. 544, and 3 Ves. 384.

(*z*) See also *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Rutter* v. *Maclean*, 4 Ves. 531; *Pole* v. *Lord Somers*, 6 Ves. 309; and *Druce* v. *Dennison*, ib. 385; and see *Finch* v. *Finch*, 4 B. C. C. 38, 1 Ves. jun. 534.

(*a*) 1 Ves. jun. 523.

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laid it down, "that the intent of the testator to dispose of that which was not his, ought to appear on the will." The admissibility of extrinsic evidence, too, was strongly denied by Lord *Loughborough*, in *Stratton* v. *Best* (*b*); and the same Judge expressed his disapprobation of *Pulteney* v. *Lord Darlington*, in *Rutter* v. *Maclean* (*c*); as did Lord *Eldon* in *Pole* v. *Lord Somers* (*d*), and *Druce* v. *Dennison* (*e*). In the latter case, however, his Lordship admitted a statement of property written by the testator, and books of account, as evidence that he considered himself to be owner, and, as such, intended to dispose of certain messuages and leases, the property of his wife, part of which the testator had made his own by alienation; but Lord *Eldon* seems to have regarded the papers themselves as testamentary, and to have thought that he must either admit the testator's explanatory statement as extrinsic evidence, or give the parties an opportunity of propunding it as part of the will in the Ecclesiastical Court. This case, however, does not contain so decided an expression of his Lordship's opinion on the subject, as we find in a subsequent case in the House of Lords (*f*), in which he observed that he thought the rules as to election had been settled: "It must appear on the face of the will, that the testator proposes that there should be an election, and as to what subjects." And his Lordship referred to the case of *Druce* v. *Dennison* as standing, to some extent at least, on the special ground which has been noticed. Lord *Eldon* also adverted to a case of *Andrews* v. *Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had power to dispose of by deed or will,) for purposes for which his own was insufficient: Sir *L. Kenyon*, M. R., sent it to the Master, to inquire whether by personal property he meant his own strictly, or intended to include both: but when the evidence was taken, he was so much struck with his own decision, that he said, "Though the evidence has been taken, I shall not now admit one word of it, it being necessary, for the general interests of mankind, that persons should in their wills state clearly what they mean."

Parol evidence rejected.

The doctrine thus earnestly advocated by these eminent Judges has prevailed in subsequent cases. As in *Clementson* v. *Gandy* (*g*),

(*b*) 1 Ves. jun. 285.
(*c*) 4 Ves. 537.
(*d*) 6 Ves. 322.
(*e*) Ib. 402.
(*f*) *Doe* v. *Chichester*, 4 Dow, 76, 89, 90.
(*g*) 1 Kee. 309; see also *Dixon* v. *Sampson*, 2 Y. & C. 566.

where parol evidence was tendered for the purpose of showing that the testatrix had supposed herself to be absolute owner of, and intended to include in the residuary bequest in her will, certain settled property, in which she had only a life interest, in order to raise a case of election against a legatee under the will, who also took an interest in such property under the settlement; but the evidence was rejected, Lord *Langdale*, M. R., observing that the intention to dispose must in all cases appear by the will itself; that there was no ambiguity in the expressions the testatrix had employed; and extrinsic evidence for the purpose of contradicting the intention was inadmissible.

Expressions must be clear in order to raise a case of election.

With respect to the intention, as manifested by the will itself, it is to be observed, that, in order to raise a case of election, it must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power. Thus, in the case of *Dummer* v. *Pitcher* (*h*), where the testator having, before making his will, transferred certain 4*l.* per cent. and 5*l.* per cent. stock (then forming the whole of his funded property), into the joint names of himself and his wife, bequeathed the rents of his leasehold houses, and the interest *of all his funded property or estate*, of whatsoever kind, to trustees, upon trust, for his wife for life, and, after her decease, upon trust, to pay divers legacies of 4*l.* per cent. stock, the aggregate amount of which fell short, by 50*l.* only, of the amount of stock of that description, so formerly transferred by him. He afterwards made some further purchases of 5*l.* per cent. stock, taking the transfers in the joint names of himself and his wife. The testator at his death left no funded property, except the 4*l.* per cents. and 5*l.* per cents. before mentioned, exclusive of which his assets were greatly inadequate to pay his legacies. It was held by Lord *Brougham*, affirming a decision of Sir *L. Shadwell* (*i*), first, that all the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport

(*h*) 2 My. & K. 262; see also *Crabb* v. *Crabb*, 1 My. & K. 511; [*Blommart* v. *Player*, 2 S. & St. 597; *Parker* v. *Carter*, 4 Hare, 411; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Seaman* v. *Woods*, 24 Beav. 381.]

(*i*) 5 Sim. 35.

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to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election (*k*).

General devise restricted to property of testator.

In like manner a general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate; for though a general disposition would not, in wills made before the year 1838, pass after-acquired real estate, and, therefore, the presumption rather is that the testator, in framing such a devise, had a particular property in his contemplation; yet the presumption is not of such force as alone to constitute an adequate ground for holding a gift of the testator's property to comprise what belonged to another: a conclusion which seems to be more improbable than the supposition that the testator introduced into his will a general or residuary disposition, without having in view any particular property.

Devise of "ground-rents."

The same principle was held, in *Timewell* v. *Perkins* (*l*), to apply to a devise of a specified kind of property, as "ground-rents;" in regard to which, however, it is to be observed, that the bequest would have included, and, therefore, might have been designed to include, *leasehold* ground-rents purchased by the testator after the making of the will; so that no inference that he had not his own property in contemplation arises from the circumstance of his not having any such when he made his will; and the same remark applies to devises affecting even real estate, in wills made or republished since the year 1837, which (as already shown (*m*)) are operative on after-acquired property of this description.

Devise of lands answering to certain locality.

With respect, however, to wills which are subject to the old law, it is to be observed, that, though a general devise is (as we have seen) construed as comprising property belonging to the testator and that only, even when there is nothing properly and strictly his own on which it can operate; yet a devise of lands, answering to a particular locality, seems to stand upon a different footing. It is hardly to be supposed that a testator would make such a devise without having a particular property in view. In

[(*k*) See *Att.-Gen.* v. *Fletcher*, 5 L. J. N. S. Ch. 75;] and compare *Shuttleworth* v. *Greaves*, 4 My. & Cr. 38, where certain canal shares standing in the joint names of the testator and his wife were held to be intended to pass under a bequest of "my shares in the N. Canal Navigation," so as to put the wife to her election, the testator having no shares of his own answering to the description.

(*l*) 2 Atk. 102.

(*m*) Ante, p. 57.

the case of *Read* v. *Crop* (*n*), however, where a testator had devised all his freehold and copyhold estates at Roydon, Thorley, Epping, and Witham, in the counties of Essex and Herts (which copyholds he had surrendered to the use of his will), to his wife for life, and after her decease in trust for his children; and it appeared that the testator, at the time of his death, (quære, at the making of his will?) was seised in fee of a copyhold estate at Witham, and also of the moiety of an estate at Thorley, to the other moiety of which he and his wife were entitled in her own right; they were also seised in her right of two copyhold estates at Roydon and Epping; but in these places the testator, in his own right, had no property. It was contended, that the testator, having taken upon himself to devise his wife's estates, she must be put to her election; but Lord *Thurlow* said, that the testator had described what he meant to devise by the words, "the estates which he had surrendered." He had not surrendered any of his wife's estates, so that they could not pass by the devise. According to another report (*o*), his Lordship said: "I think these words are too loose to raise the construction contended for. If he had devised all his estates generally, there would have been no doubt; and I cannot think that his mentioning his estates in the four places by name is sufficient to make me suppose that he meant to devise his wife's estates. As to Thorley, there can be no pretence for it, since he had an estate there to answer the description; and I think, therefore, the wife is not called upon to make an election."

Suggested distinction between general devises and devises restricted by locality.

Lord *Thurlow's* remarks, it is conceived, must be taken in connexion with the special circumstances of the case before the Court; for his Lordship could hardly mean to affirm, as a general position, that, where a testator devises all his lands at A., having no other property there than lands which he holds in right of his wife, he is not to be presumed as intending to dispose of that property. The difference between such a case and that of a general devise of all the testator's real estate is obvious. The reference to locality shows that he has a particular property in view; and if it be answered that every devise, however general in its terms, is specific, we may (without denying this as a general principle) reply, that such clauses are frequently inserted in wills to take in any property which may have escaped the testator's recollection, or may not be within his knowledge; which cannot

(*n*) 1 B. C. C. 492. (*o*) Cox's MS.; 1 Sw. 402, n.

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How affected by 1 Vict. c. 26.

be affirmed of a devise of lands in a particular parish or town, or even county. Such a question, however, will present itself under a different aspect in regard to wills made since the year 1837, which (we have seen (*p*)) speak, in reference to the property comprised in them, from the death; [though even with regard to such wills, devising lands in a particular locality, it is difficult to say that no inference that the testator had some specific property in view, arises from the fact of his having none of his own to satisfy the devise at the date of its execution, for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now, or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description; and solely with the notion that he may thereafter buy some such property (*q*). With regard to specific devises, the act does not appear to have materially affected the present question (*r*).]

Question, whether testator intends to include interest of co-proprietor.

But the most numerous as well as the most difficult class of cases with which the Courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share or [some partial or limited] interest in the property; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements, but whether he intended the devise to comprise such property, inclusive of the interest of his co-owner. [Thus, in the case of *Padbury* v. *Clark* (*s*), the testator being entitled to a moiety of a freehold house, devised "all that my freehold messuage, &c.," giving the person entitled to the remaining moiety benefits under his will; he was also entitled to a moiety of some other property, which he devised by the description of "all that my moiety, &c." Lord *Cottenham*, C., decided that the person entitled to the other moiety of the messuage must elect; and his Lordship, it seems, would have had no doubt upon the point, even if the testator had not, by another part of his will, shown that, where he meant only to devise his own moiety, he expressed himself accordingly, though he allowed that this strengthened the construction which he put upon the first gift.

Padbury v. *Clark.*

Swan v. *Holmes.*

So, in the case of *Swan* v. *Holmes* (*t*), where a sum of 10,000*l.*

(*p*) Ante, Chap. X.

[(*q*) Per Sir *W. P. Wood*, V. C., *Usticke* v. *Peters*, 4 Kay & J. 455.

(*r*) See ante, p. 308.

(*s*) 2 Mac. & G. 298; see also *Fitzsimons* v. *Fitzsimons*, 6 Jur. N. S. 641.

(*t*) 19 Beav. 471; see remarks on *Reynolds* v. *Torin*, post, in this chapter.

[consols stood settled in trust for two sisters for life, and after their deaths, two-thirds of the capital in trust for their brother, and one-third in trust for their sisters; and the brother bequeathed the whole of his property to trustees, as to part on certain trusts for his sisters; and he afterwards bequeathed the property, "including the 10,000*l.* trust money," to other persons: it was held by the Master of the Rolls that the sisters must elect between the benefits given them by the will, and their interest in the 10,000*l.* consols.

Question, whether testator, having reversion only, intends to include the immediate interest.

So, where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. Primâ facie, the testator must of course be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power to dispose of, be indicated; and for this purpose, notwithstanding some strong expressions tending to show the difficulty of applying the doctrine of election to such cases (*u*), the ordinary rules for collecting the testator's intention must be observed, the question being simply, what does the testator mean? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established (*x*). But these indications of intention will not prevail against an express and unreserved confirmation of the settlement creating the estates, which precede the testator's reversion. Express declaration overrides conjecture, however probable (*y*).

Similar question where testator is entitled, subject to incumbrances.

Again, if a testator, having an estate subject to an incumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition; and the incumbrancer to whom other benefits are given by the will, is not, in such a case, put to his election: still less, if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the will (*z*).

[(*u*) See per Lord *Eldon*, in *Rancliffe* v. *Parkyns*, 6 Dow, 149.

(*x*) *Welby* v. *Welby*, 2 V. & B. 187; *Wintour* v. *Clifton*, 21 Beav. 447; on app. 26 L. J. Ch. 218, 3 Jur. N. S. 74; *Usticke* v. *Peters*, 4 Kay & J. 437.

(*y*) *Rancliffe* v. *Parkyns*, 6 Dow, 149. But confirmation of a *portion* of the settlement leaves the remaining portion unconfirmed, *Blake* v. *Bunbury*, 1 Ves. jun. 514.

(*z*) *Stephens* v. *Stephens*, 3 Drew. 697, 1 De G. & J. 62.]

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Dowress when put to her election.

General devise does not put dowress to her election.

[A question similar to that in the above cases, and which has been more frequently agitated, is] whether the testator's widow is precluded, by a benefit given to her by his will, from claiming dower out of lands devised by that will. It is clear that a mere devise in general terms of the testator's real estate affords no indication of an intention to dispose of the dower. This was adjudged so long ago as the case of *Lawrence* v. *Lawrence* (*a*), where a testator gave certain legacies to his widow, and also part of his real estate during widowhood, and devised the residue of his estate to other persons; and it was held by the House of Lords that she was not precluded, by the acceptance of the legacies, from claiming dower in the whole.

And the addition of the word "all" would not enlarge the operation or vary the construction of the devise, which is still but a gift of "all" the testator's own estate. Thus, in the case of *Thompson* v. *Nelson* (*b*), where a testator devised "all and singular" his real estates whatever, and all his goods, chattels, and personal estate, to trustees, upon trust, in the first place, to pay his wife the sum of 480*l.*, and then to apply the residue amongst his three children—Sir *Lloyd Kenyon*, M. R., held that she was entitled to both, on the principle that, to put the widow to her election, "it should appear that, if she took both dower and the provision under the will, some other part of the testator's disposition would be defeated."

According to these authorities, as well as upon principle, it seems to be immaterial whether the lands devised to the widow be or be not part of that out of which her dower arises; nor, it should seem, would her dower be excluded, even in respect of the lands so devised. Where the contrary has been decided, it has always been upon the ground of the testator having introduced into the devise some special provision which is irreconcileable with the widow's claim of dower; as by prescribing a mode of enjoyment that requires the devisee to have the entirety of the property.

Thus, in the case of *Birmingham* v. *Kirwan* (*c*), where a tes-

(*a*) 2 Vern. 365, 1 Eq. Ca. Ab. 218, pl. 2, 1 Freem. Ch. Ca. 234, 3 B. P. C. Toml. 484, 8 Vin. Abr. Copyh. 361, pl. 22; see also *Lemon* v. *Lemon*, 8 Vin. Abr. Copyh. 366, pl. 45, 2 Eq. Ca. Ab. 355, pl. 13; *Hitchin* v. *Hitchin*, Pre. Ch. 133, 2 Vern. 403; *Brown* v. *Parry*, 2 Dick. 685; *Incledon* v. *Northcote*, 3 Atk. 430; *Strahan* v. *Sutton*, 3 Ves. 249; *Lord Dorchester* v. *Earl of Effingham*, G. Coop. 319; see also *Ayres* v. *Willis*, 1 Ves. 230; *Waller* v. *Fuller*, 8 Vin. Abr. Copyh. 244, pl. 19.

(*b*) 1 Cox, 447; see also *Dowson* v. *Bell*, 1 Kee. 761; *Harrison* v. *Harrison*, ib. 765.

(*c*) 2 Sch. & Lef. 444.

tator devised his house and demesne to trustees, upon trust to permit his wife to enjoy the same for life, she paying 13*s.* yearly for every acre, to keep the house in repair, and not to let, except to the person who should be in possession of the remainder; and the residue of his lands, subject to debts and legacies, to A. for life, remainder to B. in fee. The question was as to the wife's right of dower; first, in the part devised to her; secondly, in the residue. Lord *Redesdale*—"The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds. It is clear the assertion of a right of dower as to the house and demesne would be inconsistent with the devise of the house and demesne. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the enjoyment of the house and demesne, paying a rent of 13*s.* an acre, which must be paid out of the whole (*d*). Then follow directions that she shall keep the house and demesne in repair, that she shall not alien, except to the person in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming title by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the house and demesne under a right created by the will; and not part of it under a right which she previously had, and part under the will." On the other question, however, his Lordship held, that the devise of the beneficial interest in the house and demesne was not a bar to the widow's right of dower in the rest of the estate. The will might be perfectly executed as to all other purposes, without injury to the claim of dower. With respect to the rest of the estate, it might be mortgaged or sold subject to that claim.

What provisions are inconsistent with claim of dower.

It should be observed, that a restriction on letting, which was one of the circumstances adverted to by Lord *Redesdale* in the preceding case, had been held by Sir *R. P. Arden*, M. R., in *Strahan* v. *Sutton* (*e*), not to render the devise inconsistent with the dowress's claim, though it was contended that she might

As to direction to let;

(*d*) Why out of the whole? If a devise of my house and demesne does not include the dower, how can an obligation to pay a certain rent for every acre (which clearly means every acre of what is before devised), extend it? See infra.

(*e*) 3 Ves. jun. 249.

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have her dower set out by metes and bounds; in answer to which, the M. R. said, "It has been determined, that the widow need not take it by metes and bounds; she may take a rent-charge; she may take one-third of the rents and profits. To think she would occupy one chamber in this house, in order to let it to those persons," (*i.e.* the persons to whom it was prohibited to be let,) "is really most extravagant." The devise in *Strahan* v. *Sutton*, containing this prohibitory direction, was to another person, and not to the dowress, as in *Birmingham* v. *Kirwan*. The principle of the two cases, however, is not easily distinguishable. Subsequent Judges, certainly, seem to have followed Lord *Redesdale*, in allowing weight to circumstances of a less decisive and unequivocal character than Sir *R. P. Arden* thought necessary (*f*) to create an inconsistency which would exclude the dowress's claim. As in *Miall* v. *Brain* (*g*), Sir *J. Leach*, V. C., held, that the claim of dower was inconsistent with a trust to permit another to use, occupy and enjoy the estate for her life: his Honor thinking that the testator contemplated the personal use, occupation and enjoyment.

—to use, occupy, and enjoy;

—to carry on business and let.

So, in *Butcher* v. *Kemp* (*h*), the same learned Judge considered that a direction to trustees (to whom a farm was devised during the minority of the tenant for life, who was the testator's daughter) "to carry on the business thereof, or to let the same upon lease for her benefit," was inconsistent with the claim of dower. "His (the testator's) plain intention," said the Vice-Chancellor, "is that his trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this intention must be disappointed, if the widow could have assigned to her a third part of this land." How far the argument and decision just stated are obnoxious to the reasoning applied to some of the cases stated in the sequel, the learned reader will form his own opinion.

A power to lease puts the widow to an election.

[Again, in the case of *Hall* v. *Hill* (*i*), there was a general devise of the testator's estates to a trustee, upon trust to pay his wife an annuity, and to permit her to enjoy part of the property for her life, and the residue was otherwise disposed of. By a codicil a power to lease was given to the trustee. Sir *E. Sugden*,

(*f*) See his Lordship's judgment in *French* v. *Davies*, 2 Ves. jun. 576, and in *Strahan* v. *Sutton*, 3 Ves. 250.

(*g*) 4 Mad. 119.

(*h*) 5 Mad. 61; [see also *Roadley* v. *Dixon*, 3 Russ. 192.]

(*i*) 1 D. & War. 94, 1 Con. & L. 120.

[C., decided that the widow must elect between her dower and the benefits under the will. He observed, "that he was not aware how a power of leasing in the case before him could be exercised over all the estate, if the widow's right to dower were allowed. He could understand how the rents might be enjoyed or the estate sold subject to the claim for dower; but how could the estate be demised subject to the right of the lady to have a third part set out by metes and bounds?" In *O'Hara* v. *Chaine* (*k*), before the same Judge, there was a devise to trustees, upon trust to sell and a power to lease *from year to year* so much as remained unsold, and also a direction to the trustees to complete the sale of lands contracted to be sold by the testator in his lifetime. As to the estates contracted to be sold, the Court said there was no doubt the widow must elect as in the absence of any stipulation the contract imported that they were to be conveyed discharged of dower; as to the residue the power of leasing was sufficient to show she must also elect. These decisions as to the effect of a power of leasing have been followed by Sir *J. K. Bruce*, V. C., in *Grayson* v. *Deakin* (*l*), and by Sir *R. T. Kindersley*, V. C., and the Court of Appeal, in *Parker* v. *Sowerby* (*m*); (in which latter case the circumstance that the power was limited to the minority of the devisees was considered to make no difference,) and, yielding to the current of authority, by Sir *J. Stuart*, V. C., in *Linley* v. *Taylor* (*n*).

Power of sale does not put the widow to an election.

However fine the distinction, yet it is clearly settled, in accordance with the opinion of Lord *Redesdale* (*o*), that a general devise of all the testator's estates upon trust for sale will not put the widow to her election; and this, on the ground assigned by his Lordship, that the sale may be made subject to her right of dower (*p*). But in a case where there was a devise of a particular house, with the furniture and appurtenances, upon trust for sale, Sir *L. Shadwell*, V. C., thought the widow must elect (*q*). "How," said that learned Judge "could there be a sale of the house if the lady had said, 'No, I will have a third of it?' Directing the property to be sold *with the appurtenances attached*

[(*k*) 1 J. & Lat. 662.

(*l*) 3 De G. & S. 298; and see *Reynard* v. *Spence*, 4 Beav. 103; *Lowes* v. *Lowes*, 5 Hare, 501; *Taylor* v. *Taylor*, 1 Y. & C. C. C. 727; *Pepper* v. *Dixon*, 17 Sim. 200.

(*m*) 1 Drew. 488, 4 D. M. & G. 321, overruling *Warbutton* v. *Warbutton*, 2 Sm. & Giff. 163.

(*n*) 1 Giff. 67.

(*o*) Ante, p. 431.

(*p*) *Ellis* v. *Lewis*, 3 Hare, 313; *Gibson* v. *Gibson*, 1 Drew. 42; *Bending* v. *Bending*, 3 Kay & J. 257.

(*q*) *Parker* v. *Downing*, 4 L. J. N. S. Ch. 198.

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[*to it*, is necessarily inconsistent with the claim of dower." The difference between the two cases is not clear.

Election as to the whole property implied from an election being raised as to part.

A power or direction affecting any given portion of the testator's property, which would be sufficient to put the widow to her election in respect of her rights in that portion, will, it seems, also have the same effect as to the other property of the testator, whether included in the same devise (*r*) or not (*s*).]

As to devise to dowress and another in equal shares.

Another point much discussed has been, as to the effect of the property being devised to the dowress and others in equal shares. In the case of *Chalmers* v. *Storil* (*t*), the devise was in these words: "I give to my dear wife A. and my two children (naming them) all my estates whatsoever, to be equally divided amongst them, whether real or personal." One of the questions was, whether the wife, taking a share under this devise, was bound to relinquish her dower. Sir *W. Grant* considered the claim of dower to be directly inconsistent with the disposition of the will. He said, "The testator directing all his real and personal estate 'to be equally divided,' &c., the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the widow first takes out of it her dower, and then a third of the two remaining thirds. Farther, by describing his English estates, he excludes the ambiguity which Lord *Thurlow*, in *Foster* v. *Cooke* (*u*), imputes to the words 'my estate,' as necessarily extending to the wife's dower."

Remarks on *Chalmers* v. *Storil*.

Lord *Thurlow's* observation in *Foster* v. *Cooke*, to which probably Sir *W. Grant* referred, was made in answer to an argument founded on the testator's direction to trustees to possess themselves of "all his estates and substance," and was as follows: "Because he gives all his property to trustees, am I to gather from his having given all he has, that he has given that which he has not?" That his Lordship would not have considered that the word "English," (which, it is observable, does not appear in the case as reported,) constituted a ground for varying the construction, is evident from his decision in the case of *Read* v. *Crop* (*x*), where he held that a devise of estates in a certain locality did not demonstrate an intention to include the

[(*r*) *Miall* v. *Brain*, 4 Mad. 119; *Roadley* v. *Dixon*, 3 Russ. 204; *O'Hara* v. *Chaine*, 1 J. & Lat. 665.

(*s*) *Parker* v. *Sowerby*, 1 Drew. 488, 4 D. M. & G. 321.]

(*t*) 2 V. & B. 222. [But is the report correct? See 3 Kay & J. 261, 262.]

(*u*) 3 B. C. C. 347.

(*x*) Ante, p. 427.

testator's wife's interest in lands in which he and she had undivided shares; or, indeed, even lands belonging exclusively to the wife, though the testator had no lands of his own answering to the locality. It is evident, however, that the Master of the Rolls did not wholly rely on this ground, as he lays much stress upon the words importing equality of division. That these words ought not to influence the construction, will be apparent upon a moment's consideration. The presumption being (as we have seen), that a testator means to dispose of his own interest exclusively of that of any co-owner, it follows that every devise is first to be read as applying to that interest, and, unless some repugnance or inaptitude occurs in such an application of the testator's language, there is no ground for extending the devise to that portion of interest which is not disposable by him. Now, to try the case of *Chalmers* v. *Storil* by this test. A testator gives all his estates, or all his *English* estates (no matter, for the present purpose, which,) to A. (who has dower or any other interest in the lands), B., and C., "equally to be divided among them." These words are obviously satisfied by applying them to the interest, whatever it may be, belonging to the testator; for nothing is to be divided but what is before given; and as it is clear that, if the devise had stopped at the names of the devisees, it would not have included the dower, the subsequent words evidently ought not to be made a ground for extending them. The argument for such a construction is evidently fallacious: it makes the words "all my estates" extend to the dower, by reason of the after-added expression, "equally to be divided;" assuming, in opposition to the established construction of devises couched in these general terms, that the dower is one of the subjects "to be divided." It is remarkable that a Judge, whose logical acuteness and powers of reasoning have deservedly excited admiration, should not have instantly detected the fallacy of the argument.

Subsequent cases in which *Chalmers* v. *Storil* has been followed.

Dickson v. *Robinson.*

But, however unsatisfactory may be the principle upon which the case of *Chalmers* v. *Storil* stands, it seems to have been adopted in several subsequent cases. Thus, in *Dickson* v. *Robinson* (*y*), where the testator having given his real and personal estate to his widow, upon trust, for the equal benefit of herself, his two daughters, and the child or children with which she was then pregnant—Sir *T. Plumer*, M. R., on the authority of the

(*y*) Jac. 503.

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case of *Chalmers* v. *Storil*, held, that the widow, if she took under the will, must relinquish her dower.

Roberts v. *Smith.*

So, in the case of *Roberts* v. *Smith* (*z*), where a testator devised to his wife M., a freehold messuage in fee-simple, his ready money, and household furniture. He then devised to A. and B. and the said M. certain freehold and leasehold messuages, and all other his estates and property, upon trust to apply one half part of the money arising therefrom to M., so long as she should remain unmarried, for the support of herself and the children of her former husband, until they should attain twenty-one; and then, upon trust to pay the same, and also the other half part of the monies to arise as aforesaid, from the time of testator's death, for the maintenance of his (the testator's) children until twenty-one; and, on attaining that age, such child to take an equal share of his said freehold property. The widow claimed dower. Sir *John Leach*, V. C., said, "The principle referred to in *Chalmers* v. *Storil* decides this case. The plain intention of the testator was, that the wife should have half the income of his property for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower."

Remarks upon *Roberts* v. *Smith.*

Undoubtedly, if an intention to give an immediate interest in the entire corpus of the land can be perceived in these cases, the intended equality would be destroyed by letting in the dower. But how does this intention appear? There is no other evidence of it than a simple devise of the land, which all the authorities, from *Lawrence* v. *Lawrence* down to *Dorchester* v. *Effingham*, tell us demonstrates no intention to give a larger interest than the testator has; otherwise, indeed, the question could never arise, as the widow must, in every case, be excluded from dower in land devised by the will, or relinquish all claims under it. The probability is, that in these cases the testator never thinks of the dower; but that, as Lord *Alvanley* has observed, is not sufficient for her exclusion: "it must appear that he did know it, and meant to bar her, or that what she demands is repugnant to the disposition (*a*). This principle, indeed, is not denied in *Chalmers* v. *Storil* and *Roberts* v. *Smith*, but the great difference consists in the application of it.

(*z*) 1 S. & St. 513. [And see *Goodfellow* v. *Goodfellow*, 18 Beav. 356.]

(*a*) See *French* v. *Davies*, 2 Ves. jun. 577.

[These cases were much commented upon by Sir *J. Wigram* in the case of *Ellis* v. *Lewis* (*b*), where the devise was upon trust to sell and pay debts and legacies, and invest the residue of the proceeds, and pay a moiety of the income to the testator's wife during her widowhood, and the other moiety to his sister for life, with bequests over after their decease. The Vice-Chancellor, in deciding that the widow was not obliged to elect, founded his judgment on the ground that, according to the cases, a trust for sale was not inconsistent with dower, and that the direction to divide the proceeds of sale could not decide what the subject of the sale was, so as to show that it included the interest of the widow: and he distinguished the cases before noticed, and apparently opposed to this construction, on the ground that in them there was a direction to divide the *subject of gift itself;* in the case before him, it was the proceeds of the sale only that were to be divided, and he referred to the final observations of Sir *W. Grant* in *Chalmers* v. *Storil*, as showing that that learned Judge thought the testator intended his property to be divided as it stood *in specie*, an intention certainly inconsistent with the right of dower.]

Ellis v. *Lewis.*

Devise on trust to sell.

In *Reynolds* v. *Torin* (*c*), where a testator bequeathed to his wife during her life four-sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond, as appeared by the schedule of his property annexed to his will, (in which he had specified the amount of this bond,) but the infant heir having elected, under the order of the Court, to claim against the will, took that bond by his legal title, subject to the widow's right of terce—Lord *Gifford*, M. R., held, that the widow must elect, and that, although disappointed of the four-sevenths of the interest of the bond debt which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate.

Reynolds v. *Torin.*

As the testator had stated this bond at its full amount in the schedule of his property, perhaps this case may be sustained independently of the reasoning on which *Chalmers* v. *Storil* and the other cases of that class (which, it is observable, were not cited in it,) are founded; though certainly the ground of distinction would have been much stronger if the widow's terce had extended to a portion of the capital; for, subject to her claim in

Remarks upon *Reynolds* v. *Torin.*

[(*b*) 3 Hare, 314; see also *Gibson* v. *Gibson*, 1 Drew. 58; *Bending* v. *Bending*, 3 Kay & J. 257.]

(*c*) 1 Russ. 129.

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respect of part of the income, the capital was still the property of the testator.

Whether dower is excluded by rent-charge.

Another question which has been much litigated between the dowress and devisees, is, whether she is put to her election by a rent-charge, or an annuity payable out of the property. Lord *Hardwicke*, in *Pitts* v. *Snowden* (*d*), decided that she was not. Lord *Northington*, on the other hand, in *Arnold* v. *Kempstead* (*e*), without adverting to, or, it should seem, being acquainted with the former case, held the dower to be barred. Similar decisions were subsequently made by Lord *Camden*, in *Villa Real* v. *Lord Galway* (*f*), who delivered an elaborate judgment; by Sir *Thomas Sewell*, in *Jones* v. *Collier* (*g*); and Mr. Justice *Buller*, in *Wake* v. *Wake* (*h*). These authorities against the dowress's claim, however, are encountered by the decision of Lord *Loughborough*, in *Pearson* v. *Pearson* (*i*), and that of Lord *Thurlow*, in *Foster* v. *Cooke* (*k*); to which may be added, the opinion of Lord *Alvanley*, in *French* v. *Davies* (*l*); who have all concurred with Lord *Hardwicke* in holding the rent-charge not to exclude the dower; and the point seems to have been treated as clear [in several recent cases (*m*).]

Dowress not barred by mere annuity out of property.

The preponderance of authority, therefore, seems to be greatly in favour of the proposition, that an annuity to the widow, charged upon the property out of which the dower arises, is not a satisfaction of her dower; and this seems to be the sound doctrine. It ought, in the words of Lord *Alvanley*, in *French* v. *Davies*, "to be clear, plain, and incontrovertible, that the testator could not possibly give what he has given, consistently with her claim of dower." A mere annuity certainly furnishes no such incontrovertible evidence; on the contrary, the more reasonable supposition is, that the testator gives that which he has power to dispose of, and that only; and the answer to the argument commonly urged, that the remedy by distress requires that the entirety of the lands should be subject to the annuity, and not the two-thirds only, is, that the dowress takes not an undivided third, but the entirety of a divided share, which is set out by metes and bounds. In *French* v. *Davies* (as well as in

(*d*) 1 B. C. C. 292, n.
(*e*) Amb. 466, 2 Ed. 236.
(*f*) Amb. 682; more fully reported, 1 B. C. C. 292, n.
(*g*) Amb. 730.
(*h*) 3 B. C. C. 255, 1 Ves. jun. 135.
(*i*) 1 B. C. C. 291.
(*k*) 3 B. C. C. 347.
(*l*) 2 Ves. jun. 572.
(*m*) *Miall* v. *Brain*, 4 Mad. 119; *Dowson* v. *Bell*, 1 Kee. 761; [*Holdich* v. *Holdich*, 2 Y. & C. C. C. 18; *Lowes* v. *Lowes*, 5 Hare, 501; *Hall* v. *Hill*, 1 D. & War. 103.]

Greatorex v. *Carey* (*n*), where a similar decision was made by Lord *Alvanley*,) the annuity was charged on a mixed fund, consisting of both real and personal property, and the same occurred in *Miall* v. *Brain*. In the case of *Pearson* v. *Pearson* (*o*), Lord *Loughborough* seems to have thought that the annuity was a bar of dower if the annual value of the lands were not adequate to satisfy both; but this appears to introduce a fluctuating and unsatisfactory rule, and the notion derives no countenance from any of the recent cases (*p*).

To whom the bar of dower enures.

And here it may be observed, that where a widow is barred of her dower in lands devised by the will, by a benefit given to her in satisfaction of such claim, the exclusion is considered as made, not in favour of the devisee personally, but of the estate; and, consequently, it enures to the benefit of the heir, in case of the devolution of the land upon him by the failure of the devise (*q*).

Widow, when excluded from share of personalty.

But it has been decided that a gift to the widow in satisfaction of all her claims on the testator's estate, does not preclude her from claiming her share of the personalty under the Statute of Distributions, in the event of the failure of a bequest of that property. And, therefore, where a testator gave certain property to his wife in satisfaction of all dower or thirds which she could claim out of his real and personal estate, or either of them, and bequeathed his personal estate to charitable purposes, and which bequest was void as to such of the estate as consisted of real securities, it was held by Sir *R. P. Arden*, M. R., on a rehearing, and afterwards by Lord *Loughborough* on appeal, that the clause in question did not prevent the widow from claiming her share in the real securities, with the next of kin, his Lordship observing, that neither the heir at law, nor by parity of reasoning, the next of kin, can be barred by anything but a disposition of the heritable subject, or personal estate, to some persons capable of taking (*r*); [and it follows, therefore, that an annuity given to the widow "in lieu and satisfaction of all dower and thirds or *other claims and demands* which she could or might have had or been entitled to" out of the testator's estate, will not bar her right

(*n*) 6 Ves. 615.

(*o*) 1 B. C. C. 291.

(*p*) Except *Warbutton* v. *Warbutton*, 2 Sm. & Gif. 163, which, however, is overruled, ante, p. 433.

(*q*) See *Pickering* v. *Lord Stamford*, 3 Ves. 337.

(*r*) *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272, 581, 3 Ves. 332, 492; see also *Sampson* v. *Hutton*, 11 Vin. Abr. Copyh. 185, 2 Eq. Ca. Ab. 439, but more correctly stated 3 Ves. 335; [but a declaration to this effect in a *settlement* will, of course, effectually bar the widow, *Gurly* v. *Gurly*, 8 Cl. & Fin. 743; *Druce* v. *Denison*, 6 Ves. 395; the former case appears to overrule *Slatter* v. *Slatter*, 1 Y. & C. 28.

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[as *customary heir* to her husband in respect of copyholds not disposed of by his will(*s*).]

Effect of failure of disposition of dower-lands, where a benefit is given in lieu of dower.

The difference between such a case and that of dower seems to be this: Where a testator gives a benefit in lieu of dower, he purchases an interest in the estate for the benefit of any and every person claiming that estate under him, whether as heir or devisee; and the exclusion of the dower arises, not from the disposition of the property, (which, it has been shown, will not per se exclude the dower,) but from the provision for the widow being given expressly in satisfaction of it, and, consequently, is not affected by the failure of the disposition. Whereas, in the case under discussion, though the gift is expressed to be in satisfaction of the widow's claim on the testator's estate, yet, in fact, the efficient part of the exclusion consists in the disposition, which gives the property to some other person: that disposition therefore failing, the widow's claim under the Statute of Distributions is revived; and such claim is not inconsistent with any disposition in the will. It would seem to follow, from this view of the subject, that where the exclusion of the dower by means of election arises merely from the terms and mode in which the estate subject to the dower is devised, there is strong ground for holding that the failure of the devise lets in the claim of dower. The question, of course, is always a question of intention to be collected from the whole will.

Distinction in case of personalty where widow is in terms excluded but part of the personalty is left undisposed of.

[And with regard to the widow's exclusion from her share of the personalty the case would be different if, on the face of the will, there were an original intestacy as to a part of the personal estate. The clause of exclusion could not then be represented as auxiliary to any disposition of that portion of the personalty: it must have an independent effect; and the only effect it could have would be to exclude the widow from participation in the undisposed part of the personalty. This was accordingly so decided by Sir *J. Stuart*, V. C., in the case of *Lett* v. *Randall*(*t*). This case was distinguished by his Honor from one where it might be attempted to exclude the heir from taking undevised realty, without effectually disposing of it to some other person. The equivalent to which case in regard to personalty would be an attempt to exclude all the next of kin, which would be as nugatory as an universal exclusion of all mankind. In the case

[(*s*) *Norcott* v. *Gordon*, 14 Sim. 258.]

(*t*) 3 Sm. & Gif. 83, not appealed on this point, 30 L. J. Ch. 110, 7 Jur. N. S. 1359.

[before the Court, the exclusion of the widow would enure to the benefit of the remaining next of kin.]

What bars widow of share in personal estate.

A provision made for a wife "for her jointure, and in lieu of dower and thirds, at common law," does not extend to her distributive share of the personal estate (*u*); [but with the further words "out of any real or personal estate," though strictly speaking, the widow has no thirds at common law out of her husband's personal estate, they have been held to extend to such share (*x*); and the words "in lieu of dower or thirds at common law *or otherwise*," have been held to extend to the wife's right of free-bench in copyholds (*y*).]

Effect of 3 & 4 Will. 4, c. 105, upon points discussed in this chapter.

The question whether a dowress is put to her election by the contents of her husband's will, will less frequently arise in regard to widows whose marriage was since the 1st of January, 1834; as such persons may, under the act of 3 & 4 Will. 4, c. 105, be excluded from dower by various acts of the husband, including a disposition of the property by deed or will, or a mere declaration therein, or a rent-charge, or other interest devised to her out of any lands subject to dower; but a mere gift of personal estate, or of an interest in lands not liable to dower, will not defeat the widow's claim.

From what acts an election is presumed.

[In conclusion, it must be observed, that, in order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect of them, &c. (*z*); and a person having elected under a misconception is entitled to make a fresh election (*a*); and the fact of a person not having been called upon to elect and entering into the receipt of the rents and profits of both properties, as it affords no proof of preference, cannot be held an election to take one and reject the other (*b*).]

(*u*) *Colleton* v. *Garth*, 6 Sim. 19.

[(*x*) *Gurly* v. *Gurly*, 8 Cl. & Fin. 743.

(*y*) *Nottley* v. *Palmer*, 2 Drew. 93.

(*z*) *Wake* v. *Wake*, 1 Ves. jun. 335, and the other cases mentioned, 1 Sw. 381, n.; *Reynard* v. *Spence*, 4 Beav. 103; *Edwards* v. *Morgan*, 13 Price, 782, M'Clel. 541, 1 Bligh, N. S. 401; *Brice* v. *Brice*, 2 Moll. 21; *Wintour* v. *Clifton*, 21 Beav. 468.

(*a*) *Kidney* v. *Coussmaker*, 12 Ves. 136.

(*b*) *Padbury* v. *Clark*, 2 M. & Gord. 306; *Brice* v. *Brice*, 2 Moll. 21; but see *Worthington* v. *Wiginton*, 20 Beav. 67; and generally, as to what acts constitute election, see note to *Dillon* v. *Parker*, 1 Sw. 382; *Giddings* v. *Giddings*, 3 Russ. 241; *Briscoe* v. *Briscoe*, 1 J. & Lat. 334; *Mahon* v. *Morgan*, 6 Ir. Jur. 173; *Ruttledge* v. *Ruttledge*, 1 Dow. & Cl. 331. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris* v. *Watkins*, 2 Kay & J. 473.]

CHAPTER XV.

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS.

Rule in case of contradiction or repugnancy.

DOUBT is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorizing the adoption of one, and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralising and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills, [subject to an observation to be made in the sequel (*a*),] that where two clauses or gifts are irreconcileable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention: Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est (*b*). Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy: for instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.

Posterior of two inconsistent clauses preferred;

As in the case of *Crone* v. *Odell* (*c*), where a testator devised the residue of his real and personal property to his children A., B., and C., and all their younger children, their heirs, executors, administrators and assigns, for ever; so far it was a clear joint

[(*a*) Post, p. 452.]

(*b*) Co. Litt. 112, b; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100; *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; see also *Chandless* v. *Price*, 3 Ves. 99; *Wykham* v. *Wykham*, 18 Ves. [421; *Marks* v. *Solomon*, 18 L. J. Ch. 234, 19 L. J. Ch. 555.]

(*c*) 1 Ba. & Be. 449, 3 Dow, 61; see also *Roe* d. *James* v. *Avis*, 4 T. R. 605.

devise; but he went on to declare, that, nevertheless, his intentions were, that A. should receive the entire interest or yearly produce of such part of his real or personal fortune as he (testator) intended for his (A.'s) younger children during his life. The testator then made a similar direction as to B. and C.; and he provided, that, in case any of his said three children should die, the share of such should go to the younger children of such children; if no younger childen, to the survivors; and he gave the parents a power of distribution among their younger children. Lord *Clare*, the then Chancellor of Ireland, held the parents and children to be entitled jointly; but this was reversed by his successor Lord *Manners*, who determined that the parents took life interests only, with a power of distribution among their younger children; which decree was affirmed in the House of Lords.

So, in the more recent case of *Sherrat* v. *Bentley* (*d*), where a testator, after bequeathing several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, *to hold to his said wife, her heirs, executors, administrators and assigns, for ever.* The testator then directed that none of the legatees should be entitled until twelve months *after his wife's decease;* and, in case his wife should happen to die in his lifetime, and the beforementioned devises and bequest to her should thereby lapse, the testator gave the estate and effects, as well real as personal, comprised therein, to S., his heirs, executors, administrators and assigns, to the use of such persons as his wife should, in her lifetime, by writing under her hand appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A. and his (the testator's) brother in law's children the residue of his real and personal estates, to be equally divided amongst them, share and share alike, *at the decease of his said wife.* The heir at law contended, that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime; but Sir *J. Leach*, M. R., was of opinion that the Court was not warranted in putting such a construction upon the will, for that the testator's general intention, as collected from the concluding passages in

(*d*) 2 My. & K. 149.

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his will, was to give the wife the full enjoyment during her life only, and to give it over to the persons named afterwards; and that the words "heirs, executors, administrators and assigns," were to be rejected; and his Honor referred, as one of the grounds of his decision, to the rule, that the latter part of a will shall prevail against inconsistent expressions in the prior part of it. On appeal, Lord *Brougham*, C., affirmed the decree, observing, that either the testator had changed his intention, and was minded to give his wife a life estate instead of the fee, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative was the one to which the rule, sanctioned by the authorities, (which his Lordship stated in detail,) led. The latter was the inference drawn, not unfairly, from the whole instrument taken together.

—but prior devise not unnecessarily disturbed.

But in these cases it is a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition.

As in the case of *Doe* d. *Amlot* v. *Davies* (*e*), where a testator devised all his messuage and garden in the occupation of D., and also all that his messuage and garden wherein he then resided, both situate in P., to trustees and their heirs, upon trust to pay the rents to his wife during widowhood, and after the determination of that estate, to the use of his children by his said wife, equally to be divided between them and the lawful issue of their or his bodies or body, and, in default of such issue, to his nephew D. The testator immediately afterwards gave to his daughter F. a pecuniary legacy when she attained the age of twenty-one years, and the house where she then lived, after the decease of her mother or the day of intermarriage; and the testator gave to his daughter R. a legacy in like manner, and the house then in the occupation of I., after the decease of her mother or the day of her intermarriage. The two houses lastly referred to were those comprised in the previous devise. It was admitted that, under the first devise, the daughters would have been tenants in common in tail of the two houses, but, as the second devise clearly indicated an intention to give one of the houses to each daughter, the whole was in some degree reconciled by holding each to take an estate for life in severalty in her own house, under the latter devise, (which contained no word of inheritance,) leaving the prior devise still to operate on the inheritance in remainder, of

(*e*) 4 M. & Wels. 599. [See also *Crossman* v. *Bevan*, 27 Beav. 502.]

which it made the two daughters tenants in common in tail expectant on the estate for life of each in the respective houses.

Devise annulled by subsequent inconsistent devise in same will;

The doctrine in question has been sometimes unsparingly applied, even where the effect of the posterior devise is not merely (as in the two last cases) to restrict and qualify the interest conferred by the prior devise, but wholly to defeat and frustrate such prior devise. Thus, in *Ulrich* v. *Litchfield* (*f*), where a testatrix bequeathed her real *and personal estate* to A. and B. equally for life, and, upon the death of A., she gave the whole estate to B. in tail, with remainder over, with a few pecuniary legacies, and charged her real estate with the payment of the legacies, if the personalty should be insufficient. The testatrix then gave *all the residue of her personal estate* to her uncle C.'s three daughters. Lord *Hardwicke* held the daughters to be entitled to the residue of the personal estate, considering that the testatrix must be presumed to have altered the intention expressed in the prior part of her will.

—the whole to be reconciled, if possible.

But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective (*g*). In the attainment of this object the local order of the limitations is disregarded, if it be possible, by the transposition of them, to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A. in fee, and in a subsequent clause give the same lands to B. for life, both parts of the will shall stand; and, in the construction of law, the devise to B. shall be first (*h*), the will being read as if the lands had been devised to B. for life, with remainder to A. in fee. [And in like manner where a man devised *all* his lands to J. in tail, and in a subsequent part of the same will proceeded, "Item, I give my land in F. to S. in fee, it was held that S. took in remainder after the determination of the prior estate tail (*i*).]

So, where (*h*) a testator, after devising the whole of his estate to A., devises Blackacre to B., the latter devise will be read as an exception out of the first, as if he had said, "I give Black-

(*f*) 2 Atk. 372.

[(*g*) *Langham* v. *Sandford*, 19 Ves. 647; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 459; *Briggs* v. *Penny*, 3 De G. & S. 539; *Jackson* v. *Forbes*, Taml. 88; *Brocklebank* v. *Johnson*, 20 Beav. 205.]

(*h*) Per *Anderson*, *Anon.*, Cro. El. 9; see also *Ridout* v. *Dowding*, 1 Atk. 419; [*Plenty* v. *West*, 6 C. B. 201; *Usticke* v. *Peters*, 4 Kay & J. 437.

(*i*) *Wallop* v. *Darby*, Yelv. 209.]

(*k*) *Cuthbert* v. *Lempriere*, 3 M. & Sel. 158; [see also *Anon.*, Dalison, 63; *Adams* v. *Clerke*, 9 Mod. 154; *Allum* v. *Fryer*, 3 Q. B. 442; *Doe* d. *Snape* v. *Nevill*, 11 Q. B. 466.]

acre to B., and, subject thereto, all my estate, or the residue of my estate, to A."

Devise qualified by subsequent disposition.

By parity of reason, where (*l*) a testator gives to B. a specific fund or property at the death of A., and in a subsequent clause disposes of the whole of his property to A., the combined effect of the several clauses, as to such fund or property, is to vest it in A. for life, and, after his decease, in B.

Again (*m*), where a testator gave his real and personal estate to A., his heirs, executors and administrators, and in a subsequent part of his will gave all his property to A. and B., upon trust for sale, and to pay the interest of the proceeds to A. for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A. was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second (*n*).

Effect of separate contradictory devises, each in fee.

Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons *in fee*. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcileable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concurrently (*o*). The contrary, indeed, is laid down by Lord *Coke* (*p*) and other early writers (*q*), who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord *Hardwicke*, though he admitted that, latterly, a different construction had prevailed (*r*). The point underwent much discussion in the recent case of *Sherrat* v. *Bentley* (*s*), already stated; and Lord *Brougham*, after reviewing the authorities, and fully recognising the general doctrine, which upholds the latter part of a will by the sacrifice of the former to which it was repugnant, considered that, consistently with this rule, it might be held, that, where there are two devises in fee of the same property, the devisees take concurrently. "If,

Both take concurrently.

(*l*) *Blamire* v. *Geldart*, 16 Ves. 314.

(*m*) *Brine* v. *Ferrier*, 7 Sim. 549.

(*n*) In point of fact, in this case the inconsistent gifts were contained in several papers supposed to be written at different times; but as the Ecclesiastical Court had allowed them to be proved as one will, they were, of course, to be so construed.

(*o*) 3 Leon. 11 pl. 27; 8 Vin. Abr. Copyh. 152, pl. 3; arg. in *Coke* v. *Bullock*, Cro. Jac. 49, and in *Fane* v. *Fane*, 1 Vern. 30.

(*p*) Co. Lit. 112.

(*q*) Plow. 541.

(*r*) See *Ulrich* v. *Litchfield*, 2 Atk. 374.

(*s*) 2 My. & K. 165, ante, p. 443.

in one part of a will," said his Lordship, "an estate is given to A., and afterwards the same testator gives the same estate to B., adding words of exclusion, as 'not to A.,' the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A., and then to B., unless it be some indivisible chattel, as in the case which Lord *Hardwicke* puts in *Ulrich* v. *Litchfield*, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule, as laid down by Lord *Coke* and recognised by the authorities, that a subsequent gift, entirely and irreconcileably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation."

Whether as joint tenants or tenants in common.

[It is laid down by Lord *Hardwicke* in *Ulrich* v. *Litchfield* (*t*), that the two devisees, if they take concurrently, are joint tenants; this is supported by several old authorities (*u*), and appears to have been assumed by Lord *Brougham* in the case just stated, where he speaks of their joint estate (*x*). It is true he also adverts to their taking in "moieties;" but that expression seems to be used to designate the amount of each devisee's interest, and to negative the total exclusion of either; not to signify that they take as tenants in common. In the case of *Ridout* v. *Pain* (*y*), Lord *Hardwicke*, speaking of such a devise, says, that "latterly it has been construed either a joint tenancy or tenancy in common, according to the limitation;" and this it is said must be presumed to mean, "that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint tenancy, the devisees shall be joint tenants, but otherwise shall be tenants in common (*z*). Now, as we are supposing both devisees to have estates in fee simple, and, therefore, to have a sameness of interest, there is nothing in the foregoing interpretation of Lord *Hardwicke's* dictum to prevent our holding that the devisees take as joint tenants. Independently of authority this seems the] preferable construction, as less violence is thereby done to the

[(*t*) 2 Atk. 372.
(*u*) 14 Vin. Ab. 485, pl. 2; *Anon.* Cro. El. 9; *Wallop* v. *Darby*, Yelv. 210; Co. Lit. 21 a, n. (4.)
(*x*) 2 My. & K. 166.
(*y*) 3 Atk. 493.
(*z*) Har. Co. Lit. 112 b, n. (1).

testator's language than by making them tenants in common, as the creation of a tenancy in common requires positive intention.

Whether doctrine applies to an indivisible chattel.

It is observable that both Lord *Hardwicke* and Lord *Brougham* considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion is attended with difficulty, for though, certainly, it may seem rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of gift?

Apparent inconsistency reconciled by reference to lapse.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devise in the case of lapse (*a*), [or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it (*b*).]

Instances of devises reconciled.

The anxiety of the Courts to adopt such a construction as will reconcile and give effect to all parts of a will is further exemplified by the case of *Holdfast* d. *Hitchcock* v. *Pardoe* (*c*), where a testator devised to A. a farm in the occupation of C., and to B. lands in L. marsh; and it appeared that part of the farm in the occupation of C. consisted of lands in L. marsh; but there was another estate, not in his occupation, consisting entirely of marsh lands in L.; and it was held, that the subsequent devise was not a revocation of the preceding devise, as was contended, but that A. took the farm, and B. the marsh lands, not included in that farm.

[So, in *Doe* d. *Bailey* v. *Sloggett* (*d*), where a testator devised to A. "her heirs, executors and administrators," a house in Tavistock Street (describing it), and in distinct clauses gave her several other houses, "the whole of which *premises* were in the borough of Plymouth, during her natural life," but should A. have children, "the before-mentioned houses" to descend to

(*a*) *Clayton* v. *Lowe*, 5 B. & Ald. 536; but as to which see some remarks post, Chap. XLIX.

[(*b*) *Ley* v. *Ley*, 2 M. & Gr. 780.]

(*c*) 2 W. Bl. 975; see also *Woolcomb* v. *Woolcomb*, 3 P. W. 111.

[(*d*) 5 Exch. 107.]

[them; but if she should die without issue (which happened), then the "said premises" to become the joint property of the children of X. The house included in the first devise being, as well as all the rest, in the borough of Plymouth, it was contended that it went with them to the children of X. But the Court of Exchequer held, that although the words were not perfectly accurate, yet they could not intend that the testator meant by the subsequent words to cut down the estate in fee first given.]

But, perhaps, the strongest authority of this kind is the case of *Bettison* v. *Richards* (*e*), where a testator, after devising an estate pur autre vie, devised *all other his estates*, real and personal, *wheresoever situate*, unto E. L., her heirs, executors, &c., for ever, charged with debts and certain legacies; and in case his son should die without issue of his body lawfully begotten, then he devised all his manors, messuages, tenements and real estate, *not thereinbefore disposed of*, situate in the several counties of H., G., N., L., and D., and the town of N., (though, it will be observed, he had previously disposed of *all* his real and personal estate,) and also all his personal property in the public funds or elsewhere, unto the said E. L. during her life, and after her decease unto R. S. in fee. It appeared that the testator had the reversion in fee expectant on the determination of an estate tail male in his son, in large estates in the several counties specified, except D. and the town of N., where he had lands in fee-simple in possession. It was contended, that the latter devise was confined to the lands in the specified counties, *of which the testator had the reversion only*; and that the other lands *even in the counties particularized in the second devise*, passed under the first devise; and of this opinion appears to have been the Court of Common Pleas, the Judges of which certified that E. L. took an estate in fee in the lands *in D.* and the *town of N.*, subject to the debts, &c.

Rule as to the rejection of words.

It is clear, however, that words and passages in a will, which are irreconcileable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein.

(*e*) 7 Taunt. 105.

Thus, in *Boon* v. *Cornforth* (*f*), where a testator bequeathed the interest of 6000*l.* stock to his daughter for life, and after her decease, upon trust to dispose of the principal and interest to and between her husband and his (testator's) daughter's child and children, viz. her husband should have and enjoy one half of the interest thereof for and during his natural life, *if there should be no child or children*, (the words in italics were interlined (*g*),) and the child or children the other half; on his death his half should go to the child or children, but till the child or children attained twenty-one the husband should have the whole interest, and on the death of their father, they should have the remaining 3000*l.*; but if no such child or children at the time of her death, or they should die before twenty-one, then to go on further trust as he should thereafter mention—Lord *Hardwicke* rejected the interlined words, as inconsistent and repugnant with the whole disposition, his Lordship being of opinion that he had no alternative but that of rejecting either these or the entire provision.

Passage at variance with context rejected.

So, in the case of *Coryton* v. *Helyar* (*h*), where a testator devised lands to the use of his son *for ninety-nine years*, and, after the determination of that estate, to the use of trustees during the life of the son, to preserve contingent remainders; and, after the decease of the son, to the use of his first and other sons in tail male—Lord *Hardwicke* held, that the term was, with reference to the true construction of the several parts of the will, to be construed, not as an absolute term, but as determinable with the decease of the son.

Ambiguous words inconsistent with prior devise rejected.

In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

Thus, where (*i*) the devise was to A. and her heirs, *for their lives*, Lord *Ellenborough* rejected the latter words; which, he said, were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heir might take, they could in fact only enjoy the benefit of it for their own lives.

(*f*) 2 Ves. 277; [*Jones* v. *Price*, 11 Sim. 557; *Aspinall* v. *Andus*, 7 M. & Gr. 912; *Hanbury* v. *Tyrell*, 21 Beav. 322 (case on a deed); *Campbell* v. *Bouskell*, 27 Beav. 325, ("aforesaid nephews," "aforesaid" rejected).]

(*g*) The case of *Lunn* v. *Osborne*, 7 Sim. 56, affords another instance of the rejection of words which had been interlined by a testator, and were at variance with the general context.

(*h*) 2 Cox, 340. [See, for other examples of powers or interests reduced within a limited period by force of the context, *Watlington* v. *Waldron*, 4 D. M. & G. 259; *Chapman* v. *Gilbert*, ib. 366.]

(*i*) *Doe* d. *Elton* v. *Stenlake*, 12 East, 515. [See also *Towns* v. *Wentworth*, 11 Moo. P. C. C. 545.

[In like manner, in the case of *Doe* d. *Herbert* v. *Thomas* (*k*), where a testator gave to his wife, her heirs and assigns for ever, his house and other property, with the intention that she might enjoy the same *during her life*, and by her will dispose of the same as she thought proper; it was contended that the wife took only a life interest with a testamentary power of appointment; but the Court held, that the latter part of the clause did not cut down the clear gift of a fee-simple contained in the former part, and that the testator merely meant to mention all the incidents of a fee which occurred to him at the time.]

So, where (*l*) a testatrix bequeathed an annuity, to be equally divided between M. B., C. S., and C. A., "to them and their heirs, or the survivor of them, *in the order they are now mentioned*," Sir *W. Grant*, M. R., rejected the latter words as repugnant. "The proposition," said he, "equally to divide a fund between two persons in a given order, is mere nonsense, directly repugnant. There can be no division, if there is an order in which they are to take. Suppose it stood simply a bequest, to be equally divided between A. and B., in the order they are mentioned, the Court could only say the first words are plain, importing equal division, a benefit, and a personal benefit to both; and they do not know what meaning to put upon the other words: they are insensible, as coupled with such preceding words. The only question therefore is, whether words having a plain meaning are to be rejected, for the sake of words of which you do not see the sense or meaning. It is very probable, the testatrix might have had in her mind some vague, indefinite notion of preference, but that is not expressed in any manner, so that the Court can act upon it; not even by saying the words importing equal division are to be coupled with the original annuitants and not with the survivors. Those words must be equally applied to all the persons who are to take, or they must be equally rejected. It is to be equally divided among the three; not a different division among the survivors. In order to give effect to the latter words, I should be under the necessity of rejecting the words expressing an equal division, retaining the others with reference to one event, and of doing the reverse in reference to another

[(*k*) 3 Ad. & Ell. 123, 4 Nev. & M. 696. See also *Brocklebank* v. *Johnson*, 20 Beav. 205; *Pasmore* v. *Huggins*, 21 Beav. 103.]

(*l*) *Smith* v. *Pybus*, 9 Ves. 566; see also *Jesson* v. *Wright*, 2 Bligh, 1, and other cases of the same class discussed, Vol. II., p. 341; and *Reece* v. *Steel*, 2 Sim. 233; *Townley* v. *Bolton*, 1 My. & K. 148; [*Harvey* v. *Harvey*, 5 Beav. 134.

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event. In the event of all living, I should have kept the former and rejected the latter words; but in the event of two surviving, I am to reject the former and preserve the latter. There is no ground for such a capricious rejection of words to suit the event. The testatrix has not pointed out the specific event in her contemplation, or showed a different intention as to the accruing parts and the whole; and this order to take place is so obscurely expressed, that it is utterly impossible for me to give any effect to it."

[The embarrassment often caused by cases of this description is well exemplified by the case of *Morrall* v. *Sutton* (*m*), where a testator limited life interests in his leasehold property charged with certain annuities, with remainder to S. C., "her executors, administrators and assigns, subject to the said annuities charged thereon during her natural life." The general rules above mentioned were acknowledged on all hands; but there was a difference of opinion upon the question, whether or not sufficient evidence of the testator's intention could be collected from the context to authorize the rejection of the words "during her natural life," so as to give S. C. the absolute interest; for, in the absence of such evidence, those words being placed last must, according to the general rule, overrule the preceding words "executors, &c.," thereby limiting S. C.'s interest to a life-estate. *Coleridge*, J., in a valuable judgment, supported the affirmative against the opinions of *Parke*, B., (who, with *Coleridge*, J., had been called in to the assistance of the Chancellor upon the appeal,) and of Lord *Langdale*, M. R., before whom the point was originally argued. The case was ultimately compromised.]

Words not to be expunged unless inconsistent.

But words are not to be expunged upon mere conjecture, nor unless actually irreconcileable with the context of the will, though the retention of them may produce rather an absurd consequence.

Thus, where (*n*) a testator after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estates "to the use of *the said* Thomas Brailsford and his assigns, for and during the term of his natural life, and, after his decease, to the use of *the said Thomas Brailsford, son of my nephew Samuel Brailsford*, his heirs and assigns, for ever." The only Thomas Brailsford mentioned in the will was the son of Samuel, but the testator had another nephew of that name, (who was uncle of the legatee,) to whom, therefore, it was con-

[(*m*) 4 Beav. 478, 1 Phil. 533.]
(*n*) *Chambers* v. *Brailsford*, 18 Ves. 368; [and see *Mellish* v. *Mellish*, 4 Ves. 48.]

tended, that the devise to "*the said* Thomas Brailsford" applied, though he was not before named, according to the case in Hawkins (*o*), that father and son having the same name, the son, not the father, is distinguished by an addition (*p*). The words "the said," it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or, there must be an inquiry. But Sir *William Grant* said, that it was impossible to contend that there was, *primâ facie*, any ambiguity in the description; by the words, "the said Thomas Brailsford," the Thomas Brailsford, who had been before mentioned, was sufficiently described. "The argument on the other side," said his Honor, "rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; *but the devise as it stands is not so insensible or contradictory as to drive the Court to the necessity of expunging or adding words to give it a meaning;*" and this decree was affirmed by Lord *Eldon* on appeal (*q*).

Devise not controlled by reason assigned.

And though *repugnant* expressions will yield to an intention and purpose expressed or apparent upon the general context, yet it does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear (*r*). Thus, where (*s*) a testator expressed his conviction of the honour and justice of his trustees, and made that conviction the ground of his reposing in them the trust of distributing his property among his relations, authorizing them to fix both the objects and the proportions, but afterwards gave the power in express terms, to them, *and the heirs, executors and administrators of the survivor of them*—Sir *W. Grant*, M. R., observed, "Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorized to strike these words out of the will, upon the supposition, though not impro-

(*o*) 2 Hawk. P. C. 271, s. 106.

(*p*) See also *Goodright* d. *Hall* v. *Hall*, 1 Wils. 148.

(*q*) 19 Ves. 652, 2 Mer. 25; see also *Roe* v. *Foster*, 9 East, 405; [*Ridgeway* v. *Munkittrick*, 1 D. & War. 90, 91; *Ridout* v. *Pain*, 3 Atk. 493; *Langley* v. *Thomas*, 6 D. M. & G. 645.]

(*r*) Per Sir *W. Grant*, M. R., 16 Ves. 46; [and see 4 Ves. 808; *Thompson* v. *Whitelock*, 5 Jur. N. S. 991.]

(*s*) *Cole* v. *Wade*, 16 Ves. 27.

bable, that they were introduced in this part by inadvertence or mistake."

Devise in general terms will not control another distinct devise.

[Again, it is a general rule, that a devise couched in general terms shall not, even at the expense of rendering it inoperative, be held to control another devise made in distinct terms. Thus, in the case of *Borrell* v. *Haigh* (*t*), where a testatrix devised all her messuages, cottages, closes, lands and hereditaments at H. to A., and afterwards gave all her copyhold estates and hereditaments at N. and T. and *elsewhere;* and it appeared that the only place besides N. and T., in which the testatrix had copyholds, was H.: Lord *Langdale*, M. R., held, nevertheless, that the prior devise, which per se clearly carried the copyholds at H., was not defeated by the vague expression which followed.

And so in *Greenwood* v. *Sutcliffe* (*u*), where a testator devised his estate called S., in trust for his daughter Anna for life, and at her death the trustees were to stand seised thereof, "and also of all accruing share and interest to which she might become entitled by survivorship under the trusts of his will or otherwise," to the use of her children as tenants in common in fee. And the testator devised another estate, called R., to trustees to hold in trust for his daughter Maria, for life; and after her death, (in the events which happened,) to stand seised thereof to the use of the testator's son William and his said daughter Anna, or such of them as should be then living, their heirs and assigns in equal shares. Maria died before the testator; and upon the death of Anna, who survived her father and sister, her children claimed the R. estate under the words contained in the former part of the will, "all accruing share," &c., on the ground that the effect of them was, in the events which had happened, to limit the R. estate, after the death of Anna, to her children. But it was held, that the direct and express limitation of the R. estate to William and Anna, and their heirs and assigns, as tenants in common, was not controlled by the words in question, although no other operation could be attributed to them.]

Clear devise not controlled by subsequent inaccurate words of reference.

It is to be observed, too, that a devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms, which, had they been used in the devise itself, would have

[(*t*) 2 Jur. 229. See also *Sidebotham* v. *Watson*, 11 Hare, 170, (4th question). (*u*) 14 C. B. 226.]

conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

Thus, where (*x*) a testatrix devised lands to her eldest daughter A. S., *and the heirs of her body* for ever, with remainder over, charged with a sum of money to be raised out of the yearly profits; and the testatrix declared it to be her will that her executors (thereinafter named) should stand seised of the lands until they should have raised the said sum, or until the same should be discharged by A. S. *and her heirs;* and after the raising or payment thereof by the said A. S. *or her heirs,* then that *A. S. and her heirs* should enjoy the said lands for ever (*y*). It was held that the words "heirs" of A. S., thrice repeated, referred to the special designation of heirs to whom the estate was devised in the beginning of the will, and were not intended to introduce a new and more general denomination of heirs, and to revoke the express estate tail given in the beginning of the will.

So, where (*z*) the devise was to A. and the heirs *male* of his body, and, in case he should die *without issue,* then over, the words "without issue" were held to mean without issue *male.*

Both the preceding cases exhibit deficiency, rather than repugnancy of expression, and will serve, therefore, not inaptly to conduct to the commencing subject of the next chapter.

(*x*) *Doe* d. *Hanson* v. *Fyldes,* Cowp. 833.

(*y*) The words "for ever" were not strictly repugnant, as an estate tail is capable of perpetuity of duration.

(*z*) *Tuck* v. *Frencham,* Moore, 13, pl. 50, 1 And. 8; [see also *Ellicombe* v. *Gompertz,* 3 My. & Cr. 127; *Hillersdon* v. *Lowe,* 2 Hare, 355; *Mortimer* v. *Hartley,* 3 De G. & S. 332.]

CHAPTER XVI.

AS TO SUPPLYING, TRANSPOSING AND CHANGING WORDS.

Words may be supplied, when.

I. *As to supplying Words.*—It is established that [where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted (*a*), those words] may be supplied, in order to effectuate the intention, as collected from the context. Of this we have a very simple example in an early case, where a devise to A. and the heirs of his body, and, if he should die, then over, was read "and if he should die *without issue* (*b*)."

"Without issue" supplied.

So, where (*c*) a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and declared that if John *died*, living Alice, William should be his heir. And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should be his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should be to the children of his brother. John died in the lifetime of Alice, leaving a son; and the Court held, that, upon the whole context of the will, the construction should be "if John died *without issue*, living Alice;" and that this was the intent appeared, it was said, by other parts of the will, the other sons having other lands to them and the heirs of their bodies; and that if they all died without issue, it should be to his brother's children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

"Without issue" read "without leaving issue."

And in several instances where a testator, in a will made before the year 1838, has used the phrase "without *leaving* issue"

[(*a*) See *Hope* v. *Potter*, 3 Kay & J. 206.]

(*b*) *Anon.* 1 And. 33; see also *Atkins* v. *Atkins*, Cro. El. 248.

(*c*) *Spalding* v. *Spalding*, Cro. Car. 185.

and "without issue" indifferently, in bequests of *personalty*, in regard to which alone (as hereafter shown) the difference of expression is material, the word "leaving" has been supplied, in order to produce uniformity, which, it was considered, must have been intended.

Thus, in *Shepperd* v. *Lessingham* (*d*), where A., having two children, F. and M., bequeathed certain stock, in trust, as to one moiety, for F. for life, remainder to such child or children of F. as should be living at his decease; and, if he should not leave any child, or in case such children should die without issue, then to M. for life, remainder to such child or children of M. as she should have at the time of her death; and in case M. should leave no issue living at her death, or if such child or children as she should so leave should die *without leaving any issue*, then to J. S.; and, as to the other moiety, the testatrix appointed the interest to be paid to M. for life, remainder to such child or children as she should leave at her decease; and in case M. should leave no such child or children, or all such child or children as she should leave should die *without issue*, then to F. for life, remainder to his children living at his decease; and in case F. should leave no child or children, or they should die without issue, then to J. S. the same as the other moiety—Lord *Hardwicke* was of opinion that the same construction was to be put on the words "without issue," in the bequest over of the second moiety to F., as on the words "without *leaving* issue," in the other moiety (*e*); the only difference intended in the disposition of the two moieties evidently being to prefer F. as to one moiety, and M. as to the other. The consequence was, that these words, being used in relation to personal estate, referred to issue at the death (*f*).

Word "leaving" supplied in expression "without issue."

So, in the case of *Kirkpatrick* v. *Kilpatrick* (*g*), where a sum of money was bequeathed to J. and S. to be equally divided; but in the event of the death of either of them *before he attained the age of twenty-one years, and without issue*, his share to go to the survivor; but in the event of both dying *without issue*, then over; Lord *Erskine*, on the authority of the last

Words "under twenty-one" supplied.

(*d*) Amb. 122.

(*e*) But the word "leaving" occurred in the *ulterior* bequest of the other moiety.

(*f*) Even with this construction, the gift over, in the event of the children not leaving issue, was too remote, as M. might have had children born *after the death of the testator*.

(*g*) 13 Ves. 476; [see also *Wheable* v. *Withers*, 16 Sim. 505; in *Radley* v. *Lees*, 3 M. & Gr. 327, the codicil showed that the testator's intention would be defeated by supplying the words there proposed to be inserted in the will.]

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case, supplied the words "under twenty-one," in the ulterior bequest.

"Without issue" read without "*leaving* issue."

Again, in the case of *Radford* v. *Radford* (*h*), where a testator devised freehold and leasehold estates to A. and B. as tenants in common, and the heirs of their bodies: and if either of them should die without *leaving* issue, then, as to the share of such of them as should so die, to the survivor and the heirs of his body; and if both of them should die *without issue*, then to C. for life—it was held, that by the word "issue," in the last instance, the testator meant such issue as were designated in the prior limitation over (i. e. the word "leaving" was supplied between the words "without" and "issue" occurring in the second executory gift, in order to assimilate it to the first executory gift); and that, consequently, the bequest over to C. was a good disposition of the leasehold estates, to take effect in the event of A. and B. dying without leaving issue living at their respective deceases.

"On marriage" read "at twenty-one or marriage."

[The case of *Lang* v. *Pugh* (*i*) was of the same kind. A testator gave a sum of money, in trust for his son for life, and after his death for his lawful issue, if then of age or married, equally if more than one, if only one the whole to go to such only child; or in case such child or children of his son should be under age at the death of the son, then "to be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of twenty-one years, if sons, or if daughters, on their marriage respectively. Sir *K. Bruce*, V. C., read the will as if it had been written, "or, in the case of daughters *marrying earlier*, upon marriage;" for he thought it improbable that the testator could have meant a daughter of J. surviving her father, and having attained majority in her father's lifetime, to take the fund, or a portion of it, absolutely, though never married, but that he meant altogether to exclude any daughter, a minor at her father's death, if not then married, unless she should at some period of her life marry.

"Dying" read "dying without leaving a child."

Somewhat similar also, but of greater difficulty, was the case of *Abbott* v. *Middleton* (*k*), where a testator gave an annuity of 2,000*l.* per annum to his wife for life, and directed funds to be set apart for securing it, "and on her decease the sums provided and set

(*h*) 1 Kee. 486.

[(*i*) 1 Y. & C. C. C. 718; see also *King* v. *Cullen*, 2 De G. & S. 252; *Woodburne* v. *Woodburne*, 3 ib. 643.

(*k*) 21 Beav. 143; in D. P. 7 H. of L. Ca. 68, 28 L. J. Ch. 110. And see *Brotherton* v. *Bury*, 18 Beav. 65.

[apart for such payment to become the property of my son A. so far as he the said A. my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters" B., C. and D. The son A. having died before his mother but leaving a child, the question was, whether the words "without leaving any child" could be supplied after the word "dying" in the final gift over, so as to leave the child of A. in possession of the property, and it was held by the M. R. that those words must be supplied. Referring to *Spalding* v. *Spalding*, the learned Judge said the principal ground of the decision there seemed to him to be that the heirs of the body of the first son should take, and it was to be observed that they could take only by descent through the father, whereas in the present case they took vested interests direct from the testator. The case was appealed to the House of Lords, but the judgment of the M. R. was affirmed, principally on the same ground (*l*). A clear gift was not to be devested but by an unmistakeable provision to that effect (*m*).]

The principle has been applied in numerous other cases, from which the following have been selected, as affording apt examples of its application.

Words supplied to provide for an alternative event, obvious, though not expressed.

Thus, where (*n*) a testator having two sisters, A. H. and M. J. and also two cousins, F. and G., devised his estate at A. to his sister A. H. for life, remainder to his sister M. J. for life, remainder to another person for life, remainder to F. in tail, remainder to G. in tail, with remainders over; and then devised another estate at B. "to his sister M. J. for life, OR *if she should survive his wife and sister A. H., so that she should come into possession of the estate at A.*" then to L. J. *for life*, towards the support of his cousins F. and G., remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it

[(*l*) Lords *Cranworth* and *Wensleydale* dissentientibus. It is to be observed, that whether the words were supplied or not the will remained incomplete. If they were not supplied, the testator's bounty to his grandchildren would depend on their father's surviving his mother, which appeared unreasonable; on the other hand, if they were supplied, there still remained unprovided for the event of the son surviving his mother, and dying without leaving children.

(*m*) See *Hope* v. *Potter*, 3 Kay & J. 206.]

(*n*) *Doe* d. *Leach* v. *Micklem*, 6 East, 486; see also *Webb* v. *Hearing*, Cro. Jac. 415; *Anon.* 2 Vent. 363; *Pearsall* v. *Simpson*, 15 Ves. 29; Lord *Eldon's* judgment in *Doe* d. *Planner* v. *Scudamore*, 2 B. & P. 296.

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was therefore contended that the remainder to L. J. and G. failed; but the Court decided, that, as the word *or* so placed was unintelligible, being referrible to no other alternative; and as it was apparent, from the whole context, that the testator had in contemplation another alternative, namely, the death of his sister M. J., and that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail, after a remainder in tail to his brother F.; in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read as a gift to his sister M. J. for life, AND AFTER HER DEATH, *or if she should survive his wife* (*o*) *and sister A. H.*, so that she should come into possession of the estate at A., then over to L. J., who consequently took a vested remainder, and was entitled in the events that had happened.

Object supplied by reference to preceding devise.

But no case, probably, has gone further in supplying words in compliance with the intention appearing by the context, than the case of *Doe* d. *Wickham* v. *Turner* (*p*), where the testator's deficiency of expression left the devise without an object. The will was in these words: "I give unto H. W. a messuage or tenement now in the possession of W. *Item*, I give further unto my nephew H. W. half part of my garden, and 100*l.* stock in the 4 *per cent.* Bank annuities. *I give, further, my yard, stables, cowhouse, and all other outhouses in the said yard,* my sister M. W. to have the interest and profits during her life." The question was, whether the nephew was entitled to the yard under this devise. The Court (*Best*, J., *dissentiente*) decided in the affirmative; for as the testator had used the word "further" in the preceding part of his will, when he made an additional gift to the same devisee, and as the clause would otherwise have been senseless and inoperative, the words "to him" might be supplied, and then it was a devise to M. W. for life, remainder to her son H. W. *in fee* (*q*).

So, in the case of *Langston* v. *Pole* (*r*), where a testator, pass-

(*o*) It does not distinctly appear why the death of the wife is introduced; but probably she had a life estate in the property at A.; [or, perhaps, it was because the wife had a life annuity of 50*l.* out of the property at A.; and that, therefore, M. J. was not intended to lose the estate in question till after the cesser of that charge upon her interest in the property at A.]

(*p*) 2 D. & Ry. 398.

(*q*) There must be a mistake in this, as the will was destitute of any ground for raising a fee in the devisees, and it was not necessary for the Court to determine *the quantity* of the devisee's interest.

(*r*) 2 M. & Pay. 490, [5 Bing. 228, Sugd. Law of Prop. 370.

ing over the first son of A., (his son and devisee for life,) proceeded to limit the estate to the *second* and other sons in tail successively of A., and then to the first and other daughters of A. in like manner: the Court supplied the vacancy in the series of limitations, by holding the first son to take an estate tail immediately expectant on his father's decease. [It appears that the Court of B. R. had come to an opposite conclusion upon the same will. But upon appeal to the House of Lords, the decision of the Court of C. B. was affirmed (*s*). Lord *Brougham*, in moving the judgment of the House, relied on the trusts of a term, which were, in case there should be only one son and one daughter, to raise a portion for the daughter; an absurd provision, if the daughter herself took the estate, as she would, under the circumstances, unless the son did. Moreover, his Lordship was of opinion that the phrase "other sons" included the first son, and therefore the decision of the Court below was right, without supplying any words (*t*).

There are in the books several cases like the last, and which, although not strictly, perhaps, instances of supplying words to the will, are intimately connected with this subject. Thus, in the case of *Clements* v. *Paske* (*u*), the devise was to trustees, during the life of J. C., upon trust for J. C. for life, and, after his decease, to the eldest son of J. C., and for default of such issue, then likewise to the second, third, and every other son of J. C. successively, according to seniority, and the several and respective heirs male of the body and bodies of such (omitting the first son) second, third, or other son or sons, the *eldest of such sons* and the heirs male of his body being always preferred to and take before any of the younger sons and the heirs male of his body, and, in case of such issue male failing by J. C., then over. The Court of B. R. held, that the eldest son of J. C. took an estate tail, and not an estate for life. Lord *Mansfield*, who delivered the judgment of the Court, seems to have chiefly relied on the word "likewise," as indicating an intention that the first son should have the same estate as the younger sons, and not to have placed any such dependence on the word "other" as (according to the judgment of Lord *Brougham*, in *Langston* v. *Langston*) would have been warranted. In the case of *Owen* v. *Smyth* (*x*), how-

Clements v. *Paske.*

[(*s*) *S. C.* nom. *Langston* v. *Langston*, 8 Bli. 167, 2 Cl. & Fin. 194.

(*t*) The case was one out of Chancery (see Taml. 119), and the Courts of C. B. and B. R. simply returned their certificate, without stating any reasons.

(*u*) 3 Dougl. 384, cit. 1 M. & Sel. 130, 2 Cl. & Fin. 230, note.

(*x*) 2 H. Bl. 594.

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[ever, *Eyre*, C. J., expressed a doubt, whether words such as those which afterwards occurred in *Langston* v. *Langston* could, in a deed, be considered to give an estate tail to the eldest son.

Barnacle v. *Nightingale.*

In the case of *Barnacle* v. *Nightingale* (*y*), where there was a devise to A. for life, and, after his decease, *to his first son, and, for default of such issue,* to the second, third, &c., and all and every other son and sons of A., and the heirs of *his or their* bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body: Sir *L. Shadwell*, V. C., decided that the limitation to the heirs of the body of the first son had been omitted, and could not be supplied, and that the heir took only an estate for life. This decision is opposed to the case of *Galley* v. *Barrington* (*z*), in which, on a settlement couched in language almost the same, the court of C. B. held, that the limitation "to the heirs of the body" included the heirs of the body of the first as well as of the second and younger sons. The same question on the will in *Barnacle* v. *Nightingale* was again litigated in the case of *Doe* d. *Harris* v. *Taylor* (*a*), and the Court of B. R. came to a decision opposite to that of Sir *L. Shadwell;* but, singular to say, for a reason which it is conceived the reader will hereafter (*b*) find to be equally insupportable, namely, that the words "*for default of such issue*" did not, as is the universal rule, mean for default of such issue as took under the previous limitation, that is, "for default of such first son," but meant "for default of issue of such first son," and that the first son, therefore, took an estate tail by implication.]

Words of limitation used in one devise, not to be applied to a distinct devise.

But it is not to be inferred from the preceding cases, that words may be inserted upon mere conjecture, in order to equalize estates created by several distinct and independent devises, in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be *conjectured* that he had the same intention as to all.

Thus, where (*c*) a testator, having three sons, T., F., and H., devised lands to T. and the heirs male of his body, remainder to F. and his heirs. *Item*, he devised his house in H. to F. and the male heirs of his body, remainder to H. and the heirs male of his body; *Item*, he gave to H. and his heirs freely another

[(*y*) 14 Sim. 456.
(*z*) 2 Bing. 387.
(*a*) 10 Q. B. 718.
(*b*) Chap. XL. Sect. 3.]

(*c*) *Spirt* v. *Bence*, Cro. Car. 368; [see *Hay* v. *Earl of Coventry*, 3 T. R. 83.]

house; *Item, he gave to his said son H.* houses and land *without any words of limitation.* Also he willed that H. should enjoy certain other premises to him and his heirs for ever, and for want of heirs of his body, to F. for ever: it was held that H. had only an estate for life in those premises, in reference to which no words of limitation were added.

Words of limitation not extended by inference to other devises.

So, where (*d*) a testator gave unto his wife, her heirs and assigns for ever, all his lands in the parish of Bampton in the Bush, in the county of Oxford, and then in the occupation of S. *And* he gave and devised *to his loving wife aforesaid* all his lands, tenements and houses lying in Chipping Norton, (to wit,) the house he then lived in, &c. (describing them); it was held that the wife took only an estate for life in the Chipping Norton lands.

So, where (*e*), as touching his "worldly and personal estate," a testator gave the same in the following manner: He gave to his grandson James Wright, *all his lands, freehold, copyhold and leasehold, in Essex; also,* he gave to his grandson James Wright, all his *estate,* freehold and copyhold, in Ellington, in Huntingdonshire; and also, he gave to his grandson John Wright, all his *estate,* &c., called the Coal-yard, in the parish of St. Giles, London; and he gave to his grandson James Camper, (who was his heir at law,) the house he lived in, and also his houses and land called Castle Yard, in Holborn, London: it was held that James Wright took only an estate for life in the lands in Essex, in respect of which the testator had not used the word "estate," which in two of the other devises was held to carry a fee.

A striking instance of the application of the principle in question appears in the case of *Right* d. *Compton* v. *Compton* (*f*), where a testator devised to his son Thomas Compton, (his heir at law,) all his lands for life, and he gave to his grandson Thomas Compton, after the death of his father, all the north side of his Down Farm, being about two hundred and fifty acres; he gave to his granddaughter Frances, all the south part, being about two hundred and forty acres; he gave unto his grandsons George and Edmond, and his granddaughter Elizabeth, the upper part of the Lain Farm, being about two hundred acres, equally between them as long as they should remain single; but if either

(*d*) *Right* d. *Mitchell* v. *Sidebotham,* Dougl. 759.

(*e*) *Doe* d. *Child* v. *Wright,* 8 T. R. 64; see also 1 B. & P. N. R. 335, where the same construction was adopted by three of the Judges, with the reluctant concurrence of Sir *James Mansfield.*

(*f*) 9 East, 267.

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of them should marry, "*then to have paid by the other two* 10*l. a year for his or their life.*" He gave to Edward and John, and his granddaughters Mary and Ann, all that lower part of the Lain Farm, being about two hundred and forty acres, equally between them as long as they should live single; but if either of them married, *then* 10*l. a year for his or their life,* (but not said to be paid *by the others*). The testator also gave unto his son's wife 5*l.* a year out of each of the said farms, if she should survive him. It was contended that the words "to have paid *by the other two,*" used in the clause respecting the upper part of the Lain Farm, (and which had the effect of enlarging the estate of the devisees of that farm to a fee (*g*),) might be supplied in the devise of the lower farm, in which they were omitted; as there could be no plausible reason assigned for supposing that the testator meant to make a different disposition of one part of the same farm to certain of his grandchildren, from that which he had made of another part of the same farm to other of his grandchildren. But the Court decided that the devisees of the lower Lain Farm took an estate for life only. Lord *Ellenborough* said, "that the exposition of every will must be founded on the whole instrument and made ex antecedentibus et consequentibus, is one of the most prominent canons of testamentary construction; yet, where between the parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied the phrase or expressed himself imperfectly, the Court cannot go into one part of the will to determine the meaning of another *perfect in itself and without ambiguity,* and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction." And his Lordship subsequently said, that "from a testator having given persons in a certain degree of relationship to him a *fee-simple* in [part of] a certain farm, no conclusion, which can be relied upon, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm, where the words of the two devises are different: the more natural conclusion is,

Words not supplied in order to render uniform several devises of different parts of one farm, to persons in same relationship.

(*g*) Vide post, Vol. II., p. 250.

that, as his expressions are varied, they were altered because his intention in both cases was not the same."

So, in *Paice* v. *Archbishop of Canterbury* (*h*), where the words of the will were: "I give and bequeath to the Rev. Henry Taylor my farm and lands at Royston, to him and his heirs and assigns for ever, and I also give and bequeath to the said Rev. Henry Taylor my farm and manor at E." Lord *Eldon* held, that the devisee took only an estate for life in the farm and manor of E.; his Lordship said, that all the old rules against disinheriting an heir, except by plain words or necessary implication, were gone, if the contrary construction were to prevail.

Words enlarging estate of devisee not extended to other devises in the will;

Again, in the case of *Doe* d. *Ellam* v. *Westley* (*i*), where a testatrix gave several pecuniary legacies, prefacing each bequest with the word *Item*. "*Item*" she devised a messuage to J. E., and after his decease to his son. She then proceeded as follows: "*Item*, I give and bequeath unto M. W. all that my messuage or dwelling-house wherein I now dwell, with the garden, and all the appurtenances thereunto belonging; *and I also* give unto the said M. W. all my household goods and chattels, and implements of household within doors and without, *all for her own disposing, free will, and pleasure*, immediately after my decease;" it was held, that the words in italics were confined to the last section of the clause, and consequently that the devisee took only an estate for life in the messuage.

—nor words diminishing it;

[Again, in the case of *Walker* v. *Tipping* (*k*) where, amongst several legacies of 300*l.* each to the testator's grand-nephews, some of which were directed to be paid at particular ages, and others to be sunk in annuities for the lives of the respective legatees, there occurred two bequests as follows: "J. W., 300*l.* annuity for life." "Martha—, 300*l.*, an annuity for life." Sir *G. Turner*, V. C., held, that he could not read these bequests as if they were gifts of sums of 300*l.* *to be sunk* in annuities for the

(*h*) 14 Ves. 366; [see *Doe* d. *Crutchfield* v. *Pearce*, 1 Pri. 353.]

(*i*) 4 B. & Cr. 667; [see also *Anon.*, Moo. 52; *Gower* v. *Towers*, 26 Beav. 81. But a devise thus, "I give Blackacre to C. and his heirs, *and also* Whiteacre" (not repeating the devisee's name and the verb of gift), gives C. the fee in Whiteacre; per *Levinz*, J., 1 Mod. 130. However, in *Willis* v. *Curtois*, 1 Beav. 189, where a testator gave to A. "his carriages, horses, &c., and chattels in and about his house at M.; *and also* his household goods and furniture, pictures, plate, &c., and likewise his watches and personal ornaments;" Lord *Langdale*, M. R., held that A. was entitled to all the testator's household goods, &c., and not those only which were at his house at M. As to the force of the word "item," or "also," see *Hopewell* v. *Acland*, 1 Salk. 239: of the word "likewise," *Paylor* v. *Pegg*, 24 Beav. 105.

(*k*) 9 Hare, 800.

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[lives of the legatees, but must understand them in their plain and obvious sense as giving annuities of 300*l.*

—nor in codicil.

Still less can the words of a devise contained in a will be extended to modify the effect of an independent devise contained in a codicil (*l*).]

Effect, where clauses of will are numerically arranged.

But where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems, they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxta-position. As, in *Fenny* d. *Collings* v. *Ewestace* (*m*), where a testator devised, "first," to his wife, all his household goods, &c., to her and her heirs for ever; *also*, he gave to his wife three cow commons, to her and her heirs for ever. "*2ndly.*" To his two nephews, J. and T. C., all that piece of land called P.; *also*, he gave to his nephews, J. and T. C., all that piece of land called L., to be equally divided between them as tenants in common, *and to their several heirs and assigns for ever.* "*3rdly*," as follows: "I give unto my nephew J. D. all that my house and premises at P., in the occupation of R.; I *also* give unto my nephew J. D. all that my land in the parishes of P. and A., in the occupation of J. T. *to him my said nephew J. D., his heirs and assigns for ever.*" The question was, whether the words of limitation in the last devise applied to the lands in the occupation of R., or were confined to those immediately preceding, i. e. in the occupation of J. T.; and it was held that they applied to both. Lord *Ellenborough* said, "If it had not been for the numerical arrangement, there might have been some difficulty, but that removes it. It seems clear, from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

Words may be transposed, when.

II. *As to the Transposition of Words and Clauses.*—It is quite clear that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being (*n*) transposed, the Courts are warranted in making that transposition.

[(*l*) *Biss* v. *Smith*, 2 H. & N. 105; *Grimson* v. *Downing*, 4 Drew. 132.]

(*m*) 4 M. & Sel. 58; [see also *Child* v. *Elsworth*, 2 D. M. & G. 679.]

(*n*) See *Green* v. *Hayman*, 2 Ch. Cas. 10; *Sparke* v. *Purnell*, Hob. 75; *Cole* v. *Rawlinson*, 1 Salk. 236; *East* v. *Cook*, 2 Ves. 32; *Duke of Marlborough* v. *Lord Godolphin*, ib. 74; [*Gibson* v. *Lord Montfort*, 1 ib. 490; *Mohun* v. *Mohun*, 1 Swanst.

Instances of transposition.

Thus, where (*o*) A. devised all that his messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, in the parish of *M. R., then in the occupation of T. W.*, except one meadow, called Floodgate Meadow; and it appeared that T. W. was in possession of the messuage, and a small part only of the lands in Blythbury, *and not of Floodgate Meadow;* it was held, that the words "now in the occupation of T. W." might be transposed and applied to the dwelling-house according to the fact, which would render the whole consistent; whereas, without this transposition, the exception of Floodgate Meadow was senseless and nugatory, as it had never been in the occupation of T. W. The effect consequently was, that the devise extended to all the lands in Blythbury, except Floodgate Meadow, whether in the occupation of T. W. or not.

Words transposed in compliance with context.

So, where (*p*) the devise was in the following words: "I devise all my hereditaments in Standon unto my sister Elizabeth Thorley and to her daughters Ann Shaw and Frances Thorley, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint tenants, *for and during the life of my said sister Elizabeth Thorley;* and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments *so devised to my said sister for life as aforesaid*, unto her said two daughters Ann Shaw and Frances Thorley, their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." It was contended, that under this devise the daughters of the testator's sister took estates pur autre vie for the life of their mother concurrently with her as tenants in common; and *as to one third* with remainder in fee to the daughters, leaving the reversion in fee in the other two thirds undisposed of; but it was held, that the daughters took estates in fee in *the entirety* expectant on the decease of their mother. Lord *Ellenborough* said, "The testator has thrown together a heap of words, the sense and meaning of which he did

[201; *Wilson* v. *Eden*, 19 L. J., Q. B. 104. If the clause or expression be sensible and not contradictory, its transposition would either alter the sense of the will, or it would not; if the former, it is not allowable, (*Key* v. *Key*, 1 Jur. N. S. 372,) except to effectuate a clearly-expressed intention of the testator (as in *Moseley* v. *Massey*, post); if the latter, it is unnecessary, for in such cases as *Blamire* v. *Geldart*, 16 Ves. 314; *Tiley* v. *Smith*, 1 Coll. 434, and the like, the so-called transposition is not such as we are here considering, but only another way of putting what is already sufficiently manifested by the words of the will as they stand.]

(*o*) *Marshall* v. *Hopkins*, 15 East, 309.

(*p*) *Doe* d. *Wolfe* v. *Allcock*, 1 B. & Ald. 137.

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not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way, as, if *taken in the order in which they stand, they do not convey any meaning;* yet, in favour of common sense, we may take the liberty of transposing them, according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labour of the argument has been, to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder; whereas, his meaning evidently was to dispose of the whole."

Observations upon *Doe* v. *Allcock*.

That the construction adopted by [Lord *Ellenborough* and *Abbott*, J.] accorded with the intention of the testator, is highly probable; and if, as his Lordship suggested, the words taken in the order in which they stood did not convey *any* meaning, the established rules of construction clearly authorized the transposition. But the difficulty was in saying that the words *were* unmeaning in their actual order; for it is submitted, that the will, read in that order, contained a clear and express devise to the three devisees for the life of the mother, remainder as to one-third to the two daughters in fee; and had the testator deliberately intended to confine his disposition to those estates, he could hardly have expressed himself in more technical or formal language. The construction indeed was apparently absurd, but let it be remembered that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation (*q*). However, the case was *professedly* [referred by those eminent Judges to] the principle before laid down, and may, therefore, properly be treated as an authority in favour of that principle (*r*).

Transposition of the subject of devise.

Another case of transposition sometimes occurs, where a testator has devised lands at A. to B., and lands at C. to D., and it appears by the fact of the limitations of each devise being exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each instance, placed the devised estate in the position intended to have been occupied by the other.

(*q*) *Mason* v. *Robinson*, 2 S. & St. 295.

[(*r*) It ought, however, to be mentioned, that *Holroyd*, J., while concurring in the decision, rested his judgment on the ground that the words "equally to be divided . . . . . Elizabeth Thorley," might be read as in a parenthesis; and so made to refer only to the mode of enjoyment during the life of E. Thorley, without affecting the quantity of estate to be taken by the devisees.]

As where (*s*) J. H.,—having an estate in the county of Monmouth, of which he was seised in fee to his own use, and another estate in the county of Radnor, of which he was also seised in fee subject to the trusts of his marriage settlement, (by which he had covenanted to convey the lands to the use of himself, remainder to his wife for life, remainder to his first and other sons in tail), both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle,—by his will, reciting that he was seised in fee of a messuage and lands at L., in the county of *Radnor*, and of a moiety of a messuage in the parish of O. R., in the county of *Radnor*, and that he was also seised of the reversion in fee, expectant on the death of his wife, and of his son without issue, of lands in the counties of *Monmouth* and *Northumberland*, (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own,) devised his said estate in the said county of *Radnor* to his wife for life, remainder to his only son for life, remainder to his (the son's) sons and daughters in tail, in strict settlement, remainder to his own daughter, &c., and devised the reversion of his said estates in the said county of Monmouth, *after the deaths of his wife and only son without issue*, to his daughter, &c. The will moreover referred to the lands devised as part of the estate of his late uncle. It was held that, comparing the devising clause with the recital and the facts, sufficient appeared to ascertain, beyond a possibility of doubt, that the devisor had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had respectively misdescribed their local situations.

Transposition of name.

The same principle, too, is applicable to the *objects* of a devise; for it has been held, that, where (*t*) a testatrix, having two nieces, Mary who had never been married, and Ann who had been married, and was dead, leaving two children, bequeathed one moiety in a certain portion of her property to *the children* of her niece *Mary*, and the other moiety to her niece *Ann;* it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the Court corrected the mistake.

(*s*) *Moseley* v. *Massey*, 8 East, 149; 8 Taunt. 306, 3 B. & Ald. 632.]
[conf. *Doe* d. *Le Chevalier* v. *Huthwaite*, (*t*) *Bradwin* v. *Harpur*, Amb. 374.

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As to changing words.

III. *As to changing Words.*—To alter the language of a testator is evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context. It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one (*u*); and, if this be clear, the alteration of language is warranted by the established principles of construction. The recent and much-discussed case of *Doe* v. *Gallini* (*x*) affords an apposite example of such a correction of phrase. The testator, after devising estates for life to his children, and, in case of the death of any of them, to their respective children living at their decease, for life, proceeded thus: "And from and after the decease of all the children of *each* of my said sons and daughters *without* issue, I give and devise the estate or 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 my said sons and daughters respectively, so long as there shall be any stock or offspring remaining." It was contended that the word "all" was to be changed into "any," and the words "without issue" to be read "leaving issue," in order to render the language of the will sensible and consistent with the context; and the Court did not hesitate in adopting this construction, though the point was not the main subject of discussion in the case.

Words "without issue" read *leaving* issue.

"Fourth" read "fifth."

[So, in the case of *Hart* v. *Tulk* (*y*), where a testator's general intention appeared to be to make an equal distribution of his property, (which he described in seven different schedules,) amongst his seven children; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner, that, if in a particular clause, the words "fourth sche-

[(*u*) *Taylor* v. *Richardson*, 2 Drew. 16.]

(*x*) 5 B. & Ad. 621, 3 Ad. & Ell. 340, 2 Nev. & M. 619, 4 Nev. & M. 893.

[(*y*) 2 D. M. & G. 300; and see *Philipps* v. *Chamberlaine*, 4 Ves. 50; *Dent* v. *Pepys*, 6 Mad. 350; *Bengough* v. *Edridge*, 1 Sim. 173; *Pasmore* v. *Huggins*, 21 Beav. 103, (where "future" might, it seems, have been read "former;") *Re Bayliss's Trust*, 17 Sim. 178, (where "are" was interpreted in a future sense); *Taylor v. Creagh*, 8 Ir. Ch. Rep. 281, (400*l.* read 500*l.*); compare *Thompson* v. *Whitelock*, 5 Jur. N. S. 991.]

[dule" were read literally, not only would the entire plan of the will, as indicated above, be frustrated, but the payment of the debts in the manner provided by the will would become impossible; Sir *J. Knight Bruce* and Lord *Cranworth*, L. Js., held that they were warranted in reading the word "fourth" as meaning "fifth," which the context showed was the change required to render the will consistent.]

The changing of words, however, has most frequently occurred in regard to expressions, which, in common parlance, are often used inaccurately; as the word "severally" for "respectively," of which we have an instance in the recent case of *Woodstock* v. *Shillito* (*z*), where a testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the *several* deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. The surviving daughters claimed to be entitled to the entire fund, under the express gift to the daughters living at the decease of the testator's widow; but Sir *L. Shadwell*, V. C., held, that the words "from and after the several deceases of my said daughters," were to be construed "from and after the decease of my daughters *respectively*." "It was clear," he said, "the testator meant to give to the children the share of their mother on her death."

"Several" used in sense of *respective*.

But by far the most numerous class of cases, exhibiting the *change* of a testator's words, are those in which the disjunctive "or" has been changed into the copulative "*and*," and vice versâ. It is obvious that these words are often used orally without a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the Courts have often been called upon to rectify blunders of this nature: so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognised by the Judges who decided them.

"Or," changed into *and*.

(*z*) 6 Sim. 416.

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In case of devise over, in event of death under twenty-one, *or* without issue.

It has been long settled that a devise of real estate to A. and his heirs, or, which would be the same in effect (*a*), to A. indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word "or" is construed "and," and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.

One of the earliest authorities for this construction is the case of *Soulle* v. *Gerrard* (*b*); where a testator, having four sons, devised lands to Richard, one of his sons, and his heirs, for ever; and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the land should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held, that in the event which had happened, the devise over to the three sons had failed; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was "all one as if the disjunctive *or* had been a copulative."

Principle of the rule;

The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one, (the age at which he would acquire a disposing competency,) he should take the estate absolutely, i. e. whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition.

—applicable to bequests of personalty.

And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable (as the reason of it evidently is) to bequests of personalty; and, therefore, in the case of a

[(*a*) *I. e.* under the act 1 Vict. c. 26; secus by the old law, under which moreover the subsequent words did not give an estate tail, *Eastman* v. *Baker*, 1 Taunt. 174. The rule seems otherwise untouched by the above act, *Morris* v. *Morris*, 17 Beav. 198.]

(*b*) Cro. El. 525; *S. C.* nom. *Sowell* v. *Garrett*, Moore, 422, pl. 590; *Price* v. *Hunt*, Pollex. 645; *Barker* v. *Suretees*, 2 Str. 1175; *Walsh* v. *Peterson*, 3 Atk. 193; *Doe* d. *Burnsall* v. *Davy*, 6 T. R. 34; *Fairfield* v. *Morgan*, 2 B. & P. N. R. 38; *Eastman* v. *Baker*, 1 Taunt. 174; *Right* v. *Day*, 16 East, 67; see also *Doe* d. *Herbert* v. *Selby*, 4 D. & Ry. 608, 2 B. & Cr. 926; [*Morrall* v. *Sutton*, 1 Phill. 551.]

legacy to A., and in case of his death under age *or* without issue, to B., it is not to be doubted that A. would retain the legacy, unless he died under age *and* without leaving issue at his decease.

And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority. As in the case of *Mytton* v. *Boodle* (*c*), where a testator bequeathed 5000*l.* to A. if he attained twenty-one; but if he should not attain that age, *or* die without leaving issue, then over. It was held, that A., on attaining twenty-one, was absolutely entitled.

In this case [and in that of *Framlingham* v. *Brand* (*d*),] the expression which raised the question in the will was repeated in the codicil—a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

Gift over in case of death during minority unmarried *or* without issue.

And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a devise in fee or bequest to A., with a gift over in case of his dying during minority *unmarried*, *or* without issue (*e*); and that, too, though the copulative "and" is found in company with the disjunctive "or" in the same will, indeed, in this very sentence. As in the case of *Miles* v. *Dyer* (*f*), where the bequest was to A. for life, and after her decease to her children on their attaining twenty-one; and in case they should die in the lifetime of A., *or* under twenty-one, *and* without leaving issue, then over, it was held that the interests of the children were not divested unless the three events happened.

It is obvious that the ground for changing *or* into *and* exists à fortiori where children or issue are the express objects of the prior gift; as where (*g*) there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently), in tail, with a devise over if he die *under twenty-one* OR *without children*.

Suggested extension of the rule.

It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding

(*c*) 6 Sim. 457.
(*d*) 3 Atk. 390.
(*e*) *Framlingham* v. *Brand*, 3 Atk. 390; [see *Doe* v. *Cooke*, 7 East, 269, post.]
(*f*) 5 Sim. 435, 8 Sim. 330.
(*g*) *Hasker* v. *Sutton*, 9 J. B. Moo. 2, 1 Bing. 501; [*Read* v. *Snell*, 2 Atk. 642. Still less if the word "and" were actually used, could it be changed to *or*, *Key* v. *Key*, 1 Jur. N. S. 372, notwithstanding *Brown* v. *Walker*, 2 L. J. O. S. 82, where the V. C. E. appears to have thought otherwise, though under the circumstances no change was made.]

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devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or, at least, who *might* take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to A., and if he shall die *in the lifetime of B.* OR *without issue* (*h*), [or should he die *without heir* OR *will* (*i*),] then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife.

Gift over on death under twenty-one, *or* without leaving a husband.

Thus, where (*k*) a testator bequeathed the residue of his personal estate to his daughter, her executors, &c., with a proviso, that in case his daughter happened to die under twenty-one, *or without leaving any husband* living at her death, then he gave several legacies, all which he directed to be paid within twelve calendar months after his decease, *in case of the death of his daughter under age as aforesaid;* and in such case he gave the residue to other persons—Sir *W. Grant*, M. R., held, that "or" was to be read "and," and that the expression "under age *as aforesaid*" meant not leaving a husband.

The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not be rejected or changed on account of their unreasonableness; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object who would, if the devisee

(*h*) *Wright* v. *Kemp*, 3 T. R. 470, [a case on a transaction inter vivos; *Denn* v. *Kemeys*, 9 East, 366; *Doe* d. *Knight* v. *Chaffey*, 16 M. & Wels. 656.

(*i*) *Green* v. *Harvey*, 1 Hare, 428; *Beachcroft* v. *Broome*, 4 T. R. 441; and see *Incorporated Society* v. *Richards*, 1 D. & War. 283; *Greated* v. *Greated*, 26 Beav. 621.]

(*k*) *Weddell* v. *Mundy*, 6 Ves. 341.

retained the estate, take an interest derivatively through him, the copulative construction prevails; though it is by no means equally clear that the rule is *confined* to such cases.

Whether rule applies to estates tail.

Lord *Hardwicke*, in *Brownsword* v. *Edwards* (*l*), expressed an opinion, that the construction in question was not applicable to estates tail, they being capable of a remainder. If so, the consequence is, that under a devise to A. and the heirs of his body, and if A. should die under twenty-one or without issue, then to B., the devised estate would pass from A., in case of his dying under age, though he might leave issue, being precisely the result which it is the especial object of the rule under consideration to prevent. Cases certainly may be adduced which lend some countenance to this supposed exception to the rule. As, in *Woodward* v. *Glasbrook* (*m*), where a testator devised a house to his sons, James and Thomas, and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided, that if any of his said children should die under twenty-one *or* unmarried, the part or share of him or her so dying should go to the survivors; and it was held by *Holt*, C. J., that the shares of two of the children dying unmarried, though they attained twenty-one, went to the devisees over.

Devise over if devisee in tail should die under twenty-one *or* unmarried.

In this case, the event was not dying without issue, but dying unmarried; either event, however, involves the extinction of the estate tail. If the changing of "or" into *and* is to be denied to these cases, it must be upon the ground that, as an estate in tail does not include the whole fee, the effect of construing the clause introducing the devise over conjunctively, would frequently be to produce intestacy. On the other hand, the argument in favour of the issue which prevailed in the class of cases before stated, applies à fortiori in these, where they are the express objects of the limitation. To defeat an estate tail, because the devisee died under age, though he left issue, is productive of, at least, as much absurdity and hardship as to defeat an estate in fee, made defeasible on the event of his dying under age or without issue. [However the authority of Lord *Hardwicke's* dictum was acknowledged and acted upon in the recent case of *Mortimer* v. *Hartley* (*n*), where the testator devised lands to John and Ann successively in tail (*o*), and "if it should please God to take

(*l*) 2 Ves. 249.
(*m*) 2 Vern. 388.
[(*n*) 6 Exch. 47; and see *S. C.* 3 De G. & S. 316.

(*o*) The Court of C. B. held upon the same will that the prior devise gave a fee, and then they read "or" as "and," 6 C. B. 819.]

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[away both Ann and John under age, *or* without leaving lawful issue" then over. The Court of Exchequer refused to read "or" as "and," holding that Ann having died under twenty-one, and without issue, and John having also died without issue, though he had attained twenty-one, yet the devise over took effect. *Parke*, B., in delivering the judgment of the Court, said, "If we abide by the words of the will, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under age; but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to Joseph on the determination of the estate tail: on the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under age, we defeat the clear and manifest intention to give the remainder to Joseph on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided." "None of the authorities," added the learned Baron, "apply to an estate tail, and we have Lord *Hardwicke's* high authority for distinguishing such a case."]

Case of *Brownsword* v. *Edwards*.

Indeed, in *Brownsword* v. *Edwards* (*p*), Lord *Hardwicke* went much further, as he actually changed "and" into "or," for the purpose of attaining a result directly the opposite of that for which the converse alteration was made in the preceding line of cases, namely, in order to give effect to the devise over, in the alternative of the devisee's dying either under twenty-one, or without issue. The devise was to trustees and their heirs, to receive the rents until A. should attain twenty-one; and if he should live to attain twenty-one, or have issue, then to A. and the heirs of his body; but if A. should die before twenty-one *and* without issue, then in trust for B. A. and B. were the testator's illegitimate son and daughter. A. attained twenty-one and died without issue. Lord *Hardwicke* decreed B. to be entitled. He observed, "In a devise to one and his heirs, and if he should die before twenty-one or without issue, then over, the Court has said, it was not the intent to disinherit the issue, and, therefore OR shall be considered *and;* but if the first limitation had been in tail, there would be no occasion to resort to that."

(*p*) 2 Ves. 243.

Remarks upon *Brownsword* v. *Edwards*.

It is observable that in this case (and the same remark applies to *Woodward* v. *Glasbrook*, [and *Mortimer* v. *Hartley*],) the event which happened was the death of the devisee in tail, above the prescribed age and without issue; and this circumstance, probably, had some influence upon the adjudication; for if the converse event had happened, i. e. if the devisee had died under twenty-one leaving issue, it is evident that Lord *Hardwicke* would not have listened for a moment to the suggestion of changing the testator's language, when it would have been attended with the consequence of excluding the issue; and yet, in allowing any weight to the accidental state of circumstances, his Lordship lost sight of the rule which teaches, that in construing wills *possible* as well as actual events are to be regarded (*q*).

[However, it is perhaps incorrect to say that Lord *Hardwicke* changed "and" into "or:" for he says, "There is no necessity in this case to transpose or supply words, but there is a plain natural construction upon these words, viz., if the said John shall happen to die before twenty-one, and also shall happen to die without issue: which construction plainly makes the dying without issue *to go through the whole*, and fully answers the intent, which was in that manner." And soon after, "my construction is this, viz., if he dies *without issue* before twenty-one, then over by way of executory devise (*r*); if he dies without issue *after twenty-one*, when the estate had vested in him, it would go by way of remainder." His Lordship, therefore, seems to have supplied in the first branch of the clause the words "without issue," and in the second the words "after twenty-one," thereby avoiding, indeed, a construction which would have deprived the son's issue of the estate, had the son, though having issue, died under twenty-one, but treating the language of the will in a manner unusually free. With regard to the devise over taking effect in one case as an executory devise, and in the other as a remainder, it may be observed, that it is in virtue of this difference alone that the words of the limitation, *as construed by the Court*, comprise distinct events, or rather point at distinct results. For, since a man must die without issue, (if at all,) either before or after the age of twenty-one,

(*q*) See *Earl of Radnor* v. *Shafto*, 11 Ves. 357; [In *Malcolm* v. *Taylor*, 2 R. & My. 416, Lord *Brougham* seems to have been prepared to follow Lord *Hardwicke*. But it was unnecessary for the decision of the case to do so.

(*r*) For the estate of the trustees is thereby cut short.]

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[that construction would, in an ordinary case of a vested estate tail, (for then the gift over must be a remainder,) reduce the clause introducing the limitation over to the simple phrase, "if he die without issue," a course involving the unwarrantable rejection of the other branch of the contingency, viz., the dying under twenty-one. Another reason (founded on a principle presently adverted to) against the decision in *Brownsword* v. *Edwards* is, that the words introducing the limitation over did, without any addition, precisely correspond with the terms describing the event upon which the estate was to vest in the prior devisee.]

"And" not changed into "or," in limitation over after an estate tail.

That this case is not an authority for changing "and" into "or," whenever a clause of this nature follows an estate tail, is evident from the subsequent case of *Doe* d. *Usher* v. *Jessep* (*s*), where A. devised to trustees and their heirs, in trust for his natural son J. and the heirs of his body, and if J. should die before he attained his age of twenty-one years, *and* without issue, then over. J. attained his majority, but died without issue. It was contended, on the authority of *Brownsword* v. *Edwards*, that "and" was to be read *or*, which would, in the event that had happened, give effect to the devise over; but Lord *Ellenborough*, though he admitted the cases to be very similar, (the only distinction being that the limitation over in the cited case was in favour of a daughter, who, without such a construction as was there put upon the word "and," would have been without a provision,) decided that the word was to be taken in its literal sense. [And in a recent case (*t*), Lord *Cranworth*, C., and upon appeal, the House of Lords (*u*), treating the two authorities as conflicting, declined to follow Lord *Hardwicke's* decision.]

But to return to the cases in which "or" has been construed *and*. The argument for this construction is, of course, very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in *either* of two alternative events, unless both events should happen, as in the case of a bequest to A. on his ttaining thirty-

(*s*) 12 East, 288; see also *Soulle* v. *Gerrard*, Cro. El. 525 (stated ante, p. 472), where it was considered (though, according to subsequent authorities, erroneously), that the first devisee had an estate tail.

[(*t*) *Pearson* v. *Rutter*, 3 D. M. & G. 398.

(*u*) *S. C.* nom. *Grey* v. *Pearson*, 6 H. of L. Ca. 106, dissentiente Lord *St. Leonards*. See also *Malcolm* v. *Malcolm*, 21 Beav. 225; *Seccombe* v. *Edwards*, 6 Jur. N. S. 642.]

one *or* marrying; and in case he should die under thirty-one *or* unmarried, then over: in such a case "or" is necessarily construed *and*, in order to make the limitation over consistent with the terms of the prior gift (*x*).

Gift on two events, with gift over on non-happening of those or another event.

[This species of argument applies with equal force to cases where property, being, as in the preceding case, expressly given to a person in either of two events, is according to the literal construction given over, unless not only those two events, but an additional event also happens. Thus, in *Grimshawe* v. *Pickup* (*y*), where a testator devised to the use of A. and his heirs, if he should attain twenty-three, *or* should be married with the consent of trustees; and in case A. should die before that age, *or*, being married with such consent as aforesaid, should die without issue, or such issue should die under twenty-one, Sir *L. Shadwell*, V. C., thought that, if it were necessary, the Court would read the word *or* as *and;* for it seemed to him a singular thing, that after having given the estate to his son in fee, absolutely in the event of his marrying with consent, the testator should give it over in the event of his son dying without leaving issue living at his death.

Where there is no prior gift.

The ground of all these decisions lay in the terms of the preceding gifts, and the inconsistency which a literal construction would have caused between those gifts and the executory gifts over. Where there is no prior gift, therefore, the ground fails: and accordingly a bequest to A. after the death of testator's mother *or* the second marriage, death or forfeiture of his wife, although the testator had made life-provisions for both his mother and wife, upon whose death therefore a certain amount of the estate would be set free, yet was held to take effect immediately on the death of the mother without waiting for the second marriage, death or forfeiture of the wife: in other words, the Court refused to read "or" as "and" (*z*). And a similar observation must be made with reference to the opposite change of "and" into "or" (*a*).

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head. Thus, in the case of *Long* v. *Dennis* (*b*), where

(*x*) *Grant* v. *Dyer*, 2 Dow, 87; [*Thompson* v. *Teulon*, 22 L. J. Ch. 243.

(*y*) 9 Sim. 591; and *Miles* v. *Dyer*, ante, p. 473; *Law* v. *Thorp*, 25 L. J. Ch. 75, 1 Jur. N. S. 1082; *Johnson* v. *Simcock*, 29 L. J. Ex. 478; *Bentley* v. *Meech*, 25 Beav. 197; *Hawkins* v. *Hawkins*, 7 Sim. 173.

(*z*) *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

(*a*) See *Malden* v. *Maine*, 2 Jur. N. S. 206.

(*b*) 4 Burr. 2052; see also *Nicholls* v. *Tolley*, 2 Vern. 388.

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"Or" read *and* on general context.

[there was a devise to A. for life, upon condition that if he should marry with any woman not having a competent fortune, *or* without the consent of trustees, the estate should not vest; the Court of K. B., considering that the testator meant to require the sanction of the trustees only in case A. married a woman without a competent fortune, and also that conditions in restraint of marriage were odious, held that the estate vested upon performance of either part of the condition; that is to say, they read the word "or" as *and*. And in another case, where a testator bequeathed (*c*) the produce of real estate, after the cesser of certain life-estates, to J. A. for life, and after his death to his eldest son for life, "and to remain entailed on the eldest son descended from J. A. and his posterity from one generation to another for ever: but in case of death *or* want of issue from the said J. A.," then over: Sir *L. Shadwell*, V. C., read the will as if it had been "in case of death *and* failure of issue," so as to agree with the general intent collected from the context, that all the descendants of J. A. were to take in succession.]

Gift to several objects alternatively.

Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive "or" occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty (*d*); but more frequently, in such cases, the word has been changed into *and*. As in *Richardson* v. *Spraag* (*e*), where a testatrix bequeathed money in trust for such of her daughters or daughters' children as should be living at her son's death—it was held, that the children, as well of the living as of the deceased daughters, came in for their shares, the word "or" being read *and*.

Gift to A. *or* his children, read *and*.

So, in the case of *Eccard* v. *Brooke* (*f*), where the bequest was to L. for his life, and after his decease to the nephews and nieces who should be then living, as well on the side of the testatrix's late husband as of her own, to wit, A. *or* her children, and B. *or* his children, and C. *or* his children, and D. *or* his children, and E. *or* her children, share and share alike. Of these five persons four died in the lifetime of L., three without issue and one leaving two children. The other was living and had no child. Sir *Lloyd Kenyon*, M. R., was of opinion that the word "or" must be considered as if it had been *and*, for that otherwise he must either adopt the argument that it meant to

[(*c*) *Monkhouse* v. *Monkhouse*, 3 Sim. 119; see also *Hawkes* v. *Baldwin*, 9 Sim. 355.]

(*d*) Ante, p. 343.

(*e*) 1 P. W. 434.

(*f*) 2 Cox, 213.

substitute the children of each nephew and niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground, or he must say that the clause was so uncertain that he could give it to none. His Honor held, that the two children of the deceased niece and the surviving niece took in equal thirds; but that, if the latter had had any children living, they would have taken equally with her.

Gift to A. *or* his issue.

Again, in the case of *Horridge* v. *Ferguson* (*g*), where the testatrix directed the residue of her property to be divided among such of the children of five persons (naming them) as should be born in lawful wedlock and living at her decease, *or* the issue of such of them as should be married—Sir *T. Plumer*, M. R., considered, that, in order to make sense of the passage, "or" might be construed *and*. All the children and grandchildren, therefore, took equally.

"Or" read "and" in order to prevent uncertainty.

[And in the case of *Maude* v. *Maude* (*h*), where a testator bequeathed a sum of money to his four sons A., B., C. and D., in trust for another son E. during his life, and after the death of E. without children upon trust to divide the money equally amongst the testator's said sons A., B., C. and D., *or* to such other of his sons as should afterwards be, in succession, trustees for E. under the proviso thereinafter contained, the Master of the Rolls held that, in order to avoid the difficulties of a literal construction, "or" must be read "and:" otherwise, if two of the four had died and two others had become trustees in their place, and then E. had died without issue, would the two original *or* the two new trustees take the fund? If they did not all take one class must be excluded.]

To A. *or* his heirs.

"Or," too, has often been changed into *and* where interposed between the name of the devisee and words of limitation introduced into the devise, as in the case of a devise of real estate to A. *or* his heirs, or to A. *or* the heirs of his body (*i*), [or to A. *or* his issue, where the word "issue" has been taken to be a word of limitation (*k*).] Whether the same construction would be applied to bequests of personalty to A. *or* his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest, (a difference, however, which the new law extinguishes,) there may

(*g*) Jac. 583.

[(*h*) 22 Beav. 290.]

(*i*) *Read* v. *Snell*, 2 Atk. 642; *Wright* v. *Wright*, 1 Ves. 409; [*Harris* v. *Davis*, 1 Coll. 416; *Greenway* v. *Greenway*, 29 L. J. Ch. 601.

(*k*) *Parkin* v. *Knight*, 15 Sim. 83; but of course not where substitution, and not succession, is clearly intended, see *Speakman* v. *Speakman*, 8 Hare, 180.]

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"Or" read as introducing a substituted gift.

seem to be more reason for contending that they are inserted diverso intuitu. The strong tendency of the modern cases certainly is to consider the word "or" as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in other words, as inserted in prospect of, and with a view to guard against, the failure of the gift by lapse.

To A. *or* her issue.

Thus, in the case of *Davenport* v. *Hanbury* (*l*), where the bequest was to A. *or* her issue, it seems to have been taken for granted that the word *or* was intended to substitute the issue in case of the death of A. in the testator's lifetime; the question discussed being, not *whether* issue were entitled, but *how*, i. e. whether per stirpes or per capita.

To legatees, *or* to their respective child or children.

So, in *Montagu* v. *Nucella* (*m*), where legacies were bequeathed to the testator's nephews and nieces, "*or* to their respective child or children," Lord *Gifford*, M. R., held the effect to be to vest the legacies absolutely in the children surviving the testator, and that the children were let in only as substitutes for their parent or parents dying in the testator's lifetime.

To the children of A., *or* to their heirs.

Lastly, in *Gittings* v. *Mac Dermott* (*n*), where a testator bequeathed certain stock to the children of his sister, the late Elizabeth Wall, OR *to their heirs*, Sir *J. Leach*, M. R., considered it to be clear that the word "or" implied a substitution, and that the next of kin (who, in regard to personalty, were considered to be designated by the word heirs) of such of the legatees as died in the testator's lifetime were entitled to their legacies; and Lord *Brougham* on appeal, affirmed his Honor's decree.

These cases, [which have been repeatedly followed (*o*),] seem to be inconsistent with, and therefore to have overruled the earlier case of *Newman* v. *Nightingale* (*p*), where a sum of 500*l.* was bequeathed to the sole use of A. *or of her children* for ever; and Lord *Thurlow* held, that the true construction of the words was, to give A. an interest for life, and the children to take it amongst them at her death.

(*l*) 3 Ves. 257; see also *Crooke* v. *De Vandes*, 9 Ves. 199; [and see the same force attributed to the word *and* in *Burrell* v. *Baskerfield*, 11 Beav. 534; *Tucker* v. *Billing*, 2 Jur. N. S. 483. Sed qu. as to the last case.]

(*m*) 1 Russ. 165.

(*n*) 2 My. & K. 69.

[(*o*) *Whitcher* v. *Penley*, 9 Beav. 477; *Penley* v. *Penley*, 12 ib. 547; *Chipchase* v. *Simpson*, 16 Sim. 485; *Salisbury* v. *Petty*, 3 Hare, 86; *Doody* v. *Higgins*, 9 Hare, App. 32; *Jacobs* v. *Jacobs*, 22 L. J. Ch. 668; *Amson* v. *Harris*, 19 Beav. 210; *Sparks* v. *Restal*, 24 ib. 218; *In re Craven*, 23 ib. 333; *Timins* v. *Stackhouse*, 27 ib. 434. In *Lachlan* v. *Reynolds*, 9 Hare, 796, where the gift was to such of the testator's children *as should be living at the time of distribution, or their heirs*, it was of course impossible to follow the above cases, because there was no gift but to such as were alive to receive; "heirs" therefore was, if anything, a word of limitation.]

(*p*) 1 Cox, 341.

Where, however, the words in question are applied to a bequest which may not take effect in possession on the testator's decease, another point presents itself, namely, whether the word "or" (admitting it to be introductory of a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's lifetime, or that of his dying in the interval between the death of the testator and the vesting in possession.

Whether words refer to contingency in lifetime of testator, or afterwards.

Such a question occurred in *Girdlestone* v. *Doe* (*q*), where a testator bequeathed 40*l.* per annum to A. for life, and after her decease to B. *or his heirs;* and it was held that B., who survived the testator, did not take the absolute interest, but that the latter words created a substitutional gift for his next of kin in the event of B. dying in the lifetime of A. (*r*)

[But if the gift be to the specified persons "or their heirs *or assigns*," it is clear that these words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest (*s*).

Gift to "assigns" implies an absolute interest.

Here we may distinguish those cases where, under a power to appoint in favor of A. *or* B. (A. and B. being either classes or individuals), a gift in default of appointment is implied between A. *and* B. (*t*). This is an apparent but not a real change of "or" into "and"; the true reason that A. and B. both take being that both are objects of the power, and no selection having been made by the person empowered to select, the Court divides the subject of gift equally between the objects of the power (*u*).

Power to appoint to A. *or* B. Implied gift to A. & B. in default.

Again, if the form of the gift be to *such* of several persons *as shall survive a given event "or"* the children of such of them as shall then be dead, the word "or" will be read "and" (*x*): and that in perfect consistency with the foregoing cases where the gift is in the first instance to several persons generally.]

Gift to persons living at a certain time "or" their children.

The word "and," too, is sometimes construed *or*. This change (being the converse of that which is exemplified by the preceding cases, [but, like it, generally made to favour the vesting of a

As to turning "and" into *or*.

(*q*) 2 Sim. 225; see also *Corbyn* v. *French*, 4 Ves. 418; [*Tidwell* v. *Ariel*, 3 Mad. 403;] *Hervey* v. *M'Laughlin*, 1 Price, 264; [*Price* v. *Lockley*, 6 Beav. 180; *Salisbury* v. *Petty*, 3 Hare, 86.]

(*r*) The further discussion of the point suggested by this case, however, will more properly find a place in the chapter as to Clauses of Substitution.

[(*s*) *In re Walton's Estate*, 25 L. J. Ch. 569, 2 Jur. N. S. 363.

(*t*) *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Longmore* v. *Broom*, 7 Ves. 124; *Burrough* v. *Philcox*, 5 My. & Cr. 73; *White's Trust*, 1 Johns. 656; the decision in *Jones* v. *Torin*, 6 Sim. 255, is inconsistent with these cases, and with the subsequent decision of the same Judge in *Penny* v. *Turner*, 15 Sim. 368 (affirmed 2 Phil. 493), which, however, he attempted to distinguish.

(*u*) 7 Ves. 128; 2 Phil. 495.

(*x*) *Shand* v. *Kidd*, 19 Beav. 310.

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[legacy, and not to devest it (*y*)],) may be called for by the general frame and context of the will, [as in the case of *Jackson* v. *Jackson* (*z*), where a testator bequeathed a leasehold house to his wife for her life; "and after her death, if his son R. should be living, then to him" (for his life), "but if he should be living at the time of the death of the testator's wife, *and* should then or thereafter have any issue male of his body, then all the right therein to go to R.; but if R. should die in the life of his (testator's) wife without leaving issue male," then over: Lord *Hardwicke* thought it clear on the face of the will that the testator did not intend the property to go over, unless R. died in the lifetime of the wife without issue male; and to effect this end he construed "and" as if it had been "or": the consequence of which was, that, though R. died in the lifetime of the wife, yet, as he left issue male, he took the estate absolutely (*a*).

So, in *Hetherington* v. *Oakman* (*b*), where the ultimate bequest after the failure of certain prior interests under the will, was to the testator's nephews and nieces *and* such of them as should be then living, it was impossible, upon any reasonable construction, to read the word "and" otherwise than as "or." So if a testator give a power to be exercised by A. *and* his heirs *and* assigns, the words as they stand requiring the heirs to join with the ancestor, would prevent a sale being ever made at all; for "nemo est hæres viventis:" "*and*" must therefore be read disjunctively (*c*).

And where a testator made a bequest after a specified period "to such of his grandchildren *and* their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read as "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator (*d*).

The change may also be called for] by the circumstance that a literal adherence to the testator's language occasions that one

[(*y*) See per *Wood*, V. C., *Day* v. *Day*, Kay, 708; *Maddison* v. *Chapman*, 3 De G. & J. 536.

(*z*) 1 Ves. 217. This is an analogous case to *Grant* v. *Dyer*, 2 Dow, 87, ante, p. 479. See *W* —— v. *B* —, 11 Beav. 621, stated post, vol. ii. p. 40.

(*a*) The Chancellor proceeded to say, that if R. had survived the wife, but had no issue then living, he would have taken only a life interest, and that by the express words of the gift; so that it seems the Court, in effect, struck out of the clause introducing the bequest over the words, "if he should be living at the time of the wife's death."

(*b*) 2 Y. & C. C. C. 299; see also *Haws* v. *Haws*, 1 Ves. 13, 1 Wils. 165; *Stubbs* v. *Sargon*, 2 Kee. 255; *Stapleton* v. *Stapleton*, 2 Sim. N. S. 216; *Davidson* v. *Rook*, 22 Beav. 206.

(*c*) *Jones* v. *Price*, 11 Sim. 557; see acc. 2 Sugd. Pow. 465, pl. 20, 7th ed.

(*d*) *Maynard* v. *Wright*, 26 Beav. 285.]

member of his apparently copulative sentence is included in, and, therefore, reduced to silence by another. On this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried *and* without issue.

Unmarried *and* without issue.

Thus, in *Wilson* v. *Bayly* (*e*), where a testator devised certain leasehold lands to trustees, in trust for his son John until his marriage, and then to make provision for his wife; and if John should have any issue, then to assign the premises to him, to enable him to make provision for his children; and if John should happen to have no issue lawfully begotten, in trust for testator's son Mark in like manner; it being his intention that, if his son should die before he was married, or, if he were married, and should have no issue lawfully begotten, then the lands should be enjoyed by Mark; and in case both his sons, Mark and John, should "happen to die unmarried, *and* neither of them should have any issue lawfully begotten," then over. Mark died unmarried. John married, but had no issue. The devise over was held to have taken effect, the clause being construed in the disjunctive.

So, in *Hepworth* v. *Taylor* (*f*), a bequest over, in case the legatees died unmarried *and* without issue, was held to take effect on the death of one married but without leaving issue.

"Unmarried *and* without issue."

Again, in the case of *Maberley* v. *Strode* (*g*), where the bequest was in trust for the testator's son A. for life, and after his decease for his children; but in case he should die unmarried *and* without issue, or having issue, they should all die, if sons, before they attained twenty-one, or, if daughters, before they attained twenty-one or were married, then over. A. married, but died without issue; and Sir *R. P. Arden*, M. R., held that the gift over took effect.

"Without being married and having children."

So, too, in *Bell* v. *Phyn* (*h*), where a residue was bequeathed equally between the testator's three children, and in case of the death of any of his children, (without being married *and* having children,) the share of the child so dying to be divided between the surviving children—Sir *W. Grant*, M. R., on the authority of the last case, held, that the word "and" was to be construed *or*, for as, legally speaking, there could be no children without a marriage, it was almost necessary, in order to give effect to all the words, to construe the copulative as disjunctive. [However,

(*e*) 3 B. P. C. Toml. 195.
(*f*) 1 Cox, 112.
(*g*) 3 Ves. 450.
(*h*) 7 Ves. 450.

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[the daughter whose share was in question having married and also had a child, it was unnecessary to decide the point.

Lastly, in the case of *Mackenzie* v. *King* (*i*), where real and personal property was given in trust for A. for life, and after her death for her children; but in the event of her not intermarrying *nor* having children; then the same property to be subject to her disposal by will or otherwise; Sir *K. Bruce*, V. C., held that "nor" (the component parts of which are "and not") must be read "or not," and that the fund was at A.'s disposal, in the event either of her remaining single, or marrying and not having a child.]

But though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is rendered inoperative, (since the fact of being unmarried includes the not having or leaving issue, which always means *lawful* issue,) yet, on the other hand, the disjunctive construction reduces to silence the word "unmarried;" for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words, if the estate is to go over on the non-happening of *either* of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone. In these cases, it will be observed, the disjunctive construction can never operate to let in the devisee over to the exclusion of the children or issue of the first taker, as in the class of cases before noticed; which accounts for the seeming anomaly of torturing the words in both instances to produce a contrary effect (*k*).

Whether "unmarried" means not *having been* married, or not being married at the time.

The word *unmarried* means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification; and it was considered as so used in the

[(*i*) 12 Jur. 787, 17 L. J. Ch. 448.]

(*k*) The cases of *Maberley* v. *Strode*, and *Bell* v. *Phyn*, were much canvassed in the case of *Dillon* v. *Harris*, 4 Bligh, N. S. 329; where Lord *Brougham* seemed very reluctant to consider them as general authorities for turning into *or* the word "and," occurring in a limitation over, in case of the prior legatee dying unmarried and without leaving lawful issue; his Lordship's opinion being that Sir *W. Grant*, in deciding *Bell* v. *Phyn*, upon the authority of *Maberley* v. *Strode*, did not sufficiently advert to the special circumstances of the latter case. The case in the House of Lords, however, did not raise the point, as the prior bequest was to take effect upon the legatee marrying with consent, and the bequest over was in case he should *so* die unmarried and without leaving lawful issue; which Lord *Brougham* thought referred to such a marriage as had been previously referred to, namely, marriage with consent; and as the legatee had married without consent and had left no issue, (so that, even according to the disjunctive construction, the bequest over failed,) the question did not arise.

four last cases, where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense (*l*), which has a two-fold advantage, that it removes the necessity of changing the particle "and" to "or," and gives effect to all the testator's words.

"Unmarried" construed to mean not having husband or wife *at the time.*

Thus, in the case of *Doe* d. *Everett* v. *Cooke* (*m*), where the bequest was to B. and his assigns (after the death or marriage of A.) for his life, and after his decease then to the child or children of B. by any future wife, his, her, or their executors, administrators and assigns; but the testator declared his will to be upon this further condition, that in case B. should die an infant unmarried *and* without issue, then over to C. and his children. B. attained his majority, and died, leaving a widow, but without having had issue; and it was held, that in these events the gift over failed. Lord *Ellenborough* said, "The most rational construction we can give this will is, to construe it as Lord *Hardwicke* did the devise in *Framlingham* v. *Brand* (*n*), as one contingency, namely, B.'s dying an infant, attended with two qualifications, viz. his dying *without leaving a wife surviving him*, or dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the Statute of Distributions with the next of kin, or that B. should be able to make a testamentary disposition in her favour; meaning, also, that if he left children, they should have the estate in preference to the wife; and that if he left neither wife nor children at his death during his minority, C. and his children should have the estate; but that if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children."

So, in the case of *Doe* d. *Baldwin* v. *Rawding* (*o*), where a testator devised his lands to his daughter and any other children he might leave, and to her or their heirs and assigns for ever; but in case his daughter and such other children as aforesaid should die *under the age of twenty-one years unmarried and without lawful issue*, then to his wife in fee. The daughter died

(*l*) The word "unmarried" is used in this sense in the stat. 3 W. & M. c. 11, s. 7, which provides, that "if any *unmarried* person, not having a child or children, shall be lawfully hired," &c.; as no one, *not having been* married can have children in the legal sense.

(*m*) 7 East, 269.

(*n*) 3 Atk. 390.

(*o*) 2 B. & Ald. 441.

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under age and without issue, but leaving a husband surviving; and it was held, on the authority of the last case, that the devise over failed.

"Unmarried" ought to be construed according to circumstances.

[As B. in the former case left a wife and the daughter in the latter case left a husband surviving, neither of them were "unmarried" in *any* sense, and it was therefore unnecessary to decide upon the actual meaning of the word. The former case shows the opinion of Lord *Ellenborough*; but in the latter case, *Bayley* and *Holroyd*, JJ., seem to have thought that either of the two meanings might be ascribed to it according to circumstances, and Lord *Cottenham* was of the same opinion (*p*).

Limitation to next of kin of feme coverte as if she had died "unmarried."

Where personal property is limited, in case of the death of a married woman in her husband's lifetime, to such persons as would have been entitled thereto in case she had died intestate and unmarried, the word "unmarried" is always held to mean, "not having a husband at the time of her death (*q*)." To ascribe to the word its other meaning would plainly exclude the children of the marriage; and slight circumstances, such as an express provision made for the children in another part of the will, either out of the same (*r*), or a different (*s*) fund, will not control the rule.

And the mere circumstance that the woman is unmarried at the date of the will does not supply a reason for putting a different construction on the word, since when it occurs with such a context it is clear that her marriage at some future time is

Gift to person

contemplated (*t*). On the other hand, where a legacy is given to a

[(*p*) *Maugham* v. *Vincent*, 9 L. J. N. S. Ch. 329, 4 Jur. 452.

(*q*) *Maugham* v. *Vincent*, supra; see also *Hoare* v. *Barnes*, 3 B. C. C. 317, ed. by Eden, n. (*a*); *Hardwick* v. *Thurston*, 4 Russ. 380; *Pratt* v. *Mathew*, 22 Beav. 328; and on app. 2 Jur. N. S. 1055, 25 L. J. Ch. 686; *In re Gratton's Trusts*, 3 Jur. N. S. 684, 26 L. J. Ch. 648; *In re Saunders' Trust*, 3 Kay & J. 152. In the last case, the lady was twice married, and the words in question occurred in the settlement on her first marriage: her second husband survived her. The children of the second marriage were held entitled.

(*r*) *Coventry* v. *Earl of Lauderdale*, 10 Jur. 793; *Pratt* v. *Mathew*, sup. Some expressions in the judgment of Sir *W. P. Wood*, V. C., in *Mitchell* v. *Colls*, 1 Johns. 674, seem to favour the conclusion, that the construction is different where the provision for the children is *in all events* absolute. Now where the whole fund is previously given to the children absolutely on their birth, no question can arise, because the gift over would of course only provide for the event of there being no children, and the fund would be already exhausted by the gift to the children: they would take under the express gift to them, and need not resort to the ultimate limitation to next of kin. The only case where the question can possibly arise is, where an absolute provision is made for the children out of another fund. But the authorities give no countenance to the doctrine that in such a case the children would be excluded from the fund in regard to which the gift to next of kin occurs.

(*s*) *Re Norman's Trust*, 3 D. M. & G. 965.

(*t*) *Day* v. *Barnard*, 9 W. R. 136.

[person who at the date of the will has never been married, and the gift is made conditional on the legatee being "unmarried," it may well be that the testator intends the legacy to be conditional on the continuance of the legatee in the same status. And if the purpose of the legacy be to provide the testator's unmarried daughter with an outfit, and he speaks of her (though in a different part of the will) as "still unmarried," the intention is put beyond a doubt (*u*).

not married at date of will on condition of her being unmarried.

The term "unmarried" is a designatio personæ; and, if once a person is entitled to participate in a fund by filling the character of an unmarried person, he will not lose that right if he subsequently marries (*x*).

The reader will have observed that in the majority of cases where "and" has been construed disjunctively, it has been in order to favour the vesting of a legacy, and not in order to defeat a previously vested gift. Accordingly, in the case of *Day* v. *Day* (*y*), where a testator bequeathed the interest of his residuary personal estate to his wife for life, and after her death to his brother for life, and after the death of the survivor, the capital to A., subject to the payment of 1000*l.* each to B., C. and D., which the testator gave to them to be paid to each of them at the end of twelve months next *after the decease of the survivor* of his wife and brother; provided, that if either of the said B., C. and D. should die "in the lifetime of my said wife *and* my said brother," his legacy should lapse. Sir *W. P. Wood*, V. C., refused to read "and" as "or," and thereby cause a lapse of B.'s legacy, who had survived the wife, but died before the brother (*z*).]

"And" not construed "or" where a previous gift would be thereby divested.

[(*u*) *Re Thistlethwayte's Trust*, 24 L. J. Ch. 713; and see *Heywood* v. *Heywood*, 30 L. J. Ch. 155.

(*x*) *Jubber* v. *Jubber*, 9 Sim. 503; see *Niblock* v. *Garratt*, ante, p. 304; *Hall* v. *Robertson*, 4 D. M. & G. 781.

(*y*) Kay, 703.

(*z*) It was held that "die in the lifetime of my said wife and my said brother" meant "die in their *joint* lifetime:" and *Brudnell's case*, 5 Co. 9, was cited.

CHAPTER XVII.

ESTATES ARISING BY IMPLICATION (*a*).

I. *Effect of Recitals.*
II. *Implication from Devises and Bequests on Death of a Person simply.*
III. — *on Death combined with some Contingency, and under other varieties of Context.*
IV. *As to implying Trust from Devise of Legal Estate.*
V. *Implication from Powers of Selection and Distribution.*
VI. *Implication of Estates Tail.*
VII. *Implication of Gifts to Children.*

Recitals, whether they create an actual gift.

I. SOMETIMES a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favour of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled.

Thus, where (*b*) a testator bequeathed unto A., his wife, 600*l.*, to be paid to W., saying it was for payment of lands lately purchased of W., *and was already estated as part of a jointure to A., his wife during her life*, being of the value of 67*l. per annum;* that of Wiskow, York, and Malton, the lands there amounting to the yearly value of 63*l.*, in all, 130*l.*, which, *being also estated upon A., his wife, was in full of her jointure.* It appeared that these lands had not been settled on the wife. And it was held by *Pollexfen*, C. J., *Rokeby*, and *Ventris*, (*Powell*, J., dissentiente,) that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was

[(*a*) Nothing contrary to law can be implied, per Sir *G. Turner*, L. J., 26 L. J. Bankr. 83.]

(*b*) *Wright* v. *Wyvell*, 2 Vent. 56.

estated in it before." *Powell*, J., relied upon the case in Moore, 31, in which "I have made a lease to J. S., at 10*s.* rent," was held to be a good devise; but the other Judges considered the case to be of little authority.

So, where (*c*) J. S., tenant for life, with remainder to his wife for life, remainder to his own right heirs, expressed himself in his will as follows: "*Item*, my land at W. my wife Mary is to enjoy for her life, and after her death it of right goes to my daughter E. for ever, provided she has heirs." The Court held that the first clause was not a devise to the wife, for the lands were settled upon her for life; and what was said as to the daughter was only a declaration of the devisor what the condition of the estate was, and how she was to enjoy it; and he could not say of right who was to enjoy them, if she claimed under the will.

Again, where (*d*) B., by his will, reciting that he was entitled for life, under the will of A., to the advowson of the rectory of D., with remainders over, "subject to a direction in the said will, that my brother J. D. shall be presented to said rectory when it shall next become vacant, which it is my wish may be complied with; now, I hereby declare it to be my desire and earnest wish, that in case upon the vacancy of the said living the said J. D. shall not be then living, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted said presentation, then" A. P. was to be presented. The fact was, that, under the will of A., J. D. was only entitled to the presentation on a certain contingency, which had not happened. The question then arose, whether the expressions in the will of B. raised a gift in him by implication, so as to put the persons actually entitled under the will of A., who took benefits under the will of B., to their election. Lord *Eldon* decided in the negative, his Lordship observing, that he found no authority for holding mere recital, without more, to amount to gift, or demonstration of intention to give.

[So, also, in *Adams* v. *Adams* (*e*), a devise and bequest to trustees of real and personal estate, subject to the dower and

Adams v. *Adams.*

(*c*) *Wright* alias *Right* v. *Hammond*, 1 Stra. 427, 1 Com. Rep. 231, 8 Vin. Abr. 110, Devise, L. 2, pl. 32, 2 Eq. Ab. 338, pl. 11.

(*d*) *Dashwood* v. *Peyton*, 18 Ves. 27; and see *Doe* d. *Vessey* v. *Wilkinson*, 2 T. R. 209, stated post; [*Smith* v. *Maitland*, 1 Ves. jun. 362; *Langslow* v. *Langslow*, 21 Beav. 552;] but see also *Poulson* v. *Wellington*, 2 P. W. 533; *Wilson* v. *Piggott*, 2 Ves. jun. 351, both which, however, arose on dispositions by deed.

[(*e*) 1 Hare, 537; see also *Doolan* v. *Smith*, 3 J. & Lat. 547; *Ralph* v. *Watson*, 9 L. J. Ch. 328.

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[thirds at common law of the testator's wife in and out of his real estates, (the testator's interest therein being an equity of redemption and not liable to dower,) upon trust to receive the income, and pay the same or the overplus thereof after deducting the dower or thirds of his said wife for the maintenance of his children, was held not to give the wife any interest by implication in the property.

Where gifts are parcelled out on faith of correctness of recital.

So far we see that a recital of a person's supposed rights, independently of the will (without any expression except such as can be gathered from such recital) of an intention to benefit him, will not confer on him those rights. But the result is different where the circumstances are such as to show that the testator has parcelled out his gifts on the faith of the correctness of the recital. Thus, in *Westcott* v. *Culliford* (*f*), where a testatrix had taken, under her husband's will, freehold and leasehold estate, the freehold charged with a legacy of 600*l.* to T., and had devised the leasehold estate as "her freehold lands called B.," to the plaintiff in fee, "subject, in conjunction with her M. estate, to the sum of 600*l.*, given to T. by the will of her husband;" and the freehold estate as her close of M. to the defendant in fee, "subject to the payment of the said sum of 600*l.* to T. in conjunction with the said hereditaments called B." Sir *J. Wigram*, V. C., held that the plaintiff must pay his proportion of the charge. He said, "I am bound to attribute to the testatrix a definite and deliberate intention to benefit the plaintiff and defendant respectively, her two specific devisees, in some ascertained proportions, and that such amount has been calculated upon the assumption that B. as well as M. is to bear some proportion of the charge." And again, "The clauses relating to M. unequivocally declare an intention (proceeding doubtless from mistake) that B. is, in favour of M., to be treated as originally charged, in conjunction with M., with the legacy. The intention of the testatrix, so to determine the amount and character of the benefits conferred by herself on her two specific devisees, is placed beyond the reach of argument, and the declaration respecting M. is the key to her real intention." If the M. estate had been left to descend or had been given under a general residuary clause, the Vice-Chancellor thought that the B. estate might not have been impliedly charged.]

Westcott v. *Culliford.*

Reference by

And it seems that if a testator unequivocally refer to a dispo-

[(*f*) 3 Hare, 265.

sition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated. [In such cases "the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication" (*g*).]

testator to a disposition made in that his will.

Thus, where (*h*) a testator bequeathed one moiety of certain leasehold estates to E.; and if she should die before twenty-one, to G.; and if he should die before a certain event, to another person; and after her death, to A.; and provided that in case A. should die without issue, and E. or G. should be then living, or either of them, the *said* moiety of his leasehold messuages, *before given to the said A., should go to E. and G.* Sir *Thomas Sewell*, M. R., considered it to be quite clear that the second devise related to the other moiety not before devised, as the manner in which it was given was inconsistent with the disposition of the first moiety, which A. was not to take until after the death of E. and G. His Honor further held, that the Court would imply a gift of the second moiety to A. and her issue, ([the issue taking, since there was no gift over except on the death of A. without issue,]) with contingent limitations over. There could, he said, be no doubt of the intention, and the words of gift being omitted by mistake, the Court would supply them.

[But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property (*i*).

Again, in *Jordan* v. *Fortescue* (*k*), under a gift by codicil of "500*l.*, in addition to 1,500*l.* before bequeathed" to the same

Jordan v. *Fortescue.*

[(*g*) Per Sir *J. Wigram*, V.C., *Adams* v. *Adams*, 1 Hare, 540.]

(*h*) *Bibin* v. *Walker*, Amb. 661.

[(*i*) *Wylie* v. *Wylie*, 29 L. J. Ch. 341. See also cases cited, vol. ii. p. 260, n. (*u*), showing the inefficacy of the word "estate," occurring in the introductory clause of a will to pass the fee-simple.

(*k*) 10 Beav. 259; see also *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; *Edmunds* v. *Waugh*, 4 Drew. 275.

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[person, there having, in fact, been only two legacies of 500*l.* each bequeathed to him by will and first codicil, it was held that there was a gift by implication of 2,000*l.* But it must be remembered, that though words such as those used in the last case may by implication effect an increase in the amount of the first gift, yet the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having any operation where their effect would be by implication to diminish the first gift (*l*).

Intention to give what will make up a certain sum.

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him. Thus, in the case of *Ouseley* v. *Anstruther* (*m*), where a testator, reciting that under a settlement his wife would have an income of 1,560*l.*, directed his trustees to add an annuity of 440*l.*, so as to raise his wife's jointure to 2,000*l.*; the income under the settlement being less than was supposed, the wife was, nevertheless, held entitled to have it made up to 2,000*l.* In the converse case of the income being more than the testator supposed, the wife would have been entitled only to the 2,000*l.* (*n*).

On the other hand, in the case of *Frederick* v. *Hall* (*o*), where a testator bequeathed all his personal estate, except his plate, "which is hereinafter given to my daughter," to his wife, with limitations over after her decease, and he took no further notice of the plate, Lord *Thurlow* thought it was undisposed of, because the context made it uncertain what interest the daughter was to take. The case thus depends on peculiar circumstances.]

And even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail. An early case (*p*) presents a very nice question of this nature.

Reference to a person as heir held to create a devise by implication.

A testator having issue by C. three daughters, S., A. and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying to the heir 10*s.* during the term, and

[(*l*) *Mann* v. *Fuller*, Kay, 624; *Gordon* v. *Hoffman*, 7 Sim. 29, ante, p. 169.
(*m*) 10 Beav. 459. Compare *Thompson* v. *Whitelock*, 5 Jur. N. S. 991.
(*n*) *Milner* v. *Milner*, 1 Ves. 106; *Trevor* v. *Trevor*, 5 Russ. 24.
(*o*) 1 Ves. jun. 396.]
(*p*) *Tilley* v. *Collyer*, 3 Keb. 589.

to the rest, after fifteen years old, 20*s.* a-piece, and the heir to pay to A. and E. 100*l.* a-piece, 40*l.* at the decease of the wife, &c.; and if S. his heir died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E., &c. It was argued that S. took nothing under the will by implication, there being no express devise to her. But, on the other side, it was contended that S. was sole heir; for it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise A., the younger daughter, would have equal share in the land and also the legacies. Lord C. J. *Hale*—"The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir (*q*)."

But the disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

Erroneous reference in codicil to the disposition of the will.

Thus, where (*r*) a testator, after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate, to other persons. In a codicil, executed on the same day, he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his "wife and her assigns, in the premises at *Wrentnall*, anything in the foregoing will to the contrary notwithstanding." It was contended, that the widow was entitled to the Wrentnall estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the Court decided against the widow's claim. Lord *Kenyon* said, that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word "Wrentnall" was written in the codicil instead of the word "Northwood."

(*q*) See *Taylor* v. *Webb*, Sty. 331, ante, p. 331, n. [Compare *Jackson* v. *Craig*, 15 Jur. 811.]

(*r*) *Skerratt* v. *Oakley*, 7 T. R. 492.

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[So in the case of *Vaughan* v. *Foakes* (*s*), where a testatrix bequeathed the residue of her estate to A., and by a codicil, reciting that gift, and that A. might die before her, she in that case appointed B. and C. her residuary legatees; and afterwards the testatrix made a second codicil to "her former one," as follows:—"As the death of Mrs. W. (the mother of B. and C.) has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to D." It was held by Lord *Langdale*, M. R., that the first codicil was not disturbed by the second. "There is a misrecital," he said, "of what she had previously given; she recites that as an absolute which is only a contingent gift; if the word *may* had been used, instead of *will*, the recital would have been in exact conformity with the prior gift."

Misrecital of disposition in the same instrument.

But this principle of construction is not confined to the case of a will and codicil; it is equally applicable to a misrecital occurring in the same instrument as the disposition sought to be disturbed. Thus, in the case of *Smith* v. *Fitzgerald* (*t*), it was held by Sir *W. Grant*, M. R., that a contingent gift was not made absolute by a subsequent recital thereof as such occurring in the same will. "The language," said the learned Judge, "refers to something as already done, something that he had given or supposed he had given to them. If in the preceding part there was nothing that could in any way answer the description of what he here says he had willed to them, there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest." We have already seen (*u*) that the misrecital of a legacy as previously given may amount to a distinct bequest, where the mistake consists in miscalculation of the amount of the legacy; it being supposed, probably, that the testator is more likely to forget what he has previously given than to err in a simple arithmetical process.

[(*s*) 1 Kee. 58; see also *Bamfield* v. *Popham*, 1 P. W. 54, 2nd point.
(*t*) 3 V. & B. 2; see also *Phillips* v. *Chamberlaine*, 4 Ves. 51.
(*u*) *Jordan* v. *Fortescue*, 10 Beav. 259.

Ambiguity in will controlled by recital in codicil.

[Where, however, the terms of the prior disposition are themselves ambiguous, their construction may properly be guided by a recital couched in more precise language in a codicil. Thus, in the case of *Darley* v. *Martin* (*x*), where a testator bequeathed leaseholds to A. for life, and after her death to her issue, and "in default of such issue," to B.; and, by a codicil, recited that he had bequeathed the leaseholds to B. after the death of A., and "in default of her *leaving* lawful issue;" it was held, that the gift over in the will being capable of importing a bequest over if no issue were living at the death, it ought to be inferred that the testator employed it in that sense, because in the codicil he referred to it as if it were a gift over in default of A.'s *leaving* issue.]

Necessary implication, what.

II. It is a well-known maxim, that an heir-at-law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*y*). In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise *to the testator's heir* after the death of A., will confer on A. an estate for life by implication; but that, under a devise to B., *a stranger*, after the death of A., no estate will arise to A. by implication (*z*). This is an exact illustration of the difference between necessary implication and conjecture. In the former case, the inference that the testator intends to give an estate

[(*x*) 13 C. B. 683; see also per Lord *Brougham*, 10 Cl. & Fin. 17.

(*y*) 1 V. & B. 466; "necessary implication is that which leaves no room to doubt," per Lord *Mansfield*, in *Jones* v. *Morgan*, Fearne, C. R. App. No. III.; and see 3 Ves. 113.]

(*z*) Year Book, 13 Hen. 7, fol. 17: Bro. Ab. Dev. pl. 52; 8 Vin. 214, pl. 5; 2 Freem. 270; T. Jon. 98; Vaugh. 263; 1 Eq. Ab. 197, pl. 6; 1 Vern. 22; 2 Vern. 572; 5 Ves. 804; 18 Ves. 40; 1 Mer. 414; 1 S. & St. 544; 5 B. & Ald. 722; 9 B. & Cr. 218; but see contra, 1 P. W. 472; 2 Eq. Ab. 343, pl. 5, 363, pl. 14, which seems inconsistent with, and is overborne by, the mass of authorities. The point, indeed, was not definitively disposed of.

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for life to A. is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir at the death of A., and yet that the heir should have it in the meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A. as the period when the devise to B. was to take effect in possession, the testator intended A. to be the prior tenant for life, yet it is *possible* to suppose that, intending the land to go to the heir during the life of A., he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B. upon the death of A., raises an implied estate in A.; but such *dicta*, even if accurately reported (which is often doubtful), cannot weigh against the current of authorities, grounded on acknowledged principles of law (*a*).

Devise to the heir after the death of A. gives A. an estate by implication.

Devisee need not be described as heir.

Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise "to my eldest son B. after the death of A.," would raise an implied estate for life in A., the fact being that B. is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A. and B., devise real estate to B. (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A., the elder son, without issue in the testator's lifetime, the younger son (i. e. the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife

Whether devisee must be heir *at the death*.

(*a*) *Ex parte Rogers*, 2 Mad. 455; see also *Den* d. *Franklin* v. *Trout*, 15 East, 398, where, however, the person in whose favour it was said the implied gift would have been raised, was himself heir, and the point, therefore, could not have arisen.

would take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the date of the will, and not otherwise. Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

To one of several coheirs.

It has been said that the implication arises in the case of a devise as well to one of several coheirs, as to a sole heir; and, therefore, that where a man devises to one of his two daughters, (his coheiresses), after the death of his wife, she (the wife) takes an estate for life by implication (*b*). This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to *one* of his coheiresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the case in which Lord *Cowper* advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to *arguendo* as a settled rule of law in another case (*c*).

Devise to heir and others after the death of A.

In cases, too, which are the converse of the last, viz. where there is a devise to the heir and other persons after the decease of A., the implication would seem, looking at the reason and principle of the doctrine, not to arise (as there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime), yet the contrary was decided in the case of *Blackwell* v. *Bull* (*d*), where a testator devised in the following words: "In the first place, my will and wish is, that my business of a cheesemonger be carried on by my wife and my son jointly, for the mutual benefit of my family; and I likewise will and devise in trust all my property, for the following purpose, that is to say, that, *at my wife's decease*, the whole of my property, of whatever nature

(*b*) *Hutton* v. *Simpson*, 2 Vern. 723; *S. C.* nom. *Simpson* v. *Hornby*, Gilb. Eq. Rep. 115.

(*c*) *Willis* v. *Lucas*, 1 P. W. 472.

(*d*) 1 Kee. 176.

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or description, as well freehold as personal, shall be equally divided amongst my children, J., R., W., M., and C., their executors or assigns." One of these children was the heir-at-law. Lord *Langdale*, M. R., was of opinion that, on the whole will, it was the evident intention that the widow should take a life interest in both the real and personal estates, though he admitted that, as to the real estate (*e*), the case was not without difficulty.

Cockshot v. *Cockshot.*

[But the doctrine of implication has been carried furthest in *Cockshot* v. *Cockshot* (*f*) where a testator, after giving 1,200*l.* to his four daughters after the death of his wife or so long as she continued his widow, further willed that his estates at A. and B. should be given to his four sons as tenants in common, but not to be *put in possession* of the said estates so long as his wife M. kept his widow. He then gave various personal property to his four sons at the death or second marriage of his wife, and gave the tenant-right of his farm at C. to two of his sons at the death of his wife or when she ceased to be his widow; and, in case his wife *gave up* the farm at C., he willed that his said sons *from and out of the A. and B. estates should pay her* 25*l. a year so long as she continued his widow.* The Vice-Chancellor thought, notwithstanding the last clause, that the expressions in the will, indicating an intention that the widow was to take during her widowhood, preponderated. It will be observed that in this case the devise of the A. and B. estates was not a future but a *present* devise, which would have taken effect on the testator's death; and the subsequent clause, deferring possession, was, it is submitted, repugnant to that devise, and ought not to have had any effect attributed to it. The same interpretation, which gave such extreme effect to this repugnant clause, also rendered nugatory the gift of 25*l.* a year to the widow out of the A. and B. estates in the event of her giving up the C. farm, for it could scarcely have been said that that sum was a charge on the reversion of the sons in the A. and B. estates.]

Distinction where there is an express anterior devise of part to the person on whose death devise is to take effect.

Where, however, there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided, by having recourse to what may, for convenience of

(*e*) In regard to the personalty, no objection seems to have been made to the implication; the only resistance to the construction adopted by the Court having proceeded from the heir. It did not appear that the real estate was wanted for the purposes of the business.

[(*f*) 2 Coll. 432.]

distinction, be called the distributive construction, by which the words *after the death* are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first instance on account of the improbability that a testator should intend a person, to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise.

Case of *Cook* v. *Gerrard*.

Thus, in the case of *Cook* v. *Gerrard* (*g*), where the testator Sir R. Kempe, being seised of demesne lands in fee, and also of the reversion of other lands expectant on the death of A., directed that his wife should have the demesne lands for one year after his death; and then, after stating that he was desirous to continue the capital messuage in the name and blood of the Kempes, he devised the demesnes and the *reversion* to B., habendum immediately from the expiration of one year next after his decease, and the decease of A., for the life of B., he doing no waste. The testator further directed that B. should, after the death of A., pay three annuities of 20*l.* each by half-yearly payments. The testator died, and the year expired. It was contended that, in order to effect the intention of the testator, the words must be taken distributively: First, because, if the lands descended to the testator's daughter and heir, she might change her name by marriage, and then his intention that the demesne lands should remain in the name of the Kempes would be defeated. Secondly, if A. died within the year after the testator, the annuities given by the will could not be paid, unless B. took the land immediately after the death of A., notwithstanding the year was not expired (*h*). And, thirdly, if the demesne lands should descend to the heir in the meantime, until the death of A., then he might commit what waste he pleased, and there would be no means to prevent it,

(*g*) 1 Saund. 183, [cited 9 B. & Cr. 225.]

(*h*) This argument supposes, that if both were postponed for the life of A., then both would be postponed for the year.

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which would be directly against the true meaning of the testator. The Court of King's Bench held, that the words of the will should be taken distributively, and that B. had good title to the demesne lands after the expiration of the year, and before the death of A.

Case of *Simpson* v. *Hornsby.*

So, in the case of *Simpson* v. *Hornsby* (*i*), where a testator devised to his wife for life all his lands in J., *and after the death of his wife,* he devised all his lands in J., *and certain other lands, and all other his real estate whatsoever,* to his daughter B. and the heirs of her body, with remainder to his daughter J. for life, with remainder to his first and other sons in tail. Lord Chancellor *Cowper* was of opinion that the wife took nothing by implication, and that she was entitled to a life estate in only those lands which were expressly devised to her; and that the rest of the real estate was intended to pass, by the will, immediately to B.

Case of *Doe* v. *Brazier.*

Again, in the case of *Doe* d. *Annandale* v. *Brazier* (*k*), where the testator gave to B. the rents of a messuage situate in A., for his life, *and after the decease of the said B.,* he gave the same rents, *together with* the rents of all his other houses and lands in A. aforesaid, unto certain persons for their lives and the life of the survivor, with remainder over. The question was, whether these devisees were entitled to the *other* lands at A. immediately on the testator's decease, or not until after the death of B.; and it was decided, that the words "from and after the decease of the said B." were to be confined to the lands devised to B. for his life, and did not postpone the interest of the devisees in question in the rest, until that period.

Simmons v. *Rudall.*

[And in the case of *Simmons* v. *Rudall* (*l*), where after a devise of a freehold estate to J. S. in fee there was a contingent executory devise over of that estate, "together with" all the residue of the testator's real and personal estate, Lord *Cranworth,* V. C., was of opinion that the distributive construction must be applied to the latter devise, that the contingency applied only to the freehold estate, and that the gift of the residue was absolute: but it was not necessary to decide the point.]

Case of *Aspinall* v. *Petvin.*

A different construction, however, prevailed in the case of

(*i*) 1 Pre. Ch. 439, 452, 2 Vern. 723; stated from the Registrar's book, 9 B. & Cr. 228; see also *Boon* v. *Cornforth,* 2 Ves. 276, where, however, the construction was aided by the context.

(*k*) 5 B. & Ald. 64.

[(*l*) 1 Sim. N. S. 115; see also *Dyer* v. *Dyer,* 1 Mer. 414; and *Drew* v. *Killick,* 1 De G. & S. 266, where the words of the will seemed to point to the distributive construction.]

Aspinall v. *Petvin* (*m*), where a testator devised his real estate to trustees, in trust, to pay one moiety of the rents to his wife E. for life, and the other moiety to his son W. (who was his heir at law), *and after the death of his said wife*, upon trust, to convey the said hereditaments unto W. in fee; but if he died without issue in the lifetime of the wife, then, upon trust, *after the death of the wife*, to convey the same to testator's nephew J. in fee. W. died without issue in the lifetime of the wife; and the question was, whether J. was entitled immediately to the moiety of the rents not expressly devised to the wife, and, if not, whether she did not take it by implication (*n*). Sir *J. Leach*, V. C., after very clearly laying down the general rule as before stated, considered this to be the common case of a devise to a stranger after the death of A.; and that, accordingly, no estate was raised in E. by implication, but the moiety in question for her life descended to the testator's heir at law.

Remarks on *Aspinall* v. *Petvin*.

It is remarkable that the point suggested by the class of cases under consideration was not presented to the view of the Court in this case, namely, that the words referring to the death of the wife applied exclusively to the moiety before devised to her, and did not prevent J. from taking the other moiety immediately; but, perhaps the frame of the will scarcely admitted of such a construction. The words "after the death of my wife" had been just before used in reference to both moieties in the devise to the son, and the terms of the *executory trust* seemed to import that no conveyance was to be made to J. until the death of the wife.

Distributive construction not the general rule.

This decision, therefore, appears not to clash or interfere with the preceding cases, which might seem to have established the distributive construction as the ordinary rule; but we are taught not so to consider them by a decision, in which all the cases in favour of this construction were treated as standing on special grounds, and as constituting an exception to the general rule.

(*m*) 1 S. & St. 544. It was ingeniously argued in this case, that, as J. was heir, as well to the testator *as to W.*, in the event on which the estate was given to him, namely, the death of W. without issue, it came within the principle of the case of an estate given to the heir after the death of the widow; but the answer to this reasoning is, that in those events, the vacant interest did not *necessarily* devolve upon J., as W. in his lifetime might have devised or otherwise aliened it; and, consequently, the argument founded on the absurdity of his taking both did not apply; [but see *Doe* d. *Driver* v. *Bowling*, 5 B. & Ald. 722.]

(*n*) No arguments appear to have been advanced in favour of the hypothesis, that if the widow did not take, it descended to the heir.

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The case here alluded to is *King* v. *Inhabitants of Ringstead* (*o*), where a testator devised to his daughter Elizabeth, the widow of his late son T. M., part of a messuage, to hold to her and her assigns for the term of her natural life, if she should so long continue a widow; *and from and after her decease, or day of marriage,* he gave the same and *other real property therein mentioned,* unto the four children of his late son T. M., deceased, their heirs and assigns for ever. It was contended, on the authority of the preceding cases, that the words were to be construed distributively, and, consequently, that the children took an immediate estate in possession in the property not devised to the wife; but the Court, after taking an elaborate view of those cases, and showing that in each of them the intention of the testator, as collected from the context of the will, required such a construction, considered that they did not apply to the will under discussion, where the words must be construed in their ordinary grammatical sense. It was held, therefore, that, until the death or marriage of the son's widow, the estate not devised to her descended to the testator's heir at law.

Remarks upon *King* v. *Ringstead.*

It will be perceived that, as in this case the widow took no implied estate, (the express devise on her decease or marriage not being to the heir of the testator,) the construction adopted by the Court did not involve the difficulty of giving by implication to a person, in the lands not expressly devised to her, an estate corresponding to that which she derived in the lands so devised, in opposition to the maxim, expressio unius est exclusio alterius. Had it been attended with this result, the conclusion of the Court might have been different. Possibly the distributive construction will, in future, be (as it ought originally to have been) restricted to such cases; but, considering how extremely slight is the difference of language in the will which was the subject of adjudication in the last case, (*King* v. *Ringstead,*) and in some of the preceding cases, particularly *Simpson* v. *Hornsby,* it must be confessed that the case of *King* v. *Ringstead* does not place the doctrine on such a footing as to exclude future controversy.

King v. *Ringstead* followed.

[However, in *Attwater* v. *Attwater* (*p*), where a testator gave to his cousins A. and B. his freehold house and premises, for their use during the life of each; and at the decease of both gave the same to C., a son of his niece, to be retained in the

(*o*) 9 B. & Cr. 218.

[(*p*) 18 Beav. 330. But see *Lill* v. *Lill,* 23 Beav. 446, before the same Judge.

[family for ever, together with his copyhold and leasehold property at N., Sir *J. Romilly*, M. R., said that although there was considerable conflict between the authorities, he considered that the case was governed by the rule laid down and settled by the case of *King* v. *Ringstead*, and that consequently C. took no interest in the copyholds and leaseholds until after the decease of both A. and B., and that the heir at law took such interest in the meantime.

Davenport v. *Coltman*.

And the case of *Davenport* v. *Coltman* (*q*), so far as it goes, is an authority on the same side. There the testator devised a house to his wife for life, and at her decease devised to his two daughters (who were not his heirs) "whatever he should die possessed of." The Court of Exchequer were of opinion that the heir of the testator took, during the wife's life, the real property not included in the gift to her, for they certified that the daughters took nothing till her death; but it must be observed that the distributive construction was not brought under the notice of the Court; the whole argument being directed to the point whether the gift to the daughters carried any real estate whatever. No claim was advanced on their part to the interest during the life of the widow, the right to which was only contested between her and the heir (*r*). The same remark applies to this case as to *King* v. *Ringstead* with respect to the widow not taking an implied estate.]

Effect of residuary devise in excluding the implication arising from devise to heir.

The position that a devise to the heir after the death of A. creates in A. an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A., (a stranger,) since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A. as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life.

Application of doctrine to residuary devises.

Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the residuary devisee, to take effect in possession on the decease of

[(*q*) 9 M. & Wels. 481, 12 Sim. 588.
(*r*) See the claim made on behalf of the daughters by their counsel, p. 483.

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another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A., to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and, therefore, in the case supposed, A. would, undoubtedly, have an estate for life by implication.

Whether a gift to children implied in a gift to posthumous children.

[It was decided in one case, that a devise by a testator, "in case his wife should be enceinte with one or more children at the time of his death, to such child or children," implied a gift to any children born after the date of the will, though before the testator's death on the ground that it was impossible to suppose the father would provide for a posthumous child, leaving children in esse unprovided for (*s*). But in the recent case of *Doe* d. *Blakiston* v. *Haslewood* (*t*), the Court of C. P. unanimously overruled that decision, thinking that in such a case the testator never contemplated the birth of children in his lifetime, and never *intended* to provide for them by his will: the will was made in contemplation of a particular combination of circumstances, which not having happened, the will failed. However, this decision has not been universally considered as conclusive; for, in a subsequent case (*u*), Lord Chancellor *Blackburne* (Ir.) expressed his opinion to be in favour of the elder authority, though the case before him did not call upon him to decide.]

As to devises in the first instance to survivors.

As a devise to a stranger after the death of A. creates no estate in A. by implication in the meantime, it might seem to follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context. A testator (*x*) devised lands at T. to trustees, in trust, to receive the rents and profits during the lives of his four daughters and the survivor

[(*s*) *White* v. *Barber*, 5 Burr. 2703.

(*t*) 10 C. B. 544.

(*u*) *Re Lindsay*, 5 Irish Jurist, 97; see also *Alleyne* v. *Alleyne*, 2 Jo. & Lat. 558; *Goodfellow* v. *Goodfellow*, 18 Beav. 356.]

(*x*) *Saunders* v. *Lowe*, 2 W. Bl. 1014. For other cases in which the implication arising from the whole will was held to be equivalent to, and to supply the place of a direct gift, see *Brown* v. *De Laet*, 4 B. C. C. 527; *Crowder* v. *Clowes*, 2 Ves. jun. 449; *Wainewright* v. *Wainewright*, 3 Ves. 558.

of them; and "*afterwards* to pay such rents and profits to and among such *survivor*, and the child or children of such my daughters who shall first happen to die; and from and immediately after the decease of my said four daughters, my will is, that they do sell the premises, and pay the monies arising therefrom, in four equal parts," to the children of his daughters. By a subsequent clause, he bequeathed his chattels among his children, except his daughter H., who was only to receive in full satisfaction of what was before bequeathed to her three shillings a week during her life, or until her distributory share was exhausted out of his estate at T. and personal effects for her separate use. The Court was clearly of opinion that the testator never intended to leave all his daughters without any provision until three of them were dead; and with reference to the subsequent clause, which showed that his daughter H. was in his opinion entitled for life, they held all the daughters to take.

As to implication of devise to survivors.

Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives only of several co-devisees or co-legatees, with a gift over on the decease of the survivor, thus leaving unprovided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survivor. In several such cases (*y*), the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

In the case of *Townley* v. *Bolton* (*z*), the bequest was in these words: "I give to my sister M. T. and her husband G. S. T. 50*l.* per annum Long Annuities *for their joint lives*, and *after their decease*, to go to my own nephew, C. P." Sir *J. Leach*, M. R., held, that the gift over being after the decease of the husband and wife, it was plain that the testator intended that the survivor should be entitled.

(*y*) *Tuckerman* v. *Jefferies*, 3 Bac. Abr. 681, Gwillim's ed. 81; *Armstrong* v. *Eldridge*, 3 B. C. C. 215; *Pearce* v. *Edmeades*, 3 Y. & C. 246, all stated post, Chap. XXXII. [But see *In re Drakeley's Estate*, 19 Beav. 395, and other cases cited, Chap. XXXII.]

(*z*) 1 My. & K. 148; [see also *McDermott* v. *Wallace*, 5 Beav. 142; *Moffatt* v. *Burnie*, 23 L. J. Ch. 591; *Day* v. *Day*, Kay, 703.

Here, too, it is doubtful whether the survivor became entitled by the effect of the implication of a gift in remainder for life, expectant on the determination of the joint lives, or as surviving joint tenant for life, the words "for their joint lives" (which, otherwise, would have determined the interest of both on the death of either (*a*)) being rejected. The latter appears to have been the ground taken in the arguments at the bar.

Annuity to several for lives of them and survivor.

In the case of *Jones* v. *Randall* (*b*), a testator bequeathed an annuity, upon trust, for A. for life, and after her death to pay and divide the same amongst the children of A. who should happen to survive her, in equal shares if more than one child, and if but one child, then to such only child; such annuity to be paid during the lives of such children, *and the life of the survivor of them.* It was contended that the survivors were entitled by implication; but Sir *T. Plumer*, M. R., held that the argument, that because the annuity was for the life of the survivors, therefore the survivors were to take, amounted only to conjecture; [that the words in question only described how long this annuity was to last; they determined the subject-matter of the bequest, regulating the duration, but not the persons to participate in it: and] the children took as tenants in common an annuity for their lives and for the life of the survivor. [Where, too, there is a gift to A., B. and C. for their lives, and after the decease of A., B. and C., to their children, we must not be too ready to infer a gift of the whole to the survivors or survivor for his or their lives, as the Courts, in favour of the children, are generally inclined to lay hold of slight indications of an intention to give the share of each, on his death, to his children (*c*).]

Doctrine of implication in regard to personal estate.

The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate, including terms for years; although, certainly, the reason on which the doctrine is professedly founded, namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate (*d*).

In an early case (*e*), it was held by three Justices, that if a

[(*a*) *Grant* v. *Winbolt*, 23 L. J. Ch. 232; but see *Smith* v. *Oakes*, 14 Sim. 122.]

(*b*) 1 J. & W. 100.

[(*c*) *Hawkins* v. *Hammerton*, 16 Sim. 410; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100; but see *Pearce* v. *Edmeades*, 3 Y. & C. 246; and other cases noticed post, Chap. XXX., Sect. 5.

(*d*) But Lord *Loughborough* considered the claims of the heir and next of kin to stand on an equal footing in this respect, 3 Ves. 493.]

(*e*) *Horton* v. *Horton*, Cro. Jac. 74; *S. C.* nom. *Burton* v. *Horton*, 8 Vin. Abr. 214, Dev. (Pa.) pl. 3; see also *Rayman*

man gave a term to his son after the death of the wife of the testator, this shall not raise any estate in the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the testator without any devise, but the executor.

But in *Doe* d. *Bendale* v. *Summerset* (*f*), where A. possessed of a term of ninety-nine years, determinable on the lives of his daughter B. and J. S., bequeathed the premises to his daughter M. after the death of his daughter B., during the life of J. S.; Mr. Justice *Willes* and Mr. Justice *Blackstone* held that B. took an estate for life by implication. A strong probable implication was, they said, sufficient: it need not be a necessary implication. Mr. Justice *Willes*, it is said, spoke slightly of the case in *Moore;* and Mr. Justice *Blackstone* still more slightly of the case in *Croke James*, which, he observed, was not determined, but was only upon a collateral point.

Observations upon *Doe* v. *Summerset.*

If the case of *Doe* v. *Summerset* is to be considered as identified with a proposition that the bequest of a term of years to B. after the death of A. gives a life interest to A. by implication, it is as difficult to reconcile it with the case of *Horton* v. *Horton* as with sound principle. The case is not implicitly to be relied upon, unless it can be referred to the special circumstance that the bequest over was to one of the testator's daughters, who would have been entitled to a share of the undisposed-of interest as one of his next of kin; and, consequently, the case can be considered as falling within the principle of the doctrine advanced in *Hutton* v. *Simpson*, and *Willis* v. *Lucas*, that a devise to one of several co-heiresses, after the death of A., raises in A. an estate for life by implication (*g*). It is true that in *Horton* v. *Horton* the bequest over was to the testator's son, and who, therefore, stood in the same relation of next of kin; but in that case there was an appointment of an executor, which, in the then state of the law, was a disposition of all the personal estate, and might therefore be considered to exclude the principle. The argument would certainly be much stronger if the legatee of the future interest were the sole person entitled, in the character of next of kin, residuary legatee, or executor, to the intermediate interest, being specifically undisposed of. The

v. *Gold*, Moore, 635, (where, however, the point did not arise, as the wife, at whose death the property was devised, was appointed executrix, and became entitled *quácunque viâ*), [*Cranley* v. *Dixon*, 23 Beav. 512.]

(*f*) 5 Burr. 2608.

(*g*) But as to which, see ante, p. 499.

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analogy to a devise of real estate to the heir, after the death of A., would then be more striking.

Tendency to imply life interest in personal bequests.

It must be confessed, however, that in some cases of a more recent date, a similar inclination is manifest towards construing generally a bequest of personalty at the death of A. to give to A. a prior life interest by implication; and this construction prevailed in one instance where there was an express gift to the same legatee determinable during her life. Thus, in *Bird* v. *Hunsdon* (*h*), where a testator directed, after payment of debts and legacies, the residue of his money to be put into government security, and the interest to be paid to bring up and educate M., adding, "the said M. to have the interest so long as she continues single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children, all share alike." M. married, and had a child; nevertheless, she was held to be entitled to the income during the remainder of her life. Sir *T. Plumer*, M. R., observed, that the testator contemplated three periods: "First, he gives the interest for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying, either that there is intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative." [But this construction does not, at all events, apply where the gift is made under a power, in which case the interest during the life of A., not being expressly disposed of, will go as in default of appointment (*i*).]

Implication from express gift on death combined with some contingency.

III. Hitherto the doctrine of implication has been viewed chiefly in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise

(*h*) 2 Sw. 342; see also *Blackwell* v. *Bull*, 1 Kee. 176, ante, p. 499; [*Ramsden* v. *Hassard*, 3 B. C. C. 236; *Huddleston* v. *Goldsbury*, 10 Beav. 547.

(*i*) *Henderson* v. *Constable*, 5 Beav. 297.]

to B. in the event of A. dying under age; in which case, as there is no devise to A. in the alternative event of his attaining his majority, the question arises, whether he can take the fee (*k*) by implication in such event. If B. were the testator's heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A.'s decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A. dying under age, supplies no more valid ground for holding A. to take an estate in fee by implication, than is afforded for the implication of an estate for life to a person on whose decease the lands are devised to a stranger: for a testator *may* intend the fee to descend to the heir on the alternative contingency of A. attaining his majority. And, perhaps, the authorities, rightly considered, do not militate against this hypothesis; for, though an estate in fee was held, in one instance, to arise by implication, under such a devise, to a person who was not the testator's heir, yet the construction was founded on reasoning partly derived from the context.

Gift implied from limitation over if the object died under twenty-one.

Thus, in *Goodright* d. *Hoskins* v. *Hoskins* (*l*), a testator bequeathed unto his son Richard certain leasehold premises, called S., to hold the same unto his said son Richard until his (R.'s) son Thomas should attain the age of twenty-one years, and no longer; but in case his said son Thomas should die in his minority, then the testator gave the said leasehold premises unto John and Richard, sons of the said Richard, or either of them attaining the age of twenty-one years as aforesaid; and he desired that his premises at S. might be quitted and delivered up as aforesaid by his said son Richard; and the testator, in a certain event, revoked, but otherwise confirmed, the said bequest of S. and the other legacies given to his son Richard's family. Thomas attained twenty-one, and was held to be entitled: Lord *Ellenborough* relying much upon the direction that the premises should be *quitted and delivered up as aforesaid* by the testator's son Richard, that is, when Richard's son Thomas came of age, to Thomas; "for to whom else" (said his Lordship) "could Richard deliver up the possession in that event?"

Remark upon *Goodright* v. *Hoskins*.

But might not these words (which merely imported *by* whom

(*k*) Why, it may be asked, a fee? On this point vide *Purefoy* v. *Rogers*, 2 Saund. 388, and other cases discussed Chap. XXXIII., Sect. 3.

(*l*) 9 East, 306.

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the premises were to be delivered up) have been satisfied by their delivery up to *any* person entitled under or *dehors* the will? Unless Thomas were to become entitled at twenty-one, the limitation over, in case he died under that age, was certainly very absurd, and the case may be considered as somewhat analogous in principle to those in which a devise has been enlarged to a fee by such a devise over (*m*).

Case of *Davis* v. *Davis*.

This case was much relied on in the subsequent case of *Davis* v. *Davis* (*n*), in support of the argument for raising an implied gift to the testator's daughter, from the following words:—"It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs; and I appoint him guardian to my daughter." Sir *J. Leach*, M. R., decided in favour of the implication. He said, that it was plain it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs; and, from his appointment as guardian to the daughter, it was to be implied that the arrangement and settlement was to be for her benefit; but Lord *Brougham*, on appeal, reversed this decree, his Lordship conceiving that there was nothing in the language or provisions of the will from which a bequest to the daughter could be safely and reasonably implied. He observed, that the cases of *Newland* v. *Shephard* (*o*) and *Goodright* v. *Hoskins*, (the former of which had been often questioned (*p*), and the latter had been rested by Lord *Ellenborough* on special grounds,) fell far short of this.

Malcolm v. *O'Callaghan*.

[And in the case of *Malcolm* v. *O'Callaghan* (*q*), where by the will a legacy was bequeathed to the testator's daughter on her marriage with consent, with a gift of the interest in the mean-

(*m*) Vide Chap. XXXIII., Sect. 3.

(*n*) 1 R. & My. 645.

(*o*) 2 P. W. 194. In this case, (which is often cited,) a testator gave the residue of his real and personal estate to trustees, upon trust, to apply the income for the maintenance of his grandchildren during minority, but went no further. Lord *Macclesfield*—"The intention is most plain, that the grandchildren should have the surplus, both of the real and personal estate, after their age of twenty-one." [In *Atkinson* v. *Paice*, 1 B. C. C. 91, a bequest in trust for R. L. until he should come of age, was held to be an absolute gift to R. L.; and in *Peat* v. *Powell*, Amb. 387, 1 Ed. 479, a gift in nearly the same words received the same construction; see also *Tomkins* v. *Tomkins*, cit. 1 Burr. 234; *Tunaley* v. *Roch*, 3 Drew. 720; *Presant* v. *Goodwin*, 1 Sw. & Tr. 544, 29 L. J. Prob. 115; *Gardiner* v. *Stevens*, 30 L. J. Ch. 199; but in the case of *Fitzhenry* v. *Bonner*, 2 Drew. 36, where there was a bequest to testator's wife for her and her son's support, clothing and education, until the son should arrive at twenty-one, with a gift over in case the son died under twenty-one, Sir *R. Kindersley*, V. C., held that the son on attaining twenty-one, took nothing by implication.

(*p*) See per Lord *Hardwicke*, 3 Atk. 316; perhaps he might have thought differently if the gift had been general and not for maintenance only.

(*q*) 2 Mad. 349. As to this case, see post, Chap. XXVII.]

[time until marriage, and by a codicil the legacy was given over on the death of the daughter before she attained twenty-five or married with consent, it was argued that from the gift over on death under twenty-five, there should be implied an absolute gift at twenty-five, so that the daughter having married without consent, but attained twenty-five, was entitled. The V. C. decided that such a gift could not be implied, but rested his decision mainly on the ground that the will and codicil together appeared to show an intention that the daughter was not to take in any case if she married without consent.]

No implication that *equitable* is to be co-extensive with *legal* disposition.

IV. Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other.

As in the case of *Stubbs* v. *Sargon* (*r*), where a testatrix devised to trustees and their heirs her copyhold dwelling-house, (wherein she principally resided,) garden and ground, *together with the furniture and effects therein*, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, &c., and the *heirs* or assigns of the survivor, should pay the rents of the said *hereditaments* to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said *hereditaments* during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the *heirs* or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said

(*r*) 2 Kee. 255, 3 My. & Cr. 507; 9 Bli. 431, 3 Cl. & Fin. 665. compare this case with *Ackers* v. *Phipps*,

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hereditaments and premises (*s*); and the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause (*t*). Lord *Langdale*, M. R., held, that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord *Cottenham*, on appeal, was of the same opinion, his Lordship observing, that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

Omission to dispose of equitable interest not cured by implication.

So, in the case of *Jackson* v. *Noble* (*u*), where a testator gave certain freehold, *copyhold*, and leasehold estates (particularly describing them) and £1,000 Three per Cent. stock, to trustees, their heirs, executors, administrators and assigns, to hold the last-mentioned *freehold and leasehold* estates, and stock, unto the trustees, their heirs, executors, administrators and assigns, in trust for his daughter A. for life, for her separate use; and after her decease, upon trust, to convey and assign the several last-mentioned freehold and leasehold estates and £1,000 stock unto the heirs, executors, administrators and assigns of A. And the testator empowered his daughter to grant leases of the freehold and leasehold estates so given to her. Lord *Langdale*, M. R., held, that as the testator had omitted all mention of the copyhold estates after the devise to the trustees, he could not consider them as comprised in the trust.

Gifts implied from powers of selection and distribution.

V. Implied gifts may be and often are created by powers of selection or distribution in favour of a defined class of objects; for, where property is given [or appointed (*x*)] to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied; the presumption being, that the testator could not have intended the objects of the power to be disappointed

(*s*) The addition of the word "premises," in this instance, afforded ground for extending the ultimate trust, unless restricted by the preceding trusts to the furniture; but as the proceeds under this trust were to form part of the residuary personal estate, the point was immaterial.

(*t*) This fact is to be assumed, but is not stated in the report.

(*u*) 2 Kee. 590.

[(*x*) *White* v. *Wilson*, 1 Drew. 298.

of his bounty, by the neglect of the donee to exercise such power in their favour (*y*).

A leading authority for this construction is the case of *Brown* v. *Higgs* (*z*), where the bequest was, "to such children of my nephew S., as my nephew I. shall think most deserving, and that will make the best use of it, or to the children of my nephew W., if any such there are, or shall be." I. died in the lifetime of the testator. Sir *R. P. Arden*, M. R., and subsequently Lord *Eldon*, after great consideration, held the children to be entitled under the implied trust: [and this decision was afterwards affirmed by the House of Lords.]

Implied gift in one, not precluded by express gift in another, event.

And the implication, it seems, is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him (*a*); which event, it is to be observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

Implication precluded by express gift in same event.

An express gift over in default of appointment, in favour of either the objects of the power or any other person, of course precludes all implication (*b*); and there is, it seems, no necessary inference that the testator intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift expressly limited in default of appointment to a class of objects identical in other respects with that of the power.

Thus, where (*c*) the devise was to A. for life, with remainder to such child and children of A. and *him surviving*, who should be educated as a member of the Church of England, in such parts and proportions, &c., as A. should appoint, and, in default of such appointment, to the first son of A. who should be educated as aforesaid and the heirs of the body of such son, with

[(*y*) The early cases of *Crossling* v. *Crossling*, 2 Cox, 396, and *The Duke of Marlborough* v. *Godolphin*, 2 Ves. 61, which are opposed to this construction, would probably be decided differently at the present day; see 2 Sugd. Pow. 7th ed. 163.]

(*z*) 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; see also *Harding* v. *Glyn*, 1 Atk. 469; *Cruwys* v. *Colman*, 9 Ves. 319; *Forbes* v. *Ball*, 3 Mer. 437; [*Witts* v. *Boddington*, 3 B. C. C. 95;] *Walsh* v. *Wallinger*, 2 R. & My. 78; [*Grieveson* v. *Kirsopp*, 2 Keen, 653; *Jones* v. *Torin*, 6 Sim. 255 (as to which see ante, p. 483, n. (*t*)); *Martin* v. *Swannell*, 2 Beav. 249; *Fenwick* v. *Greenwell*, 10 ib. 412; *Fordyce* v. *Bridges*, 10 Beav. 90, 2 Phil. 497; *Burrough* v. *Philcox*, 5 My. & Cr. 73; *Falkner* v. *Lord Wynford*, 15 L. J. Ch. 8, 9 Jur. 1006; *Penny* v. *Turner*, 15 Sim. 368, 2 Phil. 493; *Alloway* v. *Alloway*, 4 D. & War. 380; *Salusbury* v. *Denton*, 3 K. & J. 535; *Joel* v. *Mills*, ib. 474; *Reid* v. *Reid*, 25 Beav. 469. Compare *Brook* v. *Brook*, 3 Sm. & Gif. 280.]

(*a*) *Kennedy* v. *Kingston*, 2 J. & W. 431.

[(*b*) *Pattison* v. *Pattison*, 19 Beav. 638; *Roddy* v. *Fitzgerald*, 6 H. of L. Ca. 823.]

(*c*) *Smith* v. *Death*, 5 Mad. 371.

divers remainders over: it was contended that as the power of appointment was restricted to "surviving" children, the gift over was to be construed with a like limitation; but Sir *J. Leach*, M. R., held, that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference.

Objects of power and implied gift must be identical.

A gift arising *by implication* from a power of selection or distribution, however, applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favour of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who of course could not have been made objects of an appointment by will (*d*). [Consequently if all the objects die in the donee's lifetime, no gift at all can be implied. And it is all the same whether the power be a testamentary one in the tenant for life, or a power in another person to be exercised by deed or will, to arise only on the death of the tenant for life (*e*). Where the power is to appoint in favour of some one person to be selected out of a class, if any gift could be implied in default of appointment, it ought to be to one person only of the class; but as no gift can be implied to one more than another, it seems that none of the class can take by implication (*f*).]

And it should seem, that a gift arising by implication from a power of selection or distribution in favour of *relations*, will apply exclusively to the relations living at the death of the donee, even though the power is not in terms confined to an appointment by will (*g*).

If the subject of the implied gift resulting from such a power be real estate of inheritance, it may be a question (supposing the will to be regulated by the old law,) whether the implication

(*d*) *Walsh* v. *Wallinger*, 2 R. & My. 78; see also *Kennedy* v. *Kingston*, 2 J. & W. 431; [*Woodcock* v. *Renneck*, 1 Phil. 72, 4 Beav. 190; *Winn* v. *Fenwick*, 11 Beav. 438; *Falkner* v. *Wynford*, 15 L. J. Ch. 8, 9 Jur. 1006, in which latter case the appointment was to be by *deed* or will, and, consequently, the gift by implication was not restricted to the objects living at the decease of the donee; and compare observations of *Sugden*, C., 2 D. & War. 99. An express gift in default of appointment applies to the same class of persons as a simple gift unconnected with any power, *Pattison* v. *Pattison*, 19 Beav. 638.

(*e*) *Halfhead* v. *Shepherd*, 28 L. J. Q. B. 248, 5 Jur. N. S. 1162; *White's Trust*, 1 Johns. 656.

(*f*) 2 Sugd. Pow. 7th. ed. 165.]

(*g*) *Att.-Gen.* v. *Doyley*, 4 Vin. Abr. Ch. Us. C. pl. 16, p. 485; *Harding* v. *Glyn*, 1 Atk. 469, cited 5 Ves. 501. The case of *Pope* v. *Whitcombe*, *as reported* 3 Mer. 689, is contra, in regard to a power of distribution; but, as corrected from the Registrar's book, 2 Sugd. Pow. 7th ed. p. 247, and App. 29, is an authority on the same side. [And see *Finch* v. *Hollingsworth*, 21 Beav. 112.]

confers an estate for life or in fee. There would be strong ground for the latter construction, if the power authorized the limitation of estates in fee. The point was glanced at, but did not call for decision, in the case of *Casterton* v. *Sutherland* (*h*).

Life interest not implied in donee from power of distribution.

Although a power of selection or distribution is usually preceded by the reservation of a life interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided, that where a testatrix, after bequeathing her property to her mother, requested her to leave 500*l.* to each of her (the testatrix's) sister A.'s children, (and some legacies to other persons,) and the remainder to her sister B., "to dispose of among her children as she may think proper," B. herself took no interest (*i*).

Implication of estates tail.

VI. It remains to consider the implication of estates tail. According to the doctrine which has been the subject of discussion in the second section, it is not to be doubted, that if lands were devised to the testator's heir apparent or heir presumptive in fee in case A. should die without issue, (which, if the will were made before 1838, would import a *general* failure of issue (*k*),) this would make A. tenant in tail, with reversion in fee to the testator's heir—the event described being precisely that which would involve the extinction of an estate tail; and it being impossible to suppose that the testator could intend to make a devise to take effect at a future period, to the very person who would in the absence of disposition take the property by act of law, without intending that it should in the meantime devolve to some other person. The reports, however, do not present exactly such a case.

Whether an express estate for life can be enlarged to an estate tail by implication.

It has been long settled, however, that a devise, in a will which is regulated by the old law, to a person indefinitely, or to a person and his heirs, with a limitation over in case he die without issue, confers an estate tail, on the ground that the testator has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefi-

(*h*) 9 Ves. 445; [and see *Crozier* v. *Crozier*, 3 D. & War. 383.]

(*i*) *Blakeney* v. *Blakeney*, 6 Sim. 52; [but see *Huddleston* v. *Gouldsbury*, 10 Beav. 547.]

(*k*) The implication doctrine discussed in the text assumes that the words referring to "death without issue" import an indefinite failure of issue. What force of context is requisite to explain them to be used in any other than this their ordinary sense (which is a subject of much intricacy, from the accumulation of authorities), we shall have to consider in Chapter XLI.

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nite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness. According to some early cases, however, an express estate for life cannot be so enlarged into an estate tail by implication, on the ground that implication can only be admitted in the absence of, and never in contradiction to, an express limitation. But in the case of *Bamfield* v. *Popham* (*l*), (which is the authority usually adduced for this doctrine,) the conclusion at which the Court arrived may be sustained upon other grounds; if not, it has been overruled by numerous decisions (*m*), in which an estate tail has been raised in the first taker, by implication from words devising the property over in case he die without issue, although the prior devise was expressly for life; the intention of the testator being manifest, that the estate should not go over to the next devisee until the whole line of issue was extinct. And it is observable that this construction prevailed in a recent case, where the words in question were accompanied by expressions which might, if the Court had been particularly anxious to escape from the rule, have afforded a plausible ground of dereliction. The case here referred to is *Machell* v. *Weeding* (*n*), where the testator gave real and personal estate to his wife for life, and after her decease to his son J. *for his life;* but if his son *should die without issue, not leaving any children,* then his estates to be sold, and the money divided among his other children. It was contended, that the words "not leaving any children" were explanatory of the preceding words, "die without issue," and, consequently, that they did not make J. tenant in tail; but Sir *L. Shadwell,* V. C., considered that the words in question were included in the previous words; a dying without leaving a child being one mode of dying without issue; and he observed, that it was perfectly manifest that the testator did not intend the estate to go over so long as any issue of the first taker were in existence. "And I consider it," said his Honor, "to be a settled point, that, whether an estate be given in fee *or for life,* or generally, without any particular limit as to its duration, if it be followed

Express estate for life enlarged to an estate tail.

(*l*) 1 P. W. 54, Salk. 236, 2 Vern. 427, 449; see 1 Ves. 26.

(*m*) [*Blackborn* v. *Edgeley,* 1 P. W. 605;] *Langley* v. *Baldwin,* 1 P. W. 759; *Stanley* v. *Lennard,* 1 Ed. 87; *Att.-Gen.* v. *Sutton,* 1 P. W, 754, 3 B. P. C. 75; *Doe* d. *Bean* v. *Halley,* 8 T. R. 5; [*Parr* v. *Swindels,* 4 Russ. 283; *Key* v. *Key,* 4 D. M. & G. 73; *Stanhouse* v. *Gaskell,* 17 Jur. 157.]

(*n*) 8 Sim. 4.

by a devise over in case of the devisee dying without issue, the devisee will take an estate tail."

It is to be observed, that where the devise over is to take effect on the event of the prior devisee dying without issue *living at the death*, it has no effect in enlarging a prior estate for life to an estate tail (*o*); as the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at *any* time. The only question, in such a case, would be, whether the words would raise an estate by implication in the issue living at the death. Lord *Hardwicke* suggested a point of this nature in *Lethieullier* v. *Tracy* (*p*), but the case did not require its determination. It is clear that, where the estate previously devised is in fee, no such implication arises; but this is not quite conclusive, inasmuch as the motive to imply an estate tail in such cases is much less cogent, since the alternative construction gives the prior devisee an estate in fee simple in the event of his leaving issue; whereby he is enabled to make a provision for such issue, if he leaves any: so that the scheme of disposition which is thus imputed to the testator is reasonable, and wholly free from the inconvenience and objection which attach to a similar construction where the devise is for life only, in which the effect of rejecting the implication is, that, in the event of the first taker leaving issue, the property is undisposed of, as it cannot go to either himself, his issue, or the ulterior devisee.

Estate tail not implied from words referring to issue *at the death*.

A devise, in a will which is governed by the old law, to a person and his heirs, followed by a limitation over in case of his dying without issue, confers an estate tail, on the ground that the testator has, by the words introducing the limitation over, explained himself to have used the word "heirs" in the preceding devise in the qualified and restricted sense of heirs of the body.

Devise to A. and his heirs, and if he die without issue, over.

[But it is not sufficient that the words used by the testator show that he contemplated the determination of the devisee's estate upon a general failure of issue, unless an actual devise over, either express or implied, to take effect in that event, be found in the will. Thus, in the case of *Doe* d. *Cape* v. *Walker* (*q*), where the testator, in his will, said, "If my son W. (who was the testator's heir-at-law) should die, and having no heirs lawfully begotten, and my freehold messuage should fall by descent

(*o*) See *Lethieullier* v. *Tracy*, 3 Atk. 774, 793.

(*p*) 3 Atk. 796.

[(*q*) 2 M. & Gr. 113.

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[unto my grand-daughter M.," and then directed his grand-daughter to pay certain legacies "within twelve months after she came into possession of the estate," the Court held that there was no gift to the daughter, and therefore that W.'s estate was not cut down to an estate tail; and the case of *Newton* v. *Barnardine* (*r*), where the words, "if R. die before he hath any issue of his body, so that the lands do descend to G.," were held to be a good gift by implication to G., and to raise an estate tail in R. was distinguished on the ground that, in the circumstances contemplated by the testator, G. was not heir of R., and "descend" was not used in its ordinary sense; and they laid stress on the words "so that," as denoting the consequence of an estate tail in R.]

Rule where person whose issue is referred to is heir-at-law of testator.

And it is to be observed, that where the person, on whose general failure of issue a devise is expressly made expectant, is the heir-at-law of the testator, he becomes, by the application of the rule under consideration, tenant in tail by implication, in precisely the same manner as if there had been a prior devise to him and his heirs in the will (*s*).

If, however, the person, in default of whose issue the estate is given over, (or the person to whom it is so given,) be not the heir-at-law of the testator, and if the former take no prior estate under the will susceptible of enlargement or modification from these words, an estate will not accrue to him by implication; and, consequently, the devise, to take effect on the contingency in question, is void for remoteness, as an executory devise limited to arise after an indefinite failure of issue (*t*). It follows, that, if lands, by a will made before 1838, be devised to A. and his heirs, and in case A. *and another person* die without issue, then over, A. takes an estate in fee simple absolute, the devise over being, for the reason just assigned, incapable of taking effect (*u*). In the case of *Gardiner* v. *Sheldon* (*x*), (which is a leading authority on this point,) A., having a son and two daughters, devised in the following words:—"If it shall happen my son B. *and my two daughters* die without issue of their bodies lawfully begotten, then all my lands shall remain to my nephew D. and his heirs." It was held, 1st, that no express estate was given to the children; and, 2ndly, that they took no estate by implication, because, then,

[(*r*) Moore, 127, Owen, 29.
(*s*) *Goodright* v. *Goodridge*, Willes, 369, 7 Mod. 453; *Daintry* v. *Daintry*, 6 T. R. 307.]
(*t*) Ante, p. 230.
(*u*) *Scrape* v. *Rhodes*, Com. Rep. 542.
(*x*) Vaugh. 259, 1 Eq. Ca. Ab. 197, pl. 6, 1 Freem. 11.

it must be either a joint estate for life, with several inheritances in tail, or several estates tail in succession, one after another. The latter it could not be, because it was uncertain which should take first; nor the former, because the heir-at-law could not be disinherited without a necessary implication, which in this case there was not, for it was only a designation and appointment when the land should come to the nephew, as if he had devised thus: "I leave my land to descend, or give it, to my son and his heirs, till he and my two daughters die without issue, or so long as any heirs of the body of him and my two daughters shall be living," and then to his nephew (*y*).

No implication unless prior devisee takes an estate.

This doctrine, however, it should be observed, has sometimes been considered as shaken by two modern decisions. The first is *Tenny* d. *Agar* v. *Agar* (*z*), where a testator devised certain lands to his only son A. and his heirs, upon condition that he paid to the testator's daughter B. 12*l.* a year until twenty-one, and after that age to pay her 300*l.* for her portion; and, in default of payment, that she should enter and hold the lands to her and her heirs for ever; and in case his (the testator's) said son *and daughter* happen to die "*without having* (*a*) *any children issue* lawfully begotten or to be begotten," then he devised the lands to C. in fee. The son entered, and performed the condition. He afterwards suffered a recovery, declaring the uses to himself in fee. The son and daughter both died without issue, the former having devised the property. Against his devisees the heir-at-law of C. the remainderman brought an action of ejectment, contending that the son and daughter took respectively an estate in fee, subject to an executory devise on their dying "without leaving any child or issue" at their decease, (which, of course, would not have been affected by the recovery,) and not estates tail. But the Court held that nothing could be clearer than that the testator intended that C., the devisee in remainder, should not take until the extinction of the lines of issue of both his son and daughter; and that to effectuate this intention the true construction was, that A. should take an estate tail only, with remainder in tail by implication to B., with remainder in fee to C.

Case of *Tenny* v. *Agar*.

The other seemingly opposing case is *Romilly* v. *James* (*b*), where a testator devised to A., his brother, all his real estate, subject to the devises thereinafter expressed. He then devised

Case of *Romilly* v. *James*.

(*y*) They also held, that this would be a good executory devise to the nephew; but it is clear that such a devise would be void for remoteness.

(*z*) 12 East, 252.

(*a*) From other parts of the case it seems the word was "leaving;" but, the subject being real estate, the variation is immaterial.

(*b*) 6 Taunt. 263, 1 Marsh. 592.

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to his brother's son, B., all his estate called M., to hold to him and his heirs for ever; and the testator afterwards provided, that *in case his brother and his son should happen to die, having no issue of either of their bodies*, then he devised all his real estate to his nephew J. and his heirs. B. died without having had issue, and A. died without leaving issue. It was contended here, as in the case of *Tenny* v. *Agar*, that B. took a fee, subject to an executory devise in the event of himself and his father both dying without leaving issue at their respective decease. But the Court held that B. was tenant in all. "The will" (said *Gibbs*, C. J.) "gives the fee to A. in all which is not afterwards disposed of; the subsequent clause removes that estate in the premises before given to A., and gives a similar clear estate in fee in the premises to B., divesting the estate of the father (*c*); but if A. and B. die without having issue, then the estate is given over. This plainly cuts down his (i. e. B.'s) estate to an estate tail, and doing so, it leaves something behind which A. may take as part of the real estate of the testator; but the same clause cuts down also the preceding estate in fee given to A. to an estate tail. B., therefore, takes an estate tail, with remainder in tail to his father, remainder in fee to J."

Remarks upon *Tenny* v. *Agar*;

It is observable that, in the case of *Tenny* v. *Agar*, the only material question was, whether the words, "leaving any child or issue," imported an indefinite failure of issue (*d*); for the affirmative of that proposition being established, it was unnecessary to inquire whether the estate of the first taker was cut down to an estate tail, with remainder in tail by implication to the other person on failure of whose issue it was given over; or whether the first taker had a fee, subject to an executory devise to arise on these events: for, in the former case, the recovery suffered by the first devisee in tail had acquired the fee simple: and in the latter, the devise over was void for remoteness: so that the title derived from the first devisee quâcunque viâ was good. The opinion of the Court, therefore, upon the question, whether an estate tail arose by implication, may be considered as extra-judicial. It is observable, too, that the words referring to the failure of issue may have been intended to cut down the fee simple, which the daughter was to take on the non-performance of the condition by the son, to an estate

(*c*) These expressions are taken verbatim from the report.

(*d*) On this point see Chap. XLI.

tail. Lord *Ellenborough*, in his judgment, assumed that there was a preceding devise in fee to the daughter as well as to the son.

—upon *Romilly* v. *James*.

In *Romilly* v. *James*, the Lord Chief Justice appears to have considered the general devise to A. as a gift of the remainder in fee of the property in question, expectant on an estate tail in B., and that it was in effect a devise to B. and his heirs, and in default of issue by him, to A. It is evident, therefore, (whatever may be thought of the soundness of this interpretation,) that this case also is no authority for the proposition, that a devise in default of issue of a person, not heir-at-law and not taking a prior estate by the will, raises in that person an estate tail by implication. A distinct recognition of the contrary doctrine occurs in the later case of *Doe* v. *Lucraft* (*e*), which has this peculiarity, that the devise over was in case of the failure of the testator's own issue (*f*); and it was treated as clear, that the words did not raise an estate tail by implication.

Estate tail implied, notwithstanding express contingent devise in tail.

The rule which implies an estate tail from words importing a failure of issue, was carried to a great length in one case, where the implication was considered not to be repelled by an *express* contingent devise in tail to the same person (*g*). The testator bequeathed to A., his only son, an annuity, increasing it at various ages until thirty, and to be paid to him until he married; *and in case he happened to marry before thirty*, then the testator devised to A. and the heirs of his body all his real (and personal) estate, subject to the payment of certain sums of money; *and if his said son should happen to die without leaving lawful issue of his body*, then he devised same to his (testator's) brother in fee: and it was held that the latter words raised an estate tail in the son by implication, which was not affected by the non-happening of the event upon which the express estate tail was made to depend, namely, his marrying before the age of thirty.

The contrary hypothesis, namely, that if the devisee attained thirty without marrying, he was to take nothing, imputed to the testator a very absurd intention; but it was difficult to say that the words importing a failure of issue did not refer to the heirs of the body mentioned in the preceding devise.

Effect of stat. 1 Vict. c. 26, upon the implication of estates tail.

No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an

(*e*) 1 M. & Sc. 573, 8 Bing. 386.
(*f*) As to these cases vide post.
(*g*) *Daintry* v. *Daintry*, 6 T. R. 307.

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indefinite failure of issue be very distinctly marked, as the stat. of 1 Vict. c. 26, s. 29 provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, 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; and it is also provided, that the act shall not apply to cases where the words 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*).

Distinction where prior devise is in fee or indefinite, and where expressly for life.

Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature. A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted.

Thus, if, by a will subsequent to 1837, real estate be devised to A. for life, and in case he should die without issue, to B., A. will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.'s dying without leaving issue at his decease; whether in such case the issue, if any, living at the decease of A. would take the fee by implication, will remain to be decided. Such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue; and yet, in the alternative event, giving the property neither to A. himself, nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying

As to implying an estate in the issue.

[(*h*) See this section of the statute further observed upon, post, Chap. XL. Sect. 4, and Chap. XLI. Sect. 4.]

an estate in the issue living at the death (*i*), and the contrary conclusion [is supported by the case of *Monypenny* v. *Dering* (*k*), where it was argued that a devise over in default of issue of A., a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that not some only but all the issue should take; but Sir *J. Wigram* V. C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for but did not get any authority for such a proposition.

So, with respect to personal property, in *Ranelagh* v. *Ranelagh* (*l*) where, by will made in 1814, legacies were given to several persons during their lives, with a gift over in case of the demise of any of them without issue, to the survivors, it was held by Lord *Langdale*, M. R., that the issue took nothing by implication. And again, in *Cooper* v. *Pitcher* (*m*), under a bequest to A. absolutely, and in case he should die in the testator's lifetime without issue, then over, A. having died in the testator's lifetime leaving issue, Sir *J. Wigram*, V. C., decided against the claim of the issue.]

Effect where there is no prior gift.

If, in a will which is subject to the new law, property real or personal is given in the event of the death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event, leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life interest in the person whose failure of issue is made the contingency on which such gift is to take effect.

If however the devisee on the contingency of the failure of issue of another were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to give to a person at a future time, that which will intermediately devolve to him by act of law, without providing for its destination in the meantime.

(*i*) Vide ante, p. 519.
[(*k*) 7 Hare, 588.
(*l*) 12 Beav. 200; and see *Greene* v. *Ward*, 1 Russ. 262.
(*m*) 4 Hare, 485; see *Addison* v. *Busk*, 14 Beav. 459; *Lee* v. *Busk*, 2 D. M. & G. 810; *Webster* v. *Parr*, 26 Beav. 236.]

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Advantages and disadvantages of the new enactment.

The chief advantages attending the newly-enacted mode of construing words importing a failure of issue are, 1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities, (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes in esse within twenty-one years afterwards,) which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, 2ndly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that, instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event.

Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate, expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee simple; in which case, the existence of issue at his death produces, as already shown, a vacancy in the disposition.

Implication of gifts to children.

VII. As no implied estate arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to *children* from a similar limitation over in default of these objects.

Accordingly, in several cases (*n*) it has been considered that a

(*n*) *Weakly* d. *Knight* v. *Rugg*, 7 T. R. 322; *Doe* d. *Barnfield* v. *Wetton*, 2 B. & P. 324; [*Addison* v. *Busk*, 14 Beav. 459, 2 D. M. & G. 810.] In *Weakly* d.

As to implying gifts in children from devise over in default of them.

bequest to a person, and if he shall die without having children, or without leaving children, (which means without having had a child born, or without leaving a child living at his decease (*o*),) then over does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

Where the prior gift to the parent is expressly for life.

But it seems that where the language of the will necessarily confines the interest of the parent to his life, the Courts will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent.

Thus, where (*p*) a testator, having by his will bequeathed 1,000*l.* to his niece A., by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said 1,000*l.* independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, *and at her decease without child or children*, the principal and interest to be divided among such of her sisters as should be then living. Sir *T. Plumer*, M. R., was of opinion that by the combined effect of the will and codicil, he was justified in saying that the children

Knight v. *Rugg*, leasehold property was bequeathed to A., and in case she died without having children, then over; and it was held, that A., on the birth of a child, was absolutely entitled, the only question discussed being, whether the words meant "without having a child born," or "without leaving a child living at the death." In *Doe* v. *Wetton*, the devise was to A., her heirs and assigns for ever; but if she should die leaving no child, lawful issue of her body, living at the time of her death, then over. Here the only contested point was, whether the first taker had an estate tail, or an estate in fee defeasible on her dying without issue living at her decease; and the Court decided in favour of the latter construction. Lord *Eldon*, C. J., observed, "if she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. *Nothing, however, is given to them by this will: they are merely named in the description of the contingency on which the estate is to go over.*" [See also *Abram* v. *Ward*, 6 Hare, 165.

(*o*) See Chap. XXX. Sect. 6.]

(*p*) *Ex parte Rogers*, 2 Madd. 449. Some of the positions advanced in the judgment in this case must be received with an implied qualification.

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took the legacy by necessary implication; [why, he asked, did the testator mention children if he did not mean them to take?]

Remark on *Ex parte Rogers.*

Here, the implication was evidently aided by the testator's prefatory expressions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition. [In the case of *Ranelagh* v. *Ranelagh* (*q*), Lord *Langdale*, M. R., professed himself unable to answer the question proposed by Sir *T. Plumer*, and seemed to refer the decision entirely to its special grounds; he, therefore, did not consider it an authority for implying a gift to children or issue in ordinary cases like the one before him; and still more recently the case has been doubted by high judicial authority (*r*).]

[(*q*) 12 Beav. 200.

(*r*) Per Lord *Cranworth*, C., 2 D. M. & G. 812; and see *Sparks* v. *Restal*, 24 Beav. 218; *Webster* v. *Parr*, 26 ib. 237; but see *Egan* v. *Morris*, Ll. & G. t. Plunk. 297.]

CHAPTER XVIII.

RESULTING TRUST TO THE HEIR.

1. *Resulting Trust to the Heir in Real Estate not beneficially disposed of.*
II. *Effect where particular Estates are void in their Creation.*

I. If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property. It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir-at-law (*a*).

Effect when will leaves property partially undisposed of.

Trust results to the heir, when.

On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay the rents to A. for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of (*b*).

This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application; but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, ultra the purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.

Question whether devisees take beneficially, or not.

The distinction between the two classes of cases was, in the case of *King* v. *Denison* (*c*), thus stated by Lord *Eldon*:—"If

Lord *Eldon's* statement of the principle.

(*a*) *Hartop's case*, 1 Leon. 253, Cro. El. 243; and other cases infra. In the case of the legal estate so circumstanced, the lands descend to the heir charged with the trust.

(*b*) *Culpepper* v. *Aston*, 2 Ch. Ca. 115, 223; *Roper* v. *Ratcliffe*, 9 Mod. 171, 2 Eq. Ca. Ab. 508. In both the above propositions, however, it is assumed that the subject of disposition is the testator's general or residuary real estate, or that the will does not contain a residuary devise, the effect of which to pass the undisposed-of interest in particular lands is considered in Chap. XX.

(*c*) 1 V. & B. 272.

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I give to A. and his heirs all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him."

In illustration of this subject, it is proposed to state a few of the leading cases, showing, first, where a trust has been held to result; and, secondly, where not.

Cases of resulting trusts.

In the case of *Wych* v. *Packington* (*d*), a testator, after appointing his wife S. sole executrix of his will, devised to his said dear wife, his executrix, a rent-charge of 200*l.* per annum, out of certain lands, upon trust that she, her executors, &c., should be supplied with monies out of the rents and profits for the discharging his debts, legacies, and payments; to which end, he gave and bequeathed to her a lease for thirteen years of the said rent-charge, to commence six months after his decease. And the testator devised to his wife certain lands for life, in augmentation of her jointure; and the residue of his lands to his daughter (who was heir-at-law) in tail. The personal estate being found sufficient to satisfy the debts and legacies, it was not necessary to resort to this fund. The House of Lords, in affirmance of a decree of the Court of Exchequer, held that the rent-charge resulted to the heir.

So, in a case which arose on the will of Serjeant Maynard (*e*), who devised his lands to three persons, to the use of them and their heirs, upon the trusts after mentioned; and then directed the trustees, upon the death of the countess, his wife, to convey

(*d*) 3 B. P. C. Toml. 44.

(*e*) *Hobart* v. *Countess of Suffolk*, 2 Vern. 644, 1 Eq. Ab. 272, pl. 7; [see also *Collis* v. *Robins*, 1 De G. & S. 131; *Wills* v. *Wills*, 1 D. & War. 439.]

the estate to certain persons for life; but without disposing of the remainder in fee. It was contended that the devise, being to them and their heirs, upon the trusts after mentioned, imported that they should be trustees only for those purposes; and when those estates were spent, the land was to remain to them to their own use. But the Lord Chancellor held, that the remainder in fee resulted to the heir; his Lordship adverting to the circumstance that the devise was to three persons, and one of them no relation to the testator.

[And in *Watson* v. *Hayes* (*f*), the testator devised all his real estates to trustees, "in trust to and for the purposes hereinafter mentioned;" he then desired his estates to be sold, and out of the produce an annuity for life and a sum of money to be paid to his natural daughter, and also an annuity of 400*l.* a year to his wife for her life, and the residue of the income to be applied for the maintenance of his children till they attained twenty-one, "when it is my will that they shall respectively receive the principal, or one-fifth part of such sum as may remain, after first reserving a sufficient capital, the interest arising from which shall be sufficient to pay the above annuity of 400*l.* to my said wife and my legacy to my natural child." The testator left five legitimate children. It was held that there was no gift of the monies to be set apart to produce the annuity of 400*l.*, but that those monies resulted to the heir-at-law as part of the real estate undisposed of.]

It is clear that where lands are devised upon trust for sale, the resulting trust in favour of the heir is not repelled by a mere bequest to him of a sum of money payable out of the proceeds.

Legacy to the heir does not exclude him.

Thus (*g*), where a testator devised lands to his executors and their heirs, in trust, to be sold by them, and the survivor of them, for the best price, and with the money to pay his debts, legacies, and funeral, and among the legacies were two to his co-heirs: it was contended, on the authority of *North* v. *Crompton* (*h*), that, there being legacies to the heirs, and none to the executors, the latter must take for their own benefit; but Lord *Cowper*, C., held, that the trust resulted to the co-heirs, adverting to the direction to the executors to sell for the best price, which need not have been inserted if they were intended to be

[(*f*) 5 My. & Cr. 125.]

(*g*) *Starkey* v. *Brooks*, 1 P. W. 390; see *Randall* v. *Bookey*, 2 Vern. 425.

(*h*) 1 Ch. Ca. 196; see also *Halliday* v. *Hudson*, 3 Ves. 210.

owners (*i*); and also the devising the estate to the survivor, which, he observed, was a further argument of its being rather a trust than an ownership.

Resulting trust in lands devised to be sold.

Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced; but the contest in such cases generally lies between the heir-at-law and the residuary legatee, or next of kin, whose respective claims are discussed in the next chapter.

So, in a case (*k*) where the Earl of Harborough devised his manors, advowsons, &c., to trustees in trust, to pay his son 1,000*l.* a year for his life, and the rest of the profits to be laid out in land, to be settled to certain uses; Lord *Hardwicke* held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and devolved to the heir; no other profits being given than such as might be accumulated; though, he said, if the testator had devised all the surplus rents and profits, it would have carried the right of presentation (*l*).

As to chattel interest devolving upon the heir.

And here it might be observed, that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his personal representative (*m*).

Cases in which devisees held to take beneficially.

We now proceed to the cases in which a trust has been held not to result, there being an apparent intention to give the devisee as well the beneficial interest as the legal estate.

Effect of direction to sell to certain persons.

In *Hill* v. *Bishop of London* (*n*) a testator devised his per-

(*i*) Why not, as there was a trust for creditors, which might have absorbed all?

(*k*) *Sherrard* v. *Lord Harborough*, Amb. 165; see also *Kellett* v. *Kellett*, 3 Dow, 248.

(*l*) With this dictum agrees the case of *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477, 7 B. P. C. Toml. 522, where a testator devised all his manors, messuages, lands and hereditaments to A. for eleven years from his death; and from the end, expiration, or sooner determination of the said term, and in the meantime subject thereto, to B. and his issue in strict settlement. The term was declared to be bequeathed to A., upon trust, to receive the rents, issues and profits of the premises, and thereout to pay certain charges therein mentioned, *paying the overplus of such monies to the testator's daughter E.* During the eleven years an avoidance occurred in an advowson forming part of the property, and the next presentation was claimed, by B., as the devisee of the estates subject to the term, the trusts of which, it was said, did not comprise an interest of this description; and also by E., either as the cestui que trust of the residuary rents, issues, and profits, during the term, or as heir-at-law; and it was held to belong to her in the former character, the entire beneficial interest during the term, not absorbed by the charges, being given to her. [See also *Johnstone* v. *Baber*, 6 D. M. & G. 439: but see *Martin* v. *Martin*, 12 Sim. 579.]

(*m*) *Levet* v. *Needham*, 2 Vern. 138; see also *Wych* v. *Packington*, 3 B. P. C. Toml. 44, stated ante, p. 530; [*Hewitt* v. *Wright*, 1 B. C. C. 90; *Sewell* v. *Denny*, 10 Beav. 315; *Burley* v. *Evelyn*, 16 Sim. 290; *Whitehead* v. *Bennett*, 18 Jur. 140.]

(*n*) 1 Atk. 618.

petual advowson of B., in the county of H., to his honoured mother-in-law G. S., willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another, in a prescribed order. Item, he gave to his said mother-in-law his freehold lands in the parish of O., and to her heirs and assigns for ever. It was held, that the beneficial interest in the advowson included in the first devise did not result to the heir. "The general rule," said Lord *Hardwicke*, "that, where lands are devised for a particular purpose, what remains after that purpose is satisfied results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lands to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust." There were in this case, his Lordship observed, two objects of the testator's benevolence, G. S. and the colleges.

Word "trust" not necessary in creating one.

Lord *Hardwicke* also adverted to the circumstance that the word *trust* was not made use of; but this, though not immaterial, is by no means conclusive; for a trust may be created without that word, if such an intention can be collected from the whole will (*o*).

Distinction between a devisee *for*, and *subject to*, a particular purpose.

His Lordship's statement of the general rule may seem to clash with Lord *Eldon's*, before cited. He appears to have confounded the distinction, so clearly marked by Lord *Eldon*, between a devise *for* (*p*), and a devise *subject to*, a particular purpose; but, as the case before Lord *Hardwicke* seems to belong to the latter class, it is in accordance with that distinction. The frame of the devise and the context (for it was immediately followed by a devise, clearly beneficial, to the same person) certainly favoured the construction adopted. The case suggested by his Lordship, of a devise to A. to sell for the best price to B., perhaps, is more open to doubt. He admitted,

(*o*) *Halliday* v. *Hudson*, 3 Ves. 210; and see *King* v. *Denison*, 1 Ves. & B. 273; [*Briggs* v. *Penny*, 3 Mac. & G. 546.]

(*p*) See *Abrams* v. *Winship*, 3 Russ. 350, where perhaps the word "for" was read as meaning "in consideration of."

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however, that, under a devise of lands to be sold for payment of debts, there was a clear resulting trust.

Effect of expressions importing benefit to the devisee.

The resulting trust for the heir in lands devised for a particular purpose is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

Thus (*q*), where a testator, having given 5*l.* to his brother, (who was his heir,) made and constituted his dearly-beloved wife his sole executrix and *heiress of all his lands* and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, Lord Chancellor *King* held, she was not, after payment of debts, a trustee for the heir. He said that the devise that the wife should be sole heiress of the real estate, did, in every respect, place her in the stead of the heir, and not as a trustee for him. His Lordship observed, that it was plainer by reason of the language of tenderness, his "dearly-beloved wife," which must have intended something beneficial to her, and not what would be a trouble only; and what made it still stronger was, that the heir had a legacy.

Of expressions of kindness.

That neither of these two circumstances alone is sufficient, is quite clear. The former occurred in *Wych* v. *Packington* (*r*), where the expression was "my dear wife," and yet the trust was held to result; and the latter, in *Randall* v. *Bookey* (*s*), where a legacy to the heir was decided not to rebut the inference of a resulting trust.

Of describing devisee by relationship.

Where the devisee is merely described by the relationship, as "my cousin," "my brother," unaccompanied by any particular expression of kindness, the argument is still less strong, the designation being merely part of his description; though certainly, in *Coningham* v. *Mellish* (*t*), the fact of the devisee being described as "my cousin," and that of his being as nearly related to the testator as the heir, seem to have formed the grounds of the determination. In the cases of that period, however, the doctrine of resulting trusts was not so invariably and steadily maintained as it is now; and many positions to be found in them are inconsistent with the rules at present established. Such a description of the devisee is certainly a circumstance to be attended to, and was so referred to in a case by Lord *Eldon*, in reference to *Coningham* v. *Mellish* (*u*); but that it would now

(*q*) *Rogers* v. *Rogers*, 3 P. W. 193, Cas. t. Talb. p. 530.

(*r*) Stated supra, p. 530.

(*s*) 2 Vern. 425, 1 Eq. Ab. 272, pl. 4; [and see *Hughes* v. *Evans*, 13 Sim. 504.]

(*t*) Pre. Ch. 31, 1 Eq. Ab. 273, pl. 8, 2 Vern. 247.

(*u*) See *King* v. *Denison*, 1 V. & B. 276.

be allowed the weight which was given it in that case, is not probable.

[Where the gift to the devisee was in the first instance expressly upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, and having expressly declared that the heir should take nothing except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared (*x*).]

As to the expressed purpose of the devise being beneficial or not to the devisee.

In *Rogers* v. *Rogers*, the purpose expressed, namely, the payment of debts and legacies, was not beneficial to the devisee; and, therefore, unless she had taken the surplus, she would have derived no benefit from the devise. It has been truly said, "that, where the purpose expressed is something in favour of the party to whom the bequest is made, the presumption is rather stronger that the benefit specified is the only benefit which he is intended to derive from the bequest (*y*)."

In the case of *Dawson* v. *Clarke* (*z*), a testator gave to his friends A. and B. all his real and personal estate, to hold to them, their heirs, executors, administrators, and assigns, upon trust in the first place to pay, and charged and chargeable with all his just debts and funeral expenses and the legacies thereinafter bequeathed. The testator, after beqeathing several legacies, appointed A. and B. executors. Lord *Eldon*, C.:— "The question is, whether, upon the whole will, this is to be taken as a devise and bequest to these executors with reference to their office, upon a trust to pay; or as giving them the absolute property subject only to a charge; and I think the latter was the intention."

Lord *Langdale's* remark on *Dawson* v. *Clarke*.

Of this case Lord *Langdale*, M. R. (*a*), has observed that Lord *Eldon* gave effect to the words "charged and chargeable," (which he had placed in opposition to the words "upon trust,") on some ground which does not appear in the report. It might

[(*x*) *Hughes* v. *Evans*, 13 Sim. 496.]

(*y*) Per Sir *William Grant*, in *Walton* v. *Walton*, 14 Ves. 322.

(*z*) 15 Ves. 409, 18 Ves. 247. This case was decided at the Rolls, in reference exclusively to the personal estate; [see also *Mullen* v. *Bowman*, 1 Coll. 197; *Russell* v. *Clowes*, 2 ib. 648; *Mapp* v. *Elcock*, 2 Phill. 793, 3 H. of L. Ca. 492; *Fruer* v. *Bouquet*, 21 Beav. 33; bearing upon the question whether executors are trustees for the next of kin. The act 1 Will. 4, c. 40, which now, (s. 1,) in the absence of a contrary intention appearing, gives the beneficial interest to the next of kin (*Juler* v. *Juler*, 30 L. J. Ch. 142), leaves (s. 2) the old rule undisturbed as between the executor and the Crown, where there is no next of kin; *Cradock* v. *Owen*, 2 Sm. & Gif. 241; *Powell* v. *Merrett*, 1 ib. 381; *Read* v. *Stedman*, 26 Beav. 495; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182.

(*a*) 1 Kee. 324.

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be that he considered the last words in the will as explanatory of the first.

A devise subject to certain annuities.

The general doctrine was much discussed in the case of *King* v. *Denison* (*b*), where a testatrix devised her real estate to her cousin Mary A., wife of R. A., and to her cousin Arabella J., and their heirs and assigns for ever; *subject, nevertheless, to, and chargeable with,* the payment of the annuities thereinafter mentioned; and she bequeathed her personal estate to three other persons, subject to, and chargeable with, her debts and legacies; and gave such three persons equal legacies. Lord *Eldon* held, that the devisees of the real estate were not trustees, after paying the annuities, for the heir-at-law; his Lordship considering the intention to be, (according to the distinction stated by him, already quoted,) that they should not take merely *for the purpose of paying* those annuities, but beneficially, *subject to* them. The Court of King's Bench had made a similar decision upon the same will (*c*).

Circumstance of devisees being a married woman and an infant;

It happened in this case that one of the devisees was a married woman, and the other an infant of fifteen: persons, therefore, ill adapted to be trustees. But, though Lord *Eldon* admitted these were circumstances to be attended to (*d*), yet, he observed, that, if they were trustees upon the whole context, he could not say that they were not so on that ground; and upon the singularity that the testatrix had given to these cousins in preference to nearer relations, a sister and aunt, his Lordship observed, that the answer was, she had made the disposition.

—and not testator's nearest relatives.

Of their being trustees of the personal estate.

Another circumstance in the case was, that the testatrix had used the same expression, "subject and chargeable," in the bequest of the personal estate to her executors, of which it was contended they were trustees, in consequence of having equal legacies given them; but Lord *Eldon* observed, that, admitting this construction as to the personalty, which he thought doubtful upon the cases, it did not follow that the same words, in different parts of the will, applied to a different subject, were to receive the same construction. It was only the same as if she had said that the executors should not take the personalty beneficially, but had made no such declaration as to the real estate (*e*).

(*b*) 1 V. & B. 261.

(*c*) *Smith* d. *Denison* v. *King*, 16 East, 283; see also *Wood* v. *Cox*, 2 My. & Cr. 684, ante, p. 360; [*Briggs* v. *Penny*, 3 Mac. & G. 546.]

(*d*) See *Blinkhorn* v. *Feast*, 2 Ves. 27.

(*e*) But see *Countess of Bristol* v. *Hungerford*, 2 Vern. 645.

[Lastly, in the case of *Williams* v. *Roberts* (*f*), where a testator gave all his real and personal estate to his wife, her executors and administrators, upon trust to pay to his daughter an annuity during the life of his wife, and upon further trust that she, his said executrix, *at the time of her decease, should cause her executors, administrators, or assigns,* to pay or cause to be paid to certain persons, *should they survive his wife,* certain legacies, which did not exhaust the beneficial interest; it was held, notwithstanding the express words of trust, that the undisposed-of interest belonged to the testator's wife and executrix, "the will (*g*) being inconsistent with the notion that she was not to have a beneficial interest in the property."

As to resulting trust in lands given to charity.

It should be noticed that an exception to the doctrine of resulting trusts exists in regard to gifts to charity; the rule being, that, where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir-at-law (*h*).

It has been observed by Lord *Hardwicke* (*i*) and Lord *Eldon* (*k*), that, at the time this doctrine was established, the right of the heir-at-law under a resulting trust was not sufficiently understood, or it never could have been adopted. Both these great Judges, however, acknowledged it to be a principle not now to be shaken.

But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the cestui que trust, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate (*l*).

[(*f*) 4 Jur. N. S. 18, 27 L. J. Ch. 177.

(*g*) Especially, it may be thought, the expressions printed above in *italics*.]

(*h*) *Thetford School case*, 8 Co. 130; Duke's Ch. Uses, 71; *Sutton Colefield case*, 10 Rep. 31; Duke, 68; *Att.-Gen.* v. *Johnson*, Amb. 190; *Att.-Gen.* v. *Sparks*, Amb. 201; *Att.-Gen.* v. *Haberdashers' Company*, 4 B. C. C. 103; *S. C.* nom. *Att.-Gen.* v. *Tonna*, 2 Ves. jun. 1; see also *Bishop of Hereford* v. *Adams*, 7 Ves. 324; [*Re Jortin*, ib. 340; *Att.-Gen.* v. *Wansay*, 15 ib. 231; *Att.-Gen.* v. *Drapers' Company*, 4 Beav. 67.]

(*i*) Amb. 190.

(*k*) 2 J. & W. 307.

(*l*) Lord *Eldon* in *Att.-Gen.* v. *Mayor of Bristol*, 2 J. & W. 307; [and *Att.-Gen.* v. *Skinners' Company*, 2 Russ. 443.] But as charitable dispositions of lands by will are prohibited by the statute of 9 Geo. 2, c. 36 (ante, p. 200), unless in favour of certain objects, this question rarely occurs, except under wills which are prior to the statute.

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Destination of particular estates void in their creation.

II. Another question which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, a particular estate be void in its creation from being limited to a person incapable by law or refusing to take, the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir-at-law as real estate undisposed of.

Ulterior estate held to be accelerated.

The early authorities are clearly in favour of the acceleration. Thus, it is laid down in Perkins (*m*), that, "if a man, seised of land devisable in fee, devised it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently." [But Sir *J. Leach*, M. R., put this case on the ground that the monk was actually dead in the eye of the law (*n*).]

So it was held by *Gawdy*, in *Fuller* v. *Fuller* (*o*), (though the case did not raise the point,) that if the devisee of an estate tail refuse, the devisee in remainder shall take immediately. And the same point, in regard to a devisee for life, was maintained arguendo in *Archbishop Cranmer's case* (*p*), [and acknowledged by Sir *E. Sugden* in *Crozier* v. *Crozier* (*q*). And in *Hutton* v. *Simpson* (*r*), where there was a devise to A. and the heirs of his body, and for want of such issue to B., and A. died in the lifetime of the testator leaving issue, it was held that B. should take immediately, though it was against the express words of the will and the maxim of the law that an heir should not be disinherited except by clear words.]

As to acceleration by revocation of previous estate.

The principle of these cases undoubtedly applies to the case of a devise of a life estate being revoked by the testator. [Accordingly, in *Lainson* v. *Lainson* (*s*), where freehold and leasehold estates were devised and bequeathed upon trust for the testator's eldest son for life, with remainder over, and by codicil the son's life estate was revoked and an annuity given to him instead, Sir *J. Romilly*, M. R., decided that, though the remainder was only expressed to take effect after the death of the tenant for life, yet that meant after the determination of the life estate whether by death or otherwise, and that the remainder was accelerated; and the decision was affirmed by the Lords Justices *K. Bruce* and *Turner* (*t*),

(*m*) 567. See also ss. 567, 569; and Shepp. Touchst. 435, 451.
[(*n*) 2 My. & K. 779.]
(*o*) Cro. El. 425.
(*p*) Dy. 310, a.
[(*q*) 3 D. & War. 365.
(*r*) 2 Vern. 723.
(*s*) 18 Beav. 1; see *Re Colson*, Kay, 133.
(*t*) 5 D. M. & G. 754.

[the latter of whom, after remarking that the cases cited established that *primâ facie* the words used were to be understood as denoting the order of succession of the limitations, said, "If I. L. (the son) had died, there can be no doubt the grandson would have come into possession immediately; and what difference does it make whether the previous estate is removed by death or by revocation?"]

The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture; and it seems not to be (as commonly supposed) contradicted by the case of *Carrick* v. *Errington* (*u*), where a man settled [the equitable fee simple of] lands to the use of Thomas Errington (who was a papist) for life; remainder to trustees during T. E.'s life, to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to W. E. The limitations in favour of the papist were, in the then state of the law (*x*), void; and it was held, that the remainders were not accelerated, *on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E.* [This special ground seems to resolve itself into the common rule, that a contingent remainder in an equitable estate does not fail by the determination of the previous estate, and it then necessarily followed, that the intermediate equitable interest during the life of T. E., being undisposed of, resulted, according to another common rule, to the grantor.

Estate if not accelerated may be too remote.

In some cases, those for instance of a void limitation in tail, the result of deciding against acceleration would be to make the subsequent limitations void, as being, in that view, executory devises to take effect on an event too remote, namely, the indefinite failure of issue of the intended devisee in tail. Any effect which might be attributed to this consideration must of course

[(*u*) 2 P. W. 361, 5 B. P. C. Toml. 391. It is not stated in P. W. that the settlement was an equitable one, and consequently the case reads as if it were a direct authority that removal of the prior estate brought the estate in remainder of the trustees to preserve into possession; but see Lord *Hardwicke's* statement of the case in *Hopkins* v. *Hopkins*, 1 Atk. 597, and the statement of the case in Brown, and in 6 Bac. Abr. Gwil. 128.]

(*x*) But now see stat. 18 Geo. 3, c. 60.

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[be extended to all cases alike, as a test of the general principle, and not applied as a circumstance which ought to influence the determination of the particular case where the remainder would otherwise be void (*y*).

Whether same rules apply to personalty.

It is observable that the acceleration of the remainder in the real estate, in the case of *Lainson* v. *Lainson*, necessarily carried with it the acceleration of the executory gift over of the leasehold (*z*). But it has never been decided whether, in a simple case, such a gift over would be accelerated. With respect to contingent executory gifts, so far as the authorities go, the law seems to be otherwise. Thus, in the case of *Lomas* v. *Wright* (*a*), an estate was settled on an after-born illegitimate son in fee, (a limitation which we shall hereafter see is void,) and if he should die before he attained twenty-one, then over. Sir *J. Leach*, M. R., in giving judgment, expressed his opinion that in case of a void limitation of an estate for life, the use of the partial interest remained in the grantor; that, in the case before him, the use to the after-born child resulted to the grantor, and that such after-born child having in fact attained twenty-one, the limitation over could never take effect. It will be observed, that the expressions of the learned Judge as to acceleration after a void life-estate were not called for by the case before him, in which the gift over, being contingent on an event which might never happen, might, if accelerated and made to take effect before the actual happening, turn out ultimately to have taken effect on events on which it was not originally limited to take effect. The case of a simple executory gift over of leaseholds on the death of a prior legatee for life, occupies a middle position between the two extremes, and is distinguished from cases such as *Lomas* v. *Wright* by the certainty of the event upon which it is limited.

In a late case (*b*), where a sum of money was bequeathed to A. for life, and after her death to B., and by codicil the life interest given to A. was revoked, the Master of the Rolls expressed an opinion that the rules which related to real estate did not apply to personalty, though under the special circumstances of the case he held B.'s interest to take effect immediately.

The reasons in favour of acceleration evidently apply more strongly where the estate to be accelerated is strictly limited, as

[(*y*) See ante, p. 274, n. (*n*).
(*z*) The legatee over was also one of the testator's next of kin; but as to this, see ante, p. 509.
(*a*) 2 My. & K. 775; see also *David* v. *Rees*, 1 R. & My. 687.
(*b*) *Eavestaff* v. *Austin*, 19 Beav. 591.]

[a remainder to take effect on the determination of a previous void estate, than to other species of limitations, of which an example is afforded by] the case of *Tregonwell* v. *Sydenham* (*c*), where a testator devised certain estates at S., subject to some terms of years, to the use of his son A. for life; remainder to trustees, during his life to preserve contingent remainders; remainder to the first and other sons of A. in tail male; remainder to the eldest daughter of A. in tail general; with the like remainder to his second and other daughters, and divers remainders over. The testator then devised estates at D., subject to certain terms of years, to A. for life; remainder to his first and other sons in tail male; remainder to the second and other sons of the testator in tail male; and, in default of his male issue, as to that part of those estates called C., remainder to the use of the testator's brother B. for life; remainder to his first and other sons in tail male, and, after several other remainders, remainder to the plaintiff J. for life; remainder to his first and other sons in tail male; remainder to the testator's right heirs. And as to all other his estates in D., to retain the same for sixty years, and receive the rents and grant leases until the trustees should have received 17,500*l.*, which they should apply to the uses following: viz. when they should have received 2,500*l.*, to lay out the same, with the interest, in some real estate in certain parishes, and settle the estate so purchased on such person for life as, by virtue of his said will, should then be in possession of his estate at S., or in case, by suffering a common recovery, that estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same; and so, from time to time, as soon as the further sum of 2,500*l.* should be raised, until the whole 17,500*l.* should be so raised, should lay out the same in lands as thereinbefore directed, to be settled on the several persons as should be, or should have been, in case no such common recovery had been suffered at each of the said times, in possession of his S. estate, with such remainder on each of the said settlements as might continue the said estates in the blood and name of the St. Barbes; and, after the said 17,500*l.* should be so raised, then to raise the further sum of 2,500*l.*, to be laid out in some real estates in some or one of the parishes of D., E., &c. and to settle the said estate so purchased on such person for life as, by virtue of that his will, should then be in possession

Case of *Tregonwell* v. *Sydenham.*

Devise to take effect *after* raising of a sum of money for certain purposes, not accelerated by failure of the purposes.

(*c*) 3 Dow, 194.

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of the estate of D., or, in case of suffering a common recovery or otherwise, his said estate should be in other hands, then on such person as would, in case no recovery had been suffered, have been in possession of the same by virtue of his will, with such remainder as might continue the same in the name and blood of the Sydenhams. *And after the said two sums, amounting to* 20,000*l. and expenses, should be raised for the said uses, or determination of the said term of sixty years,* then to the use of the testator's brother B. for life, with remainder to his eldest and other sons in tail male; and, after such other remainder as he had limited with respect to the first part of his D. estate, remainder to J. the elder plaintiff, for life; remainder to his first and other sons in tail male, with the ultimate remainder in fee to the testator's right heirs. The testator died, leaving A., his only son, and two daughters. A died in 1799, leaving his grandson T., the only son of one of his daughters, his heir-at-law. A., B. and several of the intermediate devisees (*d*), having died without issue male, the plaintiff J. the elder, became entitled to an estate for life in possession in the property at C., and plaintiff J., the younger, (his eldest son,) to an estate in remainder therein. T. was tenant in tail of the S. estate; and, as to the second part of the D. estate, the trusts of the term had not been executed. On a bill filed by J. and J. the younger to have the trusts of the term declared void as tending to a perpetuity, and that the residue should be assigned for their benefit, the Court of Exchequer declared the trusts to be void, and the term to attend the inheritance. But the House of Lords, on appeal, reversed the decree; declaring, first, that the trusts of the term were *not* void in their creation, but became so in event, the trusts for raising the money being valid; but that of settling the lands to uses being void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death (*e*). Secondly, (and this is the point material to the present discussion,) that the trusts of the term resulted for the benefit of the heir-at-law of the testator.

Term for raising certain monies for void purposes held to belong to the heir.

The argument of Lord *Redesdale* and Lord *Eldon*, upon which this part of their decision turned, was, that the land, not being given over until "from and after" the raising of the money, the

(*d*) It is stated in the report that they died in the testator's lifetime, but this appears to be a mistake.

(*e*) On this point, vide ante, p. 262.

intermediate interest was evidently not included in the devise, and, therefore, went to the heir. The interest given to the devisee was exclusive of, and with a deduction of, that sum. "The testator, then," observed Lord *Eldon*, "has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of a testator with respect to a purpose which the law will allow, the doctrine of law is, that *he* shall take the interest who takes independently of all intention, and on whom the law casts it. On these grounds, I agree that the money must be raised and applied for the benefit of the heir, and not of the devisees (*f*)."

Remark on *Tregonwell* v. *Sydenham*.

It is evident that the two points adjudicated by the House of Lords had no necessary connection; or, in other words, that the deciding the heir to be entitled was not a consequence of holding the trusts of the term to be void in event only, and not in their creation; for Lord *Eldon* expressly laid it down, that, if the trusts had been to raise 20,000*l.* for charities, (in which case they would have been clearly void ab initio,) and after the sum had been raised, then to the devisees, as the intention would not have been in their favour, the heir would have been let in (*g*).

Whether term for years, trust being satisfied, or not arising, attends inheritance for the benefit of devisee.

It is clear, however, that where a term for years is created for particular purposes, and the land *subject thereto* is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee. And such was the decision in one case, where the nature of the trust and the expressions of the testator afforded an argument in favour of a contrary construction.

Term for years, trust being satisfied, held to attend inheritance for devisees.

The case here alluded to is *Davidson* v. *Foley* (*h*), where a testator devised lands to trustees, their executors, &c., for ninety-nine years, upon the trusts after mentioned, and, after the expiration or other determination thereof, and subject thereto, to A., testator's son, for life, remainder to his first and other sons

(*f*) And with this doctrine the cases on the statute restraining accumulation of income (ante, p. 291) seem to agree.

[(*g*) His Lordship seems to have forgotten that in the case put by him, not only the gift of the 20,000*l.*, but also the term would have been void ab initio (see ante, p. 206), and the reversioner, and not the heir, would then have become entitled in possession. See *Williams* v. *Goodtitle*, 5 M. & Ry. 757, post, p. 545.]

(*h*) 2 B. C. C. 203. See Lord *Eldon's* judgment in *Sidney* v. *Shelley*, 19 Ves. 364.

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in tail male. Another term was created, in the same manner, of property similarly given to B., another son, and his sons in tail male. The trusts of the respective terms were for the trustees, in their discretion, to pay testator's two sons an annual allowance, not exceeding a given sum, but so as that *they should have no estate or interest in the rents of the property for their lives,* other than the trustees, in their discretion, should think proper; and then to pay off a certain mortgage; and then to pay certain debts of his sons, but so that the testator's son's creditors should have no lien upon the land; and, *after the decease of his sons,* and the payment of the mortgage-money and debts before mentioned, and the costs, the terms were to attend the inheritance. Lord *Thurlow* was of opinion, that, as the purposes for which the terms were created were exhausted, the terms attended the inheritance for the benefit of the tenants for life. It had been ingeniously argued, he said, that these were trusts extending beyond the lives of the sons, and that, if those trusts were sufficient the sons were to have no interest for their lives. But the nature of a resulting trust was, that it was such as had escaped the attention of the testator, and that here the intention of raising a trust beyond the payment of debts, was totally unexpressed. No trust could be raised upon the terms used.

Lord *Thurlow's* reasoning evidently assumes that the devises, subject to the term, comprised all the interest not actually absorbed by the trusts of such term; and this may serve to reconcile some expressions in his judgment, which might otherwise seem to warrant a conclusion more favourable to the heir than to the devisees.

Case in which term was created, but no trusts were declared.

The same principle has been applied to a case in which a term for years was devised, upon trusts to be thereinafter declared, (but which were not declared,) with devises over on the "expiration or sooner determination" of the term, the words "subject thereto," though not actually occurring in the will, being by force of the intention appearing upon the general context, supplied.

As, in the case of *Sidney* v. *Shelley* (*i*), where A. devised lands to trustees and their heirs, to the use of them, their executors, &c., for ninety-nine years, "upon the trusts hereinafter expressed and declared concerning the same, and from and after the expiration or other sooner determination of the said term of

(*i*) 19 Ves. 352.

ninety-nine years," he gave the said lands to several persons for life and in tail; and the will contained no declaration of the trusts of the term: it was strongly contended that the trusts resulted to the heir, chiefly on the authority of a dictum of Lord *Hardwicke* (*k*), in a case wherein a term of ninety-nine years having been created by settlement, without any declaration of trust, his Lordship is made to say, upon the question whether there was a resulting trust for the settlor, "It has been determined so in the case of voluntary settlements and wills;" his Lordship distinguishing a settlement for valuable consideration. But Lord *Eldon*, in the principal case, decided that the testator, having created a term for ninety-nine years, upon trusts to be afterwards declared, and, at the expiration or sooner determination of that term, having devised those estates in such a manner as that the actual enjoyment of them was clearly intended; the termors having nothing for their own use, and he not having declared any trust, the result was exactly the same as if some trust had been declared, which it became unnecessary to satisfy, or which was satisfied after his death. His Lordship considered that the will was to be read as if the words "subject to the trusts thereof" were in it.

As to terms not upon trust.

Lord *Eldon* observed, that, if the limitation had been simply to the trustees, without reference to any trusts, however monstrous the supposition with reference to the intention, the subsequent devisees must have taken subject to the term.

Reversion accelerated where term is void.

[If the limitation of the term itself is void, as where trusts are declared in favour of a charity, the devisee of the freehold is, of course, immediately entitled in possession (*l*).

As to appointments under powers.

The doctrine of acceleration does not extend to estates limited under powers of appointment, where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment (*m*).

And there is no case in which the estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued prior to the time when his estate took effect. Therefore, where after a limitation to trustees to preserve contingent remainders an estate was limited to the first and other

(*k*) In *Brown* v. *Jones*, 1 Atk. 191. A note of this dictum, found among Lord *Northington's* papers, coincided.

[(*l*) *Williams* v. *Goodtitle*, 5 M. & Ry. 757.

(*m*) See per Sir *E. Sugden*, *Crozier* v. *Crozier*, 3 D. & War. 365, 366; and 2 Sugd. Pow. 67, 7th ed. And distinguish the cases there cited, and *Reid* v. *Reid*, 25 Beav. 469, in which the remainder as well as the particular estate fails.

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[sons of A., who should be born within fifteen years, successively in tail, with remainder to B., and A. had no son and the fifteen years had not expired; it was held that B. had no right to the rents accruing during the fifteen years (*n*).]

Whether, under devise to A. during minority of B., A.'s estate determines on B.'s decease during minority.

Sometimes an estate is made to determine at the majority of a minor; and it happens that he dies under age: whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated.

In *Carter* v. *Church* (*o*), A. devised lands to his daughter in fee, and declared that his executors should receive the profits until she attained twenty-one, towards payment of his debts and legacies. The daughter died when five years old. The Lord Keeper was of opinion that the charging the profits until the daughter attained twenty-one, amounted to a term until she would, if living, have attained that age.

So, in *Coates* v. *Needham* (*p*), where A. devised lands to C. and D. and their heirs, upon trust, to receive the rents until his son W. should attain the age of twenty-one years; and pay one-third to the testator's wife in lieu of dower; and out of the other two-thirds to raise portions for his daughters; and devised all to W., when twenty-one, in tail; and, in default of such issue, then over. W. died under the age of twenty-one, without issue; the widow afterwards died before W. would, if living, have attained that age; and it was held, [according to the first report of the case (*q*), which is probably the correct one (*r*), that the wife's administrator was entitled during the term for which the minority would have lasted; but, in a subsequent case on the same will, it was held] that the wife's third for such period was an interest undisposed of, and went to the testator's heir, on the ground that nothing was given to the devisees until W. attained (or, rather, would have attained) his majority, and died without issue.

[(*n*) *Sidney* v. *Wilmer*, 25 Beav. 260.]

(*o*) 1 Ch. Ca. 113.

(*p*) 2 Vern. 65, [*Levet* v. *Needham*, ib. 138, which states the decision in *Coates* v. *Needham* wrongly.

(*q*) 2 Vern. 65.

(*r*) The decree is given in Mr. *Raithby's* edition from Reg. Lib., but he states that he could not find any decree in *Levet* v. *Needham*,] the most singular feature in which case is, the holding the interest of the wife to have ceased at her death. If, as the Court assumed, a term was absolutely carved out of the inheritance, clearly words of limitation were not necessary to vest it in the wife with the transmissible quality of personal estate.

On the other hand, in the case of *Manfield* v. *Dugard* (*s*), where A. devised lands to his wife until B., his eldest son, should attain twenty-one; and, when he should attain that age, to him in fee. B. died at the age of thirteen; whereupon his heir-at-law claimed the rents from his death. The Lord Chancellor held, that the heir was entitled, for that the wife's estate determined at the death of the son, whose estate in fee, which was vested at the testator's death, took effect in possession on that event.

One of the reasons assigned for this adjudication was, that the land was not devised to the wife for the payment of debts; [and this agrees with *Boraston's case* (*t*), where a testator devised lands to his executors until such time as his grandson, Hugh, should accomplish his full age of twenty-one years, and the mean profits to be employed by his executors towards the performance of his will. Hugh died at the age of nine years; and it was argued by *Coke*, that the term of the executors did not thereby cease, because it was to be intended that the testator had computed that the profits to be taken of his lands by his executors, during the minority of his grandson, would suffice to pay his debts and perform his will, and that he did not intend that it should determine by the death of his grandson, for then his debts would remain unsatisfied and his will unperformed, which was granted by the whole court (*u*).

This argument was adopted by Sir *J. Jekyll*, M. R., in the case of *Lomax* v. *Holmedon* (*x*), in which he distinguished the cases where such an interest was created for a particular purpose, as for a fund for payment of debts (which he said was *Boraston's case*), from the cases where no such intention appeared: in these latter he said the interest would absolutely determine by the death of the party under the age specified in the will. It is plain that here] the existence of the minority supplies the sole occasion and motive for the creation of the estate in question (*y*). [The principle of these authorities is clearly unaffected by the

(*s*) 1 Eq. Ca. Ab. 195, pl. 4.

[(*t*) Co. 19, a.

(*u*) 3 Co. 21, a.

(*x*) 3 P. W. 176. See also *Sweet* v. *Beal*, Lane, 56, where the term was held to endure beyond the death of the minor under age, for the termor's own benefit, which was therefore the "particular purpose" in that case.

(*y*) See *Castle* v. *Eate*, 7 Beav. 296. If the person to whom the intermediate interest is given should die during the minority, the same reasons (i. e. "the existence of the minority") will give the interest to his representatives during the remainder of the term: see *Laxton* v. *Eedle*, 19 Beav. 321. Where it is a class during whose minority the income of property is given, the estate will continue while there is a chance of any persons becoming members of the class, though none may for the time being be actually in existence, e. g., during the life of a parent whose children's minority is contemplated, semb. *Conduitt* v. *Soane*, 4 Jur. N. S. 502.]

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[circumstance of the specified purpose being insufficient to exhaust the whole proceeds of the term. The construction is that the testator has made his own computations, so that the estate must endure until the regular expiration of the term, and if any part of the beneficial interest is undisposed of, it must result to the heir-at-law.]

Postponement during minority, not extended to devisees over.

Sometimes it happens that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would during the minority have devolved to the heir-at-law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately (*z*).

[It may be proper here to observe, that where property, vested in a trustee for the testator, is devised to other trustees for purposes which do not appear, or which are void, or fail, so that the heir, if there be one, would be let in, then in case of there being no heir, the trustees under the will can claim a conveyance from and enjoy the property beneficially as against the prior trustees (*a*).]

(z) *Chambers* v. *Brailsford*, 18 Ves. 368.

[(*a*) *Onslow* v. *Wallis*, 1 Mac. & G. 506.]

CHAPTER XIX.

DOCTRINE OF CONSTRUCTIVE CONVERSION.

I. *Money considered as Land, and vice versâ. Distinction between absolute and qualified Converting Trusts.*

II. *Election to take Property in its actual State.*

III. *Effect where Legatee's Enjoyment is apparently postponed until Conversion, and, generally, as to relative Rights of Legatee for Life and ulterior Legatee under residuary Clauses.*

IV. *Destination of undisposed-of Interests in Property directed to be converted. Doctrine of Conversion as between Claimants under Will and real and personal Representatives of Testator.*

V. *Effect of Failure by Lapse, or otherwise, of pecuniary Gifts out of Proceeds of Land.*

Money to be laid out in land considered as land, and vice versâ.

I. On the principle that equity considers that as done which ought to have been done, it is well established that "money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the land, [qu. property?] or the contracting parties, may make land money, or money land (*a*)." It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense: since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion is expressed to be

(*a*) Vide Sir *Thomas Sewell's* judgment in *Fletcher* v. *Ashburner*, 1 B. C. C. 499, whose statement of the doctrine in these terms was commended for its accuracy by Lord *Alvanley*, in *Wheldale* v. *Partridge*, 5 Ves. 396.

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reposed. The principle is, besides, too well supported by numerous authorities (*b*), to be called in question at this day.

Cases illustrative of the doctrine.

Thus, money directed to be laid out in land, and settled on A. in fee, is, though not actually laid out, descendible as real estate to the heir, is subject to tenancy by the curtesy (*c*); is not liable (otherwise than real estate is liable) to simple contract debts (*d*); and passes under a devise of lands, tenements, and hereditaments (*e*), in a will sufficiently attested to pass real estate; [and will not pass under a bequest purporting to include personal estate only (*f*)].

On the same principle, where, under the old law, a person entitled to the fee simple, in possession or reversion, of lands to be purchased, devised them by a will executed before the actual conveyance, the lands subsequently purchased were bound in equity by the devise (*g*).

So, in the converse case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of personal estate (*h*).

General doctrine denied by Lord *Loughborough*.

His dictum overruled.

It is true that, on one occasion (*i*), Lord *Loughborough* doubted whether, in such cases, there was any equity between the real and personal representatives; suggesting that they were rather to take according to the state in which the property was found. But this solitary dictum has been completely overruled by subsequent Judges, who, following the earlier cases, have confirmed the rule before stated (*k*).

(*b*) 2 Keb. 841; 2 Vern. 55; Pre. Ch. 543, cited 2 Vern. 58; 1 Vern. 345; 2 Vern. 20; 1 Eq. Ab. 273, pl. 5; 1 Eq. Ab. 274, pl. 6; 2 Vern. 101; ib. 295; ib. 506; 1 P. W. 172; Pre. Ch. 400; 1 Eq. Ab. 175, pl. 5; 3 P. W. 212; Cat. Talb. 80; 1 P. W. 204; ib. 483; 1 B. P. C. Toml. 207; 3 ib. 1; ib. 148; 2 Atk. 452; 3 Atk. 111; 3 ib. 254; 1 B. C. C. 224; 7 B. P. C. Toml. 530; 1 B. C. C. 497; ib. 505; 2 Kee. 653.

(*c*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. 174; *Dodson* v. *Hay*, 3 B. C. C. 404.

(*d*) *Lawrence* v. *Beverly*, 2 Keb. 841; now see stat. 3 & 4 Will. 4, c. 104.

(*e*) *Lingen* v. *Sowray*, 1 P. W. 172; *Shorer* v. *Shorer*, 10 Mod. 39; *Harvey* v. *Aston*, 1 Atk. 364; *Guidot* v. *Guidot*, 3 ib. 254; *Rashleigh* v. *Master*, 1 Ves. jun. 201, 3 B. C. C. 99; *Hickman* v. *Bacon*, 4 B. C. C. 333; *Green* v. *Stephens*, 12 Ves. 419, 17 ib. 64.

[(*f*) *Gillies* v. *Longlands*, 15 Jur. 570, 20 L. J. Ch. 441; and see *Richards* v. *Att.-Gen. of Jamaica*, 13 Jur. 197; *In re Pedder's Settlement*, 5 D. M. & G. 890.]

(*g*) See Lord *Cowper's* judgment in *Lingen* v. *Sowray*, as reported 1 Eq. Ca. Ab. 175, pl. 5. Such a question can hardly arise under a will made or republished since 1837.

[(*h*) *Elliott* v. *Fisher*, 12 Sim. 505.]

(*i*) *Walker* v. *Denne*, 2 Ves. jun. 170.

(*k*) *Wheldale* v. *Partridge*, 5 Ves. 388, 8 Ves. 227; *Thornton* v. *Hawley*, 10 Ves. 129; *Biddulph* v. *Biddulph*, 12 Ves. 161; *Green* v. *Stephens*, ib. 419, 17 Ves. 64; *Kirkman* v. *Miles*, 13 Ves. 338; *Triquet*

Double conversion.

The doctrine, of course, applies where the ultimate destination of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be regarded as real estate (*l*).

What amounts to a constructive conversion.

[In order to work a constructive conversion, an actual sale or purchase either immediately or in future, and either absolutely or contingently at a specified time, must be directed expressly or impliedly. A mere direction that real estate is to be considered as personal, or vice versâ, is insufficient (*m*), since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another.

Effect of words giving an option as to investments.

Where there is an option to invest money, either in the purchase of fee simple lands or leaseholds, or on securities bearing interest, there will be no constructive conversion of the money into land, unless the trust or limitations declared of the fund are such as to be solely applicable to fee simple property, and can be properly carried out only by the purchase of such property (*n*); where the trusts are applicable solely to personalty, or may be adapted either to personalty or fee simple lands, the money will be deemed unconverted.

Cases where money has been held converted.

Earlom v. *Saunders*.

And first as to the cases where money has been held to be converted. In *Earlom* v. *Saunders* (*o*), lands were devised to trustees to the use of the testator's wife for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with remainder to two persons as tenants in common in fee; and money was bequeathed to trustees to be laid out in the purchase of lands *or any other security or securities* as they should think proper and convenient; and the testator directed that the lands and securities should be made to and settled on the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease to such uses and under such provisions, conditions and limitations as his lands before devised were limited; Lord *Hardwicke*, on the

v. *Thornton*, ib. 345; *Van* v. *Barnett*, 19 Ves. 102; *Ashby* v. *Palmer*, 1 Mer. 296, and stated post; *Stead* v. *Newdigate*, 2 Mer. 521.

(*l*) *Sperling* v. *Toll*, 1 Ves. 70; *Pearson* v. *Lane*, 17 Ves. 101. [In such a case, where part of the land has been sold and the money not yet re-invested, the money will not pass under a devise of all the testator's interest in the land, there being part still unsold to answer the description, *In re Pedder's Settlement*, 5 D. M. & G. 890.

(*m*) *Johnson* v. *Arnold*, 1 Ves. 171; *Att.-Gen.* v. *Mangles*, 5 M. & Wels. 120.

(*n*) *See De Beauvoir* v. *De Beauvoir*, 3 H. of L. Ca. 524.

(*o*) Amb. 241; see also *Johnson* v. *Arnold*, 1 Ves. 169; *Meure* v. *Meure*, 2 Atk. 265.

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[ground that if the money was laid out on securities which were personal, all the limitations might not take place, considered the money to be constructively converted.

Cowley v. *Harstonge.*

In *Cowley* v. *Harstonge* (*p*), the point was much considered. The trust was to lay out monies "either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the money, &c., to H. for his life," and then followed a series of limitations of estates for life, and in tail to the sons and daughters of H., and to other persons. The House of Lords, affirming the decree of the Irish Court of Chancery, considered that taking the whole will together, the testator contemplated *an investment in land at some time or other*, and there was therefore a constructive conversion. It must be observed that in this case there was an ultimate limitation to the testator's right heirs, *executors and administrators;* but Lord *Redesdale* said those words merely showed that if all the previous limitations failed, the personal estate was to go to the next of kin, and the real estate to the heir; for, as we shall see hereafter, property may be converted as to some of the takers of partial interests, and not as to others.

Hereford v. *Ravenhill.*

In *Hereford* v. *Ravenhill* (*q*), fee-simple estates were devised in strict settlement, and money was bequeathed upon trust with consent to be invested in the purchase of freehold, *leasehold*, or copyhold messuages, lands or hereditaments, which were to be conveyed, settled or assured to the like uses, &c. as the hereditaments thereinbefore devised stood limited. There was, also, a power to invest at interest till a purchase could be made. The M. R. decided that this was a trust for conversion, and observed that the case before him differed from *Walker* v. *Denne* (which will be noticed hereafter), in that the leaseholds to be purchased in that case were to be for very long terms of years. This difference is not very apparent; but the limitations in the several cases were such as easily to lead to different conclusions.

Cookson v. *Reay.*

In *Cookson* v. *Reay* (*r*), the testator directed a sum of money to be invested in land or other securities for his son John, the interest of such money or produce of such lands to be paid to him for his life, and if he married with consent, and made a proper settlement on his wife, that the remainder should go to

[(*p*) 1 Dow, 361. (*r*) 5 Beav. 22.
(*q*) 5 Beav. 51.

[such child or children as he might have lawfully begotten, and on failure of these to the testator's son Isaac and his heirs for ever. The M. R., without deciding the point, said that, upon the authorities of *Earlom* v. *Saunders* and *Cowley* v. *Harstonge*, he was inclined to consider the money as directed to be laid out in the purchase of land, and that the direction to invest on some other securities had reference only to the time which might elapse before a purchase of land could be procured. This is a strong case, and could have turned solely on the words "remainder" and "heirs" in the limitations to the children and Isaac. The decision was subsequently affirmed by the House of Lords (*s*), but upon different grounds.

Simpson v. *Ashworth*.

In *Simpson* v. *Ashworth* (*t*), the testator gave to his daughter C. 4000*l.* out of his personal estate, and directed his executors to pay her the interest of 2000*l.* till she attained the age of twenty-one years. He also directed his executors or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed 2000*l.*, for her use and her lawful heirs, the daughter to come into possession, with the accumulations, at her age of twenty-one years. If the land was not bought before she attained that age, she was to receive the 4000*l.*, and to give security for 2000*l.*, to be returned, if she died without lawful heirs, to the testator's son and daughters that should have heirs, share and share alike, and provided the land be purchased, to be returned in the same manner. The Master of the Rolls considered that the 2000*l.* was intended to be converted at all events, and that the daughter took an estate tail. The will was, it is presumed, made previously to the late act; consequently the gift over on the death of the daughter without heirs could not have been held valid unless the fund had been considered as constructively converted, and this, according to *Earlom* v. *Saunders*, was a sufficient reason for deciding in favour of the conversion.

Next, with respect to the cases in which it was held that there was no conversion.

Cases where money has been held not converted.

Curling v. *May*.

In *Curling* v. *May* (*u*), the trust was to lay out money in the purchase of lands, or put the same out on good securities, upon trust for the separate use of H., her heirs, executors and administrators. The money never having been laid out, Lord *Talbot* decreed the administrator of H. to be entitled.

(*s*) 12 Cl. & Fin. 121.
(*t*) 6 Beav. 412.
(*u*) Cited 3 Atk. 255.

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Van v. *Barnett*.

[In *Van* v. *Barnett* (*x*), lands were devised to trustees to be sold, and the produce, with the consent of certain persons, was directed to be laid out in the purchase of *lands or in government securities*, and the latter trust was held not to operate as a re-conversion, the trusts declared of the fund in its ultimate state not being such as to show that a re-investment in land at some time or other was intended (*y*).]

Walker v. *Denne*.

In the case of *Walker* v. *Denne* (*z*), where money was directed to be laid out in (freehold) lands, *or* long terms of years, Lord *Loughborough* held that it was not converted into realty so as to escheat to the Crown on failure of heirs, there being an option in the trustees to have it laid out in either species of property. His Lordship, indeed, doubted whether, even if there had been no such option, the Crown could have claimed. But his doubt appears to have referred as well to the general doctrine, as to its effect in regard to escheat. There would seem to be considerable difficulty in supporting the claim of the Crown to have the money laid out in such a case, escheat being a consequence of tenure; and, therefore, it should seem inapplicable to equitable interests of every description (*a*).

Doctrine of conversion in regard to escheat.

Implied trust for conversion.

[Sometimes there is no express trust for conversion, but the circumstances are such as to lead to an implication that conversion was intended.

Cornick v. *Pearce*.

Thus, in *Cornick* v. *Pearce* (*b*), the testator devised all his real and personal estate to trustees upon trust to receive and apply the income for the benefit of his two daughters until the youngest should attain the age of twenty-one, and then to divide the whole of his estate and effects into two equal moieties, one moiety to be divided between his two daughters equally, and the other moiety to be placed out by the trustees on government or real securities, the income to be paid to the daughters during their lives, and upon the death of the daughters, "upon trust to divide the monies and effects amongst the children equally." If either of the daughters should die leaving a husband surviving, the testator directed that the husband should enjoy her share for his life, and upon his decease that such share should come back to the surviving daughter, her executors, administrators and assigns. It seems to have been admitted, that by the direction for the investment of a moiety was implied a direction

[(*x*) 19 Ves. 102.

(*y*) See also *Biggs* v. *Andrews*, 5 Sim. 424.]

(*z*) 2 Ves. jun. 170; see also *Van* v. *Barnett*, 19 Ves. 102.

[(*a*) See 3 My. & K. 494; ante, p. 62, n. (*a*).

(*b*) 7 Hare, 477.

[for the conversion of that moiety; but it was also argued that a conversion of the whole real estate was thereby implied; but the Vice-Chancellor said there was no direction which required a conversion, except as to the moiety to be settled. The words applied only to a moiety after a division had been made. In *Mower* v. *Orr* (*c*), the same Judge decided that a direction to divide copyholds, and personal properties of different sorts, into twenty shares, with a gift of a certain number of shares to each of four persons, though there was no direction to invest, operated as an implied direction to sell the copyholds; and he distinguished *Cornick* v. *Pearce*, on the ground that the purposes of the will would, in the circumstances of that case, be effected without a conversion of the whole estate. But the purposes of the will, in the case of *Mower* v. *Orr*, could have been equally effected without a conversion, unless we admit, that because the number of shares is large, and consequently, a division otherwise than through the medium of conversion inconvenient, therefore a trust for conversion must be implied from words, which, had the number of shares been small, would have given rise to no such implication, a construction which would lead to very inconvenient results. The case of *Mower* v. *Orr* seems to go little short of deciding that every direction to divide implies also a direction to convert into money, for the purpose of rendering the division more easy (*d*).

Conversion implied for convenience of division.

In *Burrell* v. *Baskerfield* (*e*) it was held, that the words "I give full power to my executors, their heirs and assigns, to collect all my property together, and sell the houses and other estates, and to convert into money all my funded property, and *then* to pay, first the following legacies," followed by bequests of several legacies, and a division of the property into twelve shares, created a trust for conversion of the real estate, and not merely a power.

Burrell v. *Baskerfield.*

In *Tily* v. *Smith* (*f*), the testator directed that his wife should hold one of his houses for her use to bring up his children E. and M., and at their arriving to the age of twenty-one years, then all his estates real and personal to be sold and converted into money, and the proceeds to be divided between his wife and as many children as she had at his decease. The wife and one

Tily v. *Smith.*

[(*c*) 7 Hare, 475; see also *Rigden* v. *Peirce*, 6 Mad. 353.

(*d*) But see *Greenway* v. *Greenway*, 29 L. J. Ch. 601.

(*e*) 11 Beav. 525.

(*f*) 1 Coll. 434. See also *Pearce* v. *Gardner*, 10 Hare, 287, where the period (five years) within which conversion was directed had elapsed; held nevertheless on the context that the trust might still be executed.]

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[daughter M. survived the testator, but the daughter E. died in his lifetime under twenty-one, and the other daughter afterwards died also under twenty-one, so that, strictly speaking, the time for conversion never arrived. However, the V. C. thought that in the event, which happened, of the wife or one or both of the daughters surviving the testator, he intended that there should positively and absolutely at some time, and not conditionally or contingently, be a sale of the real estate. That time, he thought, arrived at or before the widow's death.]

Direction for temporary investment does not prevent conversion.

A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of real estate instanter (*g*), this being a mere temporary arrangement; [unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final disposition of the *capital* fund, in certain events, as money, it is shown, that the conversion is to take place only in the alternative events (*h*).

Effect of sale or purchase being only to be made on consent.

It is not material that the sale or purchase is to be made only when or in case the trustees think fit, or with the approbation or upon the consent of certain persons.

Doughty v. *Bull.*

Thus, in *Doughty* v. *Bull* (*i*), the trust was to sell as soon as the trustees should see necessary, and it was held, that only the time of the sale, and not the question as to whether there should be any sale, was left to the discretion of the trustees.

Lechmere v. *Carlisle.*

In the case of *Lechmere* v. *Earl of Carlisle* (*k*), the purchase was to be made by Lord Lechmere with the consent of trustees; Sir *J. Jekyll*, M. R., said it had been objected that something was to be done previously by the trustees, namely, that they were to consent; but, in his opinion, they were not to do the first act; Lord Lechmere ought to have proposed his purchase and settlement, upon which the trustees were to have signified their agreement or disagreement.

Effect where sale or purchase to be made upon request.

If the purchase is to be made on or after request, the question whether or not a conversion is intended, must be answered from

(*g*) See *Edwards* v. *Countess of Warwick*, 2 P. W. 171.

[(*h*) *Wheldale* v. *Partridge*, 5 Ves. 388, 8 ib. 227.

(*i*) 2 P. W. 320. See also *Robinson* v. *Robinson*, 19 Beav. 494. If the trustees decline to exercise their discretion the court will consider the conversion as effected at the testator's death, ib. And of course they may not frustrate the intended conversion by withholding their consent from corrupt or interested motives, *Lord* v. *Wightwick*, 4 D. M. & G. 803.

(*k*) 3 P. W. 211; and see *Wrightson* v. *Macaulay*, 4 Hare, 497; and compare *Huskisson* v. *Lefevre*, 26 Beav. 157.]

[a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made.

Thus] in the case of *Thornton* v. *Hawley* (*l*), Sir *W. Grant* was of opinion, that the circumstance that a sum of stock was to be sold after request, and the produce laid out in the purchase of land at the request and with the consent of [husband and wife, or the survivor, or the executors or administrators of the survivor,] did not prevent the fund being immediately impressed with the quality of real estate, [because to such property alone were the limitations applicable, and also because it was hardly possible to suppose an intention to give an option to any person who should be an executor or administrator whether it should be money or land, though it might be intended to give that option to the husband and wife. From these considerations he inferred] that this requisition did not exclude the authority of the trustees to convert the property at their own discretion, without request; but only rendered it imperative on them to act on the request, if made. *If* the M. R. was right in this construction of the deed, the conclusion at which he arrived respecting the nature of the property was inevitable.

Taylor's Settlement.

[On the other hand, in the case of *Taylor's Settlement* (*m*), houses held in fee simple had been vested by marriage settlement in trustees in trust, upon request of the husband and wife, or the survivor, to sell and invest the produce of the sale, and to pay the income of the money, or of the houses till a sale, to W. for life, and after his decease, to his wife for life, and after the decease of the survivor, to convey the houses unless sold, or to assign the money, to the issue of W. and his wife. Under an Act of Parliament (*n*), power was given compulsorily to purchase these houses, and the price was settled by a jury, but the trustees not being able to make a good title, the purchase-money was paid into Court, and no conveyance was ever executed by the trustees. Sir *G. Turner*, V. C., considered that the sale had not been made under the trusts of the settlement, and that the purchase-money must be considered as land, though if the trustees had executed a conveyance at the request of the

(*l*) 10 Ves. 129; see also *Triquet* v. *Thornton*, 13 Ves. 345; but see Lord *Eldon's* judgment, in *Van* v. *Barnett*, 19 Ves. 102; where, however, the direction was alternative to invest in personal security or land.

[(*m*) 9 Hare, 596; and see *Davies* v. *Goodhew*, 6 Sim. 585.

(*n*) As to the effect of a compulsory sale under an Act of Parliament, see cases cited ante, p. 152, n. (*l*).

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[proper persons, he was disposed to think it would have been different. He remarked that, in the case of *Thornton* v. *Hawley*, the sale was, after the death of the husband and wife, to be made at the request of the executors or administrators of the survivor; but, in the case before him, the sale was to be made only on the request of the husband and wife or the survivor; so that no sale could be made after their deaths; and that words of request in cases of such nature must be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument might require. In this case, the general intent that the houses should be sold at some time or other was evidently wanting, the last proviso in the settlement directing that the property, if sold, was to be personal, if not sold, real.]

Effect of property directed to be sold being devised in a certain contingency as land.

It seems that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state; as he may have contemplated the possibility of the contingency happening before a sale could be effected; besides which, it seems to have been considered, that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

Lands devised to be sold, and proceeds given to A.;

Thus, in the case of *Ashby* v. *Palmer* (*o*), where a testatrix devised and bequeathed her real and personal estates to trustees, upon trust, as soon as convenient after her decease, to sell, and with the money thereby raised, and the rents until the sale, to pay her and her late husband's debts, and with the surplus to educate and bring up her daughter; and when she should attain twenty-one, or marry, "to pay the monies which should be in the hands of the trustees, by virtue of the will, undisposed of for the uses aforesaid," to the daughter. And the testatrix went on to direct, that if the daughter died under twenty-one or un-

(*o*) MS.; *S. C.* 1 Mer. 296. The statement of this case is extracted from a note with which the author has been favoured. It supplies a deficiency in Mr. Merivale's report of it, in which, with less than his usual accuracy, he omits, in the statement of the will, the very bequest on which the question arose, and to the particular language of which the M. R. adverted; [see also *Tily* v. *Smith*, 1 Coll. 434, stated supra; *Ward* v. *Arch*, 15 Sim. 389; and see Lord *Redesdale's* remarks in *Cowley* v. *Harstonge*, 1 Dow, 381, supra, which show that property may be constructively converted quoad a particular interest in it, as an estate for life or in tail, and remain unconverted as to the subsequent interests. But such a partial conversion will not be implied from the mere fact that conversion is less necessary for distribution in one alternative than in another, *Wall* v. *Colshead*, 2 De G. & J. 683. And see *Wilson* v. *Coles*, 6 Jur. N. S. 1003.]

—with a limitation over of the monies, *or the estate, if unsold* to B.

married, the monies in the hands of the trustees, *and such part of the real estate (if any) as should remain unsold at the time of her decease*, and not be applied for the payment of her debts or for the education of her daughter, should go to the testatrix's sister, her heirs, executors and assigns. The daughter attained twenty-one but was a lunatic, and therefore incompetent to elect to take the estate as land or money. The question was, whether it went, at her death, to her heirs-at-law or next of kin? For the heir, it was contended that the estate was not to be sold at all events, but only to answer a particular purpose; that the testatrix did not mean it to go as money; *that she contemplated the possibility of its not being sold.* For the next of kin, it was argued that the estate was to be sold out and out; that the testatrix had no objection that her sister should take it as land, if by accident it should remain unsold; and she might have contemplated the premature death of the daughter before a sale could be effected; in which event, and in that only, she directs that the trustees shall not proceed in the accomplishment of her purpose. And it was contended that the words "pay to" supported this construction; and it was said that, at all events, the daughter was to take it as money. Sir *W. Grant*, M. R.: "I think that the construction of this will admits of no reasonable doubt: it is the settled rule of this Court, that land once impressed with the character of money retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character. The testatrix has directed the estate to be sold; but the question is, not whether the estate shall be actually sold or not, but whether it is to be treated as personal estate? There is no gift to the daughter in any other shape than that of money. I see nothing inconsistent in the subsequent clause, by which, in the event of the death of the daughter under twenty-one, such part of the estate as should remain unsold is given to the sister (*p*). She might choose to give it to the daughter as money, and to the sister as land. There is no inconsistency in saying it shall be converted quoad the first taker, not quoad the second. The cases which have arisen between the heir and next of kin of a testator have no application to the present (*q*).

Held to be personal estate as to A.

(*p*) As to this, see also *Crabtree* v. *Bramble*, 3 Atk. 680.

(*q*) What is the effect of a direction to purchase land in a particular parish, in which it turns out that land cannot be obtained, is not settled. Lord *Thurlow* thought it could not be laid out elsewhere; Lord *Loughborough*, that it might. Lord *Eldon* has alluded to these conflicting opinions without stating his own; see *Broome* v. *Monck*, 10 Ves. 610; also Hayes' Introd., 5th ed., p. 95.

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Mere power does not produce conversion unless by force of the context.

And though a mere *power* of sale or purchase, of course, does not change the nature of the property; yet, the circumstance of the clause respecting the sale or purchase being framed in the language of a power will not prevent its producing a constructive conversion, if the context of the will shows that it is meant to be imperative, or in the nature of a trust. Thus, in the case of *Grieveson* v. *Kirsopp* (*r*), where a testator gave to his widow, for the benefit and advantage of his children, power of selling his Woodfoot estate; and by a codicil expressed himself (in effect) thus: "I do empower my wife to sell all my estates whatsoever; and the money arising from such sale, together with my personal estate, she, my said wife, *shall* and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The estate was neither sold nor appointed by the widow. It was held that a trust for the children was created by the will, and that they were entitled equally. It was held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

Nature of property made to depend on trustee's option to sell or not.

But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected; yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the meantime will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state. Thus, in the case of *Polley* v. *Seymour* (*s*), a testatrix devised the residue of her real and personal estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell and dispose of the whole, or such part thereof as and when he or they should from time to time think expedient, and then, upon trust to invest the proceeds. The testatrix then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and after such sale, of the securities whereon

(*r*) 2 Keen, 653; [see also *Burrell* v. *Baskerfield*, 11 Beav. 525.]

(*s*) 2 Y. & C. 708; [see also *Taylor's Settlement*, 9 Hare, 596, stated supra; *Harding* v. *Trotter*, 21 L. T. 279, V. C. S.; *Greenway* v. *Greenway*, 29 L. J. Ch. 601; *Lucas* v. *Brandreth*, 6 Jur. N. S. 945.

the same should have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life annuities; and, after payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same or any part thereof should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust for five persons (including W. himself), in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof. It was held, that upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out; but that W. had a discretion to sell the whole or any part of it, when and as he might think expedient; and that, until he exercised that discretion, the property must be considered to remain in the state it was in at the time of the death of the testatrix.

[So in *Yates* v. *Yates* (*t*), where a testator devised lands to trustees in trust for his wife during her life, with remainders over; and for carrying into effect the purposes of his will, he "authorized his trustees at such time or times as they should think proper, in case they should think it necessary so to do, but as to which they should have absolute discretion" to sell the lands or any part thereof: the land in question was nearly unproductive in its actual state, but was valuable for building purposes; it had not yet been sold by the trustees; and the widow, the tenant for life, claimed interest at 4*l.* per cent. upon the value of the land from the death of the testator: but Sir *J. Romilly*, M. R., held that she was not entitled to this, the trustees having a discretionary *power* to sell when they thought fit. If there had been an absolute trust for conversion, though the time for exercising it had been left to the discretion of the trustees, the case would have been different (*u*).]

Legacy duty on proceeds of real estate, often raises question whether conversion is absolute.

The question whether real estate is absolutely converted by a direction or authority often comes under consideration on the claim of the Crown to legacy duty under the General Stamp Act (55 Geo. 3, c. 184, sched. part 3), which subjects to the duty "moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mort-

[(*t*) 6 Jur. N. S. 1023. (*u*) Infra, p. 576.]

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gaged or otherwise disposed of." On this subject, the following points have been decided :—

Rule on this subject.

1st, That where real estate is directed to be sold out and out, the duty attaches, though the property is not actually sold because the legatee elects to take it as real estate (*x*).

2ndly, That where trustees have an option to sell or to continue the property in its actual state, and in the exercise of this discretion they leave it unsold, the legacy duty does not apply (*y*); but that

3rdly, Even where the terms of the will confer on the trustees an absolute discretion in regard to the conversion of the property, yet, if they do actually sell, the proceeds of the sale are, by such means, rendered liable to the duty (*z*); [and where a sale is directed by the Court of Chancery, in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are compelled by the Court to exercise, but not (*a*) if the Court acts upon its general jurisdiction in such cases.

4thly, Where there is a trust for sale and re-investment in land, the duty is not payable, even though there has been a sale, and the beneficial owners have elected to take the property as money (*b*).]

Mere power of sale does not let in legacy duty.

And it is to be observed, that where trustees are authorized to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration. Inasmuch, therefore, as an absolute direction to sell will produce a constructive conversion for this purpose, notwithstanding a declaration that the property should have the qualities of real estate; so, by parity of reasoning, a declaration that it shall be deemed personalty would not bring the legacy duty on property upon which the character of personalty was not otherwise impressed.

(*x*) *Att.-Gen.* v. *Holford*, 1 Pri. 426; *Adv.-Gen.* v. *Ramsay's Trustees*, 2 C. M. & R. 224, n.; [*Williamson* v. *Adv.-Gen.*, 10 Cl. & Fin. 1.]

(*y*) *Att.-Gen.* v. *Mangles*, 5 M. & Wels. 120; [*Att.-Gen.* v. *Simcox*, 1 Exch. 749.

(*z*) *Att.-Gen.* v. *Simcox*, 1 Exch. 749, overruling *In re Evans*, 2 C. M. & R. 206, unless that case can be considered as depending on its own peculiar circumstances, namely, that there was an implied trust for re-investment in land.

(*a*) *Hobson* v. *Neale*, 8 Exch. 368, 17 Beav. 178.

(*b*) *Mules* v. *Jennings*, 8 Exch. 830].

Option to allot property to beneficial legatees as real estate.

Thus, in the case of *Attorney-General* v. *Mangles* (*c*), where a testator gave to his executors, their heirs, executors and administrators all the residue of his estate, real and personal, upon trust, at such times as they might think fit, to *sell, convey or otherwise convert into money* the same, or any part thereof; and directed that all the residue of his estate should be invested as it should be realized, and should be divided amongst his children in certain shares; and the testator directed, that, in the event of any of his children dying under twenty-one and without issue, his or her legacy or share should be considered as having lapsed; and that in case any of his daughters should marry under twenty-one, his trustees should settle her fortune upon such trusts, &c., as were specified in the will of his the testator's father with respect to certain bequests of *personal property* to the sisters of the testator contained in such will; and the testator directed that his trustees should have full power, in making such sales as in the said will were *directed*, to resort to either public or private sale, and to buy in and resell, and to defer any sale so long as they might think fit, *and of causing any part or parts of his real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of his children at the amount of the valuation*, as a part of his or her proportion of his residuary estate; *but to be considered as personal estate* and subject to the trusts in the will declared respecting such proportions of residuary estate. The trustees sold part of the property, and caused the remaining part, which consisted entirely of real estate, to be valued, and allotted such unsold part to one of the children in satisfaction of his share, appropriating the proceeds of the rest to the other shares. The Court of Exchequer held, that legacy duty was payable upon the amount of the part which was actually sold, but not upon the part which the trustees had allotted to the testator's son under the discretionary power in the will; the Court considering that the power of allotting the estate was inconsistent with saying that it should be personal estate; and that as this declaration did not affect the trustees' discretion to sell or not as they might think fit, it did not render the property liable to the duty (*d*).

(*c*) 5 M. & Wels. 128.

Legacy duty on proceeds of conversion.

[(*d*) It may be useful here to refer to some of the authorities as to legacy duty. An annuity charged on land is liable to duty, and so is a rentcharge limited under a power in a will, whether the power is to be exercised by deed or will, and whether it be general or in favour of particular objects (*Att.-Gen.* v. *Pickard*, 3 M. & Wels. 552, 6 ib. 348; *Sweeting* v. *Sweeting*, 1 Drew. 336); and it is immaterial that the appointee

Person absolutely entitled, may elect to take property in its actual state.

Who competent to make election.

II. But although a new character may have been in plain and unequivocal terms impressed upon property by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion de facto, elect to take the property in its actual state. And then comes the inquiry, who are personally competent to make, and what amounts to, such an election. It is clear that an infant (*e*), or lunatic (*f*), is incompetent, and also a feme covert (*g*), unless under a power or trust authorizing her to deal with the property as a feme sole.

How long such a power remains exercisable.

[And in a recent case (*h*), where property subject to a trust for conversion was settled by the owner on her marriage, and a

is put to an election, as in case of a wife, between the rentcharge and her dower [(*Att.-Gen.* v. *Henniker*, 7 Exch. 331; *Sweeting* v. *Sweeting*, supra). On the other hand, where the power is given by deed to charge or appoint out of land "a specific sum," whether generally or in favour of particular objects, duty does not attach (*Att.-Gen.* v. *Hertford*, 14 M. & Wels. 284); but the duty does attach on a sum of money not charged on land, appointed under a general power given by deed (*Re Cholmondeley*, 1 Cr. & Mees. 149); and money given by will under a general power to appoint, contained in a previous will, pays double duty, that is to say, under the first will as if it had been an absolute legacy to the donee of the power, and under the second will as if it had been an ordinary legacy out of the estate of such donee; but before 23 & 24 Vict. c. 15, s. 4 (ante, p. 3, n.), probate duty was payable only under the first will (*Platt* v. *Routh*, 6 M. & Wels. 756, 3 Beav. 257, 10 Cl. & Fin. 257). The last case also decides that a power to appoint to any one except specified individuals, must, at all events, so far as regards the legacy duty acts, be considered as a general power of appointment. Nothing but what is generally a charge in favour of one person on the estate of another is within the act (*Shirley* v. *Ferrers*, 1 Phill. 167.) But a charge originally in favour of a third person, but which by *subsequent circumstances only* has become a charge in favour of the owner of the estate, is within the act (*Att.-Gen.* v. *Metcalfe*, 6 Exch. 26; and see *Swabey* v. *Swabey*, 15 Sim. 502; *Re Taylor*, 8 Exch. 384; and further on this subject, Williams on Executors, 1429, 5th ed.) These cases are rendered of considerably less importance by the act 16 & 17 Vict. c. 51, imposing a duty on successions.

Probate duty on proceeds of conversion.

With regard to probate duty, it was decided by *Matson* v. *Swift*, 8 Beav. 369, and *Custance* v. *Bradshaw*, 4 Hare, 315, that a trust for conversion created by act inter vivos by the testator or intestate *himself for a particular purpose*, as the payment of a debt, or a trust for conversion implied from the circumstances of the estate of the testator or intestate *himself*, as in the case of land held for partnership purposes, does not render his interest liable to probate duty. The judgments in those cases appear to have proceeded on the principle that the *actual* state of the property at the testator's death was to be looked at; not the character *imputed* to it by a court of equity; and they are considered to have established that in no case where a person is entitled to the proceeds, or to an aliquot portion of the proceeds, of real estate directed to be sold, but which has not *actually* been sold, is probate duty payable (see "Lewin on Trusts," 3rd ed. p. 807.) *Secus*, if he be entitled to a specified sum payable out of the proceeds. See the judgments of the Lords in *Att.-Gen.* v. *Brunning*, 6 Jur. N. S. 1083, in D. P., where it was decided that the purchase-money of property, contracted to be sold and conveyed to the purchaser after the death of the vendor, is recoverable by the executor by virtue of the probate, and therefore liable to duty.]

(*e*) *Carr* v. *Ellison*, 2 B. C. C. 56; *Van* v. *Barnett*, 19 Ves. 102. [Except under the direction of the Court, *Robinson* v. *Robinson*, 19 Beav. 494.]

(*f*) *Ashby* v. *Palmer*, 1 Mer. 296.

(*g*) *Oldham* v. *Hughes*, 2 Atk. 452.

[(*h*) *Doncaster* v. *Doncaster*, 3 Kay & J. 26, citing *Ware* v. *Polhill*, 11 Ves. 257.]

[power to reconvert (or retain the property in its actual state) was reserved to the trustees, to be exercised with the consent of the tenants for life or the survivor, it was held by Sir *W. P. Wood*, V. C., that the power ceased as soon as the property had vested absolutely in the children, although one of the tenants for life was still living.]

Parol election, whether good.

It was said by Lord *Macclesfield* in *Edwards* v. *Countess of Warwick* (*i*), that the election might be made by parol. Lord *Hardwicke*, in *Bradish* v. *Gee* (*k*), said that he could not admit this proposition; but the affirmative appears to have been decided at the Rolls (*l*), in the case of *Chaloner* v. *Butcher*.

What amounts to an election.

The expressions or acts declaratory of such an intention, however, must be unequivocal (*m*). Thus, where (*n*) a person was, under a settlement, tenant in tail of lands, with a reversion in fee to himself, and was entitled under the same settlement to lands to be purchased with a certain sum of money and settled to the same uses; it was held, that his levying a fine of the land limited by the settlement, to bar the issue, did not demonstrate an intention to take as money the fund not laid out (*o*).

Changing the securities.

And where a person, entitled to the fee simple in lands to be purchased with trust-money, called in [part of] the money, and placed it out upon a fresh security, in the name of a trustee for himself, his executors and administrators, it was held that he had by these acts elected to take [that part] as money (*p*), [but that the rest of the money, whether subsisting upon the securities upon which it was originally placed or any other securities where no new trusts had been declared, ought to be considered as real estate.]

Demising the property.

But, where (*q*) the legatee of the proceeds of an estate directed to be sold, entered upon the whole estate and made a lease of part of it, reserving rent to her heirs and assigns, she was held to have elected to take it as land.

Bequeathing it as personalty.

And where (*r*) a person entitled to the absolute reversion in a fund of this description, [who described himself in a memorandum at the foot of an account of the property as residuary *legatee*

(*i*) 2 P. W. 173.
(*k*) Amb. 229.
(*l*) 8 March, 1736; cited 3 Atk. 685.
(*m*) *Stead* v. *Newdigate*, 2 Mer. 531; [*Re Pedder's Settlement*, 5 D. M. & G. 890.]
(*n*) *Edwards* v. *Countess of Warwick*, 2 P. W. 171, 2 Eq. Ca. Ab. 42, pl. 3, 1 B. P. C. Toml. 207; [and see *Biddulph* v. *Biddulph*, 12 Ves. 161; *Dixon* v. *Gayfere*, 17 Beav. 433; *Griesbach* v. *Fremantle*, 17 Beav. 314; *Meredith* v. *Vick*, 23 Beav. 559.]
(*o*) As to barring entails in lands *to be* purchased, see stat. 3 & 4 Will. 4, c. 74, ss. 70, 71; and 1 Hayes's Introd., 5th ed., p. 204.
(*p*) *Lingen* v. *Sowray*, 1 P. W. 172, Pre. Ch. 400, 1 Eq. Ca. Ab. 175, pl. 5.
(*q*) *Crabtree* v. *Bramble*, 3 Atk. 680.
(*r*) *Triquet* v. *Thornton*, 13 Ves. 345.

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[of the last owner, which he was,] made his will, in which, after devising certain real estate, he bequeathed the residue of his personal estate in possession *or reversion*, Sir *W. Grant* decided, that as the testator [had so described himself, and] had no other reversionary interest to which this expression could be applied, it amounted to a demonstration of intention to bequeath this fund as personal estate. There seems, however, to be some difficulty in drawing any such inference from the inaptitude of the terms of the bequest to any other *existing* property of the testator at the date of the will, seeing that a residuary disposition of this nature comprises after-acquired personalty (*s*).

Davies v. *Ashford.*

Taking possession of deeds.

[In *Davies* v. *Ashford* (*t*), where a person made inquiry as to his interest in lands held upon trust for sale, and on finding that he was absolutely entitled to the money to arise from the sale, took the title deeds into his own possession (from whom or by what means he obtained them being held immaterial), it was held that there was sufficient evidence of his election that the land should not be converted; but the mere entering into and continuing for two years in possession of an estate has been held not sufficient evidence of election that there should be no conversion (*u*). Again, in *Cookson* v. *Reay* (*x*), where a sum of money subject to a trust for investment in land, which ultimately became liable to be settled upon one for life, with remainder to another

Where person bound to lay out money in land becomes himself entitled to it.

(*s*) It seems, that where a person covenants to purchase land, and eventually himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for, the money centre in the same person; the covenant is, without any act on his part, considered as discharged. As in the case of *Chichester* v. *Bickerstaff*, 2 Vern. 295, where A. on his marriage covenanted to lay out a sum of money in the purchase of land, to be settled to the use of himself for life; remainder to his intended wife for life; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to his own right heirs. A. did not lay out the money, and survived his wife, who died without issue; and it was decided, that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations; and was therefore, at the death of the settlor, his personal estate. This decision, indeed, was questioned by Lord *Talbot*, in *Lechmere* v. *Lechmere*, Cas. t. Talb. 90; and by Sir *Joseph Jekyll*, in *Lechmere* v. *Earl of Carlisle*, 3 P. W. 221; but Lord *Thurlow*, in the great case of *Pulteney* v. *Darlington*, 1 B. C. C. 238, 7 B. P. C. Toml. 530,* expressed a strong opinion that it was right; which case went, Lord *Eldon* has said, to this: "that if the property was at home, in the possession of the person under whom they claimed as heir and executor, the heir could not take it;" and his Lordship observed, the question, then, was not upon the equity between the heir and the executor, but whether the property was at home.

[(*t*) 15 Sim. 42.

(*u*) *Kirkman* v. *Miles*, 13 Ves. 338.

(*x*) 5 Beav. 22, nom. *Cookson* v. *Cookson*, 12 Cl. & Fin. 125.

* The able and elaborate arguments of Sir *John Scott* (afterwards Lord *Eldon*), and Mr. *Fearne*, the counsel for the appellants, display the deepest research into the subject, but they did not succeed in overturning the decree.

[in fee, was, by those two persons in a deed appointing new trustees, spoken of as monies which they were then entitled to receive, and trusts for investment in *securities* were declared, it was held that there was sufficient evidence that they had elected that the money should not be converted, and this, notwithstanding that the trusts of the monies and securities were declared by reference to a prior settlement, the trusts of which were also declared by reference to a former will, under which will it was assumed for the purpose of the decision that the money was constructively converted; this reference was held not sufficient to outweigh the direct words contained in the deed of appointment, as to the parties being entitled to the receipt of the money.

Harcourt v. *Seymour*.

In the case of *Harcourt* v. *Seymour* (*y*) there were several circumstances, from which, taken together, election was presumed; the principal one seems to have been, that the sum of money in question, which was subject to a trust for investment in land, (to which, when purchased, the testator would have been entitled in fee, subject only to a provision for his wife in bar of dower,) was included in a statement of the testator's personal property found among his papers after his death.]

All persons interested must concur in act of election.

And here it may be observed, that in order to amount to an election to take property in its actual, as distinguished from its eventual, or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character, in regard even to his own share; for, as the act of the whole would be requisite toput an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A., B. and C., in equal shares, and after the death of the testator, and before the sale is effected, A. grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares,

Owner of undivided share cannot elect.

[(*y*) 2 Sim. N. S. 12.

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the converting trust having been created for the benefit of all (*z*).

Dispositions by partial owner before actual conversion.

But, although it is not in the power of the owner of an undivided share, or any other partial interest in property which is directed to be converted, by his single act to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear, that if a person entitled to a partial interest in money to be laid out in land, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition (*a*); though, on the death of the donee, it would devolve to *his* real representative. So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee (*b*).

Husband and wife may convey land directed to be sold as real estate.

And here it may be observed, that where (*c*) real estate was devised, upon trust for sale, and the proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein; it was held, that the wife was, by this means, barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced, by the husband and wife conveying the property by a deed acknowledged by her, according to the statute of 3 & 4 Will. 4, cap. 74, ss. 77, 79.

Trustees' op-

III. Sometimes, the exercise of trustees' option to convert

[(*z*) See *Elliott* v. *Fisher*, 12 Sim. 505; *Holloway* v. *Radcliffe*, 23 Beav. 163; but this rule would not apply where the trust for sale of land was for the purpose of paying debts, legacies, &c.; the devisee (or legatee of the surplus proceeds) subject to the charges, might himself clear them off and retain the land unsold, *Griesbach* v. *Fremantle*, 17 Beav. 314.]

(*a*) *Triquet* v. *Thornton*, 13 Ves. 345.

(*b*) See *Hewitt* v. *Wright*, 1 B. C. C. 86.

(*c*) *May* v. *Roper*, 4 Sim. 360. This doctrine is often found very convenient in practice, where a married woman has a reversionary interest in a fund of this description; which, in its character of personalty, she is incompetent to deal with, so as to bar her contingent right by survivorship, but which may be effected by means of a deed (duly acknowledged as to the wife) assigning the property. [*Briggs* v. *Chamberlain*, 11 Hare 69, overruling *Hobby* v. *Allen*, 15 Jur. 835, 20 L. J. Ch. 199, 4 De G. & S. 289; and see Sugd. R. P. S. 240; and *Tuer* v. *Turner*, 20 Beav. 560. The Act 20 & 21 Vict. c. 57, enabling married women thenceforth to dispose of their reversionary interests in personalty, does not extend to interests under marriage settlements.]

regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; i. e. until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail, in spite of any suspicion that the testator misapprehended the effect of the term he has employed.

Direction to sell may affect destination of property.

As in the case of *Brown* v. *Bigg* (*d*), where a testator ordered and empowered his wife (in case she chose so to do) with the advice of W. G., to sell all his G. estates, (stating that she would probably not choose to live there,) with the crop, stock, and effects, with all convenient speed; and the money arising from such sale, to be placed out on security, the yearly interest of which, as well as the interest due to the testator on notes, bonds, mortgages or otherwise (except what was in the public funds), he gave to his wife for life, determinable as to one moiety on marriage again. And the testator gave the whole of his personal estate, principal and interest, of every kind, both on public and private security, before undisposed of, to several persons. The wife sold part of the G. estate, and died; and Sir *W. Grant*, M. R., held, that the proceeds of such part belonged to the residuary legatees, and that the unsold part of the estate remained the property of the testator's heir.

Vesting of fund postponed until actual sale.

So, if the fund arising from the sale be disposed of in such terms as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

Thus, where (*e*) a testator devised certain real estates to his wife for life, and directed that A. should, as soon after her decease, or her refusing to release her dower, as conveniently might be, sell the estate; and as to the monies arising from the sale, together with the rents till sold, he gave the same to be equally divided between his five nephews (naming them), at such time as the sale should be completed, *in case they should be then living;* but, in case any of them should die in his lifetime, or before the sale of his said estate should be completed, leaving issue, his part should be paid to his children; but in case any of them should die in his lifetime, or before the sale should be completed,

(*d*) 7 Ves. 279; [and see *Harding* v. *Trotter*, 21 L. T. 279, V. C. S.]

(*e*) *Elwin* v. *Elwin*, 8 Ves. 547. See also *Faulkener* v. *Hollingsworth*, cit. 8 Ves. 558.

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without leaving issue, to the survivors. Sir *W. Grant* held, that the share of a nephew surviving the testator, but dying before the sale, did not vest; observing, that to adopt the contrary construction would deny to the testator the power, by any express form of words, or clear manifestation of intention, to make the vesting depend on the actual sale.

In all such cases, however, the courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to, are those in which a will, creating a trust for conversion, is so framed, as that the enjoyment of the cestui que trust, is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposeable that the testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place. Thus, where (*f*) lands were conveyed upon trust to be sold, and out of the money arising from the sale other lands were to be purchased, to be settled to certain uses, and a person, who would have been tenant in tail under those uses with reversion in fee to himself, levied a fine of the estate conveyed to be sold; Sir *W. Grant* held, that though no estate was in terms limited to him in that property, yet he was tenant in tail in equity; and, by the fine, acquired an equitable fee; [and the same would, of course, hold under a devise.]

Doctrine as to enjoyment of property which is subject to a trust for conversion.

But though the general principle is well settled, yet many questions have arisen in the course of its application, especially respecting the precise point of time at which the enjoyment of the legatee for life commences; the effect of an express direction to accumulate the income until conversion; and, above all, as to

(*f*) *Pearson* v. *Lane*, 17 Ves. 101.

whether the legatee for life of the proceeds is, until the conversion of the property, to take the actual income, or the assumed income; in other words, whether he is entitled to the income accruing from the property in its actual condition, or the income which, if duly converted and invested, it would have yielded.

Points of this nature have most commonly occurred under general residuary clauses containing trusts for sale and conversion, in which the principle has to be applied to the various species of property of which a residue is composed.

Rules deduced from cases.

The following positions will be found to embody the chief doctrines to be deduced from the authorities:—

First, That in the ordinary case of residuary personal estate being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) laid out in government or real securities for the benefit of a person for life, at whose decease the capital is given over, without any express appropriation of the income accruing before conversion, the income arising from such part of the residue as, at the testator's decease, was actually invested in government or real securities, (being securities of the nature contemplated by the investment trust,) belongs to the residuary legatee for life from the period of the testator's decease (*g*).

As to income during first year of property duly invested.

Secondly, That in the case already described, namely, that of a residuary bequest containing a trust for sale and conversion, *without any express appropriation of the annual income until conversion*, the destination of such income arising within the first year from the unconverted property (comprising all which does not consist of such investments as the proceeds are directed to be converted into) is more doubtful. In *La Terriere* v. *Bulmer* (*h*), Sir *A. Hart*, V. C., decided, that the first year's income formed part of the capital. In *Dimes* v. *Scott* (*i*), Lord *Lyndhurst* held the legatee for life to be entitled during the year, in lieu of the actual income, to dividends on so much Three per Cent. stock as the proceeds of the property, if converted, would have purchased

Destination, during first year of income of unconverted property.

(*g*) *Hewitt* v. *Morris*, T. & R. 241; *Angerstein* v. *Martin*, ib. 232; *Dimes* v. *Scott*, 4 Russ. 209; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Douglas* v. *Congreve*, 1 Kee. 410; [*Taylor* v. *Clark*, 1 Hare, 161; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Macpherson* v. *Macpherson*. 16 Jur. 847, 1 Macq. H. of L. Ca. 243. But income arising within the first year from so much of the testator's estate, (say consols) as is wanted and is afterwards applied towards payment of legacies, is not income arising from residue; it falls into and increases the capital of the residue, *Holgate* v. *Jennings*, 24 Beav. 623.]

(*h*) 2 Sim. 18.

(*i*) 4 Russ. 195.

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at the end of the year. In *Douglas* v. *Congreve* (*k*), Lord *Langdale*, M. R., (after noticing these conflicting opinions,) gave the legatee for life the actual income arising from unconverted funds, from the testator's death until the end of the year, or until conversion, which should first happen (*l*); a rule which certainly seems to be more just than the first, and more convenient than the second, of the others which have been referred to, [and was apparently adhered to by the same Judge in *Mehrtens* v. *Andrews* (*m*). However, the rule laid down in *Dimes* v. *Scott* has since been followed by Sir *James Wigram*, V. C., though reluctantly, in *Taylor* v. *Clark* (*n*); by Sir *John Romilly*, M. R., with approval, in *Morgan* v. *Morgan* (*o*); and, lastly, in *Macpherson* v. *Macpherson* (*p*), though it was unnecessary to decide the point, Lord *St. Leonards*, C., said that when Lord *Eldon*, in *Angerstein* v. *Martin*, decreed the tenant for life entitled to the dividends on Russia stock, he thought his attention could not have been called to the point; but subsequent decisions had taken a fair course in that respect, and there would be no difficulty in dealing with a case of that sort when it arose. The Lord Chancellor's opinion was, therefore, evidently opposed to *Douglas* v. *Congreve*.] The ground, however, for the construction which gives the income to the legatee for life of the proceeds from the testator's death, is strengthened, where he has bequeathed out of the fund pecuniary legacies, which are expressly made to carry interest from that period (*q*); and it should seem that such is the invariable rule, where the subject of disposition is a specific property, and the execution of the trust for conversion is not involved in the administration of the general personal estate; in which case (there being no analogy to the case of general pecuniary legacies which are payable at the end of a year) the legatee of the dividends or interest would be entitled to the rents from the period of the testator's death (*r*). [Where the words of the will are sufficiently clear upon the point, the tenant for life will of course be entitled to the income of the property in specie until conversion, however long that may be deferred (*s*).

(*k*) 1 Kee. 427.

(*l*) See *Angerstein* v. *Martin*, T. & R. 232.

[(*m*) 3 Beav. 72.

(*n*) 1 Hare, 161.

(*o*) 14 Beav. 77.

(*p*) 16 Jur. 847, 1 Macq. H. of L. Ca. 243.]

(*q*) *Fitzgerald* v. *Jervoise*, 5 Mad. 25. The marginal abstract of this case is very inaccurate.

(*r*) See *Hutcheon* v. *Mannington*, 1 Ves. jun. 366; *Sitwell* v. *Bernard*, 6 Ves, 541.

[(*s*) *Sparling* v. *Parker*, 9 Beav. 524; *Mackie* v. *Mackie*, 5 Hare, 70; *Wrey* v. *Smith*, 14 Sim. 202; *Johnston* v. *Moore*, 27 L. J. Ch. 453; and other cases, post.]

[We shall hereafter discuss the question as to what words are sufficient for this purpose.

Thirdly, The rule that a conversion is to be deemed as made within a year from the testator's death, is applied in favour of, as well as against, the tenant for life. Thus—]

Effect of direction to accumulate until conversion.

Where trustees are directed to convert the property, (whether it be land into money, or money into land,) *and until conversion the income is directed to be accumulated* and added to the capital; and it happens that the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year; this being considered to afford a reasonable time for the conversion of the property (*t*); and it is immaterial, in such case, that the clause directing the accumulation of the immediate income goes on to provide for its investment (*u*). [Again, in the case of *Beanland* v. *Halliwell* (*x*), in which there was a devise of an estate in mortgage and a direction to the executors to pay the interest of the mortgage debt out of the rents and profits of the mortgaged property until the debt should be paid off, and a further direction that the debt itself should be discharged out of the first money that should come to the hands of the executors from other property given by the will, and not out of the mortgaged estate, Lord *Langdale*, M. R., decided that the rents were to be applied in payment of the interest on the debt during the first year, and *no longer;* and in *Greisly* v. *The Earl of Chesterfield* (*y*), where there was a devise to trustees of estates in mortgage upon trust, "immediately or as soon as conveniently might be," to sell the same or so much as should be necessary to pay all the testator's debts, including mortgage debts, and a settlement was directed of the unsold estates; and in the meantime, and until the estates should be sold or until the settlement should be made as thereinafter directed, the trustees were, out of the rents and profits, "in the first place to keep down the interest of the *mortgages* affecting the devised property, and pay and apply the residue of such rents and profits to the person or persons, and in the manner to and in which the same

(*t*) *Sitwell* v. *Bernard*, 6 Ves. 520; and cases there cited; *Kilvington* v. *Gray*, 2 S. & St. 396; *Noel* v. *Henley*, 7 Pri. 241; [*Stair* v. *McGill*, 1 Bli. N. S. 662;] *Vickers* v. *Scott*, 3 My. & K. 500; [*Tucker* v. *Boswell*, 5 Beav. 607; see also *Vigor* v. *Harwood*, 12 Sim. 172, where an *implied* direction to accumulate was altogether disregarded, so that the tenant for life got the income from the testator's death.]

(*u*) *Entwistle* v. *Markland*, 6 Ves. 528, n.

[(*x*) 1 C. P. Cooper, temp. *Cottenham*, 169, note.

(*y*) 13 Beav. 288.

[rents and profits would be payable under the settlement directed to be made if such settlement were then actually made;" and there was a direction for a settlement of the unsold property. The specialty and simple contract debts of the testator, payable out of the produce of the sale, amounted to a large sum; and no sale having been made for more than a year after the testator's death, the question was, whether the interest on debts other than mortgage debts was, during the first year, to be borne by the tenant for life. Lord *Langdale* decided that such interest must be paid out of the corpus, and that the tenant for life was bound to keep down the interest on the mortgage debts alone during the first year, but after that period to keep down the interest on all the debts (*z*). It was argued that the tenant for life was bound to keep down the interest on the mortgages only till *the time of sale*, however long deferred; and in this view the case may be considered as one decided against the tenant for life.]

It is to be observed, that where the purchase of land is to be made with a pecuniary legacy, which is to come out of the testator's general estate, (and payment of which, therefore, may, under the general rule, be made at any time within a year,) the twelve months, at which the income becomes receivable by the tenant for life, is computed from the time of the receipt of the legacy (*a*).

As to income of property converted within the year.

Fourthly, That with respect to such portion of the property as is, in point of fact, converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not (*b*).

As to income of property which can be but is not converted within the year.

Fifthly, That if the property [*can be*, but] is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result, if the conversion had taken place at such year's end, and the proceeds had been then invested in Three per Cent. stock, supposing the trust to be to invest in government security; the dividends of which stock will form the income to which the legatee for life will be entitled either from the testator's decease, or from the end of the year, according to the fact, whether there is not, or is, an interme-

[(*z*) See *Hawkins* v. *Hawkins*, 6 L. J. N. S. 69.]

(*a*) *Parry* v. *Warrington*. 6 Mad. 154.

(*b*) *La Terriere* v. *Bulmer*, 2 Sim. 18; see also *Dimes* v. *Scott*, 4 Russ. 209; *Gibson* v. *Bott*, 7 Ves. 89.

diate trust for accumulation (*c*). And this rule applies as well where the unconverted fund or property is of a permanent nature, as where it is limited in its duration, as leaseholds, &c. (*d*), [and

(*c*) But the stock might happen to be lower at the actual investment at the year's end; and then it should seem, a portion of the income would be undisposed of during the life.

(*d*) See *Dimes* v. *Scott*, 4 Russ. 209; *Mills* v. *Mills*, 7 Sim. 501; [*Mehrtens* v. *Andrews*, 3 Beav. 72.] In *Dimes* v. *Scott*, a testator bequeathed the residue of his personal estate to trustees, upon trust, to convert the same into money, and thereout to pay debts, and invest the surplus in *government or real security*, for the benefit of A. for life; at whose decease the capital was given to other persons absolutely. When the testator died, part of his property was invested in an East India security yielding 10*l.* per cent., on which the executors permitted it to remain for several years, and during this period paid over the whole interest to the legatee for life; Lord Chancellor *Lyndhurst* decided, that they could only be allowed, as a proper application of income, a sum equal to the dividend on so much Three per Cent. Consols as the proceeds of the security, if turned into money at the end of a year from the testator's decease, would have purchased; such dividends to be computed from the decease of the testator; and though it appeared that the fund had actually yielded more than it would have produced, if sold, at the end of a year, yet the trustees were held not to be entitled to the benefit of this gain, by way of set-off against the claim of the ulterior legatees for excess of income paid to the legatee for life; but were bound to account for both such excess, and also the entire sum actually received on the conversion of the security. [The only ground for charging trustees with the replacement of consols, is that their duty was so to invest the produce of the testator's estate. Where the will expressly directs that mode of investment such is clearly their duty, *Bate* v. *Hooper*, 5 D. M. & G. 345; and where the will contains no express direction for investment hitherto (i. e. before the new order of 1st February, 1861), the result has been the same; for in that case the Court has always said that consols are the proper investment (*Robinson* v. *Robinson*, 1 D. M. & G. 247). But where the trustees have an option to invest in government or real securities, no such ground exists, and accordingly it appears by *Robinson* v. *Robinson*, 1 D. M. & G. 247, that where that option is given, trustees who have neglected to convert improper securities are to be charged, not with the replacement of the fund on the supposition that that mode of investment (whether in consols or otherwise) had been adopted which, according to subsequent events, turned out most profitable; but with the replacement of the amount of the trust fund as it would have stood *in money* at the end of a year from the testator's death, and 4*l.* per cent. interest on such amount; and that the income of the tenant for life acquiescing in the improper investment should be the amount of such interest at 4*l.* per cent., provided it did not exceed the amount actually produced by the improper investments. See also *Baynard* v. *Woolley*, 20 Beav. 583; *Baud* v. *Fardell*, 7 D. M. & G. 628. The fact of the trustees having an option was not adverted to in *Dimes* v. *Scott*, and was probably overlooked. In *Lord* v. *Wightwick*, 4 D. M. & G. 803, there was no express direction regarding investment, so that the trustee might, on the foregoing principles, have been compelled to purchase consols, and account for the dividends; but the point was not noticed in the argument or judgment, and by the decree he was ordered to repay the *money* and 4*l.* per cent. interest.

Case of *Dimes* v. *Scott*.

On what principle trustees are bound to replace trust fund.

Assuming, however, as it seems fair to do, that the law as laid down in *Robinson* v. *Robinson* is correct, the first year's income must depend on the same principles; and in cases not governed by the new order must be either 4*l.* per cent. on the amount of *money* or dividends on consols according as there is, or is not, an option given to the trustees regarding investment; see Sir *J. Wigram's* judgment in *Taylor* v. *Clark*, 1 Hare, 161.

In *Baynard* v. *Woolley*, 20 Beav. 583, the tenant for life, though not acquiescing in the improper investment, was made to refund the excess beyond 4*l.* per cent., but in *Bate* v. *Hooper*, 5 D. M. & G. 345, Lord *Cranworth* held that the tenant for life not having been a willing party to any overpayment, could not be made to refund to the trustees what they had voluntarily paid her.

Whether tenant for life not acquiescing in breach of trust must refund.

The effect of the recent General Order of the Court of Chancery of the 1st

New order of Court.

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[it also applies *in favour* of the tenant for life to monies recovered after a long interval, and to reversionary interests from which he might derive no benefit, precisely as it is applied against him to property of a wasting nature, from which he would derive more than his proper share of income (*e*); and the value of such interests is to be calculated, not at what they would sell for at the testator's death, but on their falling into possession it is to be ascertained what would have been the value at the end of a year from the testator's death of a sum of money which, as the event has turned out, was to become payable at the end of so many years, calculated at 4*l.* per cent. simple interest. On the value so ascertained, the tenant for life will be entitled to his proper number of years interest, at 4*l.* per cent., and the residue of the amount actually received, after deducting the amount of such interest, will form the capital of the fund; but the tenant for life will not be entitled to any payment till the fund actually becomes productive (*f*), and in case of his death before that time his personal representative will of course become entitled. In a case where there were both wasting and reversionary interests, the Court, for the benefit of all parties, adjusted the payments to the tenant for life out of the wasting interests, so as to compensate for his loss of income under the reversionary interests (*g*).

As to income of property which cannot be converted.

Lastly, as to the cases where property ought to be, but from its nature *cannot be*, immediately converted, at least without great loss to the estate, the authorities are not quite uniform. Thus, in the case of *Gibson* v. *Bott* (*h*), where leaseholds directed to be converted could not be sold for want of a good title, Lord

[February, 1861, under which trustees will have an option of other investments besides Bank Annuities would seem to be, that the trust fund as it would have stood in money, and interest at 4*l.* per cent., will in every case of loss by improper investments by a trustee, be the amount to be replaced by him.

(*e*) *Pickering* v. *Pickering*, 4 My. & Cr. 303; *Turner* v. *Newport*, 2 Phil. 14, 14 Sim. 32; *Hinves* v. *Hinves*, 3 Hare, 611; Lord *Eldon's* observation in *Howe* v. *Lord Dartmouth*, 7 Ves. 148. *Wilkinson* v. *Duncan*, 23 Beav. 469, (where the interest of the tenant for life was held to be the difference between the value at the year's end, and the amount actually recovered, which is in fact equivalent to giving the tenant for life 4*l.* per cent. on the value at the year's end;) *Johnson* v. *Routh*, 27 L. J. Ch. 305, (where the peculiarity existed of the tenant for life, of the reversion being under the instrument limiting the reversion tenant for life in possession of the fund). The principle seems not to have been applied, where the income of a fund set apart for a particular purpose, becomes during a period undisposed of, and falls into the residue. In such cases the tenant for life of the residue is held entitled only to the income arising from the investments as they are made of the undisposed-of income, and not to the dividends on a sum representing the capitalised value of the undisposed-of income. See *Tucker* v. *Boswell*, 5 Beav. 607; *Crawley* v. *Crawley*, 7 Sim. 427; and the cases ante, p. 291, as to the persons entitled to the interest of income directed to be accumulated beyond the period allowed by the Thellusson Act.

(*f*) *Taylor* v. *Clark*, 1 Hare, 170.

(*g*) *Glengall* v. *Barnard*, 5 Beav. 245.

(*h*) 7 Ves. 89.

[*Eldon* gave the tenant for life 4*l.* per cent. from the testator's death on a sum to be ascertained as the value *at the testator's death* (*i*)." Lord *Langdale*, in *Mehrtens* v. *Andrews* (*j*), after the leases had expired, directed a value to be put upon them *having reference to the enjoyment had thereunder*, and that the income of the tenant for life should be taken as the dividends of the sum of consols which could have been purchased for that value; and in *Meyer* v. *Simonsen* (*k*), where conversion could not, from the nature of the property, be immediately made, Sir *J. Parker*, V. C., decided, that interest at 4*l.* per cent. should be allowed. He said there were three distinct classes of cases: "First, where the subject matter of the bequest is either invested in the funds, or in some security of which the Court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the corpus belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take interest, and the remainderman the corpus. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, as in *Gibson* v. *Bott*, and *Caldecott* v. *Caldecott*. There the rule is not to convert the property, but to set a value upon it, and give to the tenant for life 4*l.* per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman (*l*).]

How far preceding doctrines apply to residuary bequests without a trust for conversion.

It remains to be considered, how far the preceding rules apply to cases, in which the residuary clause contains no express trust for conversion: as where a testator simply bequeaths all the residue of his personal estate in trust for A. for life, and after his decease, for B. absolutely. In such cases [the general rule of the Court of Chancery is (*m*), that all property of whatever kind, whether perishable or permanent, except what is invested on

[(*i*) 1 Y. & C. C. C. 320, note (*a*).

(*j*) 3 Beav. 72.

(*k*) 5 De G. & S. 723; see *Caulfield* v. *Maguire*, 2 J. & Lat. 162.

(*l*) And see *Fearns* v. *Young*, 9 Ves. 549; *Walker* v. *Shore*, 19 ib. 387, 1 Y. & C. C. C. 321, n.; *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601; but see *Crawley* v. *Crawley*, 7 Sim. 427, contra.

(*m*) This statement must now be qualified with reference to Reg. Gen. 1st Feb. 1861, ante, p. 575, n. (*d*).

[permanent government, or real securities, must be converted and invested in £3 per cent. Consolidated Bank Annuities (*n*). It results from this rule,] that as to property, which at the testator's death is invested upon permanent government or even real securities, the legatee for life is entitled to the actual income, i. e. the dividends or interest, from the period of the testator's decease (*o*). But as to property which has a temporary duration only, as leaseholds, or annuities for lives or years, the actual income of which, it is obvious, partakes to some extent of the nature of capital, the same rule could not justly be applied, as it would evidently have the effect of conferring an undue advantage on the person entitled for life, at the expense of the ulterior taker. The fair course, [and at the present day the settled rule], in such cases seem to be, to carry to account, as capital, the income accruing from the time of the testator's decease; and, in lieu of such income, to pay to the legatee for life from that period, a sum equal to the dividends which the produce of the sale would have yielded, if invested in Three per Cent. stock; such investment, however, not being supposed to be made until the period of the actual sale (if within the year), though it regulates the income retrospectively from the testator's death. But if the sale does not take place within a year after the testator's decease, the amount must, it should seem, be regulated by the presumed proceeds, i. e. the value at the end of such year, together, in either case, with dividends on the interim income of the terminable unconverted property (*p*).

As to income of a fund precarious, but not wasting.

What would be the destination of income arising from a fund, which, though not wasting or fluctuating, is precariously secured, is more doubtful. It would clearly be the duty of any executor or trustee to call in the money as soon as possible; but in the meantime, if the fund should happen to yield a larger amount of

[(*n*) *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *Thornton* v. *Ellis*, 15 Beav. 193. This rule applies where there is an express trust to permit investments to remain or to convert and invest in other securities at the discretion of trustees, but the trustees refuse to exercise any discretion, *Prendergast* v. *Lushington*, 5 Hare, 171; affirmed in D. P. nom. *Prendergast* v. *Prendergast*, 3 H. of L. Ca. 195, 14 Jur. 989; see also *Baud* v. *Fardell*, 7 D. M. & G. 633, 634. It also applies to reversionary interests in favour of the tenant for life, *Hinves* v. *Hinves*, 3 Hare, 611.]

(*o*) *Mills* v. *Mills*, 7 Sim. 501; and see *Howe* v. *Earl of Dartmouth*, 7 Ves. 137.

(*p*) *Fearns* v. *Young*, 9 Ves. 549; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; *Mills* v. *Mills*, 7 Sim. 501; [*Morgan* v. *Morgan*, 14 Beav. 72;] but see *Crawley* v. *Crawley*, 7 Sim. 427; and a remark on this case, Hayes and Jarm. Con. Wills, 3rd ed. p. 227. [The rule that the tenant for life is only entitled to so much for income as the property would have produced if sold, and invested in consols does not apply where the testator dies, and his property and the persons entitled under his will reside out of the jurisdiction of the Court of Chancery, but it attaches as soon as the persons entitled arrive in this country, *Holland* v. *Hughes*, 16 Ves. 111.]

income than a proper investment (as in the case of a loan on personal security at 10*l.* per cent.), the trustee or executor could not, it is conceived, with safety pay the legatee for life the actual income, though no loss of principal were eventually sustained; having regard to the severe lesson taught to trustees by the case of *Dimes* v. *Scott;* in which, however, it is to be remembered, there was an express trust for conversion (*q*).

Every well-drawn will, of course, precludes all such questions by explicit declaration; and this remark will serve to conduct to the next point for inquiry, namely, what amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy the property which is the subject of disposition in specie. This, of course, like all others, is a question of construction, to be elicited from the whole will; and on which a right conclusion can be formed only by an attentive examination of the cases; some of which will be found to turn upon rather nice distinctions.

What expressions prescribe an enjoyment in specie.

It is clear, that where a testator gives the income of a specific fund to a person for life, in terms exclusively applicable to describe the income in the then state of the property, the ulterior legatee cannot call for its conversion, even though it be of a wasting nature. As in *Vincent* v. *Newcombe* (*r*), where a testatrix who was possessed of Long Annuities, and no other stock, bequeathed certain annual sums to be paid out of her "funded property," and then gave to A. the whole of the remainder of her *dividends* during her natural life; and at A.'s decease, the testatrix gave sums of stock to various persons, using in such bequests terms applicable not to Long Annuities, but rather to capital, as 1,000*l.* stock, &c. The ulterior legatees claimed to have the Long Annuities converted into Three per Cent. Annuities, on the ground, that, as the Long Annuities were a decreasing fund, the ulterior legatees might, by the progress of such decrease, be disappointed of their legacies: but Lord *Lyndhurst* decided, that A. was entitled to the residue of the Long Annuities during her life, under the words "the whole of the remainder of my dividends." A fortiori are trustees not justified in converting into a permanent stock Long Annuities [included in a bequest of "all stocks and funds standing in" the testator's name] in trust for a person for life, and then to other persons absolutely (*s*).

In the case of a specific bequest;

(*q*) And see contra, *Douglas* v. *Congreve*, 1 Kee. 410; [and *Mehrtens* v. *Andrews*, 3 Beav. 72; where the fund was both wasting and precarious.]

(*r*) 1 You. 599; [and see *Cockran* v. *Cockran*, 14 Sim. 248.]

(*s*) *Lord* v. *Godfrey*, 4 Mad. 455; [see also *Milne* v. *Parker*, 12 Jur. 171;

—of a residuary bequest.

[But according to the doctrine of the present day, the question does not depend on the legacy being specific or not (*t*).] The same principle applies, even to a residuary clause, if an intention that the property shall be enjoyed in specie can be collected from the terms in which either the life interest, or the ulterior subject of disposition, or both these interests, is or are bequeathed. [For the general rule stated above as to the conversion of perishable into permanent securities, did not originally ascribe to testators the intention to effect such conversions except in so far as a testator may be supposed to intend that which the law will do: but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property as the only means of giving effect to that intention. But if the will express an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply (*u*); and it has been said that the effect of recent cases is to allow small indications of intention to prevent its application (*x*).

Expressions which prevent conversion.

A direction to renew or keep in repair (*y*) or to demise (*z*) leaseholds points to enjoyment in specie; and where after a bequest of a residue for life there is an express trust for conversion at a specified period, it will be inferred that no conversion is to take place previously to that period, and the tenant for life, therefore, takes the income in specie (*a*); so also where there is a power to sell generally (*b*), and à fortiori where there is a direction not to sell except with consent (*c*), or a direction is given either to sell or not (*d*), or to postpone the sale (*e*). But a direction to convert certain specific parts of the personal

[*D'Aglie* v. *Fryer*, 12 Sim. 1; *Bethune* v. *Kennedy*, 1 M. & Cr. 117. And see *Mills* v. *Brown*, 21 Beav. 1.

(*t*) Per Lord *Langdale*, 10 Beav. 205; and see 4 My. & Cr. 299, 1 Drew. 181, overruling dictum of *Shadwell*, V. C., in *Mills* v. *Mills*, 7 Sim. 508, 509.

(*u*) Per *Wigram*, V. C., in *Hinves* v. *Hinves*, 3 Hare, 611.

(*x*) 14 Beav. 82; and see 3 Hare, 612, 613.

(*y*) *Crowe* v. *Crisford*, 17 Beav. 507.

(*z*) *Hind* v. *Selby*, 22 Beav. 373.

(*a*) *Alcock* v. *Sloper*, 2 My. & K. 699; *Hunt* v. *Scott*, 1 De G. & S. 219; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Harvey* v. *Harvey*, 5 Beav. 134; in *Mills* v. *Mills*, 7 Sim. 508, the direction to convert had reference to a conversion into *actual money* for the purpose of making loans, and did not therefore exclude by implication a previous conversion into *other investments*.

(*b*) *Burton* v. *Mount*, 2 De G. & S. 383; *Bowden* v. *Bowden*, 17 Sim. 65; *Skirving* v. *Williams*, 24 Beav. 275. But see *Jebb* v. *Tugwell*, 20 Beav. 84.

(*c*) *Hinves* v. *Hinves*, 3 Hare, 609; *Ellis* v. *Eden*, 23 Beav. 543.

(*d*) *Simpson* v. *Lester*, 4 Jur. N. S. 1269.

(*e*) *Johnston* v. *Moore*, 27 L. J. Ch. 453.

[estate does not imply that the residuary estate is not to be converted (*f*); neither does a direction to sell the residuary personal estate for payment of debts and legacies imply that it is to be sold for no other purpose; since a sale for the purpose of making those payments is no more than the law itself would order in the common course of administration without an express direction (*g*). A power to vary securities, though an insufficient ground for conversion in the case of a specific gift (*h*), yet affords a strong argument in favour of a sale when it has reference to a residuary bequest (*i*).

Where various items of property are dealt with together, the fact that some of them are clearly to be enjoyed in specie, (and more especially if these be of a kind which, according to the general rule, ought to be converted,) affords an argument in favour of the remaining items having been also intended to be so enjoyed (*k*); an argument, however, which requires other corroborative circumstances to render it conclusive (*l*).

Where of several items in one gift some are clearly subject to sale.

An intention that the tenant for life shall enjoy the property in specie is sometimes collected from the circumstance that the terms of the gift over point to the very property at the testator's death. Thus, in] the case of *Collins* v. *Collins* (*m*), where the words of the bequest were "I give to my wife, all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death, the property so left, to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir *J. Leach*, M. R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator, that his widow should enjoy the leasehold property for her life.

Where the gift in remainder points to the very property.

Collins v. *Collins.*

Again, in the case of *Pickering* v. *Pickering* (*n*), where a

[(*f*) *Cafe* v. *Bent*, 5 Hare, 34; *Morgan* v. *Morgan*, 14 Beav. 85, 86; *Hood* v. *Clapham*, 19 Beav. 90.

(*g*) *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441.

(*h*) *Lord* v. *Godfrey*, 4 Mad. 455.

(*i*) *Morgan* v. *Morgan*, 14 Beav. 85.

(*k*) *Bethune* v. *Kennedy*, 1 My. & Cr. 114; *Burton* v. *Mount*, 2 De G. & S. 383; *Simpson* v. *Earles*, 11 Jur. 921, V. C. *Wigram*; *House* v. *Way*, 12 Jur. 958, 18 L. J. Ch. 22, V. C. *Wigram*; *Howe* v. *Howe*, 14 Jur. 359, V. C. *Knight Bruce*; *Cotton* v. *Cotton*, ib. 950; *Booth* v. *Coulton*, 7 Jur. N. S. 207 (freehold distillery with *utensils*, &c., let together at one rent); *Holgate* v. *Jennings*, 24 Beav. 623. In the last case the M. R. said the general rule was that debts as turnpike bonds must be got in, but that other property, in the nature of investments, might be left unconverted.

(*l*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 138; *Blann* v. *Bell*, 5 De G. & S. 658, 2 D. M. & G. 775.]

(*m*) 2 My. & K. 703.

(*n*) 2 Beav. 31.

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testator gave to his wife, subject to the payment of his debts and legacies, and such annuities and assurances as he was liable to pay, all the interest, rents, dividends, annual produce and profits, use and enjoyment, of his real and personal estate, for life; and at her decease, the testator gave all the rest and residue of his estate, real and personal, to his son-in-law; but, in case of his dying before the testator's wife, then he directed the residue to be divided in manner therein mentioned. Part of the testator's property consisted of a leasehold house and a life annuity; and the charges thereon also comprised annual payments. Lord *Langdale*, M. R., decided, that in this case the testator had indicated an intention that the property should be specifically enjoyed by his wife during her life; and the Lord Chancellor, on appeal (*o*), was of the same opinion; grounding his judgment especially on the case of *Collins* v. *Collins*, to which he thought the direction to divide the property on a certain event precisely assimilated the case before him. He remarked that in *Collins* v. *Collins* there were expressions only applicable to the actual condition of the property.

Hubbard v. *Young.*

[In *Hubbard* v. *Young* (*p*), there was a bequest of "*my property*" to A.; should she die, her issue to be her heirs; if she should die and not leave issue, I give all my property to, &c. *My property* is in the Bank and India House. Lord *Langdale*, with some doubt, decided that the testatrix had in view a specific enjoyment of her property in the Bank and India House.

Harris v. *Poynter.*

Again, in *Harris* v. *Poyner* (*q*), the testator devised and bequeathed all the residue of his real and personal estate, "and all his estate, term and interest therein" to trustees in trust for his wife for life, and after her death, he devised "*the same, and all his estate, term and interest therein*" to his son; Sir *R. Kindersley*, V. C., thought that the testator intended the son to take the identical property, and, therefore, that there was to be no conversion during the life of the widow.

Effect of gift of *rents* to tenant for life.

In the case of *Pickup* v. *Atkinson* (*r*), the ground on which the conversion was opposed was, that there was a gift to the tenant for life of the *rents*, profits, dividends and interest of all the residue, &c., and that if leaseholds comprised in the residue were to be converted, the word "rents" would, in effect, be struck out of the will. This argument was supported by the

[(*o*) 4 My. & Cr. 289.
(*p*) 10 Beav. 203.
(*q*) 1 Drew. 174; but see *Lichfield* v. *Baker*, 2 Beav. 481, 13 ib. 447; *Thornton* v. *Ellis*, 15 Beav. 193; *Bowden* v. *Bowden*, 17 Sim. 65.
(*r*) 4 Hare, 624.

[case of *Goodenough* v. *Tremamondo* (*s*), where Lord *Langdale*, M. R., relying on the use of that word in the gift for life, and gift over, held that there was to be no conversion; but Sir *J. Wigram*, V. C., in deciding that there must be a conversion in the case before him, said, that according to that argument, the use of the words "dividends" (*t*), "interest," would prevent the conversion of any property yielding income denominated by those words. However, in *Cafe* v. *Bent* (*u*), where a testator directed a per-centage on the receipt of the "rents" of the residue, after satisfying "all ground rents and other outgoings," to be paid to his son, and none of the property included in the residue except leaseholds produced "rents," the same Judge held that the leaseholds were to be enjoyed in specie. This conclusion was probably fortified by a different per-centage being given on the "dividends" arising from the residue.

In *Preston* v. *Melville* (*x*), there was a bequest of a residue upon trust to convert and pay the interest to certain persons for their lives, and then to invest the principal in the purchase of lands, and where any money was lying on *undoubted real or personal securities*, such securities to be renewed in the names of the trustees; and it was decided that, notwithstanding the words in italics, Long Annuities comprised in the residue must be sold.

—of direction not to sell under certain sum.

A direction not to sell a perishable chattel under a stated sum does not appear necessarily to denote any intention on the testator's part to alter the relative rights of tenant for life and remainderman, as settled by the general rule; but only to limit the discretion which the trustees would otherwise possess in carrying out the sale: so that if no sale can be effected on the specified terms, the tenant for life will not be entitled to the entire produce. Thus, in the case of *Arnold* v. *Ennis* (*y*), a testator gave all his real and personal property to trustees upon

[(*s*) 2 Beav. 512; and see *Marshall* v. *Bremner*, 2 Sm. & Gif. 237; *Crowe* v. *Crisford*, 17 Beav. 507; *Skirving* v. *Williams*, 24 Beav. 275. And apparently its effect is not impaired by the circumstance of the leaseholds being included in the same gift with freeholds: i. e. the word is not applied exclusively to the latter, *Hood* v. *Clapham*, 19 Beav. 90; *Wearing* v. *Wearing*, 23 ib. 99; but see *Craig* v. *Wheeler*, 29 L. J. Ch. 374.

(*t*) Some stress was laid upon this word by Sir *J. Leach* in *Alcock* v. *Sloper*; and see *Blann* v. *Bell*, 5 De G. & S. 658; *Bowden* v. *Bowden*, 17 Sim. 65.

(*u*) 5 Hare, 24; see *Neville* v. *Fortescue*, 16 Sim. 333.

(*x*) 15 Sim. 35; see also *Johnson* v. *Johnson*, 2 Coll. 441; *Fryer* v. *Buttar*, 8 Sim. 442; *Benn* v. *Dixon*, 10 ib. 636; *Chambers* v. *Chambers*, 15 ib. 183; *Smith* v. *Pugh*, 6 Jur. 701; *Lichfield* v. *Baker*, 2 Beav. 481, 13 ib. 447; *Thornton* v. *Ellis*, 15 ib. 193; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 737.

(*y*) 2 Ir. Ch. Rep. 601. See *Gibson* v. *Bott*, ante, p. 576.

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[trust to sell all his moveable chattels, except his horse Harkaway, and invest the produce. As to the horse, he directed him to be sold if 1000*l.* should be offered; but if no such sum should be realised, then that he should be let each season: and in the event of his being sold the testator directed the sum for which he should be sold to be in like manner invested. And the testator, after bequeathing an annuity, gave all the residue of his real, freehold and personal property to his said trustees in trust, to pay the rents, issues, interests and the whole and entire produce thereof to his wife for life, with remainder over. The trustees were unable to sell the horse for the price named, and therefore let him out as a sire. It was held by the Master of the Rolls that the tenant for life was not entitled to the entire earnings of the horse, but (*z*) that a value should have been set on the earnings, and the tenant for life entitled to interest at the Court rate (i.e. 4*l.* per cent.) on such value from the testator's death.]

Effect where there is an enumeration of specific items combined with general residue.

Sometimes, a testator combines with the general words of a residuary clause, an enumeration of certain species of property; thus raising the question, whether the enumeration is to be considered as taking the specified property out of the rule applicable to a general residue. [There is great authority for saying that such enumeration of particulars, unless it is enough to make the bequest properly "specific," is insufficient of itself to prevent the operation of the rule (*a*).]

In the case of *Bethune* v. *Kennedy* (*b*), [the bequest was held to be specific.] There a testatrix, after bequeathing 100*l.* Long Annuities to A. and B., added, "the residue of my property, all I do or may possess in the funds, copy or leasehold estates, to my dear sisters M. and H., during their lives; at the decease of both of them to be equally divided, share and share alike, between my cousins" (naming them). Part of the residue consisted of 150*l.* Long Annuities; and the question was, whether the legatees for life were entitled to receive the annuities, or whether they ought to be turned into a permanent fund. Sir *C. C. Pepys*, M. R., decided in favour of the former construction, on the ground, that it was not a mere residuary clause,

[(*z*) There was no actual decision on this latter point.

(*a*) *Stirling* v. *Lydiard*, 3 Atk. 199; *Mills* v. *Mills*, 7 Sim. 508; *House* v. *Way*, 18 L. J. Ch. 22, 12 Jur. 959; *Cotton* v. *Cotton*, 14 Jur. 950; *James* v. *Gammon*, 15 L. J. Ch. 217; *Simpson* v. *Earles*, 11 Jur. 921; *Pickup* v. *Atkinson*, 4 Hare, 628; and see *Sutherland* v. *Cooke*, 1 Coll. 504; *Morgan* v. *Morgan*, 14 Beav. 72; *Craig* v. *Wheeler*, 29 L. J. Ch. 374.]

(*b*) 1 My. & Cr. 114.

but a specific bequest of the sum belonging to the testatrix in the Long Annuities; and was to be enjoyed by the legatee for life, in the state in which the testatrix left it. He observed, that this was not disputed as to the copyhold or leasehold estates; and if so, why should it not also be specific with respect to the funds? The intention, it was reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there could be no doubt, he observed, that a bequest of all that a testator may possess in the funds, would be a specific bequest of all funded property; the rule being, that the legacy is not the less specific for being general. The M. R. considered, that the case was distinguishable from *Alcock* v. *Sloper*, where the argument in favour of the non-conversion was founded on the terms in which the income was given, and not (as here) on the mode of bequeathing the capital.

Vaughan v. *Buck.*

[The decision in the last case was followed by Lord *Lyndhurst*, C., in *Vaughan* v. *Buck* (*c*), on a will of doubtful construction, which the L. C. said might for the purpose now in question be read thus:—"I give the whole of my property, viz., my house, 21, *North Street*, 1,000*l.* New 4*l.* per Cents., 1,500*l.* in the 3*l.* per Cent. Consols, 645*l.* in the 3*l.* per Cent. Reduced, and 20*l.* per annum Long Annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children:" it was held that the widow was entitled to enjoy the house, which was leasehold, and the Long Annuities in specie. "With respect to the house," Lord *Lyndhurst* said, "the bequest is clearly specific, and as to the Long Annuities they constitute one of the items in the testator's property existing at the date of the will, and which by this description he bequeathed to his wife . . . . The case of *Bethune* v. *Kennedy* is similar in principle, and corresponds nearly in its circumstances with the present."

Oakes v. *Strachey.*

In the case of *Oakes* v. *Strachey* (*d*), there were two gifts to the testator's wife during widowhood, first, of the interest of all the money the testator had or might possess in the funds or on other securities; and, secondly, of the interest of all his other property, for the maintenance of herself, and the maintenance and education of the testator's children by her: the V. C. thought the testator had drawn a distinction between the two sorts of property, and that the former was to be enjoyed in specie, and the latter not.

[(*c*) 1 Phill. 75; see also *Hubbard* v. *Young*, 10 Beav. 203; *Mills* v. *Brown*, 21 Beav. 1.

(*d*) 13 Sim. 414.

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Effect of conversion of wasting property with consent of tenant for life.

[If wasting property (as leaseholds) bequeathed in specie be converted into a permanent fund, with the consent of the tenant for life, and he survives the period when the leaseholds would have expired, the capital of the permanent fund will become the absolute property of the tenant for life (*e*). But a lease, in which the tenant for life is *cestui que vie*, would practically not become his absolute property immediately, at least not so as to enable him to assign or surrender it; for the chance of renewal for the benefit of the remainderman would be thereby lost, and it seems that on this account the Court of Chancery would set aside the sale or surrender (*f*). It may be here added, that a tenant for life in specie of a share in a partnership has been held not entitled to the increase of the capital made during his life (*g*).]

Destination of undisposed-of interests in property directed to be converted.

IV. It is clear, that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest, such unexhausted interest, whether the estate be eventually sold or not (*h*), belongs to the heir as real estate undisposed of (*i*). The heir is excluded, not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends. Thus, in the case of *Wilson* v. *Major* (*k*), where lands were given by a testator to his wife upon trust to sell and invest the money upon security at interest; and he gave and bequeathed the interest and dividends of the same to the use of his said wife, without making any ulterior disposition of the fund, Sir *W. Grant*, M. R., held, that, there being no declaration of the trust of the money beyond the life of the wife, it resulted to the testator's heir.

Principle same,

And the same principle, it is now settled, applies in the con

[(*e*) *Phillips* v. *Serjent*, 7 Hare, 33; *Re Beaufoy's Estate*, 1 Sm. & Gif. 20.

(*f*) *Harvey* v. *Harvey*, 5 Beav. 134, where, however, under the peculiar circumstances, the sale was not held bad.

(*g*) *Mousley* v. *Carr*, 4 Beav. 49.]

(*h*) See *Hill* v. *Cock*, 1 V. & B. 173.

(*i*) 2 Vern. 571; ib. 645; 3 P. W. 20; 2 Dick. 500; 1 B. C. C. 503; 2 B. C. C. 589; 3 B. C. C. 355; 4 B. C. C. 411; 2 Ves. jun. 271; ib. 683; 3 Ves. 210; 4 Ves. 542; ib. 803; 10 Ves. 500; 11 Ves. 87; ib. 205; 12 Ves. 413; 16 Ves. 188; 18 Ves. 156; 1 V. & B. 173; ib. 410; 2 V. & B. 294; 2 Kee. 564; [1 R. & My. 752; 5 My. & Cr. 125; 4 Y. & C. 507.] The case of *Ogle* v. *Cook*, cited 1 B. C. C. 512, had been considered as a solitary exception to this class of cases; but in *Collins* v. *Wakeman*, 2 Ves. jun. 686, Lord *Loughborough*, upon an examination of the registrar's book, discovered that the very point which was alleged to have placed it in contradiction to these cases, was left undecided; so that the case has no connection with the subject.

(*k*) 11 Ves. 205; see also *Robinson* v. *Taylor*, 2 B. C. C. 389.

whether land or money is the object of conversion.

verse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund ultra that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next of kin of the testator, on the ground that *the will operates to convert the fund so far only as it disposes of it.* The contrary, indeed, was decided in the case of *Fletcher* v. *Chapman* (*l*), where a testator bequeathed 4000*l.* to W., to the intent that the persons thereinafter named should purchase an estate in lands, and that the rents thereof should come to the said W. for life; and, unless he should so settle the lands, the gift was to be void. The reversion in fee expectant on W.'s decease was held to belong to the testator's heir-at-law, [but it does not appear from the report that the question was raised on behalf of the next of kin, the contest being between the testator's heir-at-law and the children of the tenant for life, who argued that there was an implied gift to them.]

This case, however, which seemed to introduce a perplexing anomaly into the doctrine, as well as a dictum of Lord *Redesdale* (*m*) to the same effect, has been overruled in two recent cases. Thus, in *Cogan* v. *Stephens* (*n*), where the testator directed his executors immediately to lay out the sum of 30,000*l.* in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate (which was to be purchased, and always run in the testator's name) was given to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, and the prior limitations having determined, it was held by Sir *C. Pepys*, M. R., that the next of kin, and not the heir-at-law of the testator, was entitled to the fund.

So, in the case of *Hereford* v. *Ravenhill* (*o*), where a testator gave his ready money and the money which should be owing to him, to trustees, upon trust, as soon after his decease as a convenient purchase could be found, to invest it in the purchase of freehold, copyhold, or leasehold hereditaments to be settled to certain uses. These limitations having failed (some of them in the lifetime of the testator, and the rest subsequently), Lord *Langdale*, M. R., in a suit for ascertaining who was entitled to the fund, which had not been laid out, held, that the heir was

(*l*) 3 B. P. C. Toml. 1.
(*m*) See *Tregonwell* v. *Sydenham*, 3 Dow, 207; see also 4 B. C. C. 527.
(*n*) 1 Beav. 483, n., [5 L. J. N. S. Ch. 17.]
(*o*) 1 Beav. 481.

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not a necessary party; his Lordship observing, that it had been decided in *Cogan* v. *Stephens*, that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which would take effect, entitled to the personalty, as being impressed with the character of real estate; [and he subsequently decreed the residuary legatee to be entitled (*p*).]

Lapsed shares of proceeds of real estate devolve to heir.

And the same rule obtains, where the testator's disposition of the converted property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.

The title of the heir, under such circumstances, to a lapsed share of real estate directed to be sold, was established in the case of *Ackroyd* v. *Smithson* (*q*), well known as containing the celebrated argument of Lord *Eldon* (then Mr. *Scott*), which Lord *Thurlow* admitted to have changed his opinion. The testator devised all his real and personal estate in trust to be sold and converted into money, to pay debts, legacies, and funeral expenses; and the overplus to be paid to certain persons (to whom he had bequeathed pecuniary legacies), in proportion to their respective legacies. Some of these legatees died in the testator's lifetime; and, on a question whether their lapsed shares belonged to the heir-at-law or next of kin of the testator, Lord *Thurlow* at first inclined to the opinion that the next of kin were entitled, but, upon further argument, his Lordship decided in favour of the heir. He said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed-of money would be personalty; but the cases fully proved the contrary. It would be too much, he observed, to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet that, because a sale was necessary, the heir should not take the undisposed part of the produce.

Effect of failure of devise by contingency or illegality.

So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.

[(*p*) *Hereford* v. *Ravenhill*, 5 Beav. 51.] (*q*) 1 B. C. C. 503.

And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real estate; the effect in such case being that, by the failure of the intended disposition, the real estate descends to the heir, and the personalty devolves to the next of kin of the testator. Thus, in the case of *Jessopp* v. *Watson* (*r*), where a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters; and if no such child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried. Sir *J. Leach*, M. R., held, that so much of the residuary fund as was constituted of real estate, descended to the daughter as heir-at-law; and that so much as was constituted of personalty devolved to and was divisible among the persons entitled under the Statute of Distributions to the personal estate of the testator.

Failure of disposition of real and personal estate respectively.

So, in the case of *Eyre* v. *Marsden* (*s*), where a testator gave his real and personal estate to trustees upon trust, at any time after his decease, to sell and convert the property, and during the lives of his children to accumulate the annual income; and, after the decease of his surviving child, he gave the produce of the real and personal estate (directing such part as had not been previously converted, to be then converted) to his grandchildren. One of the children having survived the testator more than twenty-one years, the trust for accumulation became void for the excess under the statute of 39 & 40 Geo. 3, c. 98 (*t*), and the income, being held to be thenceforth undisposed of during the life of the surviving child, was claimed by the next of kin of the testator, as well of the proceeds of the real as the personal estate, on the ground that there was an absolute conversion. But Lord *Langdale*, M. R., decided that it belonged to the heir, observing that the sale was directed for the purposes of the will, and for the benefit of the legatees, not for the benefit of the next of kin, whose claim was therefore confined to the income of the personal estate.

(*r*) 1 My. & K. 665; [see also *Roberts* v. *Walker*, 1 R. & My. 752; *Edwards* v. *Tuck*, 23 Beav. 268.]

(*s*) 2 Kee. 574.

(*t*) Ante, p. 287.

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The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion (*u*). The learned Editor of Peere Williams's Reports, in a note which has often been referred to with commendation (*x*), states the question in those cases to be, "whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of his will." There seems to be no ground to except to this statement of the doctrine, provided that, by an indication of intention to give to real estate the quality of personalty "to all intents," we are allowed to understand something very special and unequivocal, amounting, in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin." The respective claims of his own representatives, it may be confidently affirmed, are, in such cases, not in the contemplation of the testator, who always calculates on his legatees surviving him. [Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate (*y*), nor such a direction joined with an express declaration that the heir-at-law shall not take in case of lapse (*z*), will exclude the claims of the heir-at-law.]

Conversion for purposes of will—what.

(*u*) *Wright* v. *Wright*, 16 Ves. 188.

(*x*) *Cruse* v. *Barley*, 3 P. W. 20, Mr. Cox's n.

[(*y*) *Taylor* v. *Taylor*, 3 D. M. & G. 190, overruling *Phillips* v. *Phillips*, 1 My. & K. 649; and see *Robinson* v. *London Hospital*, 10 Hare, 19; *Gordon* v. *Atkinson*, 1 De G. & S. 478; *Flint* v. *Warren*, 16 Sim. 124; *Shallcross* v. *Wright*, 12 Beav. 505; *Hopkinson* v. *Ellis*, 10 ib. 169; *Williams* v. *Williams*, 5 L. J. N. S. Ch. 84; *Collins* v. *Wakeman*, 2 Ves. jun. 683 (as to the 1000*l.*)

(*z*) *Fitch* v. *Weber*, 6 Hare, 145.]

As to conversion subjecting fund to simple contract debts.

Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir *W. Grant* (*a*), that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect. Such a conversion, however, as that referred to by his Honor, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expressions showing that it is not so confined. In short, it must be manifest that the property is to be considered as personalty quoad this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors. In *Kidney* v. *Coussmaker* (*b*), it had been held, that where a testator had devised real estate in trust to be sold, and directed the produce [to be applied in payment of the incumbrances on the estate, and the remainder] to be considered as part of [the residue of his] personal estate, and then bequeathed the [residue of his] personalty after payment of his debts, the fund was subjected to the debts; but Sir *William Grant*, in the last case, expressed his doubt of the soundness of the decision, which he said was much against the opinions taken upon it.

[Similarly, where a testator, having devised lands to trustees upon trust for sale, did not dispose of the surplus proceeds, and died without heir or next of kin, it was held that the Crown had no title to the surplus proceeds, (as it would have had if they had been personalty,) but that the trustees were entitled to retain them for their own benefit (*c*).]

As to proceeds of real estate, passing under a residuary bequest.

In farther confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of personalty in the same will, unless the testator expressly declare that it shall be considered as part of his personal estate. [This position is apparently opposed by the early case of *Mallabar* v. *Mallabar* (*d*), which, however, has been treated by Sir *W. Grant*, in the case of *Maugham* v. *Mason*, stated hereafter, as being governed by its own peculiar circumstances (*e*), an explanation

(*a*) *Gibbs* v. *Ougier*, 12 Ves. 413.
(*b*) 1 Ves. jun. 436.
[(*c*) *Taylor* v. *Haygarth*, 14 Sim. 8. See also *Cradock* v. *Owen*, 2 Sm. & Gif. 244, 245.
(*d*) Ca. t. Talb. 78.
(*e*) See also the observations of Sir *J. Leach*, in *Phillips* v. *Phillips*, 1 My. & K. 660.

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[which we must now adopt in order to reconcile it with subsequent decisions.

Berry v. *Usher.*

Thus, in the case of *Berry* v. *Usher* (*f*), the appointment of two persons as joint residuary executrix and executor was held not to give them the proceeds of real estate directed to be sold.

That real fund will not pass under a bequest of personalty, finally decided.

Again, in] the case of *Maugham* v. *Mason* (*g*), A. devised freehold chambers to trustees and their heirs, upon trust to sell, and apply the money arising by such sale towards payment of the legacies by his will bequeathed; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate, after payment of his debts, &c., bequeathed the same to trustees, upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir *W. Grant*, M. R., held, that the produce of the sale of the real estate, after payment of the legacies, resulted to the heir, *and did not pass under the residuary bequest.*

This construction, it will be observed, was somewhat aided by the circumstance of the trust being to convert the residue into money, which could not strictly apply to the money produced by the real estate; but the M. R., though he adverted to this circumstance, decided the case upon the general principle, that where there was a direction to sell land for a particular purpose, the surplus did not form "part of the personal estate, so as to pass by the residuary bequest."

Dixon v. *Dawson.*

[So, in *Dixon* v. *Dawson* (*h*), the testatrix devised and bequeathed her real and personal estate upon trust to sell and convert, and out of the proceeds of the real estate to pay her debts and testamentary expenses, and also certain legacies and annuities, and in case the proceeds should be insufficient then to pay the same out of the personal estate, and she also bequeathed legacies to charities to be paid out of her personal estate, and then proceeded thus:—"Should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and personal and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies or sums of money herein bequeathed or directed to be paid thereout, then upon trust that my said trustees shall pay and transfer the residue and remainder of my *said*

[(*f*) 11 Ves. 87.]
(*g*) 1 V. & B. 410.
[(*h*) 2 S. & St. 327.

[*estate and effects not hereby otherwise disposed of* unto, &c." It was decided by Sir *John Leach*, V. C., that the last gift did not include the residue of the proceeds of the real estate, and that the heir-at-law was entitled.

Collis v. *Robins*.

And in *Collis* v. *Robins* (*i*), where the testator devised real estate upon trust for sale, and out of the proceeds and the rents in the meantime to pay the testator's debts and the trustees' costs and certain legacies, and the will then proceeded, "and as to all and singular my ready monies and securities for money to me belonging, and all other my personal estate and effects whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath, &c." Sir *J. Knight Bruce*, V. C., considered that the surplus of the proceeds of the real estate belonged to the heir-at-law.

What expressions in residuary gift sufficient to carry proceeds of sale.

We may now notice what expressions have been considered sufficient in a residuary devise to carry the surplus proceeds of real estate directed to be sold. In the case of *Mallabar* v. *Mallabar* (*k*), before referred to, the trusts of the proceeds of the sale were to pay debts and legacies including one to the heir-at-law, and then, after "debts and legacies paid as aforesaid and subject to the same," the testator bequeathed the residue of his personal estate to C., who was held entitled to the surplus proceeds of the sale.

Griffiths v. *Pruen*.

Again, in *Griffiths* v. *Pruen* (*l*), a gift of "any sum appearing after the contents of this my will are fully complied with and fulfilled agreeably to this my determination," was held to pass the surplus proceeds of realty devised to be sold.]

Effect of declaration that proceeds shall be personalty.

If there were a declaration that the money arising from the sale should be considered as part of the testator's personal estate, it [would probably be held to] pass under a general bequest of personalty in the same will. [For although there is no clear authority in the affirmative (*m*), yet the argument adopted with reference to such a declaration in cases of intestacy as to part of the produce of land directed to be sold, viz., that the testator has adapted his language to a case of testacy but not to a case of intestacy (*n*), while it excludes the next of kin admits the claim of the residuary legatee.]

[(*i*) 1 De G. & S. 131.

(*k*) Cas. t. Talb. 78.

(*l*) 11 Sim. 202; and see *Bromley* v. *Wright*, 7 Hare, 334.

(*m*) The point was included in the decision of *Collins* v. *Wakeman*, 2 Ves. jun. 683, but was not argued for the heir. It seems to have been assumed. *Robinson* v. *London Hospital*, 10 Hare, 27.

(*n*) See per Sir *G. Turner*, V. C., in *Robinson* v. *London Hospital*, 10 Hare, 19, and other cases cited above.]

And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance. Thus, where (*o*) a testator gave his real estate and the residue of his personalty to trustees, to sell and convert the same, and invest the proceeds, and then gave the interest, dividends and produce of the whole of his real estate, and of the residue of his personalty, to his wife for life, and after her decease he gave one moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his brother M., his executors, administrators and assigns, and he gave the other moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his sister-in-law B. for life; and, after her decease, he gave the *whole* of the principal of such moieties, or the *whole residue of his estate* whatsoever and wheresoever, and the securities on which the same should be invested, to his said brother M., his heirs, executors, administrators and assigns; and the question being, whether the sister-in-law was entitled to a moiety of the income arising from the proceeds of the real estate, Sir *J. Leach*, M. R., decided in the affirmative; he said, that the testator had made one mixed fund of the residue of the personalty and the proceeds of the sale of the real estate; that the whole was to be invested in government stocks, or on real securities, and the interest was to be paid to the widow during her life; that there was no intention that upon her death a division should take place of the personalty from the produce of the realty; and, in fact, such a division could not be made; that, therefore, the testator, in the moiety given to B. during her life, meant to include the real estate; and that this conclusion was strengthened by the clause immediately following, in which the testator used the phrase, "the whole of the principal of such moieties," as synonymous with, and equivalent to, "the whole residue of my estate, whatsoever and wheresoever" (*p*), and which was, conse-

Inference that real and personal estate once blended are not to be afterwards severed.

[(*o*) *Byam* v. *Munton*, 1 R. & My. 503. And see *Wildes* v. *Davies*, 1 Sm. & Gif. 482.

(*p*) See *Wall* v. *Colshead*, 2 De G. & J. 683.]

quently, a declaration that the moieties of which he spoke were moieties of the whole residue of his estate.

Heir takes as personalty—where.

It is observable, that where a *partial* undisposed-of interest in real estate directed to be sold results to the heir-at-law of the testator, it becomes personalty in his hands. Thus, in the case of *Wright* v. *Wright* (*q*), where A. devised his real estate in trust to be sold to pay his debts, &c., and the residue in trust for his daughter, but if she died in the lifetime of his wife, to his wife for life, and, at her decease, to go as he (the testator) should by a codicil direct. He left no codicil. The daughter died in the widow's lifetime. The reversionary interest in the fund expectant on the widow's decease, which descended to the daughter as the heir-at-law of the testator, was, at her death, claimed respectively by her administratrix as personalty, and, by her heir-at-law as real estate. Sir *W. Grant*, M. R., held, on the authority of the case of *Hewitt* v. *Wright* (*r*), (in which the same principle was applied to a disposition by deed,) that it was personal estate in the daughter, and accordingly belonged to her administratrix. According to the doctrine already stated (*s*), it is clear that no act on the part of the heir electing to take such partial interest as real estate would avail to change its character.

Where the objects of the conversion wholly fail.

But if the purposes of the will *wholly* fail, as if all the legatees of the monies to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate (*t*), [and in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed (*u*): but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place (*x*).

Whether an undisposed-of share in per-

In the converse case, where a partial undisposed-of interest in personal estate, directed to be laid out in land, results to the testator's next of kin or residuary legatee, it might *primâ*

(*q*) 16 Ves. 188; see also *Smith* v. *Claxton*, 4 Mad. 484; *Jessop* v. *Watson*, 1 My. & K. 665; [*Dixon* v. *Dawson*, 2 S. & St. 327; *Carr* v. *Collins*, 7 Jur. 165; *Hatfield* v. *Pryme*, 2 Coll. 204; *White* v. *Smith*, 15 Jur. 1096; *Bagster* v. *Fackerell*, 26 Beav. 469.]

(*r*) 1 B. C. C. 86. [See also *Clarke* v. *Franklin*, 4 Kay & J. 257.]

(*s*) Ante, p. 567.

(*t*) See Sir *J. Leach's* judgment in *Smith* v. *Claxton*, 4 Madd. 493.

[(*u*) *Davenport* v. *Coltman*, 12 Sim. 610.

(*x*) *Carr* v. *Collins*, 7 Jur. 165.

sonalty directed to be invested in land devolves as personalty or realty.

[*facie* be concluded that he took it as real estate, and that in case of his death it would descend to his heir-at-law. But the case is not so simple as at first sight it appears. In fact it is the testator's executor, not his next of kin or residuary legatee, to whom the undisposed interest results, and through whom the next of kin or residuary legatee must claim; and this was held, in the recent case of *Reynolds* v. *Godlee* (*y*), to involve the necessary conclusion that the next of kin or residuary legatee takes it as personalty. "It is urged," said Sir *W. P. Wood*, "that the analogy of *Wright* v. *Wright* and *Smith* v. *Claxton* (*z*) must be applied completely, so as to make this real estate in the hands of the next of kin. But there is a great difference between realty and personalty in this respect. It is not the next of kin at all, but the executors, on whom personal property devolves until the purposes of the will are satisfied. This is met by saying that the debts and legacies are all to be satisfied before this residue is to be invested (in land). But I apprehend the executors have a right to say that this estate should come back to their hands. . . . Looking at it from this point of view, there is no way of dealing with the fund in the hands of the executors as realty. The executors must take and dispose of it *as personalty*. The observations of Lord *Eldon*, in *Ripley* v. *Waterworth* (*a*), deserve consideration in connection with this point. The question there was, whether executors named in a gift of an estate *pur autre vie* took as special occupants or under the Statute of Frauds, and Lord *Eldon* said that even if special occupants, he should hold that they took the estate as personalty. At page 428, he says, 'I doubt whether an executor or administrator ever takes anything as such that he would not be bound to apply as personal estate of the testator.' Put this case: Suppose a bequest of 20,000*l.* to be laid out in the purchase of a specific estate to be strictly settled on A., but without any limitation of the fee; then general legacies of 10,000*l.* The specific gift must be first set apart. Suppose now the estate to be deficient to pay the 10,000*l.* If after this the limitations of the 20,000*l.* are exhausted, the land purchased or directed to be purchased there-

[(*y*) 1 Johns. 536, 582.

(*z*) 4 Mad. 484; see ib. p. 492, where Sir *J. Leach*, says, "under every will when the question is, whether the devisee, or the heir failing the devisee, takes an interest in land as land or money, the true inquiry is, whether the devisor has expressed a purpose that, *in the events which have happened*, the land shall be converted into money."

(*a*) 7 Ves. 425.]

[with must certainly be dealt with as the estate of the testator, which the executors must apply as personal estate in payment of the general legacies. There is no example in the books of next of kin taking property as realty."

This decision proceeded very much on the authority of *Ripley* v. *Waterworth*. It is important, therefore, to observe that the principal point in that case was, whether the executors named in a grant of freeholds *pur autre vie* took for their own benefit, or for the benefit of the testator's residuary legatees; and it was with reference to this question that Lord *Eldon* made the remark at page 428 of the report cited by the Vice-Chancellor, with reference, that is, to the question who was entitled to the benefit of the estate, not, what was the nature or quality of the interest to be taken? It may be asked, is there greater difficulty in the next of kin or residuary legatee taking realty and holding it as such, than in the heir taking money as money? With reference to the case put by the Vice-Chancellor, may it not be said that if the undisposed-of interest is required for the purposes of the testator's will, this would be answered by holding the executor to have a power of sale; but when all those purposes are answered, and the land purchased or to be purchased becomes held on a clear trust for one or more persons as next of kin or residuary legatees, there seems no adequate reason why a trust to reconvert should be implied.]

Specific sums payable out of the produce of real estate belong to the heir —when.

V. It remains to examine the claim of the heir to undisposed-of sums of money constituting part of the produce of real estate devised to be sold.

Sums excepted out of the fund, but not disposed of;

It is clear, that a sum expressly excepted out of the produce of the sale, but not attempted to be disposed of, belongs to the heir (*b*).

Nor is it to be doubted, that where a legacy is payable out of a fund of this description upon a contingency which does not happen, the residuary devisee of the fund has the benefit of such failure, on the principle that, in the event which has happened, there is no actual disposition in favour of the legatee (*c*).

—given to objects incapable of taking.

Where, however, a sum of money, part of the proceeds of real estate, is in terms given to an object incapable by law of taking, the authorities respecting its destination are conflicting, though

(*b*) *Collins* v. *Wakeman*, 2 Ves. jun. 683, stated post, 604; [*Watson* v. *Hayes*, 5 My. & Cr. 125;] and as to trusts for conversion in deeds, see *Emblyn* v. *Freeman*, Pr. Ch. 541; [*Griffith* v. *Rickets*, 7 Hare, 311; *Matson* v. *Swift*, 8 Beav. 368.]

(*c*) Ante, p. 320.

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here, also, there seems to be a preponderance in favour of the heir. The cases of *Cruse* v. *Barley* (*d*), *Collins* v. *Wakeman* (*e*), and *Gibbs* v. *Rumsey* (*f*), are all in favour of the heir; but it will be more convenient to bring these authorities distinctly before the reader in the discussion of a subordinate question connected with the doctrine. This chain of authority, however, in favour of the heir, is interrupted by the case of *Page* v. *Leapingwell* (*g*), where a testator devised certain real estate to trustees upon trust to sell, and out of the monies arising therefrom to pay certain legacies, including two sums of 200*l.* to the poor of two parishes; and after payment of the legacies, to apply the overplus for the benefit of certain persons. There was also a general disposition of the residue of his real and personal estate, not thereinbefore disposed of. Sir *W. Grant*, M. R., observed that the disposition as to the 200*l.* was void as a devise to charity, and therefore lapsed.

Remarks upon *Page* v. *Leapingwell.*

According to the decree, however, his Honor appears to have decided, that the 200*l.* went, not to the heir, (as might have been inferred from the observations in his judgment,) but to the general residuary devisee; a conclusion which it seems difficult to reconcile with the principle discussed in the next chapter, and repeatedly laid down by Lord *Eldon* and other Judges, that a residuary devise is, under the old law, in effect, a specific devise of the lands not included in the particular devises contained in the will. It is enough, however, for our present purpose to show, that in *Page* v. *Leapingwell*, the void legacies bequeathed out of the real fund did not go to the residuary devisee of that fund; in which respect it agrees with, and is confirmed by, a more recent case. As in *Jones* v. *Mitchell* (*h*), where A. devised his real estate, after certain limitations, to trustees in trust to be sold, and out of the monies to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B.; Sir *J. Leach*, V. C., held, that the void legacy of 800*l.* belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

Destination of lapsed sums specifically given out of the produce of real estate.

The principle of the two preceding classes of cases seems to apply, with exactly the same force, to the case of lapse; and, undoubtedly, at one period, the established rule as to these cases

(*d*) 3 P. W. 20.
(*e*) 2 Ves. jun. 683.
(*f*) 2 V. & B. 294.
(*g*) 18 Ves. 463.
(*h*) 1 S. & St. 290.

also was, that the heir was entitled on failure of the devise; unless, according to the doctrine of some cases (*i*), the produce of the sale was blended with the personal estate in one general residuary disposition.

Principle governing the cases.

The ground upon which this rule was established, (and the principle is equally applicable to every class of cases before noticed,) is this: that where a testator devises real estate to be sold, and out of the produce gives a specific sum, say 1,000*l.*, to A., and the residue to B., the residue is to be considered as a gift of the specific sum which the purchase-money, after deducting 1,000*l.*, shall happen to amount to; the gift being the same in effect as if the testator had said, I give to B. the purchase-money minus 1,000*l.*, which I give to A. It is a mere distribution of the purchase-money among them, the one taking a certain and the other an uncertain share; and B. has no more right, *in any event*, to take the share of A., than A. has to take the share of B.

Claim of the heir supported by *Hutcheson* v. *Hammond*.

Thus, in *Hutcheson* v. *Hammond* (*k*), A. devised certain lands to trustees to sell, and invest the money produced by the sale in the funds, in trust for H. for his life, and after his decease to pay certain sums of money, including 1,000*l.* to G. P.; then in trust to pay all the residue of the said principal money and interest to B. and C.; and she gave the residue of her personal estate to H. G. P. died in the lifetime of the testatrix; and Mr. Justice *Buller*, sitting for Lord *Thurlow*, held, after much argument, that the lapsed sum did not fall into the particular or the general residue, but went to the heir. He said, here there was no apparent intention against the heir: therefore the general rule must take place, that the money is considered as land, and, if it lapsed, belonged to the heir-at-law. This decision was affirmed, on a re-hearing, by Lord *Thurlow* (*l*), his Lordship observing, that the testatrix having said nothing as to the 1,000*l.*, the heir was not defeated. *The merely directing an appropriation of a part would not defeat his claim to what was not disposed of.*

This case was considered to have fixed, beyond controversy, the rule of law upon this subject, having been acquiesced in for upwards of thirty years, and received reiterated confirmation in the several analogous decisions of *Collins* v. *Wakeman*, *Gibbs* v.

(*i*) See Lord *Thurlow's* judgment in *Hutcheson* v. *Hammond*, 3 B. C. C. 148; *Kennell* v. *Abbott*, 4 Ves. 802; but as to which see post.

(*k*) 3 B. C. C. 128.

(*l*) Ib., p. 148.

Rumsey, and *Jones* v. *Mitchell*. The reader, therefore, will be not a little surprised to find a different doctrine unhesitatingly propounded in a subsequent case (*m*), which was as follows:—

Claim of the heir negatived in *Noel* v. *Lord Henley*.

Lord Wentworth devised certain real estates to trustees, upon trust for sale, and out of the produce to pay certain sums of money, including a sum of 5,000*l*. to his wife, her executors and administrators, in part satisfaction of 10,000*l*. secured to her by their marriage settlement, out of certain trust funds, in case of her surviving him and failure of issue of his body by her (*n*); and after these purposes he directed the trustees to invest the residue of the said monies upon certain trusts. The testator's wife died in his lifetime. One question was, whether the 5,000*l*. devolved upon the heir or next of kin, or belonged to the persons entitled to the residue. *Richards*, C. B., after taking a distinction between legacies and debts (*o*), the former of which, he thought, were raisable out of the real estate only, and the latter out of the realty in aid of the personal estate; and, treating the gift of 5,000*l*. *as belonging to the former class*, held, that by the lapse the residuary devisees of the fund were entitled.

Observations upon the judgment in the Exchequer.

There is a singular discrepancy in the several parts of the Chief Baron's judgment. In one place, he treats the devised sum as a debt, and as such, chargeable on the real estate in aid of the personalty; observing, that "you might as well say that all the *other* debts which are thrown on the real estate, in case the personalty will not pay them, are so many trusts for the heir-at-law: such a doctrine was never heard of." And yet he afterwards says, that, "with respect to the 5,000*l*. to Lady Wentworth, *that is excluded out of the personal estate, and I should think would, if she had lived, have been raiseable out of the real estate only*."

Noel v. *Lord Henley*, in the House of Lords.

Lord *Redesdale's* reasoning on affirming the decree.

The case was carried to the House of Lords (*p*) on two questions, one of which respected the lapsed devise of the 5,000*l*.; and the decree below on this point was affirmed. Lord *Redesdale* said, "If any property is given by a will in the nature of a legacy to a person in being at the time the will is made, but who dies before the testator, that legacy of course becomes lapsed and no longer payable. That is a contingency

(*m*) *Noel* v. *Lord Henley*, 7 Pri. 241, Dan. 211, 322.

(*n*) If the devise could have been considered as subject to this contingency, there would be no difficulty in reconciling the decision with *Hutcheson* v. *Hammond*, on the principle before stated in regard to contingent charges, ante, p. 320. It seems to be impossible, however, consistently with sound construction, or the principle upon which it was decided, so to treat it. [See however Lord *Eldon's* remarks on the appeal, cited next page.]

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

(*p*) *Noel* v. *Lord Henley*, 1 Dan. 322.

to which every person who makes a disposition by will must be deemed to know that such a disposition is subject; and, although it is contended, on the part of the heirs-at-law, that this 5,000*l.* arising out of the sale of the estate should be applied to their benefit as so much real estate undisposed of by the will, I conceive that that is not the true construction of the will; because, having given that 5,000*l.* as a legacy, which in its nature must be subject to that species of contingency, that contingency is one which he must be supposed to have looked to for the benefit of those persons to whom he gave the residue of the money to arise from the sale of the estate; and, therefore, it seems to me that the decree is perfectly right in the manner in which it has disposed of that question, by holding that that 5,000*l.* is not to be raised out of the money which may be raised by sale of the real estate, inasmuch as that contingency has happened to which the testator is supposed to have looked at the time he made the will." Lord *Eldon* [concurred in the decree, but apparently on a different ground; for he said (using the word "contingency" in a different sense, as it seems, from Lord *Redesdale*) that the 5,000*l.* was only to be payable upon a contingency; and that not having happened, no direction was given, the will having failed with reference to that part of it.]

Remarks upon *Noel* v. *Lord Henley.*

The reasoning which regards the death of the devisees in the testator's lifetime as an event within the testator's contemplation, on which Lord *Redesdale* grounded his opinion, is directly opposed to the principle recognized in a great variety of cases (*q*), that a testator is in general supposed to calculate upon his dispositions taking effect, and *not* to provide for the happening of events in his lifetime which will defeat them, as the death of legatees, &c. The whole doctrine of lapse stands upon this principle.

It is most extraordinary that, neither in the Court below nor in the House of Lords, the Judges who decided the case of *Noel* v. *Lord Henley* cite or allude to the case of *Hutcheson* v. *Hammond*, whose authority they were subverting; and we are left to conjecture whether their decision was made in ignorance or with the intention of overturning that case. Fortunately, however, the perplexing uncertainty in which the doctrine was thus placed, is in some degree dissipated by the subsequent case of *Amphlett* v. *Parke* (*r*), presently stated, which, as eventually decided, appears to have restored the authority of *Hutcheson* v.

[(*q*) See accordingly *Robinson* v. *London Hospital*, 10 Hare, 28.]

(*r*) 4 Russ. 75, 2 R. & My. 221.

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Hammond. Lord *Brougham's* judgment, on the appeal, contains a detailed examination of many of the cases, among which, however, neither *Hutcheson* v. *Hammond*, nor *Noel* v. *Lord Henley*, is to be found, nor do they appear to have been cited at the bar. Indeed, the question chiefly discussed in this case was, whether the declaration that the produce of the sale should be deemed personal estate, and the blending of such produce with the general residuary personal estate, did not so absolutely convert it into personal estate as to exclude the heir; and the adjudication in the negative affords the strongest possible confirmation of the doctrine of *Hutcheson* v. *Hammond*, in opposition to *Noel* v. *Lord Henley*, in both which these circumstances were wanting.

Whether blending of proceeds of real and personal estate excludes the heir.

The unavoidable mention of the case of *Amphlett* v. *Parke* has rather anticipated the subject next to be considered, namely, whether the circumstance of the produce of the real estate being blended with the general personal estate constitutes a ground for excluding the heir, by applying to the mixed fund the rule applicable to the latter species of property; such rule being (as is well known) that the residuary legatee takes, even under the old law, whatever is not effectually disposed of to other persons. It seems difficult to discover any solid reason why the blending of the two funds should produce this consequence. The testator, intending the proceeds of the two species of property to go in the same manner, comprising them in the same disposition for mere convenience, and to avoid a needless repetition of language; and the effect ought, one should think, to be the same as if, in one part of his will, he had given the proceeds of the real estate to A., and in another part, the proceeds of the residuary personal estate to A. How far the authorities lend their support to such a conclusion, will be seen by the following statement of them.

Case of *Cruse* v. *Barley*.

A leading case on this subject is *Cruse* v. *Barley* (*s*), where a testator devised all his freehold and copyhold lands to P. and his heirs, in trust to sell the same, and, in the first place, to pay off all incumbrances upon the premises, and all his just debts. He devised all his personal estate to the same trustee, in trust to sell, and to apply the money arising by the sale, *and also the money to be produced by sale of the real estate*, amongst his five children: viz. to his eldest son C. 200*l.* at his age of twenty-one: the residue amongst his four younger children at their respective ages of twenty-one or marriage. C. died under

(*s*) 3 P. W. 20.

twenty-one; upon which a question arose as to the 200*l.*, which, it was admitted, never vested in C. Sir *Joseph Jekyll*, M. R., having ordered the precedents to be looked into, declared that the 200*l.* should be construed as land, and descend to the heir: for that it was the same as if so much land as was of the value of 200*l.* was not directed to be sold, but suffered to descend.

Remark on *Cruse* v. *Barley.*

The legacy in this case was contingent, and failed by the non-happening of the event on which it depended; a circumstance which was not adverted to, but which would clearly now be held to take it out of the principle in question (*t*). It is enough, however, for the present purpose, that the heir was not excluded by the blending of the residue of the fund with the personal estate.

Durour v. *Motteux.*

The next case is *Durour* v. *Motteux* (*u*), where a testator devised all his estate, consisting in a freehold and leasehold, monies, securities, (specifying many other species of personal property,) and all he had or might have, of what kind soever, to trustees to sell; and, after payment of all his debts, funeral expenses, and legacies, to place out all the residue of his personal estate at interest, upon securities, upon the trusts therein mentioned. One of the questions was, whether a legacy of 1,200*l.*, which was void, (because to be laid out in land for charitable purposes,) belonged to the heir or the residuary legatee. Lord *Hardwicke* decided in favour of the legatee; his Lordship laying some stress upon the fact of the real estate being turned into personal, and observing, that the intent to include the whole in the residue, plainly appeared from the testator's description of *all* his personal estate; so that the whole of the real was to be considered as personal property (*x*).

Residuary legatee held to be entitled to void legacy.

In this case (which has been regarded as a leading authority) we find, for the first time, the circumstance of the blending of the produce of the real and personal estates was made the ground of the decision; and this principle was still more distinctly re-

(*t*) See ante, pp. 320, 597, and *Doe* d. *Wells* v. *Scott*, 3 M. & Sel. 300; the principle of which is, of course, applicable to devises out of the produce of real estate devised to be sold.

(*u*) 1 Ves. 320; more fully and accurately stated, 1 S. & St. 292, n.

(*x*) Of this case, Sir *W. Grant* has observed, "From the little Lord *Hardwicke* is reported to have said, it is difficult to ascertain from what expressions he inferred, that, by the description of all his personal estate, the testator meant to include every thing in the residue. The decision is generally accounted for by the particular manner in which the sale was directed, and the circumstance of the testator having blended the real and personal estates in one gift to trustees, to sell the *whole* with his personal estate," &c., 1 V. & B. 417; see also 2 R. & My. 232; but see ib. 245.

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cognized in the subsequent case of *Hutcheson* v. *Hammond* (*y*), where Lord *Thurlow*, while deciding in favour of the heir's title to a lapsed legacy, payable out of the proceeds of real estate, added "though, if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of."

Dictum of Lord *Thurlow*, in *Hutcheson* v. *Hammond*.

Collins v. *Wakeman*.

No allusion to any such doctrine, however, occurs in the case of *Collins* v. *Wakeman* (*z*), (the next of this class,) where a testator devised certain lands to W., his heirs and assigns, in trust to sell; and the money arising from such sale he directed to be considered as part of his personal estate, and to be disposed of by his said trustee and executor, his heirs, executors, and administrators, in manner following. He then gave several pecuniary legacies out of his said trust monies and personal estate, and gave to his executor W. the sum of 1,000*l.*, to be disposed of according to any instructions he might leave in writing. The testator then gave all the residue of his goods and chattels, personal estate and effects whatsoever and wheresoever, subject to debts, legacies and funeral expenses, costs of his will and of W., whom he also appointed executor, to M., her executors, administrators and assigns. The testator left no instructions as to the 1,000*l.*, which was now claimed by the residuary legatee, the next of kin, and the heir-at-law. Lord *Loughborough* decided in favour of the heir; observing, that, "where the Court has no direction from the testator, to whom the money arising from any part of his real estate shall go, it rests with his heir-at-law (*a*)."

Heir held to take legacy excepted out of proceeds of land, but not disposed of.

Remark on *Collins* v. *Wakeman*.

In this case, it will be observed, the express declaration, that the produce of the sale should be considered personal estate, did not, in Lord *Loughborough's* opinion, authorize the Court to apply to the produce of the real estate the rule applicable to personalty in reference to the effect of the failure of a specific gift.

Kennell v. *Abbott*.

This case was soon followed by *Kennell* v. *Abbott* (*b*), where a testatrix devised a certain copyhold estate to A. and her heirs, in trust to sell, and out of the monies arising therefrom to pay certain legacies; she then made some specific bequests; and, as to the residue of the purchase-money arising from the sale of the said estate, household goods, and all the residue of her

(*y*) 3 B. C. C. 148, stated ante, p. 599.

(*z*) 2 Ves. jun. 683.

(*a*) In the case of *Amphlett* v. *Parke*, 2 R. & My. 221, Lord *Brougham* treated *Collins* v. *Wakeman* as a case in which the next of kin and the heir-at-law were the only litigating parties; but this does not agree with the printed report, in which it appears that the claim of the residuary legatee was advocated by counsel.

(*b*) 4 Ves. 802.

monies, securities for money, personal estates and effects whatsoever, she gave to B., her executors and administrators, subject to her debts and funeral expenses; and she appointed B. executrix. One of the legacies payable out of the produce of the land was void on account of fraud in the legatee; which raised a question, whether it belonged to the residuary legatee or the heir. Sir *R. P. Arden*, M. R., held, that it devolved to the residuary legatee. He distinguished *Hutcheson* v. *Hammond*, on the ground of there being two residues—a special residue of the money arising from the sale, and the general residue; but that here the testatrix had given particular parts of her estate, stock, leasehold estate, household goods, furniture, and many other articles, and this copyhold estate, which she ordered at all events to be sold, and out of the purchase-money she directed these legacies to be paid; and she made a residuary disposition, "as to which," continued his Honor, "the question is, whether it is not, to all intents, a general residuary clause, carrying everything not disposed of. I am of opinion it is, under *Mallabar* v. *Mallabar*, and *Durour* v. *Motteux*. It is making the real estate, to all intents and purposes, personal; and then, taking a retrospective view of what she had done, and meaning to give everything not disposed of, she adds this residuary clause. Therefore, I think this estate is turned entirely into money."

Residue of real fund being blended with the personalty, void legacy held to fall into residue.

This case seems to have occasioned much of the uncertainty in which this doctrine has been long involved by contradictory decisions. It was certainly founded on a very partial view of the then state of the authorities, as neither *Cruse* v. *Barley*, nor *Collins* v. *Wakeman* was noticed by the M. R., though the latter case was the latest upon the subject; having been decided only a short period before, by his contemporary on the Equity Bench.

Remark on *Kennell* v. *Abbott*.

We now come to the case of *Gibbs* v. *Rumsey* (*c*), where a testatrix devised her freehold, copyhold and personal estates to trustees, upon trust to sell, and out of the money to arise by the sale, together with her ready money and other effects, she bequeathed certain charitable legacies, and 100*l.* to her trustees for their care and trouble. And she afterwards bequeathed the residue of the *monies arising from the sale*, and all the residue of her *personal estate*, to her trustees and executors to dispose of

Heir held to take void legacies.

(*c*) 2 V. & B. 294.

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as they should think proper. It was held, that these trustees took the residue for their own benefit under this bequest; and, with respect to the charitable legacies, Sir *William Grant* treated it as a point quite clear, that they went to the heir-at-law, and not to the residuary legatee or next of kin. The principal question in the case was, whether the devisees were trustees of this surplus or not; and it is observable that the point, as to the destination of the void legacies, does not appear to have been discussed; nor was the case of *Kennell* v. *Abbott* cited, or a single argument advanced in favour of the residuary legatees.

Observation upon *Gibbs* v. *Rumsey*.

Amphlett v. *Parke*.

The subject, however, was much more fully investigated in the subsequent case of *Amphlett* v. *Parke* (*d*), where A. devised freehold and copyhold lands to M. and P., upon trust for sale, and directed that the monies to arise from such sale should be considered as *part of her personal estate;* and then went on to direct, that, out of the monies to arise from the sale, and all *other* her personal estate, certain legacies should be paid, and all the residue of her personal estate, and the monies arising from her real estate the testatrix gave upon certain trusts. Sir *J. Leach*, V. C., held, that some of the legacies which had lapsed fell into the residue. He observed, that the two first passages of the will purported an intention that the monies arising from the sale should be considered as personal estate at the testatrix's death; but the latter passages pointed the other way; and it was only from deference to the cases of *Durour* v. *Motteux*, and *Mallabar* v. *Mallabar*, that he came to the conclusion in this case, that the testatrix had in her view the improbable intention, that the monies arising from the sale of her real estate should, for purposes not foreseen by her, have the same qualities as if, at her death, they had been part of her personal estate. The case was afterwards brought again before the same learned Judge, when M. R., who continued of his former opinion; but his judgment was reversed by Lord Chancellor *Brougham*, who decided in favour of the heir, after an elaborate examination of many of the authorities.

Heir held to take void legacies.

Lord *Brougham's* judgment in *Amphlett* v. *Parke*.

The only case which his Lordship seemed to consider to press strongly against the heir was *Kennell* v. *Abbott*, which he deemed to be inconsistent with the current of authority, especially *Cruse* v. *Barley*, *Digby* v. *Legard* (*e*), and *Gibbs* v. *Rumsey*,

(*d*) 1 Sim. 275, 4 Russ. 75, 2 R. & My. 221.

(*e*) 3 P. W. 22, Cox's note, 2 Dick. 500. A. devised her real and personal estate to trustees, in trust to sell, to discharge debts and legacies, and to pay the *residue* to five persons in equal shares. One of them died before the

Digby v. *Legard*.

and to have been founded on a misconception of the case of *Durour* v. *Motteux*, in the report of which in Vesey, the will was not accurately stated, and the decision appeared from a MS. of Lord *Hardwicke's* judgment, in his Lordship's possession, to have chiefly turned on another question. The case of *Mallabar* v. *Mallabar*, Lord *Brougham* regarded as standing on special grounds, especially that of a legacy being given to the heir-at-law, but which circumstance has not invariably, we have seen (*f*), been considered to be of so much weight. In that case, however, the question, as already shown (*g*), was not, as to the destination of a lapsed or void legacy given out of the proceeds of real estate; *but whether such proceeds passed under a general residuary disposition.*

Remark on preceding cases.

It will be observed, that in several of the preceding cases, including *Gibbs* v. *Rumsey*, and *Amphlett* v. *Parke*, the *entire* proceeds of the real estate, (not merely, as in *Kennell* v. *Abbott*, the surplus, after payment of the legacies in question,) were blended with the personalty, the legacies being charged on such mixed fund; so that the fact of the void or lapsed legacy being made payable out of the personal, as well as the real, estate, was not considered to afford a ground for applying to such legacies, in toto, the rule applicable to personal estate.

Green v. *Jackson.*

In the interval between the original decree in *Amphlett* v. *Parke* and its reversal, occurred the case of *Green* v. *Jackson* (*h*), where a testator bequeathed all his personal estate to trustees, upon trust to pay some legacies, and also devised all the residue of his real estate (after some particular devises) to the same trustees, their heirs and assigns, upon trust to sell. The testator then directed, that the monies which should be received by his trustees by such sale, and by virtue of the bequest of the personalty, and all other his monies which should come to their hands, after his debts and legacies, and two sums directed to be sunk by way of annuity, and all costs attending the execution of the will should be paid and provided for, should be placed in a banking-house until the whole (except certain sums) should be got in. He then directed his trustees to pay considerable sums for charitable purposes, and concluded with a direction to them

Void legacies held to fall into residue.

testatrix, and Lord *Bathurst* held, that the share of the deceased *residuary* legatee in the real estate resulted to the testatrix's heir. The case, therefore, does not appear immediately to belong to the class of authorities discussed in the text, but ranks with *Ackroyd* v. *Smithson*, stated ante, p. 588.

(*f*) Ante, p. 534.

(*g*) Ante, pp. 591, 592.

(*h*) 5 Russ. 35, 2 R. & My. 238.

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to pay and apply all the residue of the monies in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests, to certain persons. It was admitted that the charitable legacies failed in the proportion which the produce of the real estate bore to the produce of the personalty (*i*). The heir-at-law claimed the benefit of such failure; but Sir *J. Leach*, M. R., on the authority of *Durour* v. *Motteux*, and also, he said, upon principle, held, that the failure of the charitable legacies enured for the benefit of the residuary legatees; and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate: he observed, that the facts in *Gibbs* v. *Rumsey* were not distinctly stated, and the argument there turned on another point. His Honor did not advert to the other opposing authorities.

Remark on *Green* v. *Jackson*.

The case of *Green* v. *Jackson* was referred to by Lord *Brougham* in *Amphlett* v. *Parke*, as warranted by the particular terms of the will; but as his Lordship's remarks went to impugn the authority of *Durour* v. *Motteux*, on which it was chiefly founded, they probably induced the appeal which was brought against the decision of the Master of the Rolls, and which was argued before Lord *Lyndhurst*, who, however, affirmed the decree, and that, too, chiefly on the authority of *Durour* v. *Motteux*. The circumstance that, in *Green* v. *Jackson*, the legacy was void ab initio, and in *Amphlett* v. *Parke* failed in event by lapse, seems to furnish no solid distinction between these cases; for the principle applicable to each species of case is, it is conceived, the same.

[The last case on this subject appears to be *Salt* v. *Chattaway* (*k*), in which a testator devised and bequeathed to trustees all his real and personal estate, "subject to the payment thereout of his just debts, funeral and testamentary expenses," upon trust to sell and receive the purchase-money and all money that might be owing to him at his decease, "and thereout and out of the ready money he might die possessed of to pay, among other legacies, a legacy of 100*l.* to A. *when he should attain the age of twenty-one*, and to divide the residue into three parts, which he then proceeded to dispose of. A. died under twenty-one, in the testator's lifetime: the contingency upon which the legacy was given thus never happened. According to the principle before

(*i*) On this subject, vide ante, p. 214.

[(*k*) 3 Beav. 576.

[stated (*l*), this would seem to have been the natural ground for holding that the legacy fell into the residue. Lord *Langdale*, however, passed over this ground: he said, "It is not easy to reconcile all the cases which are to be found in the books on these subjects; and the question, whether the lapsed pecuniary legacy passes by the gift of residue or ought to be considered as undisposed of, appears to me to be attended with more doubt than the other: but considering, however, that the conversion of the real estate must be deemed to have been made for all the purposes of the will, and that besides the intention to give a legacy of 100*l.* to A., there was also an intention to dispose of the residue after payment of the legacies; that the testator had determined the qualities of the property which his legatees were to take; and that the gift of the residue is made in terms to give the residuary legatees of personal estate the benefit of lapsed legacies, it appears to me that the proper course is to follow the decisions of *Durour* v. *Motteux* and *Green* v. *Jackson*, and, in conformity with those cases, I am of opinion that the lapsed legacy of 100*l.* must be held to have fallen into the residue and to have passed by the gift of the residue."]

General remarks on the cases.

Here, then, closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where *such proceeds are blended with the general personal estate.* The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of *all* the cases is still wanting.

Rule in regard to wills since 1837.

The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the 25th section of the recent act of 1 Vict. c. 26, to extend to all *interests* in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but the remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted, to which it will be sufficient to refer (*m*).

[(*l*) Ante, pp. 320 and 597.] (*m*) Ante, p. 326.

CHAPTER XX.

OPERATION OF A GENERAL DEVISE OF REAL ESTATE.

I. *In regard to void, lapsed and partial specific Devises.*
II. ——— *Reversions.*
III. *In regard to Copyholds.*
IV. ——— *Leaseholds.*
V. ——— *Powers of Appointment.*

Operation of a general bequest.

I. A RESIDUARY bequest, it is well known, operates upon all the personal estate, of which a testator is possessed at the time of his death, and, consequently, includes all specific legacies which are void, or fail by the death of the legatee in the testator's lifetime (*a*); and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest, in terms embracing the "residue," should become, in event, a gift of the whole. But as under the old testamentary law (which, it will be remembered, still applies to all wills made before the year 1838, whatever be the period of the testator's decease,) a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific (*b*); being in fact a specific disposition of the lands not before given, or, to speak more accurately, not before *expressed to be given* by the will. Thus, if a testator, being seised of Blackacre and Whiteacre, and having no other real estate, devise Blackacre to A., in fee, and all the rest of the lands to B., B. takes exactly that which he would have taken under a specific devise of Whiteacre and no more; and, consequently, if the devise to A. fail, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B. can no more take, by virtue of his residuary devise, the interest so given, or intended to be given, to A., then he could have done under a

Every general devise specific in its nature.

(*a*) *Brown* v. *Higgs*, 4 Ves. 708; *Shanley* v. *Baker*, ib. 732; *Jackson* v. *Kelly*, 2 Ves. 285.

(*b*) See Lord *Eldon's* judgment in *Howe* v. *Earl of Dartmouth*, 7 Ves. 147; *Broome* v. *Monck*, 10 ib. 605; *Hill* v. *Cock*, 1 V. & B. 175; *Spong* v. *Spong*, 1 Y. & J. 370.

specific devise of another property (*c*). Nor is this proposition at all shaken by the rule (presently discussed), that a residuary disposition of real estate will carry all the contingent or reversionary interest which a specific devise may leave undisposed of; since it is clear, upon the very same reasoning, that, in such a case, the residuary disposition is to be read as a specific devise of the interest not comprehended in the former devise.

Its operation in regard to specific lapsed devises;

In the application of this principle to the case of lapsed devises, the writer is not aware of any opposing decision, since the case of *Goodright* v. *Opie* (*d*), where the Judges were equally divided on a question, whether the share of one of several tenants in common in fee, dying in the testator's lifetime, belonged to the heir or residuary devisee. The point was afterwards settled in favour of the heir, in the cases of *Wright* v. *Hall* (*e*), and *Roe* v. *Fludd* (*f*); in the latter of which the two Judges, who had been of a contrary opinion in *Goodright* v. *Opie*, concurred (*g*).

—and specific devises void ab initio.

The principle, however, as applied to devises void ab initio, seems to be encountered by some observations which fell from the Court of King's Bench, in the case of *Doe* d. *Stewart* v. *Sheffield* (*h*). The testator devised certain premises to the sisters of H., as tenants in common in fee; and, by a subsequent clause, he devised to S. certain other real estates, and all his other lands and hereditaments, whatsoever and wheresoever the same might be, which he was in any manner entitled to or interested in, *and not thereinbefore disposed of*, to hold to him, his heirs, &c. There had been three sisters of H., but, at the date of the will, only one was living, who, therefore, was clearly entitled to the whole, she being the sole representative of the class, and the Court so decided; but, in delivering his judgment, Lord *Ellenborough* said, "But even if S. (i. e. the surviving sister) were not entitled to take the whole, the heir-at-law could not be entitled to any part of the residue undisposed of; for this is not the case of a lapsed legacy, but the residuary devisee is to take all other his lands, hereditments, and premises, whatsoever and wheresoever, *not thereinbefore disposed of, &c., and all other his real and personal estate whatsoever*, in the most comprehensive

Dictum in *Doe* v. *Sheffield* examined.

(*c*) *Goodright* v. *Opie*, 8 Mod. 123; *Wright* v. *Hall*, Fortesc. 182; *S. C.* nom. *Wright* v. *Horne*, 8 Mod. 224; *Roe* v. *Fludd*, Fort. 184; *Sprig* v. *Sprig*, 2 Vern. 394; *Doe* d. *Morris* v. *Underdown*, Willes, 293; *Watson* v. *Earl of Lincoln*, Amb. 325; *Oke* v. *Heath*, 1 Ves. 141; *Cambridge* v. *Rous*, 8 Ves. 25; *Jones* v. *Mitchell*, 1 S. & St. 290.

(*d*) 8 Mod. 123.

(*e*) Fort. 182; *S. C.* nom. *Wright* v. *Horne*, 8 Mod. 224.

(*f*) Fort. 184.

(*g*) See Willes' Rep. 299.

(*h*) 13 East, 527.

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terms. Then, admitting the law to be as stated in the cases cited on the part of the heir-at-law, with respect to lapsed legacies, this is not a lapsed legacy." Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*, both concurred in this doctrine; the former, however, appearing to think the case stronger in favour of the residuary devisee, without the words "not before disposed of," though he thought him entitled either way (*i*).

Operation of a residuary devise considered;

It is clear, therefore, that, had *all* the devisees been dead at the time of making the will, the Court would have held the residuary devisee to be entitled. Such a doctrine seems to be irreconcileable with the principle already adverted to, which teaches that a residuary devise is a specific disposition of whatever the will does not purport to dispose of, as exemplified in the case of lapsed devises, between which and the case of a void devise there seems to be no substantial distinction; for the testator conceives himself to have disposed of the property comprised in the void devise, and, therefore, does not intend the residuary devise to extend to it. It is moreover inconsistent with the decisions discussed in the last chapter, in which specific sums given out of real estate devised to be sold, and which were void ab initio, have been held to belong to the heir, and not to the residuary devisee of the fund (*k*).

—in relation to partial and contingent devise;

But it must be observed, that, if the specific devise comprise only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed-of interest will, even in a will made before the year 1838, pass by a general residuary devise.

—devises of partial interests;

Thus, where a person, by such a will, devised certain lands to A. for life or in tail, and the residue of his lands to B. and his heirs; B., under this devise, took the reversion in fee not included in the devise to A. (*l*); and, consequently, if A. died in

[(*i*) The case of *Williams* v. *Goodtitle* d. *David*, as reported 10 B. & Cr. 895, seemed to favour this doctrine; but that report is incorrect, see ante, p. 186, n.]

(*k*) *Jones* v. *Mitchell*, 1 S. & St. 293; see also *Cruse* v. *Barley*, 3 P. W. 20; *Collins* v. *Wakeman*, 2 Ves. jun. 683; *Gibbs* v. *Rumsey*, 2 V. & B. 294, all stated ante. ["The rule is, where the intention of the testator is to devise the residue exclusive of a part given away, the residuary devisee shall not take that part in any event;" per Lord *Camden*, *Gravenor* v. *Hallam*, Amb. 645. In the recent case of *Garner* v. *Hannyngton*, 22 Beav. 627, where there was a void devise to charities, the M. R. said, "the case of *Doe* v. *Sheffield*, *if an authority*, does not apply to this case, because there the words were 'property not thereinbefore disposed of;' here the expression is 'all other my real and personal estate.'"]

(*l*) *Wheeler* v. *Waldron*, Allen, 28, 3 P. W. 63, n.; *Cooke* v. *Gerrard*, 1 Lev. 212; *Rooke* v. *Rooke*, 2 Vern. 461, 1 Eq. Ca. Ab. 210, pl. 17; *Willows* v. *Lydcot*, 2 Vent. 285, 3 Mod. 229; see also *Doe* d. *Briscoe* v. *Clarke*, 2 B. & P. N. R. 343; *Bennett* v. *Lowe*, 7 Bing. 535, 5 Moo. & P. 485; [*Saumarez* v. *Saumarez*, 4 My. & C. 331.]

the lifetime of the testator, he became, at the testator's death, tenant in fee in possession.

So, where a testator devised that A. and his heirs should sell his lands for payment of debts or other purposes, not exhausting the whole beneficial interest, and devised the residue of his real estate to B.; the latter devise carried the beneficial interest not comprised in the former (*m*).

—executory devises in fee;

The same doctrine, it is clear, applied to executory and contingent devises in fee; for if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternative fee depending on the converse event is undisposed of, and, therefore, is an interest on which the residuary clause will operate. Thus, if a testator devised, in case his personal estate should be insufficient to pay his debts (*n*), certain lands to A. and his heirs, in trust to sell and pay them, and devised the residue of his estate to B.; the devise to B. carried the legal fee, in the event of the personal estate being sufficient to pay the debts (*o*).

—contingent devises in fee.

So (*p*), if a testator devised real estate to A. for life, remainder to A.'s children living at his decease in fee, and the residue of his lands to B., it is clear, that, if A. died, either in the testator's lifetime, or after his decease, without leaving a child surviving him, B. would be entitled under the residuary devise.

Alternative fee undisposed of, in event.

In the case of *Doe* d. *Wells* v. *Scott* (*q*), a testator devised certain lands to A. and his heirs, provided that he or his heirs did, within six months after his the testator's death, convey a certain copyhold estate to B. and his children; and, in default, he gave the said lands to B. for life, remainder to his children

(*m*) *White* v. *Vitty*, 2 Russ. 484, 4 Russ. 584; see also *Goodtitle* d. *Hart* v. *Knott*, Cowp. 42.

(*n*) But the validity of such a devise may be questioned, [unless it is to be presumed that the sufficiency or insufficiency will be ascertained within such a time as to preclude the operation of the rule against perpetuities. If it be the personal estate alone whose sufficiency or insufficiency is to be determined, then since that is the duty of the executors, the year ordinarily allowed to them to collect the assets and pay the debts will be the presumptive time. This follows à fortiori from the case of *Rimington* v. *Cannon*, 12 C. B. 18, where on a devise dependent on the insufficiency of a *real* estate devised to *executors* in trust for payment of debts, the same presumption was made. And even if trustees, not executors, held lands on such a trust, it might be argued that the executors, having ascertained the respective amounts of the debts and of the personalty, would apply to the trustees, who would be thereupon bound (and must therefore be presumed) to make an immediate sale of the lands, all within the year. It is scarcely necessary to observe that this is a different question from that mentioned post, Chap. XXV., Sect. 2, ad fin., and discussed Lewis, Perpet. 622—638, namely, whether a devise *after payment* of debts is good.]

(*o*) *Goodtitle* d. *Hart* v. *Knott*, Cowp. 43.

(*p*) Willes, 300; *Doe* d. *Moreton* v. *Fossick*, 1 B. & Ad. 186.

(*q*) 3 M. & Sel. 300; [see also *Vick* v. *Sueter*, 3 Ell. & Bl 219.]

living at his decease, and their heirs, as tenants in common; and the testator devised all the residue of his lands to C. and D., their heirs and assigns as tenants in common. A. and B. both died unmarried in the testator's lifetime. It was held, that the specific devise was incomplete as a disposition of the whole absolute fee, *inasmuch as it did not dispose of the interest, which remained to be disposed of if A. should not assure the copyhold estate to B., and B. should die without children;* and the necessary consequence was, that the interest depending on those contingencies passed by the general residuary clause (*r*).

Remark on *Doe* v. *Scott.*

It is clear, according to the authorities, and was so assumed by the Court, that, in the events which had happened, the children of B., to whom the lands were specifically devised in fee, on breach of the condition by A., would, surviving the testator and their parent, have taken the fee. If, therefore, B. had left children, whether they had died in the testator's lifetime or not, inasmuch as the devise to them had become absolute *in event*, the residuary devisees would clearly have been excluded, precisely in the same manner as if the devise to the children had been absolute *in its creation*. Upon the same principle, the contrary event having happened, the residuary devisees were entitled, as they would have been under a specific alternative devise expressly applied to that event.

Destination of reversion during suspense of alternative contingencies.

[And in the case of *Egerton* v. *Massey* (*s*), where a testa rix devised an estate called A. to her niece for life, with remainder to her niece's children living at her death in fee, and for want of such child then to P. in fee; and she gave all the residue of her estate and effects not thereinbefore disposed of to her said niece in fee: it was argued that the estate called A. was completely disposed of in every event, and that no interest was left for the residuary devise to operate upon; but it was answered, and so held by the Court of C. B., that the alternative remainders to the children of the niece and to P. were both contingent (*t*), and that pending the contingencies the reversion in fee which, but for the will, would have descended to the heir at law, passed by the residuary devise.

The case of *Upjohn* v. *Upjohn* (*u*) is apparently inconsistent

(*r*) Lord *Ellenborough*, in deciding *Doe* v. *Scott*, fully recognized the principle stated by *Willes*, C. J., in *Doe* v. *Underdown*, that, in regard to devises, the intent of a testator is to be taken *as things stood at the time of making his will*; and that the residuary devise must be taken to mean the residue of the lands *then* undevised.

[(*s*) 3 C. B. N. S. 338.

(*t*) See *Crofts* v. *Middleton*, 2 Kay & J. 194.

(*u*) 7 Beav. 59.]

[with the preceding authorities. A testatrix, seised of one undivided moiety of an estate, directed her executors to purchase the other moiety, if the owner would sell it; and *if the purchase should be completed* within a year after her death, she devised the entirety to certain uses; but in case her executors *should not be able* to make the purchase within the year, she made a different disposition of her own moiety, and devised the residue of her estate upon certain trusts. It appeared that the executors could have made the purchase, but neglected to do so, and Lord *Langdale* held that neither of the alternative dispositions took effect. The question then arose whether it passed by the residuary devise, and it was held that it did not, but descended to the heir.

Now according to his Lordship's construction of the will, there were three contingencies expressed or implied in the will; first, if the purchase could be and was completed; secondly, if it could not; thirdly, if it could but was not; of these the first and second were provided for; but in the opinion of the M. R. the third, which actually happened, was not: it should seem, therefore, that, according to the preceding cases, the testatrix's moiety ought in the event to have been held to pass by the residuary devise.]

Effect of devise to the testator's own heirs, in excluding a reversion from a general devise.

But if, after carving out a partial or contingent interest, the testator limit the reversion in fee, or the alternative fee, to his own heirs, such devise, though inoperative in law to break the descent, until the recent enactment on this point (*x*), is considered to indicate an intention to exclude this property from the residuary clause; and, accordingly, such reversion devolves to the heir (*y*).

The mere fact, however, that the devisee of the partial or contingent interest, specifically devised, is also the general residuary devisee, will not exclude him from taking the remaining interest in such lands in the latter character (*z*).

Extent of general devise under stat. 1 Vict. c. 26.

The points embraced by the preceding positions can scarcely arise under wills which are subject to the new law, as the act of 1 Vict. c. 26, s. 25, expressly provides, that, unless a contrary

(*x*) Vide stat. 3 & 4 Will. 4, c. 106, s. 12.

(*y*) *Amesbury* v. *Brown*, cited 2 W. Bl. 739; *Robinson v. Knight*, 2 Ed. 155; *Smith* d. *Davis* v. *Saunders*, 2 W. Bl. 736, Cowp. 420.

(*z*) *Morgan* v. *Surman*, 1 Taunt. 289. The position in the text is rather an inference from, than a point expressly decided in, this case; [see also *Williams* v. *Goodtitle* d. *David*, 10 B. & Cr. 895; *Saumarez* v. *Saumarez*, 4 My. & C. 331; *Ridgeway* v. *Munkittrick*, 1 D. & War. 90; *Egerton* v. *Massey*, 3 C. B. N. S. 338.

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intention shall appear by the will (*a*), real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (s. 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover, (s. 24,) makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate, which takes effect, must be completely testate in regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect (*b*).

Effect of residuary devise failing as to aliquot share.

[If the residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of. As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportions: some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak), under the residuary devise lapsed to the heir (*c*).]

Whether future general devise carries immediate income.

And here, it may be observed, that, where a specific devise is to take effect in futuro, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass under the residuary clause, if any (*d*), and, should the will contain no such clause, will descend to the testator's heir-at-law (*e*); and it is immaterial whether the future devise in question be vested or contingent. If the residuary devise itself be contingent or future, i. e. deferred in point of enjoyment, it becomes a question of much nicety, whether the income accruing in the interval from the residuary real estate passes by such devise; primâ facie, it might seem that the income would not pass, on the ground that

[(*a*) See *Circuitt* v. *Perry*, 23 Beav. 275.

(*b*) See acc. *Culsha* v. *Cheese*, 7 Hare, 236; *Green* v. *Dunn*, 20 Beav. 6; *Cogswell* v. *Armstrong*, 2 Kay & J. 227; *Carter* v. *Haswell*, 26 L. J. Ch. 576.

(*c*) *Greated* v. *Greated*, 26 Beav. 621. The same rule prevails in case of personalty, *Skrymsher* v. *Northcote*, 1 Sw. 566, post, Chap. XXIII.

(*d*) *Stephens* v. *Stephens*, Ca. t. Talb. 228;] *Duffield* v. *Duffield*, 3 Bli. N. S. 621, [1 Dow & Cl. 395. Nor would this result have been varied by the residue being devised upon trust for sale, ib.

(*e*) *Hopkins* v. *Hopkins*, Ca. t. Talb. 44;] *Bullock* v. *Stones*, 2 Ves. 521; [*Wills* v. *Wills*, 1 D. & War. 439.]

every residuary devise is specific; since it is clear, as we have seen, that under a contingent or future specific devise such income would be undisposed of(*f*). But if the principle of the doctrine, which teaches the identity of specific and residuary devises, be closely examined, it will appear not necessarily to involve such a conclusion. A residuary or general devise is said to be specific, because the testator can (or rather before the recent alteration of the law could) devise only such real estate as he had when he made his will, and the chief difference between the operation of a residuary devise, and that of a residuary bequest, was founded on and flowed from this incapacity; the effect of which, however, seems to go no farther than to limit the extent of property which could be brought within the operation of the will. A residuary bequest, it is well known, does (though contingent in its terms) carry the prior income (*g*): and if a testator gives all his real estate to the first son of A., who shall attain his majority (and such event happens *after* the death of the testator), or if the devise is made contingent upon any other event which happens after such period, it seems absurd that there should be an intestacy as to any portion of the real estate; seeing that the will contains in event an actual disposition of the entire real property of the testator. There appears to be no solid ground for distinguishing income which accrued before the contingency happened, from any other portion of the real estate. How could the testator more clearly evince an intention to include the interest in question than by giving all his real estate? To require the mention of part, in addition to an actual disposition of the whole, appears to be irreconcileable with sound principles of construction (*h*). In support of this view of

(*f*) So in the case of a specific bequest (for instance, of stock in the funds) to a person not in esse at the death of the testator, the immediate income of the stock would not pass under the bequest. *Wyndham* v. *Wyndham*, 3 B. C. C. 57; *Shaw* v. *Cunliffe*, 4 B. C. C. 144; and see 2 Rop. Leg., White's Ed. 276.

(*g*) *Green* v. *Ekins*, 2 Atk. 472; *Trevanion* v. *Vivian*, 2 Ves. 430.

(*h*) The writer formerly entertained, and has expressed, in print, a different opinion on this point. He was led to doubt the soundness of that opinion, while considering the question, whether the recent act of 1 Vict. c. 26, has, by extending residuary and general devises to all the real estate to which the testator is entitled at his death, brought within the operation of such devises, when future, the income which had accrued previously to the devise taking effect in possession. There seemed to be no ground for saying that it had; and then came the inevitable difficulty, if the legislature, by assimilating general devises of residuary real to residuary and general bequests of personal estate,*

[(* Sed quære whether the legislature has done so, except in one particular by s. 24; and see Lord *Hardwicke*, 2 Atk. 476, cited in text, p. 618.]

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the subject may be cited a dictum of Lord *Hardwicke*, who, in the case of *Gibson* v. *Lord Montfort* (*i*), expressed an opinion, that a residuary devise to unborn children would carry the accruing rents, although his Lordship did not rest his decision on that ground, as he collected from the language of the devise in that case an intention to accumulate the rents (*k*). And it is observable that, in the recent case of *Ackers* v. *Phipps* (*l*), Lord *Brougham* cited Lord *Hardwicke's* opinion on this point, with a strong expression of his concurrence and approbation, though there also the frame of the will rendered it unnecessary to decide the general question.

On the other hand, however, [it may be said that this argument proves too much, since it applies with equal force to the case of a specific devise; for when a testator gives all his estate of Blackacre to a person at a future period, or on a contingency which is to happen after the death of the testator, he shows as clear an intention of disposing of the whole of that particular estate, and of excluding the heir from claiming any part of it or its produce, as he does in the case of a corresponding residuary devise, with regard to the real estate comprised therein. Yet in the former case it is clear, that all profits accruing between the death of the testator and the coming into possession or vesting of the estate descend to the heir-at-law as being undisposed of. And if the heir be not entitled in the latter case also, in whom is the intermediate freehold? It cannot be in abeyance: and if it do (and it is difficult to deny that it does) descend to the heir, he is clearly entitled to the profits also (*m*). The rule as to personalty is different; but so also are the circumstances. It does not descend, or go to the next of kin; it is vested in the executor, and then there arises a question relating to the *trust* of it, where the intent of the testator must prevail (*n*). Now unless a Court of Equity can in every contingent or executory devise of a residue, or of all real estate, infer a direction

had not brought such previously-accrued income within their operation, how could the alleged difference between such devises and bequests rest on any solid foundation? The same process of reasoning, which showed that the act had left the point of difference untouched, necessarily conduced to the conclusion, that no such difference existed.

(*i*) 1 Ves. 491.

(*k*) Lord *Harkwicke* says, "It is pretty hard to say, that, in any case where one devises all the rest and residue of his real estate, the heirs should be enabled to claim anything out of it; for how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of."

(*l*) 9 Bli. N. S. 468, [3 Cl. & Fin. 691.

(*m*) 1 Atk. 424, 2 Atk. 476; n. 8 to Co. Lit. 556.

(*n*) Per Lord *Hardwicke*, ib.

[to accumulate the rents in the meantime, and so fix the heir-at-law with a trust for the benefit of the devisees, equity must in a simple case follow the law. It may be doubted whether even in the case of a devise expressly in trust, e. g., for the first son of A. who attains the age of twenty-one, and A. has a son who afterwards attains that age, the intermediate rents ought to be accumulated for him to the exclusion of the heir-at-law. *Wills* v. *Wills* (*o*) seems to be an authority to the contrary, and *Bullock* v. *Stones* (*p*) went upon too special grounds to be cited in support of the affirmative. But, be that as it may, to resort for aid to a trust expressed or implied to accumulate the profits is in effect to acknowledge that they are undisposed of at law; and at all events removes the discussion to a wholly different ground from that on which the title of the devisee is originally asserted. A further argument is supplied against his claim] by a case in which the immediate income was held to pass under a general future devise, on the special ground that the real and personal estate were blended in one gift, which was considered to denote an intention that both species of property should be subject to the rule applicable to personalty. The case alluded to is *Genery* v. *Fitzgerald* (*q*), where Lord *Eldon*, in affirmance of a decree at the Rolls, decided that a gift by a testator of all the residue of his real and personal estate to the eldest of three persons who should attain twenty-one, charged with a sum of money to the others if they should attain that age, comprised the rents accruing between the testator's decease and the attainment by the devisee of the prescribed age. His Lordship observed, "The general principles are these:—When personal estate is given to A. at twenty-one, that will carry the intermediate interest. If a testator gives his estate, Blackacre, at a future period, that will not carry the intermediate rents and profits; but where he mixes up real and personal estate in one clause, the question must be whether he does not show an intention that the same rule must operate on both."

Effect of blending real and personal estate in same devise.

Upon this principle, too, was decided the before-mentioned

[(*o*) 1 Dr. & War. 439; see also *Hopkins* v. *Hopkins*, Ca. t. Talb. 44; *Duffield* v. *Duffield*, 1 Dow & Cl. 395.

(*p*) 2 Ves. 521.

(*q*) Jac. 468; see also *Gibson* v. *Montfort*, 1 Ves. 490, and *Glanville* v. *Glanville*, 2 Mer. 38, where a testator devised the residue of his real and personal estate to the use of his son T. (who seems to have been his heir-at-law), *to be a vested interest upon his attaining twenty-one*, provided that, if he died before twenty-one, the real and personal estate should go over. Sir *W. Grant*, M. R., without any distinct intimation as to the principle or ground of his decision, held, that the rents of the real, and the interest of the personal, estate were to accumulate, until the majority or death of T.

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case of *Ackers* v. *Phipps* (*r*), where a testator vested his real and personal estate in trustees (*s*), upon trust to keep the estates in repair, and let, and also to sell or exchange the same, and the money so raised was to fall into the personal estate; and as to an estate called W., and a legacy of 7,000*l.*, the testator gave the same to A. when he attained twenty-one; and if he died before that age, and without issue, the estate and legacy were to fall into the testator's real and personal estate, and go according to the disposition (in the singular) thereinafter contained: and as to the personal estate, after payment of debts, annuities and legacies, and repairs, the trustees were to convert the surplus and accumulate the income at compound interest, until A. should attain twenty-four, and then, upon trust, to convey and transfer the real and personal estate to him, upon his giving security and executing proper deeds for securing the annuities. It was held, by Sir *L. Shadwell*, V. C., that the rents, until A. attained twenty-four, resulted to the heir-at-law; but his Honor's decision was overruled by the House of Lords, after an elaborate judgment from Lord *Brougham*, who considered that there was such a blending of the real and personal estate, as brought the present case within the doctrine of *Gibson* v. *Montfort*, and *Genery* v. *Fitzgerald*. [He also thought there was much force in the argument that the entire exclusion of the heir is effected by a gift of the rest or residue of real estate, or real estates not otherwise disposed of, though such gift were to take effect at a period subsequent to the testator's decease. He summed up a long judgment by saying that he was of opinion that the gift to A., though it was not vested (*t*), yet was a gift that displaced the heir for the reasons he had given, in respect chiefly to the residuary gift of real *and personal* estate, but in respect also, as strengthening that inference, to the intention of displacing the heir-at-law in favour of the devisee, and which intention was, he thought, clearly made out from the other circumstances of the case (*u*).]

Future general devise held to include present income.

Operation of a

II. It remains to be considered whether reversions will pass

(*r*) 5 Sim. 44, 9 Bli. N. S. 431, 3 Cl. & Fin. 665; [see also *Lachlan* v. *Reynolds*, 9 Hare, 796. But in acting upon this rule care must be taken to see that the entire real and personal estate are in fact blended. *In re Drakeley's Estate*, 19 Beav. 395; *Marriott* v. *Turner*, 20 ib. 557; *In re Sanderson's Trust*, 3 Kay & J. 497.]

(*s*) This is a very brief statement of the *effect* of the will, which was very long.

[(*t*) See however post, Chap. XXV. Sect. 2.

(*u*) See 3 Cl. & Fin. 701.

general devise on reversions.

under a general devise of lands. In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will (*x*); but they have been generally treated as belonging to the same class and sufficiently approximate in principle to warrant at least their juxtaposition.

Reversions in fee, then, will pass under a general devise of lands or hereditaments (*y*), although the testator be seised of real estates in possession to satisfy the words of the devise (a fact, however, which, in regard to wills made since 1837, would be immaterial); and although he may have been ignorant when he made his will of his having such a disposable interest (*z*); or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail (*a*).

Devise of lands "not settled," includes unsettled reversion in settled lands.

It has been even held that a testator's reversion in fee in settled lands will pass under a devise of his "*lands not settled* (*b*)," or of his lands and hereditaments "*out of settlement* (*c*)," or "*in the towns of L., M. and N., or elsewhere, not by him formerly settled or thereby disposed of* (*d*)." The argument in these cases was, that, although certain estates in those lands were settled, yet that the reversion was not, and consequently it fell within the restrictive terms of the testator's description.

So, in the more recent case of *Glover* v. *Spendlove* (*e*), where A. on his marriage having settled certain lands on himself for life, remainder to B., his intended wife, for life, remainder to their first and other sons in tail male, remainders over, reversion to himself in fee, by his will devised to his daughters in fee "all his lands *not settled in jointure upon his wife;*" Lord *Thurlow* held, without hesitation, that the reversion passed by the will.

It is true that, in *Goodtitle* d. *Daniel* v. *Miles* (*f*), where the same words occurred, Lord *Ellenborough* seemed to think they

[(*x*) See *Tennent* v. *Tennent*, 1 Jo. & Lat. 388.]

(*y*) *Chester* v. *Chester*, 3 P. W. 56; *Pain* v. *Ridout*, 3 Atk. 486; *Atkyns* v. *Atkyns*, Cowp. 808, 3 B. P. C. Toml. 408; see also *Doe* d. *Crump* v. *Sparkes*, 4 D. & Ry. 246.

(*z*) Persons not professionally informed do not readily apprehend the alienable nature of reversionary contingent interests.

(*a*) *Dalby* v. *Champernon*, Skinn. 631, where, however, it was controlled by the context.

(*b*) *Cooke* v. *Gerrard*, 1 Lev. 212.

(*c*) *Strode* v. *Russell*, 2 Vern. 621, 1 Eq. Ca. Ab. 210, pl. 18, 3 Ch. Rep. 169; see also *S. C.* nom. *Falkland* v. *Lytton*, 3 B. P. C. Toml. 24.

(*d*) *Chester* v. *Chester*, 3 P. W. 56, 2 Eq. Ca. Ab. 330, pl. 9.

(*e*) 4 B. C. C. 337.

(*f*) 6 East, 494.

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were descriptive of the *corpus* of the lands, and not of the devisor's interest. He distinguished the other cases on account of the variation of expression; and *Glover* v. *Spendlove*, on the ground that there the testator had no son, and therefore "had, for all the purposes of substantial benefit, the fee expectant on his wife's life estate, she being then alive;" but his Lordship's reasoning on this point is evidently untenable, [and the opinion of the Court was expressly rested upon grounds (*g*) strong enough, in their judgment, to support it, even supposing the words in question to be insufficient of themselves to restrain the effect of the general words.]

If Lord *Ellenborough's* observations could be considered as throwing a shade over the doctrine, it has been completely dissipated by the case of *Att.-Gen.* v. *Vigor* (*h*), where Lord *Eldon* expressed a decided opinion that the reversion in lands, settled on the marriage of the testator's son with Lady K. passed by a devise of all the testator's lands, *which he had not settled or assured, or agreed to settle or assure, to the use of his said son and the issue male of his body, upon his marriage with Lady K. his wife*; [and by the case of *Incorporated Society* v. *Richards* (*i*), where the testator—having upon his marriage agreed to settle certain estates in trust for himself for life, remainder to provide a jointure for his wife, remainder to his issue in tail, remainder to himself in fee—devised all his *unsettled* real estate to his wife for life, remainder over, Sir *E. Sugden*, C., held that the reversion passed as part of the unsettled estates.

The foregoing cases also show that the possession by the testator at the date of his will of lands, no estate or interest in which has been settled, and to which the devise is applicable, will not exclude the operation of the will.]

Though the rule of construction established by the preceding cases has been much condemned, as savouring of extreme technicality and inimical to popular notions and probable intention (*k*), they have, it is conceived, placed it beyond the reach of controversy.

"Lands not before devised."

On a principle not very dissimilar, it has been held, that a

(*g*) See post, p. 627.

(*h*) 8 Ves. 256, see p. 272.

[(*i*) 1 D. & War. 258; see also *Jones* v. *Skinner*, 5 L. J. N. S. Ch. 87; *Crowe* v. *Noble*, Sm. & Bat. 12.

(*k*) Sir *James Mansfield*, in *Morgan* v. *Surman*, 1 Taunt. 292, characterized *Chester* v. *Chester* as "a shocking decision;" but he admitted it had been followed by numerous others; [and see remarks of Sir *E. Sugden*, *Incorporated Society* v. *Richards*, 1 Dr. & War. 285; and also of Sir *C. C. Pepys*, M. R., in *Jones* v. *Skinner*, 5 L. J. N. S. Ch. 87, defending the rule.]

devise of lands "not before devised," or "not before disposed of," carries the reversion in lands which the testator had previously devised for life (*l*).

Force of general devise not restrained by ambiguous expressions.

The inclination of the Courts at the present day not to exclude a reversion from a general devise upon slight or equivocal grounds, is strongly illustrated by the case of *Doe* d. *Howell* v. *Thomas* (*m*), in which a reversion in fee in an estate limited to the testator's first and other sons in strict settlement was held to pass under a devise of estates over which the testator had a power of disposal, though in another part of the will he referred to the estate in question *as property over which he had no power*. [And again in *Ridgeway* v. *Munkittrick* (*n*), where a testator directed his trustees to let certain premises at D., and also dispose of his stock in trade and *other properties* in manner mentioned in the will, Sir *E. Sugden* held that the premises at D. passed as part of the *other* property.]

Whether inapt limitations will exclude a reversion.

But the great question which has been agitated, in regard to the operation of a general devise upon a reversion is, whether the inaptitude of some of the limitations be a ground for their exclusion.

Where there is other real estate;

In reference to this question, it is proper to consider separately those cases in which there are other lands to which the limitations in question are applicable, and those in which the reversion is the only property of the testator that the devise could apply to.

—where not.

Inaptitude of limitations no ground of exclusion, in cases of former class.

With regard to the first, it is quite clear that the impossibility of some of the limitations operating on the reversionary interest, will not have the effect of excluding it from the devise; as the limitations inapplicable to the reversion will be considered as referring exclusively to the other lands, and the other limitations as applicable to the whole *referendo singula singulis*.

Doe v. *Weatherby*.

Thus, in the case of *Doe* d. *Earl Cholmondeley* v. *Weatherby* (*o*), where a reversioner in fee, having also other lands, devised his real estate generally, charged with annuities to three persons for their lives, one of whom was tenant for life of the lands in which the devisor had the reversion, and as to whom, therefore, the charge in respect of those lands was void, it was held that the reversion passed; for though that annuity could not be charged upon this particular property, there was other real estate which

(*l*) *Rooke* v. *Rooke*, 2 Vern. 461, 1 Eq. Ca. Ab. 210, pl. 17; *Willows* v. *Lydcot*, 2 Vent. 285, 3 Mod. 229; [*Tuaffe* v. *Ferrall*, 10 Ir. Ch. Rep. 183:] but see *Hyley* v. *Hyley*, 3 Mod. 228.

(*m*) 1 Scott, N. R. 359, 1 M. & Gr. 335.

[(*n*) 1 D. & War. 84.]

(*o*) 11 East, 322; *S. P. Doe* d. *Moreton* v. *Fossick*, 1 B. & Ad. 186.

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might be charged with it. Referring, then, the charge of the three annuities to the several properties devised by the residuary clause, *singula singulis*, the charge would attach upon all the estates as to two of the annuities, and upon all but this reversion as to the three.

William v. *Thomas.*

[So in *William* d. *Hughes* v. *Thomas* (*p*), where a testator having a reversion in fee expectant on an estate tail in another person, and having also other lands in possession, after several specific devises, gave all the residue of his estate and effects, real and personal whatsoever and wheresoever after payment of his debts, legacies and funeral expenses, to his wife absolutely; it was at first argued that the charge of debts, legacies and funeral expenses showed that the testator could not have contemplated a distant reversion; but the argument was afterwards abandoned, and the Court of King's Bench thought it quite clear that the reversion was included.]

Freeman v. *Duke of Chandos.*

To this principle may also be referred the case of *Freeman* v. *Duke of Chandos* (*q*), where A., having the reversion in fee of estates in Gloucester and Worcester which were settled on his marriage, and of other estates in two other counties which were not included in that settlement, devised all his lands and hereditaments in the counties of Gloucester and Worcester, and elsewhere in the kingdom of England; and all his estates or interest in reversion, remainder, or expectancy, *subject to certain charges and to certain limitations, to his brothers and their respective first and other sons, in and by his marriage settlement, bearing date, &c. expressed*, in trust, in case himself and his brothers should all die without issue male of their bodies, or his brother should die before twenty-one, for certain persons. It was contended that from these words it was manifest that the testator had no other than the settled estates in his contemplation; but the Court of King's Bench held that the reversion in the other lands passed.

Doe v. *Bartle.*

So, in the subsequent case of *Doe* d. *Nethercote* v. *Bartle* (*r*), where a man, having in the parish of A. lands of which he was tenant in fee, and also lands which had been settled to the

[(*p*) 12 East, 141.]

(*q*) Cowp. 363. The report of this case is very defective: it neither states the uses to which the property in question was subject, nor the nature of those limited by the will; see also *Strong* v. *Teatt*, post, p. 626, which read in this place for the reason assigned, n. (*y*).

(*r*) 5 B. & Ald. 492; [and see *Ford* v. *Ford*, 6 Hare, 486; *Honywood* v. *Honywood*, 2 Y. & C. C. C. 471. The latter case appears contrary to the authorities, but the ground of the decision (which is not stated) may have been that the devise of the reversion was revoked by subsequent conveyance.]

use of himself for life, remainder to his wife for life, with remainder to their issue in tail, *leaving the ultimate reversion in himself*, (both of which were in his own occupation,) devised unto his wife all his freehold and copyhold lands of which he was then in the immediate possession, lying in the several parishes of A. and B., and also all his reversionary estate expectant on the death of his mother in other lands in A. and B., to his said wife for life; remainder to his daughter in fee. It was held that the reversion in the settled lands passed, although the wife was tenant for life, and the daughter tenant in tail in remainder of those lands, under the settlement.

Conclusion from the cases.

These decisions have established, that the inapplicability of some of the limitations will not exclude a reversion, if there be other lands upon which those limitations can operate. And the same rule of construction has been applied even to deeds (*s*).

Mostyn v. *Champneys*.

In the case of *Mostyn* v. *Champneys* (*t*), an attempt was made to support the construction, excluding a reversion in fee expectant on an estate tail, from a devise of all the testator's real estate whatsoever and wheresoever, *over which he had any disposing power*, to trustees for a term for raising debts, funeral charges and legacies, on the ground that the testator himself was tenant in tail of the lands in question; and that he could not intend to describe such a remote reversion as property over which he had a disposing power, he having taken no steps to enlarge his estate tail, as he might have done, into a fee simple. The testator had other real estate in possession, to which it was admitted the devise in question extended. The Court of C. P. certified, (it being a case from Chancery,) that, the words of the devise being sufficient to include the reversion, and no intention to exclude it being expressed, or necessarily implied from other parts of the will, such reversion passed.

Rule, where the reversion is the only property subject to the general devise.

But the other class of cases, namely, where the reversion is the only real estate of the testator upon which the general devise can operate, (the will being of course made before 1838,) is susceptible of a different train of reasoning, and is certainly environed with more difficulty, both upon principle and the authorities. There being no other lands to which the inapplicable limitations can be referred, the argument for the exclusion afforded by their introduction is obviously stronger; but, on the other hand, is met by the argument that the testator must have

(*s*) *Doe* v. *Jeyes*, 1 B. & Ad. 593.

(*t*) 1 Scott, 293, 1 Bing. N. C. 341.

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intended the devise to operate upon *some* property; for, as he could, under the old testamentary law, only dispose of the lands of which he was seised at the time of making his will, he was always to be supposed to have a specific subject in his contemplation when he made a devise, however general in its terms (*u*). The question, then, was, whether a testator was rather to be presumed to subject to certain limitations, property, which *some* of those limitations could never reach, or to make a devise which must necessarily be *altogether* inoperative. It will be seen that the early decisions incline against, and the latter in favour of, the application of the devise to the reversion in such cases.

Strong v. *Teatt.*

Thus, in the case of *Strong* v. *Teatt* (*x*), where C., having on the marriage of his son H. settled the manor of A., in the county of T., on himself for life, remainder to H. for life, remainder to the first and other sons of the marriage in tail, with reversion to himself in fee; and having issue three other sons, A., J., and T., by his will, devised certain lands of which he was seised in fee in possession, and all other his lands, tenements and hereditaments, in the counties of T. and M. (*y*), to the use of his son A. for life; remainder to his first and other sons in tail male; and so on to the sons J., T. and H., and their sons in succession; and provided that if it should happen that his sons H. and A. should both die without issue male in the lifetime of his son J. *whereby the estate settled upon H. upon his marriage would descend upon J.*, then that his said son J. should not take any estate or interest in the lands thereinbefore devised to him; but that the same should go to T. The question was, whether the reversion in the settled lands passed. Lord *Mansfield* was of opinion that the latter clause was conclusive that the testator did not mean the reversion to pass; for, if it had, it could never "*descend*" upon J., which was the event provided for. And this judgment was affirmed in the House of Lords.

There were certainly strong grounds in this case for the restricted construction.

Roe v. *Avis.*

Remote reversion excluded from trust for immediate sale.

In *Roe* d. *James* v. *Avis* (*z*), a reversion in fee expectant on an estate tail [in another person] was held not to pass under a devise of all the residue of the testatrix's real estate and effects *to be sold as soon as might be after her death and her funeral*

(*u*) See *Hockley* v. *Mawbey*, 1 Ves. jun. 152.

(*x*) 2 Burr. 912, 3 B. P. C. Toml. 219.

(*y*) He had another estate in T., besides that before described, and which, therefore, would satisfy the word "other."

(*z*) 4 T. R. 605.

expenses to be paid thereout, and the overplus (if any) to be divided between A. and B., on the ground that the purpose to which the proceeds of the sale were to be applied, namely, the payment of funeral expenses, showed that the testatrix meant to dispose of something which might be sold immediately.

This reasoning is evidently unsatisfactory. A reversion expectant on an estate tail is not absolutely unsaleable, though it may be of little value; and, if capable of being sold at all, why may it not be disposed of to pay funeral expenses as well as for any other purpose?

Roe v. *Avis* overruled.

Lord *Eldon* (*a*) has spoken of this case with disapprobation, and as the unsuccessful argument for the exclusion of the reversion in *Mostyn* v. *Champneys* (*b*), stated under the former division, was principally based on its authority, that case must be considered to have completely overturned it, if indeed the task had not been performed by antecedent adjudications (*c*).

Goodtitle v. *Miles*.

Another instance of the restrictive construction occurs in the case of *Goodtitle* d. *Daniel* v. *Miles* (*d*), where, on the marriage of A. with B., lands had been settled [by A.'s father] to the use of A. for life; remainder to B. for life for her jointure; remainder to the heirs of the body of B. by A. to be begotten; remainder to the right heirs of A. A. survived his wife, having had by her two daughters, C. and D., who survived him, and were his heirs-at-law. By his will, A. devised to his daughter C., *and to the heirs of her body lawfully begotten*, certain freehold lands of which he was seised in fee in possession, and all other his freehold, copyhold and leasehold lands, which he should be possessed of, or entitled to, at the time of his decease, *and which were not settled in jointure on his late wife;* the said daughter and the heirs of her body paying thereout to his daughter D. 15*l.* yearly during her life. And in case his daughter C. should happen to die, and leave no issue of her body, he devised the lands to his daughter D., for life, and, after her decease, to her children then living; and, for want of such issue, then over. The devisor had no real estate other than lands expressly devised, besides the reversion in question. The question was, whether the reversion passed. The Court of King's Bench held, that it did not: they admitted that the general words, if unrestrained, would carry the reversion, but as the daughters had estates tail

Reversion excluded by inaptitude of some of the limitations.

(*a*) 15 Ves. 403.
(*b*) 1 Scott, 293, 1 Bing. N. C. 341, ante, p. 625.
[(*c*) See accordingly per *Parke*, B., *Mortimer* v. *Hartley*, 6 Exch. 47.]
(*d*) 6 East, 493.

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in the settled lands, so that the testator had no disposable interest, unless they both died without issue, if these lands were included, the devise to C. in tail was necessarily inoperative (*e*); since she had an estate of the same duration under the settlement: she would then be tenant in tail general under the will, expectant on the determination of an estate tail general already subsisting in herself under the settlement. The same observation applied to the devise to his daughter D. for life, remainder to her children, which could not possibly take effect. Upon this ground, and adverting also to the restriction of the devise to lands "not settled in jointure on his wife (*f*)," the Court held that the reversion did not pass.

Church v. *Mundy*, as decided by Sir *W. Grant.*

So far the cases certainly favour the restrictive construction; but we now proceed to the important case of *Church* v. *Mundy* (*g*), which gives a new complexion to the doctrine on this subject. M. having the reversion in fee in lands expectant on an estate tail in his brother C., devised all his real and personal estate to his wife for life; and if she should die leaving no issue, then in trust for C., his heirs, &c.; and in case C. should not be then living, to be at the disposal of the testator's wife. The testator had no other real estate. Sir *William Grant*, M. R., held, that the reversion did not pass, conceiving that the testator could not intend to comprehend in that devise any estate but such as his wife might take for life, and C. might enjoy afterwards, which was impossible as to this reversion; for, until the death of C., without issue, it could not fall in. But Lord *Eldon*, on appeal, reversed this decree (*h*),—"The question is (said his Lordship), whether, as the purposes of this will are such, to which this subject cannot be so conveniently applied as a present interest in possession, not in remainder, the testator is to be considered as meaning nothing by this clause. In every case of this sort, the testator had some property, which was the foundation of an argument, that property which could be conveniently applied should pass, and that which could not be conveniently applied should not pass. That conclusion is very much confirmed by this will; adverting to the different situations in which the testator's family may be at his decease, particularly that the tenant in tail might not be living. If the testator had been asked whether he

Decree at the Rolls reversed by Lord *Eldon.*

Reversion in-

[(*e*) See *Badger* v. *Lloyd*, 1 Salk. 232.]

(*f*) As to which, see ante, p. 621.

(*g*) 12 Ves. 426; see also *Att.-Gen.* v. *Vigor*, 8 Ves. 256, where the point seemed too clear to admit of a question, the devise being simply to two persons in fee, of lands, in which they had successively chattel interests, determinable with their respective lives.

(*h*) 15 Ves. 396.

meant to dispose of his reversion, if his brother should be living, his answer would have been, that he intended to dispose of all he could dispose of; to take the chance for his wife and children; the instrument itself supposing that his brother may die before him; and disposing in terms that can apply to nothing besides this property. If the event of his brother's death within a week, without barring the entail, had been put to him, he would have answered, that, in that event, he intended to pass the property; and he would not have thought it necessary to republish his will; which, if the words are sufficient to carry this property, would not be necessary." "I am strongly influenced towards the opinion (continued his Lordship), that a court of justice is not by conjecture to take out of the effect of general words, property, which those words are always considered as comprehending. *The best rule of construction is that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, when, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning.*"

Concluded notwithstanding inapplicable limitations.

Lord *Eldon's* statement of the general rule.

It is evident, therefore, that his Lordship considered the improbability that the testator should intend to include a reversion in a devise, having limitations, some of which could never operate upon that reversion, as less violent than that he should make a devise without having any real estate upon which all the limitations could operate: and even if it be said that these general devises are frequently made by testators, without having in view any specific property, as the fact undoubtedly is, yet this does not add much to the force of the argument for the exclusion; for it shows that the testator used the general clause for the purpose of including any property which he might inadvertently leave undisposed of; and if he were told that he had such a reversion, but which could not be affected by some of the limitations of the devise, his answer would be, then let it be operated upon by the others.

Remarks on *Church* v. *Mundy*.

It should be observed, that the case of *Church* v. *Mundy* has been referred to by Sir *W. Grant*, (whose decree it will be remembered was reversed in that case (*i*)), as referable to its particular circumstances; namely, that if the brother had died before the testator, an event which his will expressly con-

Sir *W. Grant's* view of *Church* v. *Mundy*.

(*i*) See Sir *W. Grant's* judgment in *Welby* v. *Welby*, 2 V. & B. 187.

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templated, the devise would at the moment of the testator's death have had its complete operation in favour of the wife; and his Honor considered the case as not necessarily deciding, that where A., tenant for life, with remainder to B. in tail, with reversion to himself in fee, devised to B. (the tenant in tail) for life, with remainder to C., his eldest son, for life, with remainder to the first and other sons of C. in tail, the reversion would pass. The point, however, was only indirectly brought into discussion before the M. R., in the consideration of the question, whether such a reversioner making a devise in these terms, was to be considered as intending to pass his own reversion only, or the corpus of the land, inclusive of B.'s interests, so as to raise a case of election against B.: the latter was decided (*k*). Since this period, in every instance in which the question whether a reversion passes by a general devise has been agitated, it has been decided in the affirmative (*l*); and, though in all these cases, there happened to be other real estate to which the limitations inapplicable to the reversion might be referred, yet little or no stress seems to have been laid on that circumstance; and they were decided on the broad ground, that the words of the devise being sufficient to comprise the property, it would pass, without going into the question, whether the testator, could be supposed to have had it actually in his contemplation when he framed the devise, or not.

General conclusion from the cases.

The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question; and, that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not. Indeed, the latter fact would, of course, be wholly immaterial in the case of a will made or republished since the year 1837, any general devise in which would, under the new law, comprise after-acquired real

[(*k*) See also per Sir *G. Turner*, *Wintour* v. *Clifton*, 3 Jur. N. S. 77, 26 L.J. Ch. 223.]

(*l*) Vide cases, ante, pp. 623, 624; [and 6 Hare, 494, where Sir *J. Wigram*, V. C., cites and approves of the observations in the text; *Alliston* v. *Chapple*, 6 Jur. N. S. 288; *Taaffe* v. *Ferrall*, 10 Ir. Ch. Rep. 183. In *Tennent* v. *Tennent*, 1 Jo. & Lat. 388, Sir *E. Sugden* treated the cases of *Roe* v. *Avis* and *Goodtitle* v. *Miles* as clearly overruled by the current of later authorities.

estate; precluding, therefore, all inquiry into the *then* state of the testator's property, as affording any insight into the intention.

Where none of the limitations are applicable. Opinion of Sir *W. Grant*;

[But if the testator is possessed of a reversion to which none of the limitations are applicable, the question, it is conceived, is by no means the same. Sir *W. Grant*, indeed, thought there would be no room for arguing such a case; for that would be to say, the reversion passed, although it were so given that nobody could take it (*m*). It is true, that if the case be put of a legal reversion, properly so called, to which the feudal services of the prior particular tenants are incident, there will always be in contemplation of law a species of interest attached to such a reversion, irrespective of enjoyment of the land in possession. But then the question whether the inapplicability of the limitations does not exclude a reversion from the devise cannot arise; for this interest is in præsenti. Enjoyment of the land in possession must always, therefore, have been intended by the Courts, in considering this question; and then Sir *W. Grant's* remark is directly in point. A different view, however, was taken in the case of *Tennent* v. *Tennent* (*n*), which, so far as concerns the present question, was as follows:—A testator, seised of the T. estate, and of other freehold property, devised all his real and freehold estates to trustees, in trust, as to the T. estate, for his daughter L. for life, remainder to her issue in tail, remainder to his nephew R. J. for life, remainder to his issue in tail, remainder over; but leaving the ultimate remainder in fee undisposed of: and in a subsequent part of his will the testator left the rest, residue and remainder of his properties, both real and personal, to R. for life, and at his death to be entailed on the nephew R. J. "in the same manner as the testator had himself entailed the T. estate" (*o*). It was argued that the reversion of the T. estate could not be intended to pass by the residuary devise or trust, because by the terms of the trust it could not vest in possession until after the determination of the very limitations upon which the residuary property was itself to be settled: but Sir *E. Sugden*, who adverted to the distinction between a proper reversion and a residue remaining after a partial disposition of the estate by the same will (of which latter kind was the residue in question of the T. estate), said, that although it was not possible to suppose

— of Sir *E. Sugden*.

[(*m*) *Welby* v. *Welby*, 2 V. & B. 197.
(*n*) 1 Dru. 161, 1 Jo. & Lat. 379.
(*o*) This trust, it will be observed, did not authorize a limitation of the ultimate reversion expectant on the estates tail of R. J.'s issue.]

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[that the testator adverted to the fact that he could not dispose of this particular reversion in the mode he purported to dispose of the residue generally, in consequence of which the devise would be so far inoperative, yet that circumstance was not a clear indication of an intention to exclude it. The decision, however, does not seem to depend on this ground.

Remark on *Tennent* v. *Tennent.*

It should be observed, that there was other property to which the limitations were applicable. But that appears to be an immaterial circumstance, because the reason for holding a reversion to be included in a devise with other real estate, namely, that *reddendo singula singulis* the apparent incongruity of its terms can be explained, assumes that some at least of the limitations are applicable to the reversion: and here, by the hypothesis, none are applicable. So that, it is conceived, it would have been entirely consistent with the authorities to hold, that in such a case the testator had clearly shown an intention to exclude the reversion from the will.]

Unsurrendered copyholds passed in equity by a general devise —when.

III. When it was necessary to the operation of a devise of copyholds that they should have been surrendered to the use of the will (*p*), the rule was, that copyholds [so surrendered would pass under a devise of lands, tenements or hereditaments, or other general words descriptive of real estate (*q*); but] that copyholds not so surrendered would *not* pass under such a devise (*r*), *unless* the testator had no freehold lands upon which it might operate; in which case, [as there was a clear intention to pass something, the devise was held in Equity to operate on the copyholds (*s*); in favour, however, of those objects only for whom a surrender was supplied of unsurrendered copyholds expressly mentioned in the will, that is to say,] the testator's creditors (*t*), and also his wife and children (*u*), but not in favour

(*p*) See ante, p. 50.

[(*q*) 2 Atk. 85; 1 Ves. 226, 273; 6 Mad. 363, 364; and 2 Powell on Devises by Jarman, p. 123, n.

(*r*) Amb. 274;] 2 Ves. 164; 1 Atk. 387; 3 B. C. C. 188; 2 B. C. C. 64; 15 Ves. 400; also 1 Cox, 247; 13 Ves. 168; 15 ib. 390; 9 Pri. 556. And under a devise of lands *at A.*, copyholds situate there would not pass, if the testator had freeholds at that place, 1 Eq. Ca. Ab. 124, pl. 14.

(*s*) 1 Ves. 215; 1 Atk. 385; 2 Ves. 582; 12 Ves. 426; 15 ib. 396; 1 V. & B. 406.

(*t*) See infra. [" The execution of a power and the surrender of a copyhold go hand in hand, precisely on the same ground." Per Sir *R. P. Arden*, *Chapman* v. *Gibson*, 3 B. C. C. 231; see 2 Sugd. Pow. 88; *Freeman* v. *Freeman*, Kay, 479, 5 D. M. & G. 704.

(*u*) *Hardham* v. *Roberts*, 1 Vern. 132; *Hills* v. *Downton*, 5 Ves. 557; [if the interest of the favoured individuals was limited, the surrender was supplied *pro tanto* only, and then the interest resulted to the customary heir. *Marston* v. *Gowan*, 3 B. C. C. 170.]

of grandchildren (*x*), unless the testator had placed himself in loco parentis (*y*), or natural children (*z*); nor, it seems, even for the wife and children, if the will contained a provision for them (*a*).

Unattested will.

The rule that copyholds would not pass if there were freeholds was held to apply to a case where the will, being attested by two witnesses only, was, under the then existing law, inadequate to pass the freeholds (*b*); the case being, it was considered, not analogous to those in which there were no freeholds, as the failure of the devise arose, not from the absence of intention, but from the positive rule prescribed by the Statute of Frauds.

Effect on construction of statutes dispensing with surrender to the use of will.

Questions of this nature, however, can no longer arise, since the statutes dispensing with the necessity of a surrender to the use of the will (*c*), which have placed freeholds and copyholds pari passu in regard to the operation of a general devise,—a point which in a former publication of the writer was strenuously contended for, and is now settled by authority. Thus, in the case of *Doe* d. *Clarke* v. *Ludlam* (*d*), where a testator, having both freehold and copyhold estates at C., devised the whole of his real and personal estates and effects whatsoever and wheresoever, which he might be possessed of at the time of his decease, to A., his heirs and assigns, for ever; it was held that the copyholds, as well as the freeholds, passed by the devise. [And in the case of *Reeves* v. *Baker* (*e*), a devise of "all the rest, residue and remainder of my property," though followed by the words "whether freehold or personal, and wheresoever situate," was held to include copyholds, the latter words being considered to be merely an imperfect enumeration of the various species of property which the testator possessed.]

Unsurrendered copyholds now pass by general devise.

And the circumstance that some of the limitations and clauses in the will were inapplicable to copyholds, (for instance, estates for life, limited without impeachment of waste,) would not prevent their passing by such a general devise (*f*), the testator

(*x*) *Kettle* v. *Townsend*, 1 Salk. 187, 1 Eq. Ca. Ab. 123, pl. 8; but see *Hills* v. *Downton*, 5 Ves. 565, and see 1 P. W. 60.

(*y*) See *Perry* v. *Whitehead*, 6 Ves. 544. And generally as to a testator placing himself in loco parentis, see *Powys* v. *Mansfield*, 3 My. & C. 359.

(*z*) *Fursaker* v. *Robinson*, Pre. Ch. 475, 1 Eq. Ca. Ab. 123, pl. 9.

(*a*) *Ross* v. *Ross*, 1 Eq. Ca. Ab. 124, pl. 14; *Lendopp* v. *Eborall*, 3 B. C. C. 188; but see *Tudor* v. *Anson*, 2 Ves. 582; [*Wentworth* v. *Cox*, 6 Mad. 363.]

(*b*) *Sampson* v. *Sampson*, 2 V. & B. 337; see also *Chapman* v. *Hart*, 1 Ves. 270, and 15 Ves. 407.

(*c*) 55 Geo. 3, c. 192; 1 Vict. c. 26, ss. 3 and 4.

(*d*) 7 Bing. 275, 5 Moo. & P. 48; see also *Edwards* v. *Barnes*, 2 Scott, 411; [2 Bing. N. C. 252; *Doe* d. *Edmunds* v. *Llewellin*, 2 C. M. & R. 503; *Usticke* v. *Peters*, 4 Kay & J. 437.

(*e*) 18 Beav. 372.

(*f*) *Car* v. *Ellison*, 3 Atk. 73;] *Wel-*

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having other property to which the inapplicable clauses might be referred.

Equitable interests in copyholds.

[If the testator had only the equitable estate in copyholds, it did not pass by a general devise of lands, previously, at least, to the statute 55 Geo. 3, for it could not be surrendered; so that the indication of intention arising from the fact of the surrender could not be supplied; and without the clear indication of an intention to pass copyholds, an equitable interest in them could not pass (*g*). But it has been said (*h*), that possibly, since the statute, an equitable interest in copyholds would pass under such a general devise, for equity would follow the law; and as, since the statute, general words included legal copyholds (*i*), the same rule might apply in cases of trusts of copyholds.]

Lord *Eldon*, in *White* v. *Vitty* (*j*), suggested whether, as the act of 55 Geo. 3, c. 192, makes a surrender unnecessary for a devise of copyholds, a surrender to the use of the will could now be considered as any evidence of intention that copyholds should pass by a general devise; and, certainly, if unsurrendered copyholds had been held not to pass in *Doe* v. *Ludlam*, it might have been a question whether the same principle did not apply to surrendered copyholds; but, fortunately, the sound decision of the Court of Common Pleas in that case precludes any such question. The recent adjudications on the subject, however, were not considered by the framer of the late statute (*k*) to have superseded the necessity of providing, by express enactment, that copyhold estates shall pass, together with freeholds, under a general devise.

Provision in recent statute.

The rule of construction established by *Doe* v. *Ludlam* has been held not to apply to a will the execution of which was *prior* to the statute of 55 Geo. 3, c. 192, though the testator was living when it was passed, and consequently a surrender to the use of the will was dispensed with; as the *subsequent* alteration of the law could not throw any light on the testator's intention when he made his will, and therefore ought not to exert any influence on its construction (*l*).

gall v. *Brome*, 6 Sim. 99: see also *Borrell* v. *Haigh*, 2 Jur. 229; *Jackson* v. *Noble*, 2 Kee. 590.

[(*g*) *Torre* v. *Brown*, 5 H. of L. Ca. 555, 24 L. J. Ch. 757.

(*h*) By Lord *Cranworth*, ib.

(*i*) Referring to *Doe* v. *Ludlam*. See also *Seaman* v. *Woods*, 24 Beav. 372, where this point seems to have been assumed in favour of the devisee. The devise was of "all the estate of whatever kind or nature."]

(*j*) 2 Russ. 488.

(*k*) 1 Vict. c. 26.

(*l*) *Doe* d. *Smith* v. *Bird*, 5 B. & Ad. 695.

Before the statute dispensing with surrenders to the use of the will, an exception to the rule that unsurrendered copyholds would not pass with freeholds under a general devise, occurred where the devise was for payment of debts, and the freeholds alone were inadequate to the payment of them (*m*); the inference being, that the testator, who must be presumed to have intended to provide a sufficient fund, meant the copyholds (which then were not assets for the payment of debts) to be included (*n*).

Exception where devise was for payment of debts.

Now, however, these cases of lands charged with debts no longer exist as a distinct class; but with regard to them, also, the statute has introduced an alteration as to the order of the application of freeholds and copyholds so charged. Thus, suppose the testator charge his lands generally with the payment of his debts, and then devise a freehold estate to A. and a copyhold estate to B.; A.'s freehold would, according to the construction established before the statute, have been applied in the first instance, and then B.'s copyhold (*o*); but now it is clear they would be applicable pari passu, and in proportion to their respective value, as was the rule before the statute, where the copyholds were surrendered (*p*).

Effect of the new doctrine upon these cases, suggested.

Under a general devise of *copyhold* lands, unsurrendered copyholds were held to pass even before the statute of 55 Geo. 3 (*q*); although the testator had other copyholds which were surrendered (*r*). In order to restrain the devise to the surrendered copyholds in such a case, it was necessary to show restrictive words (*s*); which brings us to a question much discussed, namely, whether a reference to the fact of the testator having surrendered the copyholds, restricts the devise to copyholds so surrendered.

General devise of copyholds.

In *Banks* v. *Denshaw* (*t*), Lord *Hardwicke* thought that a devise of freehold and copyhold lands ("having surrendered the copyhold part thereof to the use of my will"), did not restrict the devise to surrendered copyholds. On the other hand, in *Gascoigne* v. *Barker* (*u*), his Lordship held that a devise of all the testator's lands, freehold and copyhold, in the parish of

Restrictive effect of reference to copyholds as surrendered.

(*m*) 1 P. W. 443; 3 ib. 322; Cas. t. Talb. 78; 1 B. C. C. 273; 3 ib. 257; 2 Cox, 397; 12 Ves. 136; 13 Ves. 168; 15 ib. 393.

(*n*) See 15 Ves. 394.

(*o*) *Coombes* v. *Gibson*, 1 B. C. C. 273.

(*p*) *Growcock* v. *Smith*, 2 Cox, 397.

(*q*) *Byas* v. *Byas*, 2 Ves. 164; *Frank* v. *Standish*, 1 B. C. C. 588, n., 15 Ves. 391, n.

(*r*) *Blunt* v. *Clitherow*, 10 Ves. 589.

(*s*) *Wilson* v. *Mount*, 3 Ves. 191.

(*t*) 3 Atk. 585, 1 Ves. 63.

(*u*) 3 Atk. 8; see also *King's Head Inn case*, cited 1 Ves. 63, 121.

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Chiswick, and elsewhere, in the county of Middlesex ("which I have surrendered to the use of my will"), was restricted by the parenthetical clause to the copyholds surrendered. In the case of *Wilson* v. *Mount* (*x*), Sir *R. P. Arden*, M. R., on the authority of the last case, held that a devise of all the testator's freehold and copyhold lands ("the copyhold whereof I have surrendered to the use of my will"), was confined to surrendered copyholds.

But, in a more recent case (*y*), Sir *J. Leach*, V. C., held that the words ("and which I have surrendered to the use of this my will"), following a devise of copyhold lands, did not restrict it to surrendered copyholds. He said the expression was affirmative and not exceptive, and that the copulative "and" distinguished the case from *Wilson* v. *Mount* (*z*). [And again, in *Oxenforth* v. *Cawkwell* (*a*), the same Judge came to the same conclusion upon the words, "the copyhold part thereof having been duly surrendered to the uses of this my will." Yet even this case he thought different from that before Sir *R. P. Arden*, who, he said, considered himself as yielding to authority, in making a decision, "which," added Sir *J. Leach*, "had not given universal satisfaction."]

So refined are the distinctions which these cases present. It seems to be clear, however, that, if *all* the testator's copyholds be unsurrendered, no expressions of this kind will restrict the devise, as the effect would then necessarily be to render it wholly inoperative (*b*).

Leaseholds for years, when they pass under general devise.

IV. The next inquiry is, whether property, in which the testator is possessed of a term of years only, will pass by a general devise. The rule on this subject, of which the early case of *Rose* v. *Bartlett* (*c*) is the well-known leading authority, is, that "where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee simple lands pass

(*x*) 3 Ves. 191.

(*y*) *Strutt* v. *Finch*, 2 S. & St. 229; but see also *Pullin* v. *Pullin*, 10 J. B. Moo. 464, 3 Bing. 47, and other cases cited post, Chap. XXIV.

[(*z*) The M. R. said (3 Ves. 193), that the words in *Gascoigne* v. *Barker* were "and which," &c., according to the R. L. Therefore, even this slender distinction is cut away.

(*a*) 2 S. & St. 558. It is remarkable that the customary heir did not contend that the alleged devisees, being the testator's nephews, were not within the equity extended to creditors, wives and children; or, at least, that the nephews were not put to prove that the testator had placed himself in loco parentis.]

(*b*) *Rumbold* v. *Rumbold*, 3 Ves. 65; *Wilson* v. *Mount*, ib. 194; [*Hills* v. *Downton*, 5 Ves. 557.]

(*c*) Cro. Car. 293; [the rule did not apply to deeds, *Doe* v. *Williams*, 1 H. Bl. 25.]

only, and not the leases for years; but if he hath no fee simple, the lease for years passeth."

Both these propositions are law at the present day, in reference to wills made before the year 1838. The former indeed was long vexata quæstio; and the reluctance to assent to it arose from the conviction, that it subverted the intention of testators, who, it is obvious, employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate.

Held not to pass with freeholds under a devise of lands, tenements and hereditaments.

One of the earliest authorities is *Davis* v. *Gibbs* (*d*), where a testatrix devised all her *lands, tenements, hereditaments* and real estate, in Kent, Essex, Bucks, Bedfordshire, and elsewhere in England, which she was any ways seised of or entitled to, to A. and B. for their lives equally; and after their decease she devised her said real estate to *the right heirs* of the said A. and B., to *them and their heirs*, as tenants in common. The testatrix bequeathed all the residue of her personal estate, and all her mortgages, bonds, specialties and credits, to A. and B. The testatrix had fee-simple lands in Kent, a mortgage of a term in Essex, and a statute in Bucks. It was therefore held that the mortgage term and statute did not pass.

Observation on *Davis* v. *Gibbs*.

Taking the circumstance of the enumeration of the counties into consideration, *Davis* v. *Gibbs* is certainly a strong decision in favour of the rule; though this would have had greater weight if the testatrix had had freehold lands in all the specified counties except those in which the chattel interests were situated, which does not appear to have been the case. It is not stated that she had either freehold or chattel property in Bedfordshire.

Leaseholds do not pass with freeholds by the word "estates."

So, in *Knotsford* v. *Gardiner* (*e*), where a testator gave, devised and bequeathed unto his wife for life, all his estates in Longdon, &c.; and after her decease he gave, devised and bequeathed the aforementioned estates to his daughter A. and her heirs for ever; and he bequeathed unto his wife all his goods and chattels, and all other things not before bequeathed, and made her executrix. The testator had a farm, consisting of freehold and leasehold lands. Lord *Hardwicke* considered that the latter passed as part of testator's personal estate abso-

(*d*) 3 P. W. 26, 2 Eq. Ca. Ab. 326, pl. 34, Fitzgibb. 116.

(*e*) 2 Atk. 450; see also *Whitaker* v. *Ambler*, 1 Ed. 151, where, however, the expression was "real estates," which, it should seem, would, independently of the rule in question, exclude leaseholds for years; see also 6 Sim. 99; [and *Parker* v. *Marchant*, 5 M. & Gr. 498, 1 Y. & C. C. C. 290, 2 ib. 279.]

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lutely to his wife, stating the rule as laid down in *Rose* v. *Bartlett;* but his Lordship directed an issue as to the facts.

Rule not varied by the inadequacy of the will, from defect of execution, to affect the freeholds.

The rule is not negatived by the circumstance that the will is inoperative as to the freehold estate, from defect of execution. Thus, in *Chapman* v. *Hart*(*f*), where a person by a will attested by two witnesses only devised all his lands and tenements at or near Fowey to A., Lord *Hardwicke* said that the defect of the execution of the instrument could not warrant the court in making a different construction of it, from what they would if duly executed, which then would be that the freehold lands only would pass.

Observation upon *Chapman* v. *Hart.*

It does not appear that the limitations in this case were inapplicable to chattel interests, or that there was any bequest in the will adequate to pass leaseholds, if the devise in question did not. These circumstances make it a strong authority.

Words "*interested in and entitled unto*" inoperative to include leaseholds.

In the case of *Pistol* v. *Riccardson* (*g*), a testator seised of freehold estates, and also possessed of two farms, held by leases for a thousand years, gave, bequeathed and devised all and every his several messuages, lands, tenements and hereditaments, whatsoever and wheresoever, which he was seised of, *interested in, or entitled to,* lying and being within the several counties of N., C., W. and Y. to his son for life, with impeachment for all wilful waste; and after his decease to the heirs of his body, with a similar limitation to the daughter, and the heirs of her body; remainder to the heir of the testator's family. He gave his personal estate to his wife and daughter. It was held, after much consideration and with some reluctance, that the two leasehold farms could *not* pass by the former devise.

Rule confirmed by Lord *Eldon* in *Thompson* v. *Lawley.*

In *Thompson* v. *Lawley* (*h*), a devise of the testator's "manors, messuages, lands, tenements and hereditaments," to trustees and their heirs, to certain uses, in strict settlement, with the ultimate reversion to his right heirs (limitations inapplicable to leaseholds), was held not to include leaseholds, there being freeholds to satisfy the words. Lord *Eldon* took a comprehensive view of all the cases, and completely recognized the rule in *Rose* v. *Bartlett,* which he characterized as one that had been acknowledged for ages.

Copyhold estate distributable by custom as personalty.

So, in *Watkins* v. *Lea* (*i*), his Lordship held that a renewable copyhold estate for lives, distributable as personal estate by the

(*f*) 1 Ves. 271; see also *Sampson* v. *Sampson,* 2 V. & B. 337.

(*g*) 1 H. Bl. 26, n., more fully stated in Mr. Cox's note to *Addis* v. *Clement,* 2 P. W. 459.

(*h*) 2 B. & P. 303.

(*i*) 6 Ves. 633.

custom of the manor, and held in trust, to be surrendered as the testator, his executors, administrators and assigns, should direct, did not pass under a devise of freehold and copyhold estates, the testator having both freeholds and copyholds of inheritance. The limitations were inapplicable, being in strict settlement, so that the first tenant in tail would have taken the absolute property, though an infant; and there was no fund for renewal.

Inapplicability of words of limitation to personal estate.

It will be observed, that in all the preceding cases, except *Chapman* v. *Hart*, which is very briefly stated, the words of limitation were applicable exclusively to real estate; a circumstance which the Judges always seemed glad to throw into their arguments in support of their decision. Considering, however, that these cases were all decided upon the authority of the general rule in *Rose* v. *Bartlett*, and that that rule recognizes no such limitation of the principle, it seems impossible to restrict it to such cases.

Words of limitation adapted to a chattel interest.

These observations, however, only apply where there is an *absence* of words of limitation; for if words of limitation adapted to a chattel interest are used, they might possibly be considered as demonstrating an intention to include the leaseholds; though certainly no decision has gone this length, without some aid from the context.

Rule yields to demonstration of intention apparent on the context.

The rule under consideration, of course, will yield to an indication of the testator's intention; and, therefore, if the will contained evidence that he meant the leaseholds to pass with freeholds under a general devise, it will be so construed. The struggle, however, has been to determine what amounts to such evidence of intent.

In the case of *Hartley* v. *Hurle* (*k*), a testator devised all his messuages, lands, tenements and hereditaments, to trustees, their heirs, *executors, administrators* and *assigns, according to their several and respective estates and interests therein;* and in another part of the will the trust for the application of the rents was declared to be "*subject to ground-rents and other outgoings;*" Sir *R. P. Arden*, M. R., thought the intention to include the leaseholds was sufficiently demonstrated: the word "ground-rents," he said, placed it beyond doubt.

Effect of a charge exceeding the value of freehold.

In *Doe* d. *Belasyse* v. *Lucan* (*l*), Lord *Ellenborough* and Mr. Justice *Le Blanc* considered the imposition of a charge to

(*k*) 5 Ves. 540. (*l*) 9 East, 448.

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which the freehold lands alone were inadequate, to be a ground for extending a general devise to copyholds. The principle, if admissible, would be equally applicable to the cases under consideration; but such inadequacy can only influence the construction, if it exist at the time of the making of the will.

The fact of the freehold and leasehold lands having been blended and let together for a long period, and that of the latter being renewable, have sometimes been relied upon, as favouring the extension of the devise to leaseholds. Under such circumstances, an entire farm composed partly of freehold and partly of leasehold lands, was held in the case of *Lane* v. *Stanhope* (*m*), to pass by a devise of all the testator's "manors, messuages or tenements, houses, *farms*, lands, woodlands, hereditaments and real estate," unto A. for life, and then to his first and other sons in strict settlement; and so to other persons, with remainder to B. and his heirs and assigns for ever. The testator bequeathed the residue of his money and personal estate to A. The respective lands had been always treated as forming one entire farm, and had been let together at one integral rent, which was reserved to the testator and his heirs. The Court adverted to the inconvenience of splitting the farm, on account of the apportionment of the rent and the power of distress; and observed, that the first words of the residuary bequest applied to money, and it therefore could not be supposed that the testator intended to recur to land, he having already used words sufficient to comprise every species of landed property (*n*); that the word used was "farms," which, in its general signification, means that which is held by a tenant (*o*); and that the lease being renewable, the testator might have considered himself to have a sort of inheritance in it.

Farm composed of freehold and leasehold, held to pass under the word "farms."

The limitations were inapplicable to leaseholds; but Lord *Kenyon* thought that circumstance not entitled to much weight. The occurrence of the word "farms" was considered to distinguish the case from *Pistol* v. *Riccardson*. Lord *Eldon*, in the case of *Thompson* v. *Lawley*, referred to these several points in the case, and especially the last, which he seems to have regarded as the soundest ground of the decision.

(*m*) 6 T. R. 345. See also *Doe* d. *Belasyse* v. *Lucan*, 9 East, 448, where the Court of King's Bench inclined to think that copyholds would pass under the word *farms*, with freeholds. Also *Arkell* v. *Fletcher*, 10 Sim. 299, where, upon the whole will, leaseholds were held *not* to pass by the word "farms."

(*n*) This argument assumes the question.

(*o*) Lord *Kenyon*, however, relied much less on the word *farm* than Mr. Justice *Grose* and Mr. Justice *Lawrence*.

Some of the cases in which the rule in question has been considered as excluded have proceeded upon distinctions which are certainly not at this day tenable.

Rule excluded upon insufficient grounds.

As, in *Addis* v. *Clement* (*p*), where the devise was of all the messuages, lands and tenements, in the parish of D. which the testator then stood "*possessed of or any ways interested in* (*q*)," words which it was considered were rather applicable to leaseholds; and in *Turner* v. *Husler* (*r*), where Mr. Baron *Eyre*, sitting for Lord *Thurlow*, refused to apply the rule to a devise of *tithes* [held in fee, and on leases renewable without fine;] both which decisions have fallen under the reprehension of Lord *Eldon* (*s*); and his Lordship seems to have been scarcely better satisfied with the case of *Lowther* v. *Cavendish* (*t*), where Lord *Northington* decided that leaseholds passed under a devise by Sir James Lowther, of "all his manors, messuages, lands, tenements, *mines of coal*, lead and other mines, rectories, advowsons, tithes, *rents* and hereditaments whatsoever, situate, lying and being in the county of Cumberland," though the testator had freeholds in that county. The circumstances relied upon by his Lordship were, a declaration by the testator that certain burgage houses should not be entailed *as his Cumberland estates were*, by which the testator evinced that he considered himself to have

Words "possessed of."

Devise of tithes.

Devise of "mines and rents."

(*p*) 2 P. W. 456.

(*q*) In *Dixon* v. *Dawson*, 2 S. & St. 327, Sir *J. Leach*, V. C., certainly lent some countenance to the argument founded on the words "*possessed of*," by adverting to it, when holding that a general devise of messuages, lands, tenements and real estate, to trustees, their heirs, executors, administrators and assigns, upon certain trusts, included leasehold estates. [But see *Davenport* v. *Coltman*, 12 Sim. 588.]

However, the words of limitation were applicable to personal as well as to real estate; but the V. C. did not rely upon this so much as upon the circumstance that the testatrix, who had given all her lands, and also her personal estate, to the same trustees, had directed the trustees to keep separate accounts of the produce of the lands, and of such of the personal estate and effects as were legally applicable to the charitable legacies contained in the will; his Honor observing, that the testatrix must have intended the produce of her chattels real to be included in one of the accounts. They could not be included in the produce of personal estate legally applicable to charitable purposes; and it was consistent with her whole intention that they should form a part of the other account, which consisted entirely of property not applicable to charitable purposes.

Case of *Dixon* v. *Dawson*.

But was there not ground to contend that the anxious mention by the testatrix, in this and other directory clauses of her will, of the produce of that portion of her personal estate which was not applicable to charitable legacies, manifested that the bequest itself included personal estate of that description; though it is to be remembered that leaseholds are not the only species of personal estate which is inapplicable to charity, and therefore it is not a necessary conclusion that the testatrix had leaseholds in her contemplation when she framed the clause in question? But the latter consideration only goes to prove the clause in question to be nugatory, and does not invest it with the importance ascribed to it by the learned Judge.

(*r*) 1 B. C. C. 78.

(*s*) See his Lordship's judgment in *Thompson* v. *Lawley*, 2 B. & P. 316.

(*t*) Amb. 356, better reported, 1 Ed. 99.

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disposed of all his property in that county (*u*); and more particularly, that the words were not "lands and tenements" merely, but "rents and mines of coal;" and the leaseholds had mostly been demised as *coal-mines and levels at rents.*

Leaseholds held to pass from their intimate connexion with freeholds;

In the case of *Hobson* v. *Blackburn* (*x*), under a devise of "my messuages or tenements, *with the appurtenances*, in Ludgate Hill, and Ludgate Street," certain leasehold messuages in Little Bridge Street (a street lying behind Ludgate Hill), and which messuages had been thrown into the testator's two houses in Ludgate Hill, and were not accessible, but only through those houses, were held to pass, although the limitations (which were to uses in strict settlement) were applicable to freehold property only, and though the testator, in a subsequent part of the will, referred to the property comprised in this devise, as his *freehold* hereditaments; the Master of the Rolls (Sir *J. Leach*) being of opinion, that these circumstances were overborne by the argument, founded on the peculiar situation of the leasehold, and its blended enjoyment with the freehold property.

—from agreement with described quantity.

So, in the case of *Goodman* v. *Edwards* (*y*), where a testator gave and devised certain messuages and buildings in Everton, and all his several closes of arable and pasture land, "*containing by estimation one hundred acres or thereabouts*, were the same more or less, situate at Everton aforesaid," to his wife for life, provided she should so long continue his widow, and after her decease or second marriage, he gave and devised all *the said hereditaments and real estates*, unto and to the use of his nephew and his heirs for ever, subject to the mortgage debt or debts then secured thereon; and it appeared, that of the hundred acres mentioned in the devise, forty acres were held under a college lease; and the question was, whether they passed to the nephew under the devise of "the said hereditaments and real estate," or under the residuary gift of personalty to the widow: Sir *J. Leach*, M. R., considered it to be plain upon the whole will, that the testator meant to comprise the forty acres of leaseholds under the description of "real estate;" he observed, that the property in question was held under a renewable lease from a college, and had been long in the testator's family, and united in occupation with the freehold land.

(*u*) This is petitio principii; for, if the prior devise referred to freehold estates only, there could be no difficulty in giving to this expression the same restricted construction. Indeed, the word "entailed" is inapplicable to leaseholds.

(*x*) 1 My. & K. 571.

(*y*) 2 My. & K. 759. [See also *Swift* v. *Swift*, 29 L. J. Ch. 121.]

Of course, the fact of the testator having in his lifetime parted with the freeholds which he had when he made his will, so that *in event* the devise had nothing but leaseholds to operate upon, cannot vary the application of the rule; inasmuch as the intention of the testator at the period of *making the will*, is the point to be ascertained, and which cannot be elucidated by subsequent events. Nor is there any distinction between leaseholds acquired before and after the making of the will, in reference to the rule under consideration.

Time of making the will the period of inquiring whether the testator has freeholds.

Leases *for lives*, being freehold interests, clearly will pass under a general devise, with freeholds of inheritance, unless an intention to exclude them can be collected from the context.

In one case (*z*) it was contended, that they did not pass with freeholds of inheritance, under a general devise of lands *to uses in strict settlement*, on account of the inapplicability of the limitations, it being impossible to entail them; but the will contained other grounds of exclusion. And in the subsequent case of *Fitzroy* v. *Howard* (*a*), it was decided, that freeholds for lives *did* pass by a general devise of lands, tenements and hereditaments in certain counties, (in one of which the property in question was situate,) and all other the testator's real estate, though the devise contained limitations in tail, and the testator was also seised of freeholds of inheritance. And in the still later case of *Weigall* v. *Broome* (*b*), it was held, that leaseholds for lives passed under a devise of all the testator's real estate whatsoever and wheresoever, although some of the limitations were inapplicable thereto, being remainders expectant on life estates, which were given to persons who were the cestuis que vie in the leases.

Leaseholds for lives not within the rule in *Rose* v. *Bartlett*.

Whether leaseholds for years will pass with *copyholds* of inheritance, under a general devise, seems doubtful.

In *Roe* d. *Pye* v. *Bird* (*c*), the question was whether a mortgage term passed with copyholds, under a devise of all that his (testator's) estate in B. to M., and her heirs; and it was held, that it did pass, principally on the ground that the leasehold and copyhold lands had been held together for a great number of years, and that the testator had contracted for the purchase of the equity of redemption in both. It is singular enough that this case was argued as falling within the rule of *Rose* v. *Bartlett*. The better opinion seems to be, that the Courts would *not*, by

Whether term of years will pass with copyholds of inheritance.

(*z*) *Sheffield* v. *Mulgrave*, 5 T. R. 571, 2 Ves. jun. 526.
(*a*) 3 Russ. 225.
(*b*) 6 Sim. 99.
(*c*) 2 W. Bl. 1301.

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analogy to the rule, exclude leaseholds from passing with copyholds of inheritance under a general devise, although copyholds are now placed pari passu with freeholds, in regard to the operation of such a devise (*d*), and the *principle* might seem therefore to have applied; for almost every Judge who has felt himself compelled by the anterior decisions to follow the rule in question, has denounced it as subverting the intention of testators; and it is therefore not probable that it would be carried beyond its letter. The question, indeed, as we shall presently see, cannot arise under a will made or republished since 1837.

Leaseholds will pass where there is no freehold.

The second branch of the proposition in *Rose* v. *Bartlett*, "that if the devisor hath no fee simple lands, the lease for years passeth," has been the subject of little controversy, as it gives effect to what is generally the intention of the testator in all these cases.

"Freehold houses in A." extended to leaseholds.

It has even been held (*e*), that where a man devised all his "*freehold* houses in Aldersgate-street," *to A. and his heirs*, and he had some leasehold but no freehold houses there, the leaseholds passed; it being the plain intention of the will to pass *some* houses, and the word "freehold" should rather be rejected than the will rendered void. [Now the reason why the will would have been rendered void by a contrary decision was, that by the old law a testator could devise those freeholds only of which he was seised at the date of his will. But this ground has been removed by the statute 1 Vict. c. 26, s. 24; and it might at first sight appear that a like decision could not be made upon a will dated since the passing of that act. But in the recent case of *Nelson* v. *Hopkins* (*f*), it was held by Sir *R. T. Kindersley*, V. C., that the rule was equally applicable to such cases. An intention to the contrary must by the express terms of the act appear by the will itself.]

Same law since 1 Vict. c. 26, s. 24.

Leaseholds declared to pass under a general devise by statute 1 Vict. c. 26, s. 26.

The exclusion of leaseholds from a general devise, where the testator has freeholds, founded as it is on a distinction purely technical, has been considered to militate so strongly against intention, that this rule of construction has been abrogated by the recent act of the 1 Vict. c. 26, the 26th section of which provides, 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

(*d*) See ante, pp. 633, 634.

(*e*) *Day* v. *Trig*, 1 P. W. 286; *Doe* d. *Dunning* v. *Lord Cranstoun*, 7 M. & Wels. 1.

[(*f*) 21 L. J. Ch. 410; see also *Lake* v. *Currie*, 2 D. M. & G. 536.

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.

Gradually, therefore, though not very speedily, the rule of construction in *Rose* v. *Bartlett*, with its various distinctions, will cease to be a subject of practical consideration.

Wilson v. *Eden*.

[A question arose upon this section in the case of *Wilson* v. *Eden* (*g*); where a testator, after making a general bequest of his personal estate, devised all his messuages, lands, tenements and hereditaments situate at or near W., and other specified places in the county of D., and at other places in the county of Y., and all other his real estates in the said counties and elsewhere in Great Britain, to uses in strict settlement. Lord *Langdale*, M. R., thought that renewable chattel leaseholds situate near W., and contiguous to, and occupied with, the freeholds, were not included in this devise: the ambiguity of the word "land" being removed by the subsequent words "other *real* estates." So that the case did not come within the act (*h*). A case, however, was directed for the opinion of the Court of Exchequer, and the learned Barons came to a different conclusion, entertaining, no doubt, that the leaseholds passed by the devise of "lands at or near W." (*i*); that devise being clearly within the terms of the act. Upon these conflicting opinions being brought before Sir *J. Romilly*, M. R., he sent a case to the Court of Queen's Bench, and that Court concurred in the view taken by the Court of Exchequer, Lord *Campbell* observing that if (as was admitted) the devise of lands at or near W., taken by itself, was within the act, he could not understand why it was the less so because of the use of the subsequent words. Accordingly, it was decided by Sir *J. Romilly* that the leaseholds passed; and he

[(*g*) 11 Beav. 237, 5 Exch. 752, 14 Beav. 317, 18 Q. B. 474, 16 Beav. 153.

(*h*) See also per Sir *J. L. Knight Bruce*, V. C., *Parker* v. *Marchant*, 2 Y. & C. C. C. 282.

(*i*) It is stated in the report that seventy-two acres of the leaseholds were on the northern side of a high ridge, the greater portion being on the southern side, and that the former were two miles from the house and estate at W. It is not stated whether they were disconnected. If they were, it might be a little difficult to reconcile the decision as to the seventy-two acres with *Doe* d. *Ashforth* v. *Bower*, 3 B. & Ad. 453.

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[remarked that though general words might be cut down by the effect of previous enumeration, yet it was new to him to say that those general words cut down the prior enumeration.

Leaseholds will not pass under 1 Vict. c. 26, as "real estate."

But leaseholds will not pass under the term "real estates" (*k*), nor, à fortiori, under a devise of "freehold" lands (*l*): unless (it may perhaps be added) the circumstances bring it within the principle of the case of *Day* v. *Trig* (*m*).]

General devise operates as an appointment—when.

V. The remaining question is, whether a devise or bequest in general terms will operate as an execution of a power of appointment over real or personal estate. This point, in regard to the former, depends on the fact which, we have seen, determines the applicability of such a devise to leaseholds, namely, whether there is any other subject for its operation. Thus, if a testator, by a will made before, and not republished on or since the 1st of January, 1838, devises all his hereditaments or real estate, and it appears that he had no estate at the time of its execution, but that he had a testamentary power over real estate, the devise will operate as an appointment under such power (*n*).

On the other hand, if the testator had real estate on which the will could operate, it will be presumed, that the devise was made with a view to such property, and not as an exercise of the power (*o*), even though the terms descriptive of the subject-matter of disposition are rather more extensive than is required to comprise the testator's own property. Thus, where a testator having real estate, and also a power over real estate, devised all his "messuages, lands, tenements and hereditaments," the power was held not to be exercised, though the property of the testator consisted of houses only (*p*). It has also been decided, that where a testator who had freehold property, and a power over freeholds and copyholds, devised his freehold and copyhold estates, the devise operated as an execution of the power with respect to the copyholds, (there being no other property of this

[(*k*) *Turner* v. *Turner*, 21 L. J. Ch. 843.

(*l*) See per Sir *J. L. Knight Bruce*, V. C., *Emuss* v. *Smith*, 2 De G. & S. 736.

(*m*) 1 P. W. 286, ante, p. 644.

(*n*) *Wallop* v. *Lord Portsmouth*, 2 Sugd. Pow. App. No. 11;] *Standen* v. *Standen*, 2 Ves. jun. 589; [affirmed in D. P. 6 B. P. C. Toml. 193, nom. *Standen* v. *Macnab*. But an argument against such an operation is furnished if the testator has by the same will expressly exercised other powers vested in him; *Att.-Gen.* v. *Vigor*, 8 Ves. 294.]

(*o*) Sir *Edward Clere's case*, 6 Co. 176; *Ex parte Caswall*, 1 Atk. 559. [The burthen lies upon the party claiming under the alleged appointment to prove that the testator had no other real estate. *Doe* d. *Caldecott* v. *Johnson*, 7 M. & Gr. 1047.]

(*p*) *Hoste* v. *Blackman*, 6 Mad. 190.

description on which it could operate,) but not as to the freeholds (*q*).

Devise of all that testator has power to dispose of.

A general devise of all the lands which the testator has power to dispose of, [will, in general, sufficiently indicate an intention to execute a power of appointment, although in some of the purposes to which the testator has attempted to devote the property, he may have exceeded the power (*r*). But a devise in such terms, following the devise of an estate particularly described], has been held not to extend to monies to arise from the sale of lands, over which monies the testator had merely a power of appointment (*s*).

And here it may be observed, that a clause of disposition, framed in general but rather equivocal terms, and not very distinctly comprising real estate, may not amount to an exercise of a power of appointment, though it might have been held to embrace realty to avoid intestacy. Thus where (*t*) a testator, by a will attested by three witnesses, devised all his estate and effects of whatever denomination; Sir *T. Plumer*, M. R., held, that though these words would have passed any real estate of which the testator might have happened to be seised, they did not demonstrate an intention to exercise a power over real estate.

General devise, which would operate on real estate, not necessarily sufficient to exercise power.

As to devises of property answering to a certain locality.

The principles regulating the construction of general devises, in regard to the subject now under consideration, for the most part apply to devises of lands circumscribed by locality. Thus, if a testator devises all his lands in the parishes of A. and B., having lands in A. only, and a power over lands in A. and also in B., the devise will exercise the power over the lands in B., but not the power over those in A. (*u*). And where a testatrix, being seised in fee of an undivided moiety of lands in Surrey, the other moiety in which had been limited to her for life, with remainder to such uses as she by deed or will should appoint, devised all her freehold estates in the county of Surrey, this devise was held to be satisfied by embracing the first-mentioned moiety, and did not operate as an appointment of the second (*x*). [And conjectural inferences, drawn from other circumstances

(*q*) *Lewis* v. *Llewellyn*, T. & R. 104.

[(*r*) *Cowx* v. *Foster*, 1 Johns. & H. 31.]

(*s*) *Adams* v. *Austen*, 3 Russ. 461. [The property subject to the power was, however, *de facto* land when the will was made: see *Standen* v. *Standen*, 2 Ves. jun. 589, and *Cooke* v. *Cunliffe*, 17 Q. B. 245.]

(*t*) *Jones* v. *Curry*, 1 Sw. 66.

(*u*) *Napier* v. *Napier*, 1 Sim. 28.

(*x*) *Roake* v. *Denn*, 4 Bli. N. S. 1. See also *Doe* v. *Roake*, 2 Bing. 497; *Denn* v. *Roake*, 5 B. & Cr. 720.

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[appearing on the will, were not allowed to influence the decision. On this principle, the fact that the testator had called property, which he had power to appoint, his own, was no sufficient reason for including other property, subject to the same power, in a *general* devise of property, also described as his own (*y*).]

General bequest does not, under old law, exercise power over personalty.

The ground on which a general devise has been held to operate as an appointment of real estate, it is obvious, does not apply to personalty (*z*); for as a will of personal estate comprises whatever property of this description a testator dies possessed of, without regard to the period of its acquisition, it is not necessarily to be presumed that the testator had any specific property in his view when he made it; and therefore, even if it should happen that the testator had no other disposeable property at the time of the making of his will, or at his death, than the subject of the power (*a*), or that its exclusion from the will will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an appointment under the power (*b*).

Distinction where it is the will of a married woman.

[What effect shall be allowed to the circumstance of the donee being a married woman, and having therefore no general testamentary capacity, has been a disputed question: but the reasonable view, and the view which the authorities appear now to warrant, with regard both to real and personal estate, is this: that if the will of a married woman would be ineffectual unless construed as an execution of the power, that construction shall prevail (*c*); but that if she has separate property (*d*), or if there is any other subject upon which her will may operate (*e*), the power will not be executed (*f*).]

What denotes

Of course, if an intention to exercise a power by a general or

[(*y*) *Morrice* v. *Langham*, 11 Sim. 260.]

(*z*) Leaseholds, of course, are undistinguishable from other personal estate in this respect, though in some cases they have most inconsiderately been treated as governed by the same principle as devises of freehold estates. See *Grant* v. *Lynam*, 4 Russ. 296, [and *Tanner* v. *Elworthy*, 4 Beav. 487.]

(*a*) *Buckland* v. *Barton*, 2 H. Bl. 136; *Langham* v. *Nenny*, 3 Ves. 467; *Croft* v. *Slee*, 4 Ves. 60; *Bradley* v. *Westcott*, 13 Ves. 445.

(*b*) *Andrews* v. *Emmot*, 3 B. C. C. 297; *Bennett* v. *Aburrow*, 8 Ves. 609.

[(*c*) *Curteis* v. *Kenrick*, 3 M. & Wels. 461, 9 Sim. 443; *Churchill* v. *Dibben*, 2 Ld. Kenyon, pt. 2, 68, 9 Sim. 447, n.; *Shelford* v. *Ackland*, 23 Beav. 10. And see *Laing* v. *Cowan*, 24 Beav. 112, which appears to have been decided on this principle.

(*d*) This applies to personalty, but whether the separate use confers a general testamentary capacity in respect of real estate, see ante, p. 34.

(*e*) The onus of proof lies on those disputing the efficacy of the will as an appointment.

(*f*) *Lovell* v. *Knight*, 3 Sim. 275; *Lempriere* v. *Valpy*, 5 Sim. 108; *Evans* v. *Evans*, 23 Beav. 1.]

intention to exercise power over personalty.

residuary bequest, can be collected by implication from the whole instrument, such construction will prevail(*g*); but it has been held, that the bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy (*h*). For the same reason, the mention of "money in the funds" in a general bequest of personal estate, and the fact of the testator having no stock of his own at the date of the will, will not cause such bequest to operate as an appointment of stock over which the testator had a general power of disposition (*i*).

On the other hand, [a gift of pecuniary legacies, followed by a general bequest of "all the rest and residue of *my* Bank stock, goods, &c., and all other property, &c., excepting 50*l.* of *my* Bank stock," contained in the will of a testator who had a power to appoint a sum of Bank stock, has been decided] to denote an intention to include in such bequest the residue of the stock which was subject to the power, [and to charge it with the legacies (*k*). Here, the expression, *my* Bank stock, joined with the other terms in the will, was primâ facie evidence that the testator was pointing to a specific fund; parol evidence was therefore admissible, to show whether he had any such fund of his own to which the bequest was applicable; and this being proved in the negative, the decision was inevitable. And it may be stated as a general rule, that where the bequest is on the face of the will specific, and it is ascertained by parol (in that case legitimate) evidence that the testator has no other such fund, the power will (other things attended to) be well executed (*l*). Beyond this,] of course, parol evidence cannot be adduced to influence the construction in any of these cases (*m*).

(*g*) *Hunloke* v. *Gell*, 1 R. & My. 515.

(*h*) *Jones* v. *Tucker*, 2 Mer. 533; [*Davies* v. *Thorns*, 3 De G. & S. 347.]

(*i*) *Webb* v *Honnor*, 1 J. & W. 352.

(*k*) *Walter* v. *Mackie*, 4 Russ. 76; [*Re Davids' Trusts*, 1 Johns. 495. In the former case it was also decided that leaseholds subject to the same power passed by the words "other property." This part of the decision has been disapproved of by Sir *C. C. Pepys*, M. R., *Hughes* v. *Turner*, 3 My. & K. 697; but see *Standen* v. *Macnab*, 6 B. P. C. Toml. 193, decreeing the *personal* estate to pass with the real; and see 1 Sugd. Pow. 382, 7th ed.; *Harvey* v. *Stracey*, 1 Drew. 73; *Reid* v. *Reid*, 25 Beav. 469, where personalty the subject of a power was held to pass by a general bequest by reason of the exception therefrom of a specific part of the subject of the power.

(*l*) *Sayer* v. *Sayer*, 7 Hare, 381, 3 Mac. & G. 607; *Horwood* v. *Griffith*, 4 D. M. & G. 708.]

(*m*) *Standen* v. *Standen*, 2 Ves. jun. 589. And as to the subject generally, see further 1 Sugd. Pow. 6th ed. 385, 2 Chance on Powers, 83.

What amounts to an appointment in wills made or republished since 1837.

The preceding doctrines, however, [so far as they relate to *general* powers,] do not apply to wills made or republished since the year 1837, the act of 1 Vict. c. 26 (sect. 27), having provided, that a general devise of the real estate of the testator, or of the real estate of the testator in 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 (*n*).

What are bequests of personalty "described in a general manner."

[Upon the construction of this section it has been held that general pecuniary legacies are "bequests of personal property described in a general manner" where the testator's own property is insufficient to answer them (*o*); and the Vice-Chancellor Sir *J. Stuart*, expressed a strong opinion that the bare appointment of executors, being equivalent to a bequest of all the personal estate to them, would operate as an execution of a general power (*p*).

Power general though only testamentary.

It has also been decided that a power is not the less general within the meaning of this section, because it is to be executed by will only, and not by deed; for the section refers to the extent of the power in regard to the objects, and does not require that the mode in which it may be exercised shall be unrestrained (*q*).

How a contrary intention may appear.

And the fact that an appointment has been actually made, will not show an intention to exclude the appointed property from a general residuary gift, where the appointment fails by

[(*n*) *Walker* v. *Banks*, 19 Jur. 606.

(*o*) *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293. The testatrix appointed executors; but though the decision was considered to be aided by that circumstance, it appears in fact to have been independent of it. See, however, *Shelford* v. *Ackland*, 23 Beav. 14.

(*p*) Notwithstanding a doubt expressed by the V. C., 3 Sm. & Gif. 304, it would seem that creditors must in such a case be let in, see *Laing* v. *Cowan*, 24 Beav. 112.

(*q*) 1 Sugd. Pow. 369, 7th ed.; *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 303; *Lefevre* v. *Freeland*, 24 Beav. 403.

[lapse (*r*), or by ademption, as where the property has been sold under a power to sell and re-invest the purchase money in other land (*s*). And if the subject of the power be appointed to trustees upon trusts which do not exhaust it, the surplus will pass by the residuary bequest, although the trust declared of the residue also leave the property unexhausted; the result of which (*t*), and also of the residuary gift itself failing by lapse (*u*), is that the next of kin of the donee are entitled.

Moss v. *Harter*.

In the case of *Moss* v. *Harter* (*x*), it was held that a gift of residue "not otherwise effectually disposed of" did not include property the subject of a general power, because the property was in fact "effectually disposed of" by a limitation in default of appointment contained in the settlement creating the power, and by partial appointments (not exhausting the property) previously effected by deed. It was argued forcibly against this construction that the words "not otherwise effectually disposed of" meant "not otherwise *by the will* effectually disposed of:" but the learned Vice-Chancellor considered that this would be to violate the express language of the will. He added, that it was probably the intention of the legislature that the enactment (s. 27) should apply only to cases like *Cox* v. *Chamberlain* (*y*), where the power was in such ample terms as to amount to absolute property. But the terms of the section are primâ facie of more extensive application; and seem scarcely consistent with the inference which is fairly deducible from this decision, that wherever the bequest is in the common form of property "not otherwise disposed of" the subject of a power, if it be expressly given over in default of appointment, will be excluded from the bequest. It is submitted, however, that when the question occurs, it will deserve reconsideration.

Remark on *Moss* v. *Harter*.

In the case of *Hutchins* v. *Osborne* (*z*), where leaseholds were settled on the testator's wife for life, and after her death as he should appoint, it was held that a general residuary gift of the testator's property "subject, as to such parts thereof as are com-

[(*r*) *Re Spooner*, 2 Sim. N. S. 129; and see *Culsha* v. *Cheese*, 7 Hare, 243; *Bernard* v. *Minshull*, 1 Johns. 276; *Hickson* v. *Wolfe*, 9 Ir. Ch. Rep. 144.

(*s*) *Gale* v. *Gale*, 21 Beav. 349. The effect of the sale is ademption, vide ante, p. 152.

(*t*) *Lefevre* v. *Freeland*, 24 Beav. 403.

(*u*) *Chamberlain* v. *Hutchinson*, 22 Beav. 444.

(*x*) 2 Sm. & Gif. 458.

(*y*) 4 Ves. 631.

(*z*) 4 Kay & J. 252, 3 De G. & J. 142. See also *Atherton* v. *Langford*, 25 Beav. 5, where an expressed intention that lands over which the testator had a power should not be included in his will, but should go according to the settlement, was held not to prevent a share in the lands vested in the testator in default of the exercise by him of the power from passing under the residuary gift in his will.

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[prised in my marriage settlement, to the said settlement and the trusts thereby declared, and which settlement I hereby ratify and confirm in all respects" operated as an execution of the power notwithstanding the reference to the settlement, which was explained by the wife having a life interest in the property.

1 Vict. c. 26, s. 27, applies to wills of married women.

The applicability of this section to wills executed by married women has been disputed, but without success (*a*).

Does not apply to special powers.

With regard to general powers, therefore, the law is placed by the act upon an entirely new footing. But special powers to appoint in favour of a particular class, as children (*b*), or kindred (*c*), are not within its scope, and therefore remain subject to the operation of the old law.

The twenty-fourth section of the new act, it will be remembered, makes the will speak with regard to the real as well as the personal property to be comprised in it from the date of the testator's death; and it has been contended that the effect of this section is to prevent a general devise of real estate from operating under the twenty-seventh section as an exercise of a general power of appointment over lands, although the testator has no other lands when he makes his will, for this reason; viz. that the testator knows that any lands which he may afterwards acquire and hold at his death will pass by such a devise, and that so this case is assimilated to a general bequest of personalty before the act. But a decisive answer was given to this objection by Lord *St. Leonards*,—"So far from operating in that way," he said, "the statute evidently meant to enlarge and give greater effect to dispositions by will. To hold that the old law is restricted and that cases, which before the late act would be considered a due execution of the power, are not so now, would, I think, be utterly incompatible with the whole scope of the act. The statute says, that the devise shall operate as an execution of the power 'unless a contrary intention shall appear by the will:' it is absolutely necessary, therefore, now to show a contrary intention to exclude the execution of the power, where under the old law you must, to give effect to the will, have shown an intention to exercise the power; the new law is therefore stronger for the appointees than the old law (*d*)." The same reasoning will obviously apply in

[(*a*) *Bernard* v. *Minshull*, 1 Johns. 276.
(*b*) *Cloves* v. *Awdry*, 12 Beav. 604; *Pidgely* v. *Pidgely*, 1 Coll. 255; *Clogstoun* v. *Walcott*, 13 Sim. 523; *Elliott* v. *Elliott*, 15 Sim. 321; *Cronin* v. *Roche*, 8 Ir. Ch. Rep. 103.
(*c*) *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 306.
(*d*) *Lake* v. *Currie*, 2 D. M. & G. 536; see also *Hutchins* v. *Osborne*, supra, and the analogous case of *Nelson* v. *Hopkins*, 21 L. J. Ch. 410, ante, p. 644.]

[cases where the testator has other lands besides those included under the power of appointment.

But if a testator, having a power to appoint estates A. and B., make his will reciting the power and giving A. to one person, and "all other the hereditaments comprised in (the instrument conferring the power) not hereinbefore disposed of," this is not a general devise within the meaning of the act, but clearly specific, and will not carry an interest in the appointed hereditaments which by reason of lapse, illegality or partial revocation, is eventually not disposed of by the will (*e*).]

Execution of testamentary appointments under new law.

It will be remembered that all peculiarities in the execution of testamentary appointments are abolished by section 10, which makes a will attested according to the statute sufficient for, as well as requisite to, the validity of all such appointments, without distinction,—a very wholesome provision, considering how much litigation the elaborate and whimsical requisitions of testators and settlors in this particular had occasioned under the old law.

[(*e*) *In re Brown*, 1 Kay & J. 522. And see *Wainman* v. *Field*, Kay, 507, and other cases cited post, Chap. XXIII.]

CHAPTER XXI.

DEVISES BY MORTGAGEES AND TRUSTEES.

I. *In regard to the beneficial Interest in Mortgages.—As to the Extinction of the Charge by Union of Character of Mortgagor and Mortgagee.*
II. *Operation of General Devise on the Legal Estate of Mortgagee or Trustee.*
III. *Whether Devisee of Trustee can exercise the Powers given to the Trustee.*

Devises by mortgagees.

As mortgages are of a complex nature, involving on the one hand a personal debt, with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt, absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.

Whether beneficial interest in mortgage will pass under devise of lands.

I. With respect to *the beneficial interest in the mortgage*, it is clear that a general devise of lands will not commonly have the effect of including it (*a*). The contrary, indeed, is laid down by a respectable writer (*b*), but his position is not warranted by either authority or principle. The case of *Ex parte Sergison* (*c*), cited by him, does not support it; for the devisee was executor and residuary *legatee*, and consequently entitled, *in that character*, to the beneficial interest in the mortgage; besides, the only question in the case related to the *legal estate* in the lands (*d*). The position is opposed, too, by the established principle of equity, which considers the mortgagee as holding the land in a fiduciary character only, and the estate as still substantially belonging to the mortgagor. The person taking the mortgaged lands therefore by devise or descent, from the deceased mortgagee, it is obvious, is a trustee for the person

Principle governing the cases.

(*a*) *Strode* v. *Russell*, 2 Vern. 621, 3 Ch. Rep. 169, 2 Vent. 351, 3 P. W. 61; [*Casborne* v. *Scarfe*, 1 Atk. 605, and n. by Sanders; *S. C.* 2 J. & W. 194.]

(*b*) 1 Rob. on Wills, 3rd ed. 403.

(*c*) 4 Ves. 147, stated post, p. 658.

(*d*) Mr. *Roberts* evidently confounds the two questions; his positions are applicable to neither.

entitled to the money or debt, by virtue of the will or otherwise (*e*), unless, of course, both these interests happen to unite in the same person.

Effect of devise of mortgaged lands on beneficial interest.

Nor is it, I apprehend, universally true, that an express devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms (*f*).

Fact of the mortgagee being in possession.

It is observable that in the cases cited in support of the doctrine referred to, *the testator was in possession* at the time (*g*), and in most of them the operation of the devise was not called in question, the only point being as to the right of redemption. The fact of such possession, particularly where it has been of long continuance, and accompanied with acts of ownership, certainly strongly favours the supposition that the testator, in expressly devising the property, means to give the beneficial interest. Having himself enjoyed the property beneficially, he can hardly but intend that his devisee's enjoyment should be of the same nature, especially where it is given not to the devisee simply in fee, but to several persons consecutively for limited estates (*h*). The testator, too, may be ignorant whether the right of redemption, on which the nature of the property depends, be barred or not, and may therefore choose to avoid using any expressions which might be construed into a recognition of it (*i*). Indeed, in such cases there would be strong ground to contend that the beneficial interest would pass, even under a general devise of lands, especially if there were no other lands to satisfy the devise, a circumstance, however, which would be immaterial, in regard to a will which is governed by the *existing* law.

In *Martin* d. *Weston* v. *Mowlin* (*k*), Lord *Mansfield* held that a copyhold estate, of which the testator was in possession as mortgagee, did not pass under a devise of all his "lands, tenements and hereditaments, within and parcel of the manor of W.," the surrender to the use of the will referring to the property as subject to a condition of redemption and resurrender; and the will *containing a recital that the mortgagor stood indebted to him,*

(*e*) *Att.-Gen.* v. *Meyrick*, 2 Ves. 44.

(*f*) 1 Pow. Mortg. Cov. Ed. 409.

(*g*) *Clarke* v. *Abbott*, 2 Eq. Ca. Ab. 606, Barn. Ch. Rep. 457. In *How* v. *Vigures*, 1 Ch. Rep. 32, this fact, though not stated, seems very probable, as the object of the suit was to foreclose.

(*h*) *Woodhouse* v. *Meredith*, 1 Mer. 450.

(*i*) But now see stat. 3 & 4 Will. 4, c. 27, s. 28.

(*k*) 2 Burr. 977.

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and giving her time for payment of the debt. It appeared, moreover, that the testator was seised of other lands, also surrendered to the use of his will, in the manor of W.

Beneficial interest in mortgage, held to pass under devise of lands in K.

In the case of *Woodhouse* v. *Meredith* (*l*), Sir *W. Grant* held that the testator's beneficial interest in leasehold property at K., of which he was in possession as mortgagee, and of which an assignment in trust for sale had been executed to him, passed under a devise of all his freehold, copyhold and leasehold messuages, farms, lands and tenements whatsoever and wheresoever, in the county of H. *and the town of K.*, to various limitations, the testator having no other than the mortgaged lands at K., though the will contained a subsequent devise of all estates vested in him as mortgagee or trustee, but which was satisfied by other lands of which the testator was seised as mortgagee. The same observation applied to the bequest of securities for money, which also occurred (*m*).

It is observable that the M. R. considered, from the nature of the limitations and provisions in the will, (which consisted of successive estates for life, with an estate interposed in trustees to preserve contingent remainders,) that, if the property passed at all, it was the beneficial interest, and not the mere legal estate, which was disposed of.

Cases suggested in which devise of mortgage estate would not carry beneficial interest.

But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect (*n*), for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will.

Devises of land contracted to be sold, held not to pass benefit of the contract.

And here it may be observed, that a devise by a testator to his wife of an estate which he had "lately contracted to sell to A." has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money (*o*).

Upon the whole, it is clear that the proposition which states that an express devise of mortgaged lands will carry the benefi-

(*l*) 1 Mer. 450.

(*m*) But as to which see next note.

(*n*) See Mr. Justice *Lawrence's* judgment in *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652; and Lord *Eldon's* in *Thompson* v. *Lawley*, 2 B. & P. 314.

(*o*) *Knollys* v. *Shepherd*, cited in *Wall* v. *Bright*, 1 J. & W. 499.

cial interest in the mortgage, must be received with some qualification.

That the benefit of a mortgage will pass by the word "mortgages," collocated with other personal chattels, is perfectly clear (*p*).

Passes by word "mortgages."

In conclusion of this branch of the subject, it may be observed, that, where a person having a mortgage or other charge upon lands becomes himself entitled to the *inheritance* of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (*q*). But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he be an infant, so that the charge would (under the old law allowing infants to bequeath personal estate) be disposeable by him, though the land would not (*r*), or a beneficial use might have been made of it against a subsequent incumbrancer (*s*), or the other creditors of the person from whom the party derived the onerated estate (*t*); in these and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law (*u*). And the same rule obtains in favour of the creditors of the person in whom these interests centre (*x*). So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist (*y*).

Charge when extinguished by union of character of mortgagor and mortgagee.

(*p*) *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; *Dicks* v. *Lambert*, 4 Ves. 730.

(*q*) *Price* v. *Gibson*, 2 Ed. 115; *Donisthorpe* v. *Porter*, ib. 162, Amb. 600; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261; [*Johnson* v. *Webster*, 4 D. M. & G. 474. The union of interest must happen in the lifetime of the party. *Tucker* v. *Loveridge*, 1 Giff. 377, 2 De G. & J. 650.]

(*r*) *Thomas* v. *Kemish*, 2 Vern. 348, 1 Eq. Ca. Ab. 269, pl. 9.

(*s*) *Gwillim* v. *Holland*, July 29, 1741, cit. 2 Ves. jun. 263.

(*t*) *Forbes* v. *Moffatt*, 18 Ves. 384; [*Lord Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Davis* v. *Barrett*, 14 Beav. 542; see *Wigsell* v. *Wigsell*, 2 S. & St. 364.]

(*u*) See Sir *W. Grant's* judgment in *Forbes* v. *Moffatt*. [Those cases, where the charge and the inheritance become united by descent or devise, are to be distinguished from *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Mocatta* v. *Murgatroyd*, 1 P. W. 393; *Toulmin* v. *Steere*, 3 Mer. 210; as to which last case, see 1 Ll. & Go. 251, 1 D. M. & G. 244.]

(*x*) *Powell* v. *Morgan*, cit. 2 Vern. 208. See also Lord *Northington's* judgment in *Donisthorpe* v. *Porter*, 2 Ed. 162; [*Pears* v. *Weightman*, 2 Jur. N. S. 586.]

(*y*) *Wyndham* v. *Earl of Egremont*, Amb. 753.

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Operation of a general devise on legal estate.

II. We will now proceed to consider the operation of a general devise on real estate vested in the testator as mortgagee or trustee. The rule at length established, after much fluctuation of authority, is, that such property *will* pass under a general devise of lands, unless a contrary intention can be collected from the testator's expressions, or from the purposes or limitations to which he has devoted the subject of disposition. And it is clear that the circumstance of there being other property to which the devise is applicable, is no ground of exclusion.

Legal estate held to pass.

Thus, in an early case (*z*), it is laid down, that if a man had but the trust of a mortgage of lands in D. and had other lands in D., by a devise of all his lands in D. the trust would pass.

Case of *Ex parte Sergison.*

In the case of *Ex parte Sergison* (*a*), a testator, who was a mortgagee in fee, devised all the rest, residue and remainder of his estate, both real and personal, and of what nature or kind soever and wheresoever, not thereinbefore specifically given, devised and bequeathed, to A., his heirs, executors, administrators and assigns, for ever, on the side of his mother, and appointed A. executor. A. was an infant. On petition for an order for him to convey under stat. 7 Anne, c. 19, the Master having reported that the legal estate in the mortgaged lands did not pass by the devise, Sir *R. P. Arden,* M. R., on exceptions taken, was of a different opinion; though, as the infant was executor, and therefore entitled to the money, he could not compel him to convey. Lord *Loughborough,* C., on appeal, also inclined to think that the estate passed by the devise; and it was stated at the bar that this corresponded with the opinion of Lord *Northington* and Lord *Thurlow,* who had overruled Lord *Hardwicke's* dictum in *Casborne* v. *Scarfe* (*b*). In the principal case, however, *the heir,* under the circumstances, was ordered to convey; the Chancellor observing, that the infant

Opinions of Lord *Northington*, Lord *Thurlow*, and Sir *R. P. Arden.*

(*z*) Sir *Thomas Littleton's* case, 2 Vent. 351. See also *Marlow* v. *Smith,* 2 P. W. 198.

(*a*) 4 Ves. 147.

(*b*) See *Casborne* v. *Scarfe,* 1 Atk. 605. But it has been suggested that his Lordship may have referred to the beneficial interest (see Mr. *Sanders's* note); and, perhaps, in regard even to the legal estate, the position is not erroneous, as a devise, in the terms supposed, would confer only a life estate; and it has never been held that a general devise conferring less than a fee would operate to pass estates vested in the testator as mortgagee or trustee. Such a question, of course, is less likely to arise now that under a will made or republished since 1837, an unrestricted devise will carry the fee. [In *Greenwood* v. *Wakeford,* 1 Beav. 576, it was held that the legal estate of lands vested in a surviving trustee during the life of a married woman, passed by a devise of "all the lands and hereditaments vested in him as trustee or mortgagee in fee," the question apparently being whether the words, "in fee" referred as well to "trustee" as to "mortgagee."]

devisee, when he was of age, might join, which would give a title quâcunque viâ.

Att.-Gen. v. *Buller*.

In *Att.-Gen.* v. *Buller* (*c*), lands of which the testator was trustee were held *not* to pass under a devise, whereby the testator, after devising for the payment of his debts and other monies, his lands and hereditaments in very general terms, unto his sons J. B. and F. B. and their heirs, for ever, added, "And all the rest and residue of my goods, chattels, rights, credits, *and all my real* and personal *estate not hereby before given*, devised and bequeathed, and all my right, property and interest therein, by law or equity, I do give, devise and bequeath unto my sons J. B. and F. B. (*d*)," whom also he appointed executors. Lord *Loughborough* assented to the statement at the bar, that the rule was that general words would *not* pass trust estates, unless there appeared to be an intention that they should pass: in allusion to which Lord *Eldon*, in *Lord Braybroke* v. *Inskip* (*e*), observed that he did not know, in his experience, of any case in which the proposition was laid down so strong one way or the other.

Decisions against the operation of general devise.

The language of Lord *Thurlow*, in *Pickering* v. *Vowles* (*f*), notwithstanding what is said in *Ex parte Sergison* of his Lordship's opinion, certainly seemed to favour the same doctrine.

Ex parte Brettell.

In *Ex parte Brettell* (*g*), too, Lord *Eldon* was of opinion, that an estate of which the testator was mortgagee in fee in trust for another person, did not pass under a devise of all the rest of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, unto G. H., his heirs, executors, administrators and assigns, for ever, to and for his and their own proper use and behoof.

Of this case, however, it is sufficient to observe, that the very learned Judge by whom it was decided warrants us in regarding it as no authority on the general question, his Lordship having, on a subsequent occasion (*h*), remarked that "it came on on petition, *and perhaps was not so attentively considered as the importance of the point required.*"

Rule finally established in *Lord Braybroke* v. *Inskip*.

The preceding cases had left the subject in some degree of doubt; but the present doctrine was finally established by the case of *Lord Braybroke* v. *Inskip* (*i*), where real estate having been devised to trustees, upon trust to pay debts, and settle the

(*c*) 5 Ves. 340.
(*d*) The direction to pay debts, &c., it will be observed, does not extend to the latter devise.
(*e*) 8 Ves. 435, stated infra.
(*f*) 1 B. C. C. 197.
(*g*) 6 Ves. 577.
(*h*) 8 Ves. 434.
(*i*) Ib. 417.

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estates to certain uses; the question was, whether the estate passed by the will of the heir of the surviving trustee, who gave and devised *all his real estates whatsoever and wheresoever, unto his wife G., her heirs and assigns, for ever*, and gave all his personal estate to her; and appointed his said wife and B. executrix and executor. The heirs-at-law were two infants and a married woman. Lord *Eldon* held that the legal estate passed by the will. His Lordship, after taking a review of the cases, stated the rule to be, that *trust estates would pass under a general devise, unless it could be collected, from expressions in the will, or purposes or objects of the testator, that he did not mean that they should pass.* In this case he observed there was no one circumstance to cut down the effect of the devise.

Trust estates will pass under a general devise containing nothing inconsistent.

It seems that Lord *Loughborough*, notwithstanding the opinion expressed by him in *Att.-Gen.* v. *Buller*, concurred in the rule laid down in the last case (*k*).

Lord Braybroke v. *Inskip.*

It should be noticed that Lord *Eldon*, in the course of his judgment in the case of *Lord Braybroke* v. *Inskip*, frequently adverts to, and even lays some stress upon the circumstance of the heirs-at-law being under a disability to convey, and the consequent inconvenience of permitting the legal estate to descend to them; his Lordship more than once observing that the quantum of convenience is to be estimated on each will. This ingredient, it is submitted, would render the rule most difficult of general application. If the "weighing of inconveniences" were to be made on every particular will, (the relative situation of the heir and devisee being thrown into the scale,) it would be impossible in any case to ascertain the effect of such a general devise without evidence of these facts, and where such evidence was inaccessible, (as it inevitably must be in regard to wills occurring in the early period of a title,) the operation of the devise must always be uncertain; and, moreover, the facts, when discovered, might present such an apparent balance of inconveniences, as to render it difficult to say on which side they preponderated. Besides, if the inquiry as to the relative situation of the devisee and heir refer, as it necessarily must, to the period of the *making* of the will, it is obvious that such an alteration may have taken place in that situation, between the period in question and the death of the testator, as would render the application of such a test not only not beneficial, but actually mischievous, even in the particular

(*k*) 8 Ves. 437.

cases for the sake of which the general inconvenience attendant on a fluctuating and uncertain rule is to be incurred. But such a principle of construction, it is conceived, is inconsistent with authority, no less than with general convenience; since all the cases which state the rule to be that trust estates will pass under a general devise, unless the purposes be inconsistent, decisively negative the introduction of any additional circumstances into the subject of consideration. To engraft such a qualification is to change the rule. It is at variance, also, with the principle on which Lord *Eldon*, in one instance (*l*), disclaimed making the coverture and infancy of devisees a ground for holding that they took beneficially, and not as trustees. In fine, his Lordship's observations in *Braybroke* v. *Inskip* seem to be merely thrown in to give additional weight to a judgment which, independently of any such reasoning, stands upon irrefragable grounds, and has (we shall see) governed the subsequent decisions upon this subject.

Bainbridge v. *Lord Ashburton.*

Thus, in the case of *Bainbridge* v. *Lord Ashburton* (*m*), where the surviving trustee under a will, after devising certain specific real estates to various persons, gave and devised all his real estates, not thereinbefore otherwise disposed of, unto his godson, Alexander Baring, (afterwards Lord *Ashburton*,) his heirs, executors, administrators and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit. It was held that the trust estate passed under the devise: Mr. Baron *Alderson* remarked (in reference to Lord *Eldon's* reasoning in the case of *Ex parte Brettell*) that it would be a very minute distinction to draw any line between the words "benefit" and "behoof."

Whether creation of tenancy in common a ground of exclusion.

It should seem that the introduction into the devise of words of severance, or other expressions showing that the devisees were to take several and not joint estates, will not prevent such devise from operating on estates vested in the testator as mortgagee, though it is usual and convenient, in devising such property, to make the devisees joint tenants, in order that the entirety may devolve to survivors.

Thus, in *Ex parte Whiteacre*, in the matter of Vallis, an infant (*n*), where a mortgagee in fee devised all the residue of his lands and hereditaments, goods and chattels, mortgages, monies,

(*l*) *King* v. *Denison*, 1 V. & B. 275; see supra, p. 536.

(*m*) 2 Y. & C. 347; [and see *Sharpe* v. *Sharpe*, 12 Jur. 598; *Langford* v. *Auger*, 4 Hare, 313.]

(*n*) Rolls, July 22, 1807, 1 Sand. Uses and Trusts, 359, n.; [see *In re Morley*, 10 Hare, 293.]

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securities for money, and all other his real and personal estate unto A., B., C. and D., *to be equally divided between and amongst them as tenants in common,* according to the nature of their respective estates; it was held that the legal estate passed to the devisees as tenants in common.

Remarks on *Ex parte Whiteacre.*

It will be observed, however, that the devise in this case contained the words "mortgages" and "securities for money," which, in some recent cases, presently noticed, have been held to be sufficient, with a very slight aid from the context, to pass the legal as well as the beneficial interest in mortgages. Whether the occurrence of these words had any weight in the decision just stated does not appear.

Reservation of power of appointment.

It is clear that the fact of the testator having reserved to the devisee a power of appointment does not constitute a ground for excluding trust estates. Thus, in the case of *Ex parte Shaw* (*o*), where the devise was in the following words: "I give, devise and bequeath unto my dear wife Ann, to hold to her my said wife, her heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, for all my estate and interest therein, to and for her own absolute use and benefit, *and to be disposed of by her, by deed, will or otherwise, as she my said wife may think fit;*" and the testator appointed his wife sole executrix: Sir *L. Shadwell*, V. C., held that an estate vested in the testator as trustee passed by this devise.

What will exclude trust estates from a general devise.

Charges of debts, executory limitations, &c., will exclude trust estates.

The converse of the rule established by the preceding cases is equally clear; namely, that if the property comprised in the general devise be subjected to the payment of debts, legacies, annuities, or any other species of charge (*p*), or the will contain any limitations or provisions to which it cannot be supposed that the testator intended to subject property not beneficially his own, as uses in strict settlement (*q*), or executory limita-

(*o*) 8 Sim. 159; [but qu. was any power created?]

(*p*) *Roe* d. *Reade* v. *Reade*, 8 T. R. 118; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Ex parte Morgan*, 10 Ves. 101; *Re Horsfall*, M'Clel. & Y. 292; [*Doe* d. *Roylance* v. *Lightfoot*, 8 M. & Wels. 553; *Rackham* v. *Siddall*, 16 Sim. 297, 1 Mac. & G. 607; *Re Morley*, 10 Hare, 293; *Hope* v. *Liddell*, 21 Beav. 183;] *Wynne* v. *Littleton*, 2 Ch. Rep. 51, 1 Vern. 3; as to this last case see 1 Cov. Pow. Mortg. 414.

(*q*) *Thompson* v. *Grant*, 4 Mad. 438; *Att.-Gen.* v. *Vigor*, 8 Ves. 276; overruling *Ex parte Bowes*, cited 1 Atk. 605, n., by Sanders, where Lord *Hardwicke* held that a general devise of real estate in S. K. and M. and elsewhere in England to certain uses, under which an infant was then entitled to an estate tail, passed the legal estate in lands of which the devisor was mortgagee in fee; [but see *Burdus* v. *Dixon*, 4 Jur. N. S. 967, where the testator had attempted to make the mortgaged property his own, by a pretended sale to another, who was a trustee for the testator, and the legal estate was held to pass notwithstanding the uses and trusts.

tions (*r*), [or a clause of accruer amongst tenants in common (*s*),] or a trust for sale (*t*), [or for a charity (*u*), or for the separate use of a married woman (*v*),] the mortgage or trust lands will *not* pass.

And it is wholly immaterial whether the testator has other lands to which the devise can be applied or not; for in these cases the Courts have not adopted the principle applicable to reversions, that, where there are other lands, to which the inconsistent limitations can be referred, they apply exclusively to those lands, *reddendo singula singulis.*

Devise confined to mortgages in which the devisor had the beneficial interest.

In *Ex parte Morgan* (*x*), Lord *Eldon* held, that lands of which the testator had merely the legal estate, as heir-at-law of the preceding mortgagee, did *not* pass under a devise to trustees of "all such real estates as are now vested in me by way of mortgage, the better to enable them my said trustees, and the survivor of them, and the executors and administrators of such survivor, to *recover, get in and receive the principal monies and interest,* which may be due thereon."

The rule under consideration, of course, does not deny the power of a testator to limit estates vested in him as mortgagee or trustee in a manner inconsistent with a due regard to the testator's duty as mortgage creditor or trustee; it merely refuses to see an intention so to do in a general devise. [Accordingly, a charge of debts or legacies (*y*) or a trust for sale (*z*) will not prevent the legal estate in the mortgage property from passing under a gift of "securities for money." And] should a testator unequivocally devise an estate vested in him as mortgagee or trustee [to uses in strict settlement,] the intention must prevail; and it would be left to the persons who may become damnified by such a proceeding to obtain satisfaction out of the estate of the deceased testator (*a*).

[(*r*) Per Lord *Eldon*, *Braybroke* v. *Inskip*, 8 Ves. 434.

(*s*) *Thirtle* v. *Vaughan*, 24 Law Times, 5.]

(*t*) *Re Marshall*, 9 Sim. 555; [*In re Cautley*, 17 Jur. 124.

(*u*) *Att.-Gen.* v. *Vigor*, 8 Ves. 276.

(*v*) *Lindsell* v. *Thacker*, 12 Sim. 178.]

(*x*) 10 Ves. 101.

[(*y*) *Re Field*, 9 Hare, 414; *Re King's Mortgage*, 5 De G. & S. 644; *Sylvester* v. *Jarman*, 10 Pri. 78, stated post, must, if it affects this position, be considered at overruled.

(*z*) *Ex parte Barber*, 5 Sim. 451, stated post.

(*a*) If, after a contract for sale, but before completion, the vendor dies leaving an infant heir, or having by will, executed previously to the date of the contract, devised the estate to a person incompetent to convey, the vendor's estate will not have to bear the costs of the suit rendered necessary to complete the conveyance, *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Hinder* v. *Streeton*, 10 Hare, 18, 16 Jur. 650; *Re Manchester and Southport Railway Company*, 19 Beav. 365; *Bannerman* v. *Clarke*, 3 Drew. 632: overruling *Prytharch* v. *Havard*, 6 Sim. 9; *Midland Counties Railway Company* v. *Westcomb*, 11 Sim. 57; *Eastern Coun-*

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Words "mortgages" and "securities for money," whether they pass the legal estate.

Whether lands held by a testator as mortgagee will pass by the words "mortgages" or "securities for money" has been the subject of much controversy. The affirmative was supposed to have been decided in the early case of *Cryps* v. *Grysil* (*b*); but on an examination of the record (*c*), it appeared that the will contained, in addition to the word "mortgages," other expressions more unequivocally applying to the land. The first of the modern cases in which this question was agitated, was *Renvoize* v. *Cooper* (*d*), where a testator devised all the residue of his freehold hereditaments, of what nature or kind soever, unto his wife H., her heirs and assigns, to sell and dispose of as she pleased, and he gave all the residue of his bonds, *mortgages* and other securities for money and effects unto his said wife; Sir *J. Leach*, V. C., held, that a mortgage in fee passed. He observed, "It may be that the mortgaged fee will not pass to the wife, by the residuary devise of the freehold estate, because, having no mortgage for years, the subsequent gift of mortgages to the wife, marks this testator's intention, that it should not pass by that devise. But if this be so, *I am of opinion, that the mortgaged fee will pass to the wife by the subsequent gift of mortgages and other securities for money*, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money, is a gift of all the testator's interest in the money and security; and will, therefore, pass the fee."

Case of *Renvoize* v. *Cooper*.

"Securities for money," held to include legal estate.

It seems very inconclusive to say, that the gift of "mortgages" shows, that the legal estate in the land was not to pass under the residuary devise, inasmuch as such a bequest, [like a general bequest of any other species of personal property, would comprise all personal property of the species bequeathed] of which the testator might be possessed *at the time of his death*; and, therefore, it affords no reason to infer that he had any specific mortgage security in view. A less disputable ground, for this part of his Honor's decision, seems to be, that the residuary devise contained a trust for sale, which, according to the established doctrine, was sufficient to exclude lands in mortgage from its operation.

[*ties Railway Company* v. *Tuffnell*, 3 Rail. Ca. 133. But if *after* contract to sell the vendor execute such a will, the costs of suit will be thrown on his estate, *Wortham* v. *Lord Dacre*, 2 Kay & J. 437; *Purser* v. *Darby*, 4 ib. 41.]

(*b*) Cro. Car. 37.

(*c*) See 9 B. & Cr. 282.

(*d*) 6 Mad. 371.

The case next in chronological order is *Sylvester* v. *Jarman* (*e*), where a mortgagee devised to J. B. and his heirs, all the rest and residue of his freehold estates, leasehold and copyhold estates, which he might be seised of at the time of his decease, either in possession or reversion, together with all his goods and chattels, monies, bonds, *mortgages* and debts, which might be owing to him at the time of his decease, subject to the payment of his debts, legacies, annuities and funeral expenses; and appointed J. B. executor of his will. It was held, that by the devise in question, the legal estate in fee in the mortgaged premises did not pass to J. B., but descended to the heir-at-law of the testator; for though the words of the devise were large enough to comprise the property in question, the charge of debts, legacies, annuities and funeral expenses, by introducing a qualification incompatible with such property, prevented its operation thereon.

Sylvester v. *Jarman.*

"Mortgages," held not to pass legal estates.

No attempt in this case appears to have been made to argue that the estate passed by the word "mortgages."

So, in the case of *Galliers* v. *Moss* (*f*), where a testator (after a devise of his lands and estate subject to charges, and upon trusts inapplicable to estates held as mortgagee, and therefore not capable of passing such estates,) bequeathed all his ready money, and *securities for money*, personal estate and effects, to certain trustees, their *executors, administrators and assigns*, upon trust that they or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, did and should dispose of his stock in trade, &c., and collect in and receive all such sum and sums of money as should be due and owing to him at the time of his death, and invest the same, also the rents and profits during the minorities of certain persons, who were devisees thereof, in manner therein mentioned. It was held, that the words "securities for money," as here used, did not operate on the inheritance in lands vested in the testator as mortgagee, the words of limitation introduced into the bequest being applicable to personalty only, and the word "heirs," subsequently occurring, being, it was considered, used in reference to the real estate to which some of the trusts, (namely, the trust respecting the appropriation of the rents during the minorities,) extended.

Galliers v. *Moss.*

"Securities for money" similarly construed.

This case was followed by *Ex parte Barber* (*g*), where a testator, (a mortgagee in fee,) (after certain specific bequests,) devised and bequeathed all his freehold hereditaments, and all his

Ex parte Barber.

"Securities for

(*e*) 10 Pri. 78.
(*f*) 9 B. & Cr. 267

(*g*) 5 Sim. 451.

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money," held to pass legal estate.

ready money, bills, bonds, notes and other *securities for money*, book debts and all other the residue of his personal estate, to trustees, their heirs, executors, administrators and assigns, upon trust to sell the freehold estates and premises, and to sell, collect, get in, and convert into money, his personal estate, and to stand possessed of the monies arising therefrom, upon the trusts therein mentioned; Sir *L. Shadwell*, V. C., held, that the legal estate in the mortgaged lands passed under the words "securities for money." He thought that a plain intention was manifested by the language of the will, that complete dominion, for the purpose of converting the whole estate into money, should be given to the trustees. His Honor intimated, that the combination of the two gifts of the real and personal estate, and the introduction of the word "heirs" distinguished this case from *Galliers* v. *Moss*.

Mather v. *Thomas*.

The next of this series of cases is *Mather* v. *Thomas* (*h*), where a mortgagee in fee devised and bequeathed all his messuages or dwelling-houses, buildings, chattels real, *securities for money*, debts to him owing, and personal estate of any nature or kind soever, to A. and B., their heirs, executors, administrators and assigns, in trust that they the said A. and B., or the survivor of them, and the executors and administrators of such survivor, did and should invest so much thereof as consisted of money, in their or his names or name, in government or real securities, and to apply the dividends, &c., in manner therein mentioned: Sir *L. Shadwell*, V. C., intimated his opinion to be, that the legal estate in the mortgaged premises passed by the words "securities for money," observing, that this case was the converse of *Galliers* v. *Moss*, for there the devise was to the trustees and their heirs: and the trusts were to be performed by them and their executors; here the word "heirs" was applicable to the words "messuages" or dwelling-houses; but in *Galliers* v. *Moss* there were no such words. In the face of that case his Honor considered, that he could not with propriety decide the present case without obtaining the opinion of another Court of Law. Accordingly a case was sent to the Common Pleas, the Judges of which certified their opinion that the legal estate in the mortgaged premises passed by the devise (*i*).

Legal estate held to pass under words "securities for money."

Result of recent cases.

But though the V. C. in the two last cases was glad to avail himself of [the word "heirs"] in order to avoid a collision with

(*h*) 6 Sim. 115. (*i*) 10 Bing. 44, 3 Moo. & Sc. 684.

the case of *Galliers* v. *Moss*, the liberal and convenient rule of construction under discussion [has not been left to depend upon] and be narrowed by such a technical distinction. The sensible and convenient doctrine is [that which subsequent authorities have finally established, namely,] that the words "mortgages," "securities for money," and similar expressions, will comprise the entire benefit of the mortgage security (including the inheritance in the lands (*k*)), unless a contrary intention appears by the context; [and that the fact of those words being found among terms descriptive exclusively of personal estate and followed by a limitation to executors and administrators only, and not to heirs, will not affect the construction. The broad principle is, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money by giving him the legal estate in the mortgaged lands (*l*).

"Money on mortgage," or "on securities;"

In the case of *Doe* d. *Guest* v. *Bennett* (*m*), a testator made his will as follows: "I leave my wife to receive all monies upon mortgages and on notes out at interest, and at her decease I leave my niece to take all that remains of my property, land or personal property;" and the Court of Exchequer held that the wife took the legal estate in the mortgaged premises. "It must be assumed," said *Parke*, B., "that the testator intended the wife to receive the money and to possess all the powers necessary for the purpose of recovering it; and therefore she is entitled to bring ejectment for that purpose." But in the case of *In re Cautley* (*n*), Sir *R. T. Kindersley*, V. C., decided that the legal estate in mortgaged premises did not pass by a gift of money in the funds and on securities and all other personal estate; and he dissented from the views expressed by *Parke*, B., in *Doe* v. *Bennett*, on the ground that if the principle relied on were carried out to the extreme, it would apply to a case where a testator merely left his personal estate to his executors, it being obviously his intention in that case that they should receive the mortgage money; and surely it could not be held that there the mort-

—whether the legal estate passes thereby.

[(*k*) Before as well as since the stat. 1 Vict. c. 26, see *Renvoize* v. *Cooper*, 6 Mad. 371; *Silberschildt* v. *Schiott*, 3 V. & B. 49, per Sir *W. Grant*; *Re Walker's Estate*, 21 L. J. Ch. 674; *Knight* v. *Robinson*, 2 Kay & J. 503; but the old case of *Wilkinson* v. *Merryland*, Cro. Car. 449, is contra.

(*l*) *In re King*, 5 De G. & S. 644; *In re Walker*, 21 L. J. Ch. 674; *In re Field*, 9 Hare, 414; *Knight* v. *Robinson*, 2 Kay & J. 503; the case of *Ex parte Gorfett*, 19 L. J. Ch. 173, 14 Jur. 53, is overruled, unless it can be distinguished on the ground that the security was in the form of a trust for sale.

(*m*) 6 Exch. 892.

(*n*) 17 Jur. 124, 22 L. J. Ch. 391.

[gaged estates would pass. In a recent case, however, Sir *J. K. Bruce*, L. J., "took occasion to express his entire concurrence in the judgment of Mr. Baron *Parke* (*o*)."

It should be observed that *Alderson*, B., did not rely solely on this part of the case; for he collected from the devise to the niece of all that remained of his property, land or personal property, that the wife was to have the whole of that of which what was devised to the niece was the remainder.]

Mortgage terms, when included in a general devise.

Hitherto the point of construction under consideration has been viewed in reference to mortgages *in fee*. With respect to mortgages for terms of years, it is conceived they fall under the principle established by *Rose* v. *Bartlett* (*p*), that leaseholds for years will not, under the old law, pass by a general devise of lands, unless the testator have no freeholds on which it might operate. If there be no such lands, or the will be subject to the new law, and if the devise contain nothing inconsistent, and there be no specific bequest which will carry the legal interest in the mortgage term, it is clear that such interest will pass under a general devise. The question, however, could hardly arise on the mere legal interest, since it would vest primarily in the executor, or the administrator *cum testamento annexo*, as part of the testator's personal estate, and it is unlikely that the legatee would claim his assent to the bequest, unless there was ground to contend, that the bequest included the beneficial interest.

Rule as to copyholds.

Estates of copyhold tenure, held by the testator in the character of mortgagee or trustee, are not distinguishable from freeholds, in regard to the effect of a general devise, whether the will is subject to the old or new law; supposing, of course, that its antiquity is not such as to exclude it from the operation of the act of 55 Geo. 3, c. 192, which first dispensed with the necessity of a surrender to the use of the will, in regard to testators dying after the passing of the act.

As to devises of lands contracted to be sold by testator.

It has been sometimes a question, how far the principle which governs the construction of devises of lands, vested in a testator as mortgagee or trustee, applies to property which, belonging to him beneficially, he has contracted to sell; for though, in such cases, the testator is, in the event of the contract being carried into effect, a trustee for the purchaser, yet, as this may not

[(*o*) *Re Arrowsmith's Trusts*, 27 L. J. Ch. 704, 4 Jur. N. S. 1123. See also per Sir *W. Grant*, M. R, in *Silberschildt* v. *Schiott*, 3 V. & B. 49: and in *Knight* v. *Robinson*, 2 Kay & J. 503, Sir *W. P. Wood*, V. C., cited *Doe* v. *Bennett*, with apparent approbation.]

(*p*) See ante, p. 636.

happen, and consequently the property may remain unconverted, the trust is of a qualified and contingent nature. It has been decided (*q*), however, that if a testator, after having contracted for the sale of an estate, devises it as, All that his estate called A., which he had contracted to sell, the effect is to vest in the devisee the legal estate only, for the purpose of enabling him to carry the contract into effect for the benefit of the executor, *and does not entitle the devisee to the purchase-money.* It is conceived, however, (though the point did not arise in the case referred to,) that if from any circumstances the contract had proved not to be binding on or had been rescinded by the testator, the devisee would have been entitled to the land, and this (as already hinted) constitutes a difference between the case, and that of a dry mortgage and trust estate, which renders the construction that has been applied to the latter, to a certain extent, inapplicable to the former. Thus, in the case of *Wall* v. *Bright* (*r*), where a testator, after having contracted for the sale of an estate, devised all his lands to trustees, upon trust to sell, with the usual powers to give discharges to purchasers (*s*), Sir *T. Plumer*, M. R., held, that the contracted for property passed by the devise: "Though," said his Honor, "there is a great analogy in the reasoning with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate; yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as his own. In that respect he does not resemble one who has agreed to sell an estate, that, up to the time of the contract, was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was, at one time, both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract; and, in the interim between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is

Difference between a vendor and a mere trustee.

(*q*) *Knollys* v. *Shepherd*, cited 1 J. & W. 499; ante, p. 152.

(*r*) 1 J. & W. 494.

(*s*) But in such case the purchase-money would be payable not to the trustees by virtue of the devise, but to the executors as part of the personal estate of the testator; [*Eaton* v. *Sanxter*, 6 Sim. 517.]

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only a trustee sub modo, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not, therefore, pursue the analogy between them too far."

Remarks upon *Wall* v. *Bright*.

In this case, the construction adopted by the Court was very convenient, as it enabled the devisees, in performance of the testator's contract, to convey the estate to the purchaser, which otherwise would have descended to an infant, who, in the then state of the law, could not, even with the aid of the Court of Chancery, have made an effectual conveyance to the purchaser. Still, however, it is to be remembered, that a trust for sale was no less inappropriate to property which had been actually sold, than a devise in strict settlement, or any other such limitations would have been, though, as it confers on the trustees an estate in fee, it happened to be more convenient; and much of the reasoning of the Master of the Rolls would have applied, if the devise had been such as to have rendered it impossible for the devisees, without the aid of the Court (*t*), to make an effectual conveyance to the purchaser. He does, however, more than once advert to the convenience attending the construction in the particular case; and the prudent practitioner, knowing the influence which such considerations, whether acknowledged or not, do often exert in questions of this nature, will hesitate too readily to assume the application of the same doctrine to cases in which a different result would follow. Nor, indeed, does it seem to be altogether inconsistent with sound principles of construction, especially that rule which has been the subject of discussion in the present chapter, that the fact of the devise being such as to enable the devisee to carry the testator's contract into effect or not, should have some weight in determining whether it was intended to apply to the property.

Distinction where purchase money paid and possession given.

[But where the purchase has been completed by payment of the purchase-money and delivery of possession, though the deed of conveyance has not passed the legal estate, the vendor is in the position of a mere trustee. The reasoning adopted in the last case is therefore inapplicable to this, and a general devise

[(*t*) 13 & 14 Vict. c. 60, 15 & 16 Vict. c. 55.

[of lands by the vendor in a manner inconsistent with his duties as trustee (charged, for instance, with the payment of his debts) will not include the legal estate (*u*).

Vendor after contract, not a complete trustee.

Thus much as to the inefficacy of inconsistent trusts or limitations to exclude from a devise the estate contracted to be sold. On the other hand, it was said by Sir *W. P. Wood*, V. C., in *Purser* v. *Darby* (*x*), that "he had held—and the decision had been since affirmed—that where there is merely a constructive and not an express trust, a devise of trust estates does not supersede the necessity of a decree (*y*)." The case itself is not an authority in point, the testator having elsewhere specifically devised the estate in question: but it is presumed the learned Judge intended his remarks to apply as well to a case where the estate was not expressly devised and descended to an heir incompetent to convey.

Purchase-money held not to pass under gift of securities for money.

Under a devise of "securities for money," the testator's interest in lands which he has contracted to sell will not pass, and the devisee will not be entitled to the purchase-money; the testator had not a security for money, but a lien on the estate (*z*).]

Effect on devise by mortgagee, of subsequent foreclosure.

Where a mortgage in fee is foreclosed subsequently to the making of a will, it is clear that the equity of redemption so acquired will not pass by a will made before and not republished on or since the 1st of January, 1838; and it has been determined, that the period of foreclosure is the date of the final order of the Court, following default of payment on the day appointed, and not the date of the decree (*a*). But though the equity of redemption *subsequently* acquired by foreclosure will not pass by the will, it is clear that the devise of the *legal estate* takes effect, notwithstanding the mere acquisition of the equity of redemption, by this or any other means. Where, however, such equity is purchased by the mortgagee, and he and the mortgagor in the usual manner join in conveying the property to a releasee to uses, to prevent dower, for the benefit of the former, the devise, being in a will which is subject to the old law, will be revoked (*b*).

In one instance (*c*) Sir *W. Grant* held, that an estate devised

[(*u*) *Dimes* v. *Grand Junction Canal Company*, 9 Q. B. 490.

(*x*) 4 Kay & J. 41. The decision to which the V. C. referred appears not to be reported.

(*y*) *I. e.*, a decree for specific performance, the effect of which is to make the vendor a trustee.

(*z*) *Goold* v. *Teague*, 5 Jur. N. S. 116.]

(*a*) *Thompson* v. *Grant*, 4 Mad. 438.

(*b*) Ante, p. 144.

(*c*) *Silberschildt* v. *Schiott*, 3 V. & B. 45.

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after foreclosure passed by a description applicable to it only as a mortgage; his Honor thinking that the intention, though inaccurately expressed, appeared upon the whole will to give the interest in the land. And Sir *L. Shadwell*, V. C., subsequently came to the same conclusion, upon the same devise (*d*). This was simply a question of intention, as the testator might of course, if he chose, continue to describe it as mortgaged property; and it would pass, unless an intention appeared, that the devisee should be entitled, only in case it retained its mortgage character.

Inquiry whether equity of redemption be barred, material, when.

It is obvious that the question, whether lands are comprised in a general devise, must frequently depend on the fact, whether the testator had or had not at the time acquired the equity of redemption by length of possession and non-recognition of any adverse title (*e*). A question of this kind occurred on the will of Sir *George Downing* (*f*); and it was held, that lands comprised in a certain old mortgage in fee, purchased by the testator, passed under a general devise; it being considered, that from the length of possession, under the circumstances, a release of the equity of redemption was to be presumed.

As to mortgages in fee;

—mortgages for years.

With respect to mortgages for years the question would be somewhat different; the point, if material at all, being, whether the equity of redemption was acquired, not at the date of the will, but at the testator's decease; since they would pass under a bequest of property of that denomination, to which they belonged at the latter period. Thus, suppose a will to contain a bequest of mortgages to A., and of leasehold generally to B., a mortgage for years, which was redeemable at the date of the will, and which would at that period have passed under the former bequest, having become, by continued possession *in the lifetime of the testator*, or by express contract, irredeemable, would, by this change in the nature of the property, pass under the bequest of the leaseholds. Such, it may be collected, was the opinion of Lord *Eldon*, in *Att.-Gen.* v. *Vigor* (*g*); and it seems necessarily to result from the acknowledged principle, that a general bequest of chattels of a particular species, carries all the chattels of that kind, which the testator is possessed of at the time of his decease. And the same principle, of course,

(*d*) *Le Gros* v. *Cockerell*, 5 Sim. 384.

(*e*) Now see stat. 3 & 4 Will. 4, c. 27, s. 28, and 1 Vict. c. 28; 2 Hayes's Introd., 5th ed., 275 and 282.

(*f*) *Att.-Gen.* v. *Bowyer*, 3 Ves. 714, 5 Ib. 300; *Att.-Gen.* v. *Vigor*, 8 Ves. 256. See also *Burdus* v. *Dixon*, 4 Jur. N. S. 967. ante, p. 662, n.

(*g*) 8 Ves. 276.

would apply even to mortgages in fee, if the will containing the devise in question were made or republished on or since the 1st of January, 1838.

Whether powers can be performed by devisees of trust estates.

[III. When a trustee having active or discretionary duties to perform devises the trust estate, it becomes a question whether the trusteeship passes with the estate so as to enable the devisee to execute the trusts originally confided to his testator. The chief argument (*h*) in favour of the capacity of the devisee (besides the alleged convenience of such a construction) is derived from the consideration that, when an estate is limited to trustees and the survivor of them, and the heirs of the survivor, it is probable that a personal confidence is given to every one of the several trustees; but that it is improbable that any such confidence is placed in the heir, a person totally unknown to the author of the trust, any more than in the devisee, who it is said is the hæres factus (*i*) of the surviving trustee. Since, therefore, there must be a devolution of the estate to some one not immediately trusted by the author of the trust, the reasons which forbid the original trustee from making an assignment inter vivos, do not seem to apply to an assignment by devise or bequest.

Cole v. *Wade.*

This argument, however, did not prevail in the leading case of *Cole* v. *Wade* (*k*), where a testator gave his real and personal estate to A. and B., whom he appointed his executors, their executors, administrators and assigns, in trust for such of his relations as they should think proper; and declared that, resting perfectly satisfied with the honour and justice of his said trustees and executors, he wished the whole disposition should be entirely in the discretion of the said trustees and executors, and the heirs, executors and administrators of the survivor of them; and he directed his trustees and executors and the survivor of them, and the heirs, executors and administrators of such survivor, if they should think proper, to sell or mortgage the estates or such parts thereof as they in their discretion should think proper: and the testator further directed the said A. and B., or the survivor of them, or the heirs, executors or administrators of such survivor, to convey and pay the whole to his re-

[(*h*) See 7 Beav. 434, 435.

(*i*) But this term is unknown to the English law. *Hogan* v. *Jackson*, Cowp. 305.

(*k*) 16 Ves. 27, affirmed 19 Ves. 424; see also *Att.-Gen.* v. *Doyley*, 2 Eq. Ca. Ab. 194; *Fordyce* v. *Bridges*, 2 Phill. 497.

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[lations within the time mentioned in the will. The surviving trustee devised and bequeathed the real and personal estates of the first testator to C. and D. upon the existing trusts. Sir *W. Grant*, M. R., held that C. and D. were not competent to exercise the discretionary power given by the first will: that the power did not pass with the estate, nor with the trust; and it was only quasi personæ designatæ that it could go to the heir. Though it seemed incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet he was not authorized to strike those words out of the will upon the supposition, though not improbable, that they were introduced in this part by inadvertence and mistake.

The question has increased in practical importance since it became an almost universal custom to introduce into wills a devise of trust estates; for a great part of the utility of such devises depends on the question whether the devisee is capable of exercising the powers and trusts relating to the estate vested in his testator. The insertion of such devises (which it is believed is of comparatively modern origin) has of late occasioned much discussion; the question generally arising upon powers of of sale which, though to some extent discretionary (*l*), do not so clearly as in the case of *Cole* v. *Wade* imply a personal confidence in the trustee.]

Case of *Cooke* v. *Crawford.*

A question of this nature arose in the case of *Cooke* v. *Crawford* (*m*), where a testator devised all his real and personal estates to A., B. and C., upon trust that they, or the survivors or survivor of them, *or the heirs of such survivor*, should as soon as conveniently might be after his decease, but at their discretion, sell all the real estates; and he authorized the trustees and their heirs to enter into contracts, and make conveyances, and declared that the receipt or receipts of the said A., B. and C., or of the survivors or survivor of them, *or the heirs, executors or administrators of such survivor*, should be good discharges to the purchasers. And the testator directed his said trustees, their heirs, executors or administrators, to stand possessed of the proceeds of the sale of the real estate, and the conversion of his personal estate, which he thereby directed, upon certain trusts. Two of the trustees declined the trusteeship, and the third (who was

Devisee of trust estate held unable to make a title to a purchaser.

[(*l*) See *Clarke* v. *The Panopticon*, 4 Drew. 29; and Lewin on Trusts, pp. 21, 22, citing Fearne, P. W. 313, contra.]

(*m*) 13 Sim. 91.

also the heir-at-law of the testator) accepted the trust, but died before the sale of the estates, having made his will, whereby he devised and bequeathed all estates vested in him as a trustee, unto D. and E., their heirs, executors, administrators and assigns, upon the trusts affecting the same respectively, and appointed D. and E. executors of his will. D. and E. entered into a contract to sell part of the trust estate, when the question arose, whether they, as devisees and executors of the surviving trustee, could make a title to the purchaser. Sir *L. Shadwell*, V. C., held that they could not, and that the devise of trust estates by the vendors' testator was an unauthorized act. ["It is plain," he observed, "that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons to whom no authority was given for that purpose by the testator; and there is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it." After observing that the testator had not used the word "assigns," his Honor concluded by saying that he saw no difference between a conveyance by act inter vivos and a devise, and that his own decision in *Bradford* v. *Belfield* (*m*), if acquiesced in, and if not, then the authority of *Townsend* v. *Wilson* (*n*), was binding on the point.

Titley v. *Wolstenholme.*

The word "assigns," on the absence of which the V. C. partly relied, occurred in the case of *Titley* v. *Wolstenholme* (*o*), where real and personal estate was devised to A., B. and C., their heirs, executors, administrators and assigns, upon certain trusts; and it was declared that the trusts should be performed by the said trustees, and the survivors and survivor of them, his or her heirs and *assigns*. The surviving trustee devised the trust estates: and upon the distinction furnished by the word "assigns," Lord *Langdale*, M. R., held, that the trust estates were well vested in the devisee *upon the trusts of the original will*, and therefore refused to appoint new trustees in their place.

Devisee held competent where trusts confided in the trustee and his *assigns*.

Mortimer v. *Ireland.*

In *Mortimer* v. *Ireland* (*p*), a testator appointed A. and B.

(*m*) 2 Sim. 264, where it was held that a trust for sale vested in A. and his heirs could not be executed by an assignee of the heir of A., i. e., a person to whom the heir in his lifetime had conveyed the estate. [On the other hand, Lord *Langdale*, M. R., while admitting this doctrine (about which there could be no question) drew a distinction between such an assignment and a devise, see 7 Beav. 434.]

(*n*) 1 B. & Ald. 608, 3 Mad. 261; this case decided that a *power* of sale reserved to three persons and *their heirs* was not well executed by two survivors.

[(*o*) 7 Beav. 425.

(*p*) 6 Hare, 196.

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[executors and trustees of his property (which appears to have been entirely personal); B. survived A., and by will gave to C. all the trust property, upon the trusts declared by the first testator, and appointed C. and D. his executors. Sir *James Wigram*, V. C., and, upon appeal (*q*), Lord *Cottenham*, decided that the appointment of C. as trustee was unauthorized, and, upon the application of the cestuis que trustent, ordered the appointment of new trustees. The L. C. observed: "Whether the property is real or personal estate is no matter; for suppose a man appoints a trustee of real and personal estate simpliciter, adding nothing more, this cannot make his representative a trustee. The case before the M. R. was quite different, for there the Court proceeded on the intention manifested, that the trusts should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here, then, are two persons appointed trustees; both die; thus there is no trustee, and it is for the Court to appoint new ones. The testator having given no indication, the Court must refer it to the Master."

Ockleston v. *Heap.*

After that case came *Ockleston* v. *Heap* (*r*), where a testator appointed A. and B. executors and trustees, and gave all his real and personal estate to his said trustees, their heirs, executors, administrators and assigns, upon trust to sell and dispose thereof at their discretion; and he declared that "the receipts of his trustees or their survivor should be sufficient," and declared the trusts of the proceeds. A. renounced and disclaimed; and B. by will devised all trust estates vested in him to C. and D. Sir *J. Knight Bruce*, V. C., said, "What I should have done if *Titley* v. *Wolstenholme* had come before me, I need not say, nor am I sure. I think that in the present case there must be a decree for the appointment of new trustees in the usual form."

Remark on *Ockleston* v. *Heap.*

It is to be regretted that we do not know the reasons upon which the learned Judge founded his opinion. The devise being to the trustees, "their heirs and assigns" followed immediately by the words "upon trust to sell," seemed to authorize a sale by the same persons, including the assigns, as were named in the devise. The power of giving receipts, it is true, was confined to the trustees or the survivor; but as in other cases, powers or trusts for sale, given to heirs, have not been extended to assigns

[(*q*) 11 Jur. 721, 16 L. J. Ch. 416. (*r*) 1 De G. & S. 640.

[by reason of the mention of assigns in the receipt clause (*s*), the same principle, especially in this instance with convenience on its side, would prevent the receipt clause having a restrictive effect on the general terms of the prior devise. And yet, unless that effect be ascribed to it, the case seems to possess no marked feature to distinguish it from *Titley* v. *Wolstenholme*. That it is to be inferred from the expression of doubt in the first branch of the judgment, that the learned Judge was disposed to question the soundness of that decision, or, in other words, thought the addition of the word "assigns" immaterial, is not probable, considering the question asked by himself in the case next stated, and considering also the case of *Whitfield* v. *Hows* (*t*). The case of *Titley* v. *Wolstenholme* has since met the approval of Sir *J. Romilly*, as it did also of Lord *Cottenham*, in the case of *Mortimer* v. *Ireland;* and was acted upon by Sir *W. P. Wood*, V. C., in the case of *Hall* v. *May* (*u*), by decreeing specific performance against a purchaser, the original trust containing the word "assigns."

Wilson v. *Bennett*

Wilson v. *Bennett* (*x*) was the case of a devise to A., B. and C., their heirs, executors and administrators, upon certain trusts; and "the said trustees and the survivors or survivor of them, his heirs, executors or administrators," were empowered to sell. C. survived his co-trustees, and devised the property to D. and E., who contracted to sell: but Sir *J. Knight Bruce*, V. C., held, that their title was too doubtful to force upon a purchaser, and asked whether there was any case deciding that "heirs" included "assigns." It was afterwards discovered that D. was the heir-at-law of C., and under these circumstances the case was brought before Sir *J. Parker*, V. C., who held that even so a good title could not be made, the intention being that the power or trust should be exercised by the person who had the estate, which had been devised away from D. the heir, to D. and E. In the course of his judgment his Honor remarked, with apparent approbation of the decision, that *Cooke* v. *Crawford*

(*s*) *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 190; *Bradford* v. *Belfield*, 2 Sim. 264.

(*t*) 2 Show. 57, 1 Vent. 338, 1 Freem. 476.

(*u*) 3 Kay & J. 585. See also *Ashton* v. *Wood*. 3 Sm. & Gif. 436. In *Hall* v. *May*, there was a power to appoint new trustees, which it has been thought would exclude the application of the doctrine of *Titley* v. *Wolstenholme;* see Lewin on Trusts, p. 267: but the V. C. thought it helped to show the testator's intention to authorize the performance of the trust by a devisee. On the word "assigns," see further, *Saloway* v. *Strawbridge*, 1 Kay & J. 371, 7 D. M. & G. 594.

(*x*) 20 L. J. Ch. 379, 15 Jur. 912,

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[stood upon the ground that a trust cannot be delegated to persons not contemplated in its original creation (*y*).

Macdonald v. *Walker*.

In the case of *Macdonald* v. *Walker* (*z*), Sir *J. Romilly*, M. R., upon a similarly worded will, and upon a similar state of facts to those in *Wilson* v. *Bennett*, followed the authority of that case, and declined to decree a specific performance against a purchaser from the devisee of the surviving trustee. But he said that the doctrine of *Cooke* v. *Crawford* was a most inconvenient one; and was clearly disposed, if the point had been unprejudiced by authority, to apply the decision of *Titley* v. *Wolstenholme* to cases where there was no mention made of *assigns*.

In re Burtt.

Lastly, in the case of *In re Burtt* (*a*), where leaseholds were bequeathed to A. and B., *their executors and administrators*, upon trust to dispose of the rents and profits as directed by the will, and after the death of A. the surviving trustee bequeathed all estates vested in him as trustee to M. and N. to hold upon the same trusts, and appointed his wife and M. and N. executors: it was held by Sir *R. T. Kindersley*, V. C., that neither M. and N. alone as trustees, nor M. and N. jointly with the other executrix, could exercise the trusts.

Result of the cases.

The tendency of these cases is clearly to support, though certainly not to extend, the doctrine of *Cooke* v. *Crawford*, namely, that no person, unless named in the original creation of the trust, can perform its duties and exercise its powers. With respect to the last case, it must be observed, that where the property is entirely personal, it necessarily vests in the executors, and cannot without their assent vest in the legatee; before such assent, therefore, the trust estate is vested in the persons whom the original testator intended to empower to act as trustees, and it might fairly have been considered that they would be thus competent to exercise the trusts. The V. C., however, said that the *testator* by the bequest had *taken away the legal estate* from those who ought otherwise to have been the trustees; and he must, therefore, (unless the question wholly escaped him,) have thought that the executor had no power by withholding his assent to prevent the estate devolving on persons who could not execute the trust, and to whom the testator ought not to have bequeathed it. Sir *J. Romilly*, M. R., also in the case of freeholds where the trust is not expressly reposed in the "assigns," a case less favourable, perhaps, to the competency of the heir

Remark on *In re Burtt*.

[(*y*) 5 De G. & S. 475.
(*z*) 14 Beav. 556.
(*a*) 1 Drew. 319.

[than that of leaseholds to the competency of the executor, appears to have thought that it is not sufficient that the estate comes to the heir of the trustee, but the mode in which it comes to him must be looked at. Thus, in *Macdonald* v. *Walker* (*b*), he remarked, that if since the late Wills Act the surviving trustee devised the trust estate to his heir, yet such heir, as he would take by devise and not by descent, could not exercise the trust. This, perhaps, was also the opinion of Sir *James Parker*, since he did not suggest in *Wilson* v. *Bennett*, that a release of the estate by the devisee who was not heir to the one who was heir, would, by ultimately vesting it in the person originally contemplated, render him a competent trustee.

Whether it be a breach of trust to devise trust estates where the devisees cannot exercise the trusts.

Connected with this question, and springing from it, is the further inquiry whether it be a breach of trust so to devise a trust estate. For it may be said that, if the trust does not pass with the estate, the trustee should permit both to descend to his heir who is expressly named in the trust, and not, by depriving him of the estate, take away also the power of executing the trusts (*c*). Thus, in the case of *Cooke* v. *Crawford*, Sir *L. Shadwell*, V. C., observed it was plain that when C., who had become the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do. And here, he continued, I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for in so doing he acts in accordance with the

[(*b*) 14 Beav. 561. See 3 Jur. N. S. Part II., p. 203.]

(*c*) The doctrine of *Cooke* v. *Crawford*, if established, would seem to require that every devise of trust estates should contain an exception, applicable to whatever estates may happen to be vested in the testator, upon any trusts which cannot be executed by a devisee. The question, whether the estate passed by the devise, and whether the devisee could execute the trust, would then be identical, and it would have to be left to the judgment of the practitioner in each par ticular case, to satisfy himself, wheth er, regard being had to the nature of the trust and the terms of its creation, it was exerciseable by a devisee—which would be found to be a task of no small difficulty. A qualification such as has been suggested would certainly render nugatory the greater part of the devises of trust and mortgage estates.

Suggested qualification in devises of trust estates.

Another suggestion arising out of *Cooke* v. *Crawford* is, that where in a mortgage-deed a power of sale is reserved to the mortgagee, his heirs and assigns, it should be stated in express terms that such power is intended to extend to, and be exerciseable by, any person in whom the legal estate shall become vested by devise, conveyance, or otherwise. A similar precaution would be requisite in the case of a trust for sale created by will.

Suggestion as to mode of framing trust for sale.

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[devise made to him. If he devises the estate, I am inclined to think that the Court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act inter vivos and a devise; for the latter is nothing but a post-mortem conveyance; and if the one is unlawful, the other must be unlawful. Lord *Langdale*, also, in *Titley* v. *Wolstenholme*, seems to treat as identical the questions whether the devisee can exercise the powers, and whether the devise be a breach of trust.

It would seem, however, to be a harsh proceeding to pronounce the devise to be a breach of trust in cases at least where the heir, through infancy or other disability, is himself incompetent to execute the trust. Accordingly, in the case of *Wilson* v. *Bennett* (*d*), Sir *J. Parker*, V. C., observed that the decision in *Cooke* v. *Crawford* had been often understood as going far beyond what it really purported. There was no doubt a trustee could devise a trust estate; but the question in every case was, whether the devise was in accordance with the title under which the trustee held (*e*). It might often be the duty of a man in such circumstances, having the legal estate, to take care that it did not vest in a lunatic, or in a person out of the jurisdiction, or in any other person who ought not to be a trustee, and for that purpose to devise it.]

[(*d*) 5 De G. & S. 479.

(*e*) See *Beasley* v. *Wilkinson*, 13 Jur. 619; and *Wall* v. *Bright*, 1 J. & W. 500, per M. R. And consider the effect of this doctrine on the rule established by *Braybroke* v. *Inskip*, and other cases of that class, ante, p. 659.]

CHAPTER XXII.

WHAT GENERAL WORDS CARRY REAL ESTATE.

I. *Words* "Estate" *and* "Property," *and other such Terms—where restrained by Association with more limited Expressions to Articles* ejusdem generis.
II. *Where not restrained by such Association.*
III. *Whether restrained by Collocation with Executorship.*
IV. *Whether restrained by the Nature of Limitations.*
V. *General untechnical Words held to pass Lands.*
VI. *Words descriptive of Personalty only, held, by force of Context, to include Real Estate.*

Words "estate," "property," &c., capable of carrying real estate.

I. It is obvious that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive of personal estate, are sometimes restrained by that association to subjects of the same species, agreeably to the maxim *noscitur a sociis;* and accordingly we find many instances, especially among the early authorities, in which the word *estate*, and other such terms clearly capable, *viribus suis*, of comprehending real estate (*a*), have been restrained by the context to personalty.

Restrained by association with personalty in following cases.

"Goods, chattels, leases, *estates, mortgages,*" &c.

Thus, in *Wilkinson* v. *Merryland* (*b*), one having lands in A., B. and C., the latter being a forfeited mortgage in fee, devised the lands in A. and B. to several persons and their heirs, and legacies to other persons; and then devised all the rest of his goods, chattels, leases, *estates*, *mortgages*, debts, ready-money, plate and other goods whereof he was possessed, unto his wife, after his debts and legacies were paid, and made her executrix. It was urged, that the fee simple in the lands in C. passed by the words "estates" and "mortgages." But the Court (*Croke*, *Jones* and *Berkeley*) were of opinion, [without deciding the point,] that these words, being coupled with personal things, must have meant estates and mortgages for years, and rather by

(*a*) *Barnes* v. *Patch*, 8 Ves. 604. (*b*) Cro. Car. 447, 449, Sir *W. Jones*, 380.

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reason of the words "whereof I am possessed" (*c*), which were applicable more properly to personal than to real estate.

"*Estate*, goods and chattels."

So, in *Cliffe* v. *Gibbons* (*d*), Lord Chancellor *Cowper* expressed an opinion, that a devise of all the testator's "*estate*, goods and chattels," did not pass land where there had been no mention of land before; but that it did where land had been devised in a preceding part of the will. The former proposition is clearly inconsistent with several decisions, particularly *Tanner* v. *Morse* (*e*), and *Doe* d. *Wall* v. *Langlands* (*f*), stated in the sequel.

"Estate and chattels, real and personal."

In *Marchant* v. *Twisden* (*g*), a testator, after bequeathing several pecuniary legacies, devised thus: "All the rest and residue of my *estate* and chattels, *real* and personal, I give and devise to my wife, whom I make to be my executrix." The Lord Keeper held that the lands did not pass; for, in the first part of the will, the testator having given only legacies, and not lands, by the residue of his "estate" must be intended estate of the same nature as that before devised. The devise was, as if he had said, "all the rest of my estate, whether chattels real or personal."

Remark on *Marchant* v. *Twisden*.

No case has gone so far as this in restraining the word *estate*. Nothing was more obvious than to consider the word "real" as applying to "estate," and "personal" to "chattels," corresponding as they respectively do in local order; and such, it is confidently apprehended, would be the construction of the devise at this day. Indeed, in subsequent cases, the real estate, we shall see, has been held to pass by words of far inferior force (*h*).

"Stock in trade, &c., and every other thing, *my property*, of what nature or kind soever."

The next authority for the restricted construction is *Doe* d. *Bunny* v. *Rout* (*i*), where the words of the will were as follow: —"I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and subject thereto I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready money, securities for money, *and every*

(*c*) But, as to these words, see *Hogan* v. *Jackson*, Cowp. 299; *Pitman* v. *Stevens*, 15 East, 505; *Noel* v. *Hoy*, 5 Mad. 38; [*Davenport* v. *Coltman*, 12 Sim. 588; *Warner* v. *Warner*, 15 Jur. 141; *Stokes* v. *Salomons*, 9 Hare, 81,] all stated post; [and see ante, p. 641, n. (*q*).]

(*d*) 2 Ld. Raym. 1326, [2 Eq. Ca. Ab. 301, pl. 17.]

(*e*) Cas. t. Talb. 284, post, p. 692.

(*f*) 14 East, 370, post, p. 692.

(*g*) Gilb. Eq. Ca. 30, [1 Eq. Ca. Ab. 211, pl. 22.]

(*h*) *Hogan* v. *Jackson*, Cowp. 299; *Hopewell* v. *Ackland*, 1 Com. 164; *Huxtep* v. *Brooman*, 1 B. C. C. 437; *Pitman* v. *Stephens*, 15 East, 505, all stated post.

(*i*) 7 Taunt. 79.

other thing, my property of what nature or kind soever, to and for her own proper use and disposal;" and the testator appointed A. R. executrix. The Court of Common Pleas held, that an intention to pass land could not be clearly collected from these words.

As to fact of will containing no other mention of real estate.

It deserves notice, that in the three last cases, in which the words "estate," and "property," were confined to personal estate, in consequence of the *society* in which they were found, there was no preceding devise or mention of real estate; a circumstance which, though not conclusive, was in each instance adverted to, and has generally been considered as having weight in the exclusion of real estate, by demonstrating that the testator had not property of that species in his contemplation when he made his will.

In the case of *Woollam* v. *Kenworthy* (*k*), however, the word "estate" in a residuary clause was restricted to personal property, by the controlling effect of the context, although the will contained a specific devise of lands.

Words "estate and effects" restricted to personalty by the context.

The testator, after devising a fee-farm rent to trustees, upon formal trusts for sale, and directing his household furniture, &c., to be sold, declared, as to the money to arise from the sale of the rent thereinbefore devised in trust to be sold, as also the monies to arise from the sale of his household furniture, &c., "*and from all other his estate and effects, of what nature or kind soever, and wheresoever,*" that the same should be chargeable with his legacies; and the residue divided into shares, which the testator bequeathed to various persons. There was the usual authority to the trustees to give receipts to the purchasers *of the fee-farm rent.* [It will be observed that there was no actual *devise* of the "estate," and] Lord *Eldon,* after premising that the question whether the words "all my estate and effects" will include real estate or not, depends, first, on the immediate context of the will, secondly, on the general form and scheme of the will as demonstrating the intention, held, that the testator, who had actually devised certain real estate to trustees upon particular trusts for sale, could not be understood to mean that another estate should be clothed with the same trusts in the hands of the heir, by the mere insertion of the word "estate."

In the case of *Bebb* v. *Penoyre* (*l*), real estate was held not to be included in a devise of *the rest and residue,* on the ground

(*k*) 9 Ves. 137. (*l*) 11 East, 160.

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"Rest and residue," held not to include real estate.

of the restraining effect of the immediate context, although there was a previous devise of land in the same will. The testator, after various devises and bequests, concluded his will in the following words:—"I order the lease of my house, with all the furniture (except the eight worked chairs), to be sold, and *all the rest and residue* to be divided among the four daughters of A., share and share alike; and I appoint C. and D. executors." It was contended, that the reversion in fee (*m*) of a moiety of certain houses devised by the will for the life of the devisee, passed by the words "rest and residue." But Lord *Ellenborough* thought that these words, in the place in which they stood, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate. He considered the division ordered, was to be made by the executors immediately afterwards named.

"Property," held not to include copyholds dealt with in codicil.

[In *Chapman* v. *Prickett* (*n*) there was good reason for holding that copyholds surrendered to the use of the will did not pass by a devise to trustees of "freehold messuages in F., and also all stocks or shares in any of the public funds, and all money in hand or debts due to the testator to be placed in Consols, and all *shares or property* whereof he might be possessed or entitled to," upon trust to pay the "rents of the said messuages, and all other freeholds and leaseholds" of his, and the dividends of the stock as therein directed; because the testator afterwards made a codicil specially dealing with his copyholds (though, as the practice is, not *devising* the estate in them), and directing them to be sold for the benefit of the same persons as were interested in the freeholds that passed by the will; thereby affording a strong ground of inference that he thought his copyholds were not included in his will (*o*). Besides the devise was of shares *or* property; and (if this be a material circumstance (*p*)), the word property was associated with words descriptive of personalty not capable of passing the whole personal estate (*q*).]

"Estate" fol-

In the two next cases the general words were followed by an

(*m*) As to the operation of these words to carry a fee, see Vol. II., p. 264.

[(*n*) 6 Bing. 602.

(*o*) See *Acheson* v. *Fair*, 3 D. & War. 512.

(*p*) See post, p. 686, n. (*b*).

(*q*) See also *Sanderson* v. *Dobson*, 1 Exch. 141; upon which case the court of C. P. came to a different conclusion, 7 C. B. 81, and thereby (as Lord *Campbell* said in *O'Toole* v. *Browne*, 3 Ell. & Bl. 572), neutralized the decision of the Court of Exchequer.]

enumeration of particulars, which were held to be explanatory and restrictive of the prior expressions. Thus, in *Timewell* v. *Perkins*, where (*r*) a testator devised in these words, "All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my *estate*, consisting in ready money, plate, jewels, leases, judgments, mortgages, *or in any other thing whatsoever or wheresoever*, I give unto A. H. and her assigns for ever." In the preamble of the will occurred the clause, "as touching the [temporal (*s*)] estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land not described in the will passed under the residuary clause. Mr. Justice *Fortescue* held that it did not, relying on the analogy of the case to *Wilkinson* v. *Merryland*.

Clause followed by enumeration of particulars explanatory and restrictive of it.

In the case just stated, there was a preceding specific devise of land; but the intention to confine the word "estate" to personalty was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate (*t*). The case of *Timewell* v. *Perkins* is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent occasions.

Remark on *Timewell* v. *Perkins*.

So, in *Roe* d. *Helling* v. *Yeud* (*u*), where a testator after giving certain legacies, [added "Item, I give to A., B., C., D. and E., whom I appoint my executors,] and to whom I give *all the remainder of my property whatever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book debts and securities in the Witham Drainage, in Lincolnshire, and funded property." The question was whether real estate passed. The Court held that it did not; considering that the enumeration at the end of the clause was explanatory of the words "remainder of my property (*x*)."

"Property" restrained by subsequent explanatory particulars.

(*r*) 2 Atk. 102; see also *Doe* v. *Rout*, 7 Taunt. 79, ante, p. 682.

[(*s*) As to this word see *Tanner* v. *Wise*, 3 P. W. 295.]

(*t*) See *Hopewell* v. *Ackland*, 1 Com. 164, [and *Wilce* v. *Wilce*, 7 Bing. 664,] stated post, with which compare the case above stated.

(*u*) 2 B. & P. N. R. 214. ["It seems that the words beginning 'whom I appoint,' and ending with 'this my will,' are to be construed as included in a parenthesis." Ib. 215, n.

(*x*) But observe the tone of Lord *Ellenborough's* remarks on this case in *Doe* v. *Langlands*, 14 East, 373.]

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The two preceding cases, *Timewell* v. *Perkins*, and *Roe* v. *Yeud*, were much relied upon by *Gibbs*, C. J., in the subsequent case of *Doe* v. *Rout* (*y*), already stated.

Clear gift of realty in will not cut down by gift of "estate, furniture, &c." in codicil.

[It has been elsewhere noticed as an established rule that a gift once clearly expressed in a will shall not be cut down by ambiguous expressions contained in a codicil; and it was mainly on this principle that in *Molyneux* v. *Rowe* (*z*), a devise of "real estate" to A. was held not to be affected by a codicil by which the testator gave "all his estate, household furniture, linen, china and all other his personal property" to B.]

Estate, property, &c., when *not* restricted to personalty.

II. But it is not to be inferred from the preceding cases, that the words *estate* and *property*, and others of the like import, when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *ejusdem generis*. On the contrary, the presumption generally is against such a construction, as it supposes the testator to use words in another sense than that which judicial construction has given to them, and frequently in a sense which is fully expressed in the context, and therefore renders them inoperative. It should be observed, however, that the circumstance of there being other words adequate to carry the whole personal estate, always affords an argument for making the words under consideration include land, since the contrary construction reduces them to silence; an argument upon which, it will be seen, great stress was laid by Lord *Hardwicke*, in the case of *Tilley* v. *Simpson* (*a*), stated in the sequel. But it must be remembered, that the fact of the word being wanted to give completeness to the disposition of the personal estate, does not raise so strong an argument in favour of the restrictive construction: since there is no reason why a testator should not have used the words for both purposes (*b*).

Cases in which

The following cases seem fully to sustain the position, that to

(*y*) 7 Taunt. 79, ante, p. 682.

[(*z*) 25 L. J. Ch. 570, coram *Knight Bruce* and *Turner*, Ls. Js., on appeal from the V. C. of the Duchy of Lancaster, dissentiente *Turner*, L. J.]

(*a*) 2 T. R. 659, n., post, p. 687.

[(*b*) In a recent case Sir *R. T. Kindersley*, V. C., laid down the rule generally, that if the other words were not sufficient to comprise the whole personal estate the word "estate" would not embrace realty, *D'Almaine* v. *Moseley*, 1 Drew. 632; but although Lord *Hardwicke's* remarks in *Tilley* v. *Simpson*, certainly favour this doctrine; yet, it is conceived, the modern cases are founded on a principle which is inconsistent with it; see particularly Lord *Brougham's* judgment in *Mayor of Hamilton* v. *Hodsdon*, 6 Moo. P. C. C. 76, 11 Jur. 193; and the case of *Scott* v. *Alberry*, Com. 337, is an express decision to the contrary.]

warrant the confining of the word "estate" and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them; for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, i. e., their unrestricted sense.

general words have been held to be unrestricted.

Thus, in *Terrell* v. *Page* (*c*), where the testator bequeathed certain legacies, and devised some lands, and then devised as follows:—"All the rest and residue of my money, goods and chattels, *and other estate whatsoever*, I give to J. S., whom I make my executor;" it was held, that the lands not previously devised passed under the latter clause.

"Money, goods and chattels, *and other estate.*"

So, in *Scott* v. *Alberry* (*d*), where the testator, "as touching the worldly estate it had pleased God to bestow" upon him, devised in these words:—"I give to my cousin T. S., all that my parcel of land lying in W. A. Item, I give to my said cousin T. S., my wearing apparel, linen, books, *with all other my estate whatsoever and wheresoever*, not hereinbefore given and bequeathed; and him, the said T. S., I make the sole executor of this my will for performing the same." The question was, whether the reversion in fee in the lands in W. A., before devised to T. S. (*e*), which were copyhold surrendered to the use of testator's will, passed under the latter devise; and it was held that it did.

"Wearing apparel, &c., *with all other my estate.*"

Again, in *Tilley* v. *Simpson* (*f*), where a testator, after declaring his intention to dispose of all his worldly estate, and making several devises to different persons, devised *all the rest and residue of his money, goods, chattels and estate whatsoever;* Lord *Hardwicke* held that the fee passed: he said, where the Court had restrained the word "estate" to personal estate only, it had been where the intention of the testator that it should be so used had appeared; as where it had stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods and estate, in which the preceding words were not a full description of the personal estate; that if the testator had said, "All the rest and residue of my personal estate and estates whatsoever," a real estate would have passed; that this bequest amounted to the same, for the word "chattels"

"Residue of money, goods, chattels and *estate* whatsoever."

(*c*) 1 Ch. Cas. 262, 1 Eq. Ca. Ab. 209, c. 11.

(*d*) Com. 337, 8 Vin. Ab. 229, pl. 14; [see also *Awbrey* v. *Middleton*, 4 Vin. Ab. 460, pl. 15, 2 Eq. Ab. 497, pl. 16.]

(*e*) As to indefinite devises, see post.

(*f*) In Chancery, 1746, before Lord *Hardwicke*, stated 2 T. R. 659, n.; and see 1 Cox, 362.

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Lord *Hardwicke's* reliance upon the fact, that the other words were adequate to describe the personal estate.

is as full a description of the personal estate as the words "*personal estate;*" that therefore, *when he had used words comprehending all his personal estate, and then made use of the word "estate," that word would carry a real estate.* That the word "whatsoever" was used here, which was the same as if he had said *of whatever kind it be;* and, if that had been the case, it would most certainly have carried the real estate. His Lordship observed that the case of *Terrell* v. *Page* was very material to the present question, and he thought could not be distinguished: the only difference was, in that case there was the word "other," which he did not think could distinguish it. If the devise had been, *and all the rest and residue of my household goods, mortgages and all other estate,* he did not think the words would have extended to the testator's real estate.

"Goods, estates, bonds, debts."

So, in *Jongsma* v. *Jongsma* (*g*), where a testator gave to his executors "all his goods, *estates,* bonds, debts, to be sold." The question was, whether this would pass a copyhold estate surrendered to the use of the will. Sir *Lloyd Kenyon,* M. R., said that, according to the case of *Tilley* v. *Simpson* (*h*), wherever the word "estate" or "estates" was restrained to personalty, it was done upon the ground of the testator's showing his intention by joining it with words which related to personalty only; but, on the other hand, *where such other words were in themselves sufficient to pass all the personal estate, then, in order to give some effect to the word "estate," it was holden to pass realty.* In this case, the word "goods" seemed to be sufficiently comprehensive; and the copyhold, therefore, passed by the word "estates."

In *Hogan* v. *Jackson* (*i*), a testator, after commencing his will with the words, "as to my worldly substance," devised certain lands to his mother M. for life: and, after giving certain legacies, to be raised out of those lands, concluded as follows:—"I give and bequeath unto my dearly-beloved mother M. all the remainder and residue of *all the effects, both real and personal, which I shall die possessed of.*" It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects" and "possessed," were applicable rather to personal than real property; but the Court held that the clause

Residue of "effects, real and personal," after an express devise of lands.

(*g*) 1 Cox, 362; see also *Smith* v. *Coffin,* 2 H. Bl. 445; *Roe* d. *Penwarden* v. *Gilbert,* 3 Br. & B. 85; *Churchill* v. *Dibben,* 9 Sim. 447, n.; [*King* v. *Shrives,* 4 Moo. & Sc. 149, 5 Sim. 461.]

(*h*) Which he denominated *Tiddy* v. *Simms.*

(*i*) Cowp. 299, 3 B. P. C. Toml. 388; [see also Lord *Torrington* v. *Bowman,* 22 L. J. Ch. 236, where there was no previous devise of land.]

amounted to a disposition of the whole of the testator's real and personal estate.

This is a strong decision, and has been much cited in subsequent cases. It is clear, however, that the word *effects*, without *real*, will not, *proprio vigore*, comprehend land, though followed by the words, "of what nature, kind or quality soever (*k*)."

Remark on *Hogan* v. *Jackson*.

In *Grayson* v. *Atkinson* (*l*), a testator, prefacing his will with the expression, "as to all my temporal estate," gave certain legacies, and directed A. to sell any part of his real and personal estate for the payment of his debts and legacies; and, as to all the rest of his "*goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements*, share in the Copperas Works," &c., he gave the same to A. Lord *Hardwicke* held that this devise carried a fee, though he did not think that the words "goods and chattels, real and personal," would have included the lands, if the devisor had not gone on to explain himself by the subsequent words, "as houses," &c. (*m*); ["all the rest," &c., he thought plainly related to something mentioned before, and that mentioned before which he was about to dispose of was, "all his temporal estate," which passed a fee when the testator had one.]

"Goods and chattels, real and personal, as houses, &c."

In *Fletcher* v. *Smiton* (*n*), a testator, after directing all his debts to be paid, gave to M., his wife, all his household goods, &c., and a legacy and annuity; and then proceeded as follows:—"The profits of my four shares in the Corn Market during her life; also the income and profit of my estate as follows, during her life, as follows, my lands lying, &c., (enumerating them,) as also the residue of my personal estate to be laid out in Bank Annuities; and then my wife to have the income, during her life only, of this and the estates before mentioned; and after her decease, as follows:—I give to W. the income of my four shares in the Corn Market for his natural life; and all the rest of *my estates*, with all monies in securities, to be divided in equal shares, to" B. C., &c. The question was, whether the reversionary interest in the shares of the Corn Market, which were freehold of inheritance, passed to B. C., &c. It was contended that

Realty passed by the word "estates," although the word was before used exclusively of the particular subject.

(*k*) *Camfield* v. *Gilbert*, 3 East, 516; *Doe* d. *Chillcott* v. *White*, 1 East, 33; *Macnamara* v. *Lord Whitworth*, Coop. 241; [*Doe* d. *Hick* v. *Dring*, 2 M. & Sel. 448; *Doe* d. *Haw* v. *Earles*, 15 M. & Wels. 450. But see cases post, s. 6.]

(*l*) 1 Wils. 333.

(*m*) If, without the words houses, &c., the devise would not have carried real estate, it is difficult to find a satisfactory ground for giving to the devisee the *fee*. His Lordship seems to have relied more upon the introductory words for this purpose than is consistent with later authorities. See infra.

(*n*) 2 T. R. 656.

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it did not; for that the word "estates" in the last clause must have the same signification with the same word in the first clause, where it could not possibly extend to the Corn Market; but the Court, relying much on *Tilley* v. *Simpson*, held that the reversion in fee passed.

"Goods and chattels, rights, credits, personal and *testamentary estate*," held to pass land.

In *Smith* v. *Coffin* (*o*), a testator, after prefacing his will with the words, "as to my worldly estate," &c., and devising certain freehold lands, gave and bequeathed all the residue of his "goods and chattels, rights, credits, *personal and testamentary estate whatsoever*," to his wife, for her own use and disposal. The real estate was held to pass.

Same construction of nearly same words.

In a subsequent case (*p*), where there were also the prefatory expressions, "as to my temporal estates and effects," and a devise of all the testator's lands to J. G., the reversion in fee in those lands was held to pass to him under these words:—"And all the rest and residue of my goods and chattels, *personal and testamentary estate and effects whatsoever*, I give and bequeath unto the said J. G., whom I make whole and sole executor (*q*)."

By confining the devise to personal estate, in the two preceding cases, the words "and testamentary" would have been rendered inoperative.

Residue of "money, stock, *property*, and effects," held to carry a fee.

So, in *Doe* d. *Andrew* v. *Lainchbury* (*r*), where a testator said,—"As to the little money and effects with which the Almighty has intrusted me, I dispose thereof as follows;" and, after several devises of land, concluded thus:—"And as to all the rest, residue and remainder of my money, stock, *property and effects*, of what kind or nature soever, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew J. and my niece S., for to be equally divided between them, share and share alike; and I do hereby also appoint my said nephew J., and my said niece S., executor and executrix, and likewise joint and equal residuary legatees," &c.; it was held that real estate passed, which construction Lord *Ellenborough* considered to be strengthened by the circumstance of the testator having, in a preceding part of his will, directed money to be laid out in the purchase of land, "to be added to his other adjoining *property*," which he said gave a standard of his meaning of the word "property," and showed that he meant by it real estate.

(*o*) 2 H. Bl. 445.

(*p*) *Roe* d. *Penwarden* v. *Gilbert*, 3 Br. & B. 85; [see also *Doe* d. *Evans* v. *Walker*, 15 Q. B. 28.]

(*q*) The marginal note of this case omits the material word.

(*r*) 11 East, 290.

[Much reliance was placed on this decision in the subsequent case of *Edwards* v. *Barnes* (*s*), where a testator "gave, devised and bequeathed to his wife all his freehold and leasehold, and all his money, securities for money, stock in government funds, goods, chattels and all other his *property* whatsoever and wheresoever, to hold the same unto and for the use of his said wife, her heirs, executors," &c. The Court of C. B. were of opinion that copyholds, which had been surrendered to the use of the will, passed by the expression "all other his property."

"Freehold and leasehold, money, stock, goods, chattels and other *property*," held to pass copyholds.

A valuable judgment was delivered by Lord *Brougham* in a case (*t*), where a testator directed any shares he might have in a vessel to be sold "for the benefit of his *estate*." And after making some specific devises of "houses and lands," in some of which the fee was not exhausted, and bequeathing to his wife certain specific chattels "which she had from her father's estate," he gave "all the remainder of his estate that was then in his possession or might thereafter be his" to his wife; and directed "his estate," after payment of debts and legacies, to be "kept together" until the time thereby appointed for "dividing" it; and declared his wife entitled, in a certain event, to one-third of "his personal estate." It was argued that the trusts and purposes of the will showed the testator's mind to be directed to personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term estate. Lord *Brougham* observed (in effect) that "estate" meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty, upon which the term could operate; that, when realty was meant to be excluded, the expression *personal* estate was used; and that the will was to be construed reddendo singula singulis, by which method all parts of it became consistent; so that there was not that clear intent on the will to restrict the meaning of the term estate which was necessary to prevent its natural operation in comprising realty as well as personalty. The unexhausted reversion was therefore held to pass.]

"Estate" held to pass realty notwithstanding context.

In most of the preceding cases the will contained specific devises of land; a circumstance which, as before observed, always favours the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively esta-

Circumstance of there being a prior devise of lands.

[(*s*) 2 Bing. N. C. 252. 6 Moo. P. C. C. 76, 11 Jur. 193.]
(*t*) *Mayor, &c. of Hamilton* v. *Hodsdon*,

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blishing the exclusion of real estate from such terms, though associated with words descriptive of personal property only. On the contrary, real estate has sometimes been held to pass in cases of this nature.

Although no such devise, lands passed in following cases.

Thus, in *Tanner* v. *Morse* (*u*), real estate was held to pass under the following words:—"As to my temporal estate, I bequeath to my nephew T. (who was the heir-at-law) the sum of 50*l.*;" then follow several legacies: "And *all the rest and residue of my estate, goods and chattels whatsoever*, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." Lords *King* and *Talbot* laid much stress upon the words "temporal estate," in the introductory clause, [to which it was said the words "rest and residue" must have relation.]

Residue of "*estate*, goods and chattels."

So, in *Doe* d. *Wall* v. *Langlands* (*x*), where a testator after giving several pecuniary legacies, bequeathed as follows:—"to R. D., and E. W., I give and bequeath *the residue of my property, goods and chattels*, to be divided equally between them, share and share alike;" it was contended, that the word "property" was restrained by the subsequent words, the clause being read, *videlicet*, "my goods and chattels;" but Lord *Ellenborough* held, that the more obvious and natural sense was, that they are to be taken *cumulatively*, that is, as *property and goods and chattels*, and, consequently, that the real estate passed under the former word.

Residue of "my property, goods and chattels."

Again, in the case of *Doe* d. *Morgan* v. *Morgan* (*y*), where a testator, after bequeathing two pecuniary legacies, devised as follows:—"All my *property* and effects of all claims that I shall have, I give to my brother J. M., but my mother is at liberty to give 1,000*l.* of my property where she please." It was contended, that the gift of the pecuniary legacies, the use of the word "effects" conjunctively with "property," and the clause respecting the 1,000*l.*, showed that the testator, by the latter term, intended to denote personal estate only; but the Court held, that the real estate passed.

——"all my property and effects."

A similar construction prevailed in the recent case of *Doe* d. *Evans* v. *Evans* (*z*), where a testator, after bequeathing certain

(*u*) Cas. t. Talb. 284; [3 P. W. 295; see also *Lumley* v. *May*, Pre. Ch. 37.]

(*x*) 14 East, 370.

(*y*) 6 B. & Cr. 512, 9 D. & Ry. 633; see also *Bradford* v. *Belfield*, 2 Sim. 264.

(*z*) 9 Ad. & Ell. 720, 1 Per. & D. 472; [and in *D'Almaine* v. *Moseley*, 1 Drew. 633, Sir *R. T. Kindersley*, V. C., said he thought no indication of intention was afforded by the absence of a previous gift of real estate. It seems also, from the case in the text, that such words as "wheresoever the same might be," &c., are not (as sometimes argued) to be understood as showing that the testator contemplated shifting or changeable property only.

articles of personal estate, gave, bequeathed and devised to his wife A., all his money, securities for money, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same might or should be at the time of his death.

"Money, goods, chattels, *estates* and effects."

[Lastly, in the case of a devise (*a*) of all the testator's "money, goods, chattels, *estates* and effects of what nature or kind soever, and wheresoever the same might be at the time of his decease," Sir *J. Knight Bruce*, V. C., held, that real estate passed; referring to the rule of construction laid down by Lord *Eldon* in *Church* v. *Mundy* (*b*) as applicable to this subject.]

General remark on preceding cases.

The last [four] cases are certainly important authorities, and they demonstrate the inclination of the Courts at the present day, to hold lands to pass under words capable per se of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed. [It was natural when the Courts held that words such as "property" and "estate," capable of including real with personal estate, were to be confined to personalty unless an intention to include the realty were proved aliunde (*c*), that their determination should often be at variance with more recent cases where the burden of proof was shifted, and it was held that such words should not be deprived of their full force without evidence that they were intended to be used in a more confined sense (*d*).]

Devise associated with nomination to executorship.

III. Sometimes words adequate to comprise land have been confined to personal estate, from their association with the legatee's nomination to the executorship, which has been considered as explanatory, and restrictive of the general expressions to that species of property which was connected with the character of executor.

As in *Shaw* v. *Bull* (*e*), where one seised in fee of five mes-

[(*a*) *Midland Counties Railway Company* v. *Oswin*, 1 Coll. 74. See also *Footner* v. *Cooper*, 2 Drew. 7; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572, (in which it was decided that after-purchased lands passed by similar words under the statute 1 Vict. c. 26); [*Patterson* v. *Huddart*, 17 Beav. 210; *Meeds* v. *Wood*, 19 ib. 215; *Re Greenwich Hospital*, 20 ib. 458; *Hawksworth* v. *Hawksworth*, 27 Beav. 1.

(*b*) 15 Ves. 406.

(*c*) See per *Trevor*, C. J., *Shaw* v. *Bull*, 2 Eq. Ca. Ab. 320, 321.

(*d*) See per *Bayley*, J., *Doe* v. *Morgan*, 6 B. & Cr. 512; *Patterson* v. *Huddart*, 17 Beav. 212.]

(*e*) 12 Mod. 592, 2 Eq. Ca. Ab. 320, pl. 8.

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suages, by will devised two to his wife for life, remainder to his two daughters in fee; the third messuage to his wife and her heirs; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all; and, if she did not make provision for the payment of his legacies in her lifetime, that it should be lawful for the legatee, after her death, to sell the said messuage, to satisfy the legacies out of the value thereof. Then followed this clause, on which the question arose:—"And all the overplus of my estate to be at my wife's disposal, and make her my executrix." *Blencowe*, J., said, if he had at first devised to his wife all his estate, this (the fifth) house would have passed to her; but compare this clause with the subsequent words, "and I make her my executrix," it shows that his intent was to grant her such estate as she was capable of as executrix. He considered "overplus" to refer to the price of the house, after payment of legacies.

"Overplus of my estate" restricted to personalty by this association.

It is to be observed, however, that this construction renders the words in question nugatory, since the appointment of the wife to be executrix was itself, in the then state of the law, a disposition of the whole personal estate; a species of argument to which great attention is paid at this day, for in modern cases no principle is more conspicuous than an anxiety to give effect to every word of the will. It is impossible to reconcile this case with the general current of authorities (*f*).

Remark on *Shaw* v. *Bull*.

Although it is indisputably clear that the word *lands* will carry real estate, notwithstanding it be collocated with words descriptive of personal property only (*g*); yet in several early cases (*h*) it has been decided, that where a testator appoints another executor of all his goods, *lands*, &c., he refers to such lands as the person may take as executor, namely, leaseholds; and accordingly real estate does not pass. Thus, in *Piggot* v. *Penrice* (*i*), freehold lands were held not to pass under the words, "I make my niece *executrix of all my goods, lands and chattels*," although the testator had no leaseholds (*k*). It was said that by this construction the word lands was not (as ob-

"Executrix of all my goods, *lands* and chattels."

(*f*) See *Noel* v. *Hoy*, 5 Mad. 38, stated next page.

(*g*) *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375, stated post, p. 712.

(*h*) 1 Roll. Ab. 613, 1 Eq. Ca. Ab. 209, pl. 12; see also *Clements* v. *Cassye*, Noy, 48.

(*i*) Pre. Ch. 471, 1 Eq. Ca. Ab. 209, pl. 13.

(*k*) This circumstance does not seem to be very material; for, as such a bequest operates upon all the leaseholds of the testator *at his death*, the fact of his having or not having any such at that period, does not mark his intention *at the making* of the will. See Lord *Eldon's* judgment in *Wright* v. *Atkyns*, as reported Coop. 111, see p. 123; but as to which see infra, Vol. II., p. 83.

jected) useless, and to be rejected; for that, in all probability, there might be rents in arrear of those lands, which would pass to the niece by her being made executrix. This explanation, however, fails to show that any efficient signification was given to the word "lands," since it is clear the executorship would have entitled the niece to the arrear of rent. The word "chattels," too, was sufficient to pass any leasehold lands of which the testator might have been possessed at his death.

"Executor of all my *lands* for ever and leasehold property," not so restricted.

In the case of *Doe* d. *Gillard* v. *Gillard* (*l*), real estate was held to pass under the words, "I do make, constitute and appoint R. G. my whole and sole *executor of all my lands for ever, and leasehold property* here or at Beeston." The question principally agitated was, whether the restrictive words "here or at Beeston," applied to both freehold and leasehold, or to leasehold lands only; and it was held, that they were confined to the latter, and that the devise of the freehold lands was general, without any local restriction.

Whatever opinion may be formed of the case of *Piggot* v. *Penrice*, it is not necessarily overruled by this case, where the will contained additional expressions, strongly aiding the construction adopted.

"All the property I may die possessed of," held to include land.

So, in *Noel* v. *Hoy* (*m*), a copyhold estate surrendered to the use of the will, was held to pass under the following disposition:—"In respect of worldly affairs, I cannot better manifest my love and attachment to my family, than in nominating (which I hereby do) my dearly beloved and most amiable wife A. F. M., the sole executrix of this my will, thereby *bequeathing* to her *all the property of whatever description or sort that I may die possessed of*, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my children," &c. Sir *John Leach*, V. C., thought that the criticism upon the words "possessed of" and "appropriated," on which had been founded the argument for excluding the copyholds, was too nice.

"All that I possess in any way belonging to me."

Again, in the case of *Thomas* v. *Phelps* (*n*), where the testator, as to his worldly estate, gave, devised and disposed of the same as follows: and then, after giving some pecuniary legacies, proceeded in these words:—"I also give and bequeath the lease of the colliery of L. to my son J. P., him and my daughter E. P. I do make, constitute and appoint my joint executor and execu-

(*l*) 5 B. & Ald. 785; and see *Marret* v. *Sly*, 2 Sid. 75, ante, p. 331, n.

(*m*) 5 Mad. 38.

(*n*) 4 Russ. 348.

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trix of this my last will and testament, *of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed of whatsoever nature or manner it may be,* only my household furniture, which I give to my daughter who lives the longest single, and after her decease or marriage to be sold and equally divided between my remaining children," &c. Sir *J. Leach*, M. R., held, that the real estate passed by this devise, the words being equivalent to a gift of all the testator's property. He observed, that the exception of the household furniture was of little weight; for where the prior words imported real as well as personal estate, it mattered not that the exception to the gift happened to be of personal chattels only (*o*).

So, in the case of *Doe* d. *Pratt* v. *Pratt* (*p*), where a testator directed that his debts and funeral expenses should be paid by his executor thereinafter named; and after giving two life annuities of 2*l.* 10*s.* each, and a legacy of 5*s.* to J. P., his heir-at-law, he appointed W. P. *whole and sole executor of all his houses and lands situate at F.:* it was held, after an extensive review of the authorities, that the houses and land at F. passed to W. P., and that he took an estate in fee.

General remark on preceding cases.

These cases evince that little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction; and the case of *Thomas* v. *Phelps* also shows that an exception of articles of personalty affords no ground for cutting down the general words of the devise.

Inapplicability of limitations, where restrictive.

IV. The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for excluding such estate from words of general description, capable, ex vi terminorum, of comprehending property of that species.

In *Doe* d. *Spearing* v. *Buckner* (*q*), a testator prefaced his

[(*o*) See also *Steignes* v. *Steignes*, Mos. 296; such an exception, though of little weight to show what is excluded (see however *Camfield* v. *Gilbert*, 3 East, 516, 2 M. & Sel. 454), is yet strong to prove what is intended to be included in the gift from which the exception is made; see *Davenport* v. *Coltman*, 12 Sim. 588, 598, 603; and cf. *Hotham* v. *Sutton*, 15 Ves. 319; *Marshall* v. *Hopkins*, 15 East, 309.]

(*p*) 6 Ad. & El. 180; [and see *Doe d. Hickman* v. *Hazlewood*, ib. 167; *Day* v. *Daveron*, 12 Sim. 200, stated post, p. 705. See and consider *Juler* v. *Juler*, 30 L. J. Ch. 142, where it was held that the words "I make A. my whole and sole executor of all the various properties I may be possessed of at my death," meant no more, with reference to the personal estate, than a simple appointment of A. to be executor, who consequently took no beneficial interest in the personalty. The real estate was not mentioned.]

(*q*) 6 T. R. 610.

will with the words, "As to my estate and effects, both real and personal, I dispose thereof in manner following." Then, after giving some pecuniary legacies, and an annuity, which he charged on a freehold messuage in W., he concluded as follows: —"All the rest, residue and remainder of my *estate* and effects of any and what nature or kind soever or wheresoever, I give and bequeath the same unto C. B., and J. R., *their executors or administrators*, in trust that they shall from time to time *add the interest thereof to the principal*, so as to accumulate the same, as it is my will that the said residue shall not be *paid or payable*, but at the time and in the manner and to the several persons, as the said principal sum of 4,000*l.* (which was a legacy before given) is before directed to be paid." It was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause. Lord *Kenyon* observed, that the limitation to executors and administrators, and particularly the direction to add the interest *thereof* to the principal, were wholly inapplicable to a real estate.

"Estate," restrained to personalty by the nature of the trusts.

So, in *Doe* d. *Hurrell* v. *Hurrell* (*r*), a testator gave certain pecuniary legacies; and after payment thereof, and of his just debts, funeral, testamentary and incidental expenses, gave and bequeathed all the rest and *residue of his estate and effects* whatsoever and wheresoever unto A. and B., their *executors, administrators and assigns*, upon trust that they should out of *such residue of the monies and effects* that he should die possessed of, carry on, manage and cultivate the farm then in his possession, for the remainder of his term, for the joint advantage of his children (naming them), and at the expiration of the said term, upon further trust *to sell such residue of his estate and effects, or such effects as should then be upon his farm*, and divide the money among his five children. It was held, that, notwithstanding the generality of the words, the nature of the trust clearly showed that the testator meant to bequeath his personal property only. It was said, that by directing the trustee at the expiration of his term, to sell such residue of his estate and effects, *or such effects as should be upon his said farm*, the testator had himself furnished a comment upon the words, "the residue of his estate and effects," and manifested that by those words he meant only such estate and effects as constituted personal property.

(*r*) 5 B. & Ald. 18.

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[The case of *Pogson* v. *Thomas* (*s*) is probably referable to this principle. A testatrix, after making some specific devises to certain persons, "their heirs, executors, administrators and assigns," according to the different tenures, and bequeathing a sum of money to trustees, "their executors," &c., declared that "as to all the residue of her estate and effects wheresoever and whatsoever, she gave and bequeathed the same" to the said trustees, "their executors, administrators and assigns," in trust for her sons equally; or if but one son, then in trust for him, "his executors and administrators." The Court of C. P. (*t*), on a case from Chancery, certified (in effect) that real estate was not included in the residuary gift.

Residue of "estate and effects to trustees, their *executors*," &c., held not to include real estate.

In *Doe* v. *Hurrell* (*u*), Lord *Tenterden* said, that the circumstance of the limitation being to executors and administrators and not to heirs, though not to be altogether rejected in construing a will, was not very strongly to be relied on. It is true that in *Pogson* v. *Thomas*, the testator had used the word "heirs" in previous devises, unequivocally relating to real estate: but that circumstance appears insufficient of itself to account for the decision, which will probably be considered a strong one.

Remark on *Pogson* v. *Thomas*.

At all events] the mere introduction into some of the clauses relating to the subject-matter of disposition, of expressions inapplicable to real property, will not in all cases confine the word "estate" to personal estate.

"Estate" not so restrained.

As in *Doe* d. *Burkitt* v. *Chapman* (*x*), where a testator devised specifically certain parts of his real and personal property, and then devised and bequeathed *all the rest and residue of his estate, of what nature or kind soever*, to C. for life; and, after her decease, directed that the same should be divided between certain persons; providing that, in case of their dying before their being entitled "*to have and receive*" their shares, their children should stand in the place of his or her parent; and that the share, on a certain event, *should be paid to their guardians*; it was contended, that these provisions being applicable to per-

Inapplicable expressions not restrictive of words "residue of my estate."

[(*s*) 6 Bing. N. C. 337; see per *Shadwell*, V. C., 12 Sim. 204. A gift of *land* to A., his executors, &c., will give A. the fee, *Rose* d. *Vere* v. *Hill*, 3 Burr. 1881, Fearne, Posth. 144; but the question here is, whether such a limitation will restrain the generality of an ambiguous term, capable of expansion or contraction according to the context.

(*t*) Absente *Tindal*, C. J.

(*u*) 5 B. & Ald. 18; see also *O'Toole* v. *Brown*, 3 Ell. & Bl. 572; *Patterson* v. *Huddart*, 17 Beav. 210. So a limitation to "heirs and assigns," will not prevent a gift of "property," including personal estate, *Robinson* v. *Webb*, 17 Beav. 260.]

(*x*) 1 H. Bl. 223.

sonal estate only, the devise must be restrained to such estate; but Lord *Loughborough* and the Court of Common Pleas held that they could not so restrain the general and comprehensive terms used, and therefore that the real estate passed.

Remark on *Doe* v. *Chapman.*

The expressions in this case were similar to some of those on which the argument for the restricted construction was founded in *Doe* v. *Buckner;* but it wanted others. Another difference between the cases is, that there all the preceding gifts related to personal estate, except, indeed, an annuity, which was charged on a freehold messuage; but, in *Doe* v. *Chapman*, there were devises of land in a prior part of the will. In *Doe* v. *Buckner*, however, the testator, in the exordium to his will, intimated an intention to dispose of all his real estate, which did not occur in *Doe* v. *Chapman*. This circumstance, it will be observed, has had various degrees of importance assigned to it. Most of the Judges who have held the real estate to pass, have thrown it into the argument. It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an actual disposition (*y*).

As to clause intimating an intention to dispose of the whole estate.

The cases under consideration often present questions extremely embarrassing to a Judge or practitioner, and different minds will almost unavoidably form different opinions as to the weight to be ascribed to particular expressions or circumstances of inapplicability as excluding the real estate (*z*); of which we have an instance in the next case, where two Judges came to opposite conclusions on the same will.

Diversity of judicial opinion on the excluding power

In *Newland* v. *Majoribanks* (*a*), a testator having real estate in *Jamaica*, by his will, after charging his debts upon his real estate, bequeathed certain pecuniary legacies; and, as to all the

[(*y*) See 2 Ed. 145, n. (*a*); *Gulliver* v. *Poyntz*, 3 Wils. 141, 2 W. Bl. 726; *Smith* v. *Coffin*, 2 H. Bl. 450; *Grayson* v. *Atkinson*, 1 Wils. 333; *Pocock* v. *Bishop of Lincoln*, 3 Br. & B. 41; *Doe* v. *Gilbert*, ib. 85; *Saddler* v. *Turner*, 8 Ves. 617; *Doe* v. *Dring*, 2 M. & Sel. 448, 456; *Bradford* v. *Belfield*, 2 Sim. 272; *Sutton* v. *Sharp*, 1 Russ. 149. The absence of such a clause was relied on in *Roe* v. *Yeud*, 2 B. & P. N. R. 214; *Doe* v. *Rout*, 7 Taunt. 79, 84; but stated by Lord *Hardwicke* in *Crichton* v. *Symes*, 3 Atk. 61, to afford no indication of intention.]

(*z*) It may seem to be superfluous to suggest to the reader the necessity of perspicuity in this particular in framing wills, when he has before his eyes such a striking illustration of the evils of the contrary practice in the mass of adjudications on the subject which the present chapter exhibits. If the testator intend the will to be confined to personal property, it should be clearly so expressed; and, if not, as is more generally the case, words technically adapted to describe the real estate should be employed; and in every case general equivocal expressions are to be avoided.

(*a*) 5 Taunt. 268.

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of expressions applying only to personalty.

rest, residue and remainder of his *estate, of what nature or kind the same might be,* and of which he might be possessed or interested in at the time of his decease, he gave, devised and bequeathed the same to A., B. and C., their *heirs and assigns, for ever,* upon trust *to place the same in some* public or private *fund upon good security,* and to receive the annual interest or produce thereof for ten years, in trust to *place the same out again* annually, so that the interest might become a principal; and that, at the expiration of such ten years, then that his trustees, their heirs or assigns, or the major part of them, should pay and apply the annual interest of the whole of the *principal money* in the erection of a free school. Sir *James Mansfield,* C. J., was of opinion, that though the words used were sufficient to comprehend the realty, yet that they were restrained to personal estate by the subsequent part which referred to personalty only. "Land (he said) could not be placed out, nor securities changed." *Heath,* J., on the contrary, thought that the words were insufficient to control the preceding devise; but as the learned Judge was of opinion, that the trustees took a term of ten years only, which were expired, it was unnecessary to decide the point.

Realty held to pass notwithstanding trusts in terms applicable only to personalty.

[Recent decisions have placed this question on a surer footing. Thus, in the case of *Saumarez* v. *Saumarez* (*b*), a testator, after giving certain directions about his dwelling-house, gave to his son R. his freehold land in D. (without words of limitation), and directed that the *residue of his property,* which he might leave at his death, might be divided between him and his two sisters in equal proportions, subject to the following restrictions. The testator then directed his son's portion to be *placed* in the names of trustees, and the *interest* to be paid to him (he being already tenant for life of the land). After his death his *share* to be divided between his children, and *placed* in the names of trustees, with a power to employ the *interest* for their maintenance and part of the *capital* for their advancement; and at their age of twenty-five to *transfer* the whole to them: with certain ulterior limitations in case R. died without issue. Lord *Cottenham,* notwithstanding the inapplicability of the trusts to real estate, held that the reversion of the estate in D. passed by the residuary clause, and that the trusts and limitations must be applied distributively to the real and personal estate. "In considering gifts of residue," said his Lordship, "whether of real or personal

[(*b*) 4 My. & C. 331.

[estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense."

So, in *Morrison* v. *Hoppe* (*c*), Sir *J. Knight Bruce*, V. C., held that the ordinary sense of the word "property" was not controlled by the circumstance that the testator had occasionally spoken of the "interest" and "dividends," when he meant income, of the property. And again, in the case of *Stokes* v. *Salomons* (*d*), Sir *G. J. Turner*, V. C., followed the authority of *Saumarez* v. *Saumarez* in giving full effect to the words "devise" and "estate," notwithstanding the use, in relation thereto, of such terms as "interest," "dividends," "capital," "transfer."

Trusts applicable exclusively to personalty held to prevent realty passing, *Coard* v. *Holderness*.

But the difficulty of laying down a rule which shall be applicable to every case is exemplified by a recent decision in which, though it was acknowledged that the burden of proof lay on the heir to show that real estate was not included, it was held under the circumstances that the heir had succeeded in doing so, and that only personalty passed by the will. The case referred to is *Coard* v. *Holderness* (*e*), in which the testator, after bequeathing some legacies, "gave, bequeathed and disposed of all *estate, effects and property* whatsoever and wheresoever, which he was then or should at his decease be possessed of or entitled to, or over which he had any right or power of disposition, to A., B. and C., *their executors and administrators*, on trust to divide into five equal parts or shares." He then gave directions respecting the *income* and *principal* of the respective parts or shares *or legacies*, and the *balance*, after deducting certain specified sums; and as to one share (intended for a son who was absent), he provided that he should claim it of the testator's executors, or the survivors, &c., *or other his legal personal representative* for the

[(*c*) 4 De G. & S. 234.

(*d*) 9 Hare, 75; see also *Hunter* v. *Pugh*, 4 Jur. 571; *Mayor, &c. of Hamilton* v. *Hodsdon*, 6 Moo. P. C. C. 76; 11 Jur. 193, stated ante, p. 691; *D'Almaine* v. *Moseley*, 1 Drew. 629; *Fullerton* v. *Martin*, 22 L. J. Ch. 893, 17 Jur. 778; *Streatfield* v. *Cooper*, 27 Beav. 338.

(*e*) 20 Beav. 147.

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time being within a given period, with directions to accumulate the share in the meantime. Upon this will Sir *J. Romilly*, M. R., held that the full and ordinary effect of the words "estate" and "property" was cut down by the subsequent expressions, so as to include personal estate only. He relied on the absence of any word peculiarly applicable to real estate, as "heir," "devise," "rent," or the like, on the limitation to executors and administrators (*f*), on the use of other terms, stated above, especially adapted to personal estate, and on the authority of *Doe* v. *Buckner* (*g*).

It cannot, perhaps, be considered that this case is absolutely irreconcileable with *Saumarez* v. *Saumarez* (*h*), but it shows, notwithstanding the general remarks of Lord *Cottenham* in that case, the necessity of attending closely and minutely in these cases to the language of each particular will.]

In some cases where the words of the devise to trustees have been sufficiently ample to include real estate, but the trusts have applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

"Estate or effects" held to include land, but trusts of will confined to personalty.

As in *Dunnage* v. *White* (*i*), where the testator, after devising certain real estate, and bequeathing some pecuniary legacies, proceeded as follows:—"And all the rest, residue and remainder of my *estate or effects, whatsoever and wheresoever, of what nature or kind soever*, I give, *devise* (*k*), and bequeath unto my said trustees and executors after named and appointed, upon the trusts following; that is to say, that they my said executors do and shall, as soon as may be conveniently after my decease, make sale and absolutely dispose of my *household goods and stock in trade*, by public auction, for the most money that can be had or gotten for the same; and also do and shall, with all convenient speed, collect in all *debts* due and owing to me at the time of my decease, together with all *monies* owing or belonging to me upon mortgage, bond, bill, note, specialties, simple con-

[(*f*) But see per Lord *Tenterden* in *Doe* v. *Hurrell*, 5 B. & Ald. 18, ante, p. 698.

(*g*) 6 T. R. 610. But of this case it was said by Sir *R. Kindersley*, in *Fullerton* v. *Martin*, 22 L. J. Ch. 894, that it would be decided differently at the present day, and that the grounds of Lord *Kenyon's* decision would not now be sufficient to warrant such a conclusion.

(*h*) On another occasion, however, the same learned Judge, Sir *J. Romilly*, said, that *Saumarez* v. *Saumarez* was a very strong case, *Meeds* v. *Wood*, 19 Beav. 224.]

(*i*) 1 J. & W. 583.

(*k*) That this word, when applied to *effects* alone, will not carry real estates, see *Camfield* v. *Gilbert*, 3 East, 516; [but see *Phillips* v. *Beal*, 25 Beav. 25. Conversely, the word "bequeath" will not be sufficient to confine the effect of a gift otherwise capable of including real estate, *Whicker* v. *Hume*, 14 Beav. 518.]

tract, or otherwise howsoever; and when the same shall be so collected and got in, to divide the same into six parts or shares, and *to pay* the same, when so divided, in manner following; that is to say, four equal sixth parts thereof to 'certain persons named,' and the remaining two-sixth parts thereof to *invest* in the public stocks or funds," &c. Sir *Thomas Plumer*, M. R., held it impossible not to construe the devise as comprising the real estate; but that the testator having given both the real and personal property to the trustees, and having only said what was to have been done with the personalty (for not a word of the disposition of the beneficial interest referred to real estate), the consequence was the trust of the realty resulted to the heir-at-law (*l*).

Resulting trust for the heir.

V. In some cases, real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration. Thus, in *Hopewell* v. *Ackland* (*m*), where the testator devised as follows:—"I devise all my lands, tenements, and hereditaments to A. Item, I devise all my goods and chattels, monies, debts, and *whatsoever else I have* (*in the world* (*n*)) *not before disposed of*, to the said A., he paying my debts and legacies; and make him executor." *Trevor*, C. J., held, that by these words an estate in fee passed; for it could not have any effect upon the personal estate, because that was given away as fully as possible by the words precedent; therefore, it must extend to the remainders in the real estate.

Real estate held to pass by vague and informal words.

"Whatsoever else I have not before disposed of."

The reasoning of the learned Chief Justice deserves attention, though the point seems not to have been necessary to the construction that the devisee took a fee; for the prior devise was clearly adequate to carry all the lands, and the charge upon the devisee would enlarge his estate in those lands to a fee (*o*).

So, in *Huxtep* v. *Brooman* (*p*), the words "all I am worth" were held to comprise land in the will of a very illiterate testator in these terms:—"This being my last will and testament, I give and bequeath to Mary, daughter of M. H., and likewise to the

"All I am worth," held to carry land.

(*l*) It seems to have been overlooked in this case, that the freehold farm, in respect to which the question arose, had been contracted to be purchased by the testator before he made his will, *but had never been conveyed to him*; so that there was no legal estate in the testator upon which that part of his Honor's decision which gave the estate to the trustees could operate.

(*m*) Salk. 239, 1 Com. 164.

(*n*) These words do not occur in Salkeld.

(*o*) See post, Chap. XXXIII.

(*p*) 1 B. C. C. 437. So, as to the words "I make A. my sole heir;" *Taylor* v. *Webb*, Sty. 301, 307, 319; 2 Sid. 75, ante, p. 331, n.

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son and daughter of S. T., all the overplus of my money; and likewise beg of my executor that he will pay into the hands of the above children's friends all the money that is due to me on settling my father's account. Friday: I give and bequeath to them *all I am worth*, except 20*l.* which I give to my executor, M. T. B."

Remark on *Huxtep* v. *Brooman*.

This case may be considered as exhibiting the extreme point to which the decisions have gone, in applying general informal words to real estate. Nothing could be more comprehensive or more untechnical than the expression here used. The case was cited with approbation by *Gibbs*, C. J., in *Doe* v. *Rout* (*q*), [and by the Court of Exchequer in *Davenport* v. *Coltman* (*r*), where it was said never to have been doubted; but in a previous case of *Wills* v. *Wills* (*s*), Sir *E. Sugden*, C. (Ir.), thought it would be difficult to support it.]

"All that I shall die possessed of, real and personal," held to pass realty.

In *Pitman* v. *Stevens* (*t*), the testator devised as follows:—"I give and bequeath *all that I shall die possessed of, real and personal, of what nature and kind soever*, after my just debts are paid: I do hereby appoint P. my residuary legatee and executor:" and, in a subsequent part of his will, he desired his legatee and executor to let his sister be interred in a certain vault, and recommended him to do something handsome for the testator's brother-in-law at his death, or when he should want anything to live on: it was held that P. took a fee in the real estate.

In the case of *Barclay* v. *Collett* (*u*), it was held, that a devise to trustees of the residue of the testator's real and personal estate comprised a freehold messuage, not included in the specific devises of the will, though the trusts expressed were so indefinite and uncertain as to render it impossible for the trustees to act without the aid of a Court of Equity.

"Every thing else I die possessed of."

So, in the case of *Wilce* v. *Wilce* (*x*), where a testator commenced his will as follows:—"As touching such worldly property, wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form." He then proceeded to make several dispositions of land and goods, and concluded with the following residuary clause:—"All the rest of my worldly goods, bills, bonds, notes, book debts and ready money, *and every thing else I die possessed*

(*q*) 7 Taunt. 81, ante, p. 682.
[(*r*) 9 M. & Wels. 481.
(*s*) 1 D. & War. 439.]
(*t*) 15 East, 505.
(*u*) 6 Scott, 408, 4 Bing. N. C. 658.
(*x*) 5 M. & Pay. 682, 7 Bing. 664; [see also *Warner* v. *Warner*, 15 Jur. 141; *Phillips* v. *Beal*, 25 Beav. 25.

of, I give to my son George, whom I make my whole and sole executor." It was held, on the authority of the preceding cases, especially *Smith* v. *Coffin*, that certain real estate, not included in the specific devises, passed by this clause to the testator's son George, and that he took the fee.

[In *Day* v. *Daveron*(*y*), a testator gave his house M. to his wife (without words of limitation), and his house N. to his wife for life, together with his household goods, &c.; but if she married again, (which she did not do,) "the above property was to become the property" of testator's daughter for life, remainder to her children: but if his wife remained unmarried, then, after her death, he gave house N. to the daughter for her life and her children. The testator then went on: "I appoint my wife sole executrix and residuary legatee to all other property I may possess at my decease. . . . Now concerning my funded property, I hereby" give one moiety to the wife and the other to the daughter. Sir *L. Shadwell* held that the wife, under the residuary clause, took the remainder in house M. It was clear, the learned Judge said, that that clause did not refer to personal property; for the testator almost immediately afterwards spoke of his funded property in a distinct sentence.

"I appoint my wife executrix and residuary legatee to all other property I may possess at my decease."

In the case of *Davenport* v. *Coltman* (*z*), a testator, after certain pecuniary legacies, bequeathed to his wife for her life his freehold house at C., together with the use of plate, &c., and of interest of stock; and declared that, "at her decease, it was his will that A. and B. should divide equally between them, *as residuary legatees, whatever he might die possessed of*, except what was already mentioned in favour of others." And after appointing executors, he authorized them to sell certain leaseholds immediately; "but the house at C. must not be sold as long as my wife lives." On a case from Chancery, the Court of Exchequer certified their opinion that A. and B. were entitled to the whole real estate of the testator at the death of the wife, subject, as to the house at C., to the wife's life estate. They relied partly on the generality of the expression, "whatever I may die possessed of," which they thought was not to be limited to personal estate, being, in their opinion, equivalent to "all I am worth (*a*)," or "all I have (*b*);" but they also relied on the

"A. and B. to take as residuary legatees whatever I may die possessed of."

[(*y*) 12 Sim. 200; *Warren* v. *Newton*, Dru. 464.

(*z*) 9 M. & Wels. 481, 12 Sim. 588.

(*a*) *Huxtep* v. *Brooman*, 1 B. C. C. 437.

(*b*) See per *Bayley*, J., *Doe* v. *Morgan*, 6 B. & Cr. 518, 9 D. & Ry. 633.]

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[direction to postpone the sale of the house at C., which could only refer to a sale for convenience of division between A. and B. according to the terms of the residuary clause, and that, if any real property was included in that clause, all must be so. Sir *L. Shadwell*, V. C., confirmed the certificate; remarking that real estate was clearly included; because (besides other reasons), in addition to the terms "whatever I shall die possessed of" (which he should say would comprehend estates in fee simple), there was an exception of "what was already mentioned in favour of others," and that there had been already mentioned the possession of the freehold house for the life of the wife.]

On the other hand, in the case of *Monk* v. *Mawdsley* (*c*), where a testatrix, in a will made under a power, after bequeathing several pecuniary legacies, proceeded thus:—"I give, devise and bequeath to my husband P. M. my two fields and house in the township of Great Neston, likewise the remainder of my personalty, *and all I may die possessed of at the time of my death*, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving this my last will and testament. I nominate and appoint A. K., and my husband P. M., trustees and executors of this my last will and testament." Sir *J. Leach*, V. C., held that the fee in the Neston estate did not pass by these words. The argument for the husband, his Honor observed, was, that these words would have no effect, unless they operated to carry the fee of the Neston estate, the whole personalty passing by the prior expression; but he knew of no case in which words had been held to carry a fee simple, because they would otherwise be mere surplusage and repetition. His Honor relied much on the words "possessed of," as being applicable exclusively to personal estate, especially when coupled with the words "at the time of my decease," which could not refer to real estate.

"All I may die possessed of," held not to pass realty.

So, in the case of *Henderson* v. *Farbridge* (*d*), it was contended, that the equity of redemption in a copyhold estate passed under the following words, in a letter from the deceased (who was abroad in a military capacity) to his mother. After giving some directions respecting the rents of the property in question, he said, "Provided I should die, or be slain in the wars, or by any other means before my return, I give and bequeath *all my*

"All my effects."

(*c*) 1 Sim. 286. (*d*) 1 Russ. 479.

effects (after paying of every due demand) to you for life, and then to go to my younger sister Ann." In another letter to his mother, he made very affectionate mention of his sister Ann, and added these words: "If anything should happen to me in this country, *what little I have left to call my own* may be useful to her." Lord *Gifford*, M. R., was of opinion that, treating these papers as testamentary, the words were inadequate to pass property of the nature of real estate.

"What little I have to call my own."

[In the case of *Maitland* v. *Adair* (*e*), it was held that the word "fortune" did not include real estate. A testator by will gave several legacies, and devised his estate at T. to A.; and by a codicil directed his undisposed-of money to be divided amongst the persons mentioned in his will in the proportion he had *bequeathed* (*f*) the other part of his *fortune;* and Lord *Rosslyn* held that the word "fortune" must mean money legacies.]

"My fortune" confined to personalty by context.

VI. It remains to be observed, that words applicable exclusively to personal estate have sometimes, by force of the context, been held to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.

Words descriptive of personal estate only held to carry land—when.

Thus, in the case of *Hope* d. *Brown* v. *Taylor* (*g*), where a testator, after devising certain lands to A., B. and C., and giving pecuniary legacies to B. and C., provided that, if either of the persons before named died without issue, then *the said* legacy should be divided equally between them that were alive: it was held that the word "legacy" in this clause extended to the land before devised. *Foster*, J., observed that one of the persons named had no pecuniary legacy.

Word *legacy* held to refer to real estate antecedently devised.

So, in the case of *Hardacre* v. *Nash* (*h*), where a testator, after bequeathing two legacies of 150*l.* each to his son and daughter, gave all his real and personal estate to his wife for life, and at her death a copyhold and freehold estate to his son, and a copyhold messuage to the daughter; adding, "but if

Word "lega-

[(*e*) 3 Ves. 231.

(*f*) As to this word, vide ante, p. 702, n. (*k*).]

(*g*) 1 Burr. 268.

(*h*) 5 T. R. 716; [see also *Brady* v. *Cubitt*, Dougl. 31, 40.] As to the words "share," "share aforesaid," "portion," and similar expressions, as applying to one or more of several preceding subjects, vide *Doe* d. *Stopford* v. *Stopford*, 5 East, 501; *Hardman* v. *Johnson*, 3 Mer. 348; *Doe* d. *Gibson* v. *Gell*, 2 B. & Cr. 680, 4 D. & Ry. 387; *Doe* d. *Driver* v. *Bowling*, 5 B. & Ald. 722; [*Scrivener* v. *Smith*, 2 D. M. & G. 399.

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cies" held to refer to realty before devised.

either or both of my children should die before the decease of my wife, then *those legacies* which are here left them shall return unto my wife for her sole use and benefit, and for her to dispose of freely as she might think fit." It was contended that the word *legacies* here referred to pecuniary legacies, and those only; but the Court of K. B. held that it extended to the real estate devised to the children; and, consequently, that on the death of the son in the lifetime of the widow she became entitled to the property given to him.

"Residuary legatee," held to refer to devisee.

[So the words "residuary legatee," though properly applicable to personalty only (*i*), have been held sufficient, under certain circumstances, to designate the person who is to take the realty; as in the case of *Evans* v. *Crosbie* (*k*), where a testator gave all his real and personal estate to trustees in trust to pay thereout to F. the sum of 1,500*l.*: he then bequeathed 1,000*l.* to J., and proceeded thus: "I leave and bequeath unto my brother D. the sum of 2,000*l.*, and also to be my *residuary legatee.* I bequeath to my sister C. 200*l.*;" and he disposed specifically of other parts of his personal estate. Sir *L. Shadwell*, V. C., held that D. took the residuary real estate. It seems to have been considered that the realty was converted into a fund for payment of all the legacies, besides that given to F., and that consequently, after they were all satisfied, D. took the residue of the real as well as of the personal estate under the designation of residuary legatee.

Again, in the case of *Wildes* v. *Davies* (*l*), where a testator gave his freehold, copyhold and leasehold estates to A. and B. in trust to sell and hold the proceeds, and also his personal estate upon the trusts thereinafter mentioned; and then gave a number of legacies, and by codicil named A., B. and C. his *residuary legatees;* Sir *J. Stuart*, V. C., held, on like grounds, that A., B. and C. took the surplus proceeds of the real estates.]

Upon the principle already stated, the word *effects* (though applicable strictly to personalty only (*m*)) has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate.

[(*i*) *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382; *Lea* v. *Grundy*, 1 Jur. N. S. 953; *Windus* v. *Windus*, 21 Beav. 373, 6 D. M. & G 549.

(*k*) 15 Sim. 600.

(*l*) 1 Sm. & Gif. 475; see also *Alleyne* v. *Alleyne*, 2 Jo. & Lat. 544; but see *Kellett* v. *Kellett*, 3 Dow, 248.]

(*m*) *Camfield* v. *Gilbert*, 3 East, 516; *Doe* d. *Hick* v. *Dring*, 2 M. & Sel. 448; [*Doe* d. *Haw* v. *Earles*, 15 M. & Wels. 450; but see *Wilson* v. *Major*, 11 Ves. 205, where Sir *W. Grant*, M. R., speaks of "cutting down" the comprehensiveness of the word, so as to prevent its including realty.]

"Said effects," held to comprehend land previously mentioned.

As in *Doe* d. *Chillcott* v. *White* (*n*), where a testator, after making several pecuniary bequests, devised to A. the income of a certain cottage, and to E. the half of a certain estate; and all the residue of his goods, chattels, rights, credits, personal and testamentary estate, and also his lands, tenements and hereditaments, he gave to his wife for life, whom he made sole executrix; and he allowed her to give what she thought proper of "her *said effects*" to her sisters, the said A. and E., for their lives; and, after the above lives were expired, he gave all his lands to J., who was his heir-at-law: it was held that the power of the widow extended to all the real and personal estate given to her for life, including the cottage in which A. had a life interest.

Word "effects" held, upon the whole will, to extend to real estate.

So, in the case of *Marquess of Titchfield* v. *Horncastle* (*o*), where the testator directed all his debts and funeral and testamentary expenses to be paid; and bequeathed all his furniture and goods, linen, plate and books to his brother J. He gave to Ruth Chambers an annuity payable out of his real and personal estate, adding "and this my executors hereinafter named will contrive." Then after giving several legacies, he gave and bequeathed all the residue of his goods and chattels, personal estate, *effects of what nature and kind soever* (*p*), to trustees, directing them to take an inventory of all his goods and chattels, of whatsoever nature they might be; but not to dispose of nor sell any part, not even the books, until the death of his brother, then the whole of the effects, &c. to be sold, and the money arising therefrom to be considered the property of the noble person thereinafter bequeathed to. And the testator further directed that no part of the real property he had in houses, land, &c. should be disposed of at the time of his decease. And then (after many intervening directions concerning his personal estate) he declared his determination, that his brother should have the whole of the profits arising from his estates, as rents, interest, dividends, as they arose, for his maintenance, subject to the control and management of his trustees, and that he should have the entire use of his furniture, in short everything; adding "And I further will and direct, that my said trustees, on the demise of my brother, shall stand seised and possessed of such moneys *and*

(*n*) 1 East, 33.

(*o*) 2 Jur. 610. [See also *Milsome* v. *Long*, 3 Jur. N. S. 1073; *Phillips* v. *Beal*, 25 Beav. 25.

(*p*) But as to the expression "of what nature or kind soever," see *Doe* v. *Dring*, 2 M. & Sel. 454.]

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effects, upon trust to pay the same to the noble Marquess of Titchfield to his own entire use." Lord *Langdale*, M. R., held, that the testator's real estate passed under this clause. "Much has been said in argument," observed his Lordship, "as to the meaning of the word 'effects,' which was understood by Lord *Mansfield* to mean much the same thing as worldly substance, although certainly in subsequent cases the Courts have inclined to consider that word in its proper or natural interpretation to be confined to personal estate, unless there are other words in the context to control that meaning; I do not express any opinion on that, although I am not aware of any reason why the word should not be applicable to the 'effects' generally arising from a man's industry, whether consisting of personal or of real estate; but it is not now necessary to express an opinion on so refined a point of construction. The testator intended that his debts should be paid; and after that was done, that his brother should enjoy what remained of his real and personal property for his life, and after his brother's death, he did not intend any relation to have any part of his property, but he did intend that his property should go to the plaintiff. He subjected the whole of his property to the payment of debts. Then the annuity given to Ruth Chambers was to be paid out of his real and personal estate, which his executors were to contrive. His executors were to contrive the mode of payment of the annuity out of the real and personal estate. They were, therefore, to have some estate or power to enable them to do that. The testator afterwards, it appears to me, gives directions as to the whole of the property which was producing income. He gives directions as to his real property. Nothing was to be sold during the life of his brother. His property was realized—perhaps it might be right to say, 'effected'—at the time of his death, and he meant it to remain so until his brother's death. Taking the whole of the will together, it does appear to me that the testator has given all his real and personal estate to the trustees, for the benefit of his brother, during his life, and has directed that, at his death, all shall be converted into money, and paid to the plaintiff."

Criticism on the word "effects."

"Said effects

So, in *Den* d. *Franklin* v. *Trout* (*q*), where the devise was to

Force of some referential expressions.

(*q*) 15 East, 394. As to the effect of some referential expressions of frequent occurrence, "as aforesaid," see [*Walsh* v. *Peterson*, 3 Atk. 194; *Davis* v. *Norton*, 2 P. W. 390;] *Weddell* v. *Munday*, 6 Ves. 341; *Sibley* v. *Perry*, 7 Ves. 522; *Meredith* v. *Meredith*, 10 East, 503; "as before," *Macnamara* v. *Lord Whitworth*, Coop. 241; "in like manner," [per *Levinz*, J., 1 Mod. 100;] *Roe* d. *Aistrop* v. *Aistrop*, 2 Bl. 1228; [*Doughty* v. *Saltwell*, 15 Sim. 640; *Lewis* v. *Puxley*, 16

E. of "all my estate and effects whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease," in trust to pay funeral expenses and debts. The testator then subjected his "*said effects bequeathed to E.* to the following *legacies*," and went on to enumerate certain pecuniary legacies, *and gave to S. a house in W.* He directed that all the above legacies should be paid out of his effects by the said E. within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his *said effects* to the said E., her heirs and assigns, for ever. It was held, that he took the remainder in fee in the house devised to S., (which was the testator's only real property,) by this devise. Lord *Ellenborough* relied much on the testator having included the house among the enumerated legacies, by which he had explained himself to describe that property under the denomination of "effects" and "legacies."

bequeathed to E.," referred to land before devised.

[Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context. Thus, in *Wright* v. *Shelton* (*r*), where a testator gave to trustees "all his *worldly goods* of what nature and kind soever and wheresoever they might be found upon the trusts undermentioned; his wife to have possession while she lived, but if she married, to quit possession: all his debts and legacies to be paid out of his personal estate and W. close. To his son A. 20*l.* and H. close: to his children B., C. and D. the rest of his

"Worldly goods" held on the context to pass real estate.

[M. & Wels. 733; *Davies* v. *Hopkins*, 2 Beav. 276; *Tyndale* v. *Wilkinson*, 23 Beav. 74; "in manner aforesaid," Co. Lit. 20 b; *Doe* d. *Woodall* v. *Woodall*, 3 C. B. 349; *Milsom* v. *Awdry*, 5 Ves. 465; *Lumley* v. *Robbins*, 10 Hare, 621; *Bessant* v. *Noble*, 26 L. J. Ch. 236; *Mountain* v. *Young*, 18 Jur. 769;] "on the same terms or conditions," *Goodtitle* d. *Cross* v. *Wodhull*, Willes, 592; *Longdon* v. *Simpson*, 12 Ves. 295; ["subject to the same restrictions," *Barber* v. *Barber*, 1 Jur. 915; *Ross* v. *Ross*, 2 Coll. 269;] and other expressions of reference to some antecedent clause or provision; [Co. Lit. 9 b;] *Shanley* v. *Baker*, 4 Ves. 732; *Roe* d. *Wren* v. *Clayton*, 6 East, 628; see also *Younge* v. *Coombe*, 4 Ves. 101; [*Dillon* v. *Harris*, 4 Bli. N. S. 329; *Re Kendall*, 14 Beav. 608; *Shawe* v. *Cunliffe*, 4 B. C. C. 144; *Doe* v. *Maxey*, 12 East, 589. It is to be collected from the cases that such referential expressions determine generally not *who* shall take a legacy, but *how* the legatees shall take. Where, for instance, a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and there follows a gift to the children of A., "in the same manner," all children of A. take whether living at that time or not. See *Yardley* v. *Yardley*, 26 Beav. 38; *Pigott* v. *Wilder*, ib. 90; *Wilder's Trusts*, 27 Beav. 418; *Re Colshead*, 2 De G. & J. 690. See, however, *Re Palmer*, 3 H. & N. 26, where a gift "for the benefit of a married woman and her children" by reference to her marriage settlement, was held to include a life interest for the husband, such as he had in the settled funds. In *Murton* v. *Markby*, 18 Beav. 196, a bequest of leaseholds upon the same trusts, &c., as those declared of the *monies to arise* by sale of property previously given upon trust for sale was held to subject the leaseholds to the trust for sale.

(*r*) 18 Jur. 445.

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[*worldly goods*:" it was held by Sir *W. P. Wood*, V. C., that the real estate was included in the gift of "worldly goods." "If," said the learned Judge, "we were to turn 'worldly goods' into 'personal estate,' it would not make the sentence read better. The second 'all' must refer to the same property as the first—viz. all that was given to the trustees, which certainly includes some premises to be quitted. There were no leaseholds as I am informed. If the premises are to be included in that word 'all,' then the 'all' here referred to must correspond with 'all the worldly goods' given to the other parties."

"Personal estates," held sufficient upon the context to pass realty.

Even the expression "personal estates" will carry realty if the testator has clearly shown his intention that it shall do so. As in *Doe* d. *Tofield* v. *Tofield* (*s*), where, after some pecuniary bequests and a particular devise of realty, the testator proceeded to give to his wife "all his stock, &c., ready money, &c. and *personal estates* whatsoever and wheresoever, subject nevertheless to the above legacies," during widowhood; but if she married she was to resign "all his *personal estates* to the after-mentioned legatees in manner following: first, he gave and bequeathed to J. the house and premises in which he the testator then dwelt, with the closes adjoining," to hold in fee; "and the remaining of his personal estates" to other persons in fee. The Court of K. B. were clearly of opinion that the wife took the real estates for her life.]

The preceding cases, in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

"Said house, goods and chattels," (omitting the word lands before used,) did not pass lands.

But in *Roe* d. *Walker* v. *Walker* (*t*), a testator devised to his wife a certain house, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life; and if his aforesaid wife should die before his sons H. and R. came to the age of fifteen, then that his *house, lands, goods and chattels*, that is to say, the rents arising from the same, should be employed in bringing them up, until the age of fifteen. The testator then declared his will to be, that his aforesaid *house, goods and chattels*, equally should be divided between all his sons and daughters that should be living at that time, share and share alike. It was held, that under the last devise, the lands did not pass.

Remark on

It will be observed, that, in *Doe* d. *Chilcott* v. *White*, and in

[(*s*) 11 East, 246.]
(*t*) 3 B. & P. 375. [Conf. *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89, 2 Jur. N. S. 372.

Doe v. *White*, *Den* v. *Trout*, and *Roe* v. *Walker*.

Den d. *Franklin* v. *Trout*, the word "effects" was used as synonymous with, and descriptive of the same subject as, the anterior expressions, which unquestionably comprised real estate; but in *Roe* v. *Walker*, the testator had in the third devise adopted precisely the same phraseology as in the first and second, with the omission of a single word, and that word the only one which applied to the land. It was too much, therefore, to infer that these words, with so material an omission, were intended to describe the same subject as the preceding expressions, however reasonable might be *the conjecture* that the omission was undesigned. If the testator in the third gift had used terms of description not exactly corresponding, so far as they went, with those of the preceding devises, the difficulty of adopting this construction might not have been so insuperable. It would not then have imposed upon the Court the necessity of treating the same words in the several gifts as descriptive of a different subject.

Words properly descriptive of personalty only, not extended to realty by ambiguous expressions.

[But though a devise in terms properly and primâ facie applicable to personalty only may thus embrace real estate where the context refers to, or otherwise speaks of the subject, or any part of the subject of the devise, in terms applicable exclusively to real estate; yet no such incontestable argument arises where the context contains words, which, though they properly comprehend real estate if a contrary intention is not shown by the will (*e. g.* property, estate), are nevertheless flexible and liable to be influenced by more precise terms of description. Thus, in the case of *Doe* d. *Haw* v. *Earles* (*u*), where one devised as follows: "I dispose of all my *effects* as follows:—all my household goods, live stock, furniture, plate, wearing apparel and other *effects* at this time in my possession, *or that* hereafter may become my *property*, to my wife:" and a second husband was to have no power of disposition over "any part of the property which was then or might thereafter be in his (the testator's) possession." *Platt*, B., admitting that the word "effects" alone could not include real estate, was induced by the context to think the testator had here used "effects" as synonymous with the word "property," and that real estate passed. But *Pollock*, C. B. and *Parke*, B., were of opinion that there was nothing in the will to extend the natural meaning of the word "effects," which they held meant personal things only. "He disposes of all his effects,"

[(*u*) 15 M. & Wels. 450.]

CHAPTER XXII. [said *Parke*, B., "*as follows*:—The words 'all my household goods, &c. and other effects now or hereafter to become my property,' carry the case no further; only such effects as are or may be his property pass." And the provision that the second husband should have no power of disposition over the property meant only, he thought, that whatever property was left to the wife should be for her separate use. "The property means only the property before devised, that is, effects merely."]

CHAPTER XXIII.

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.

Extent of words "Goods," "Chattels," "Effects," "Things."—Restrictive effect of Association with more limited Terms—Residuary Bequest—General Residue held to pass by word "Money," and other informal words.

THE word *effects* (*a*), and even the word *goods* (*b*), or *chattels* (*c*), will, it seems, comprise the entire personal estate of a testator, unless restrained by the context within narrower limits. Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles ejusdem generis; the specified effects being considered as denoting the species of property, which the larger term was intended to comprise; and this upon a principle, evidently analogous to that on which (as we have seen) the words "estate" and "property" have been confined to personalty, by their juxta-position with words descriptive of that species of property.

Word "effects," "goods," or "chattels," whether it comprises entire personal estate.

As in *Cook* v. *Oakley* (*d*), where the testator (who was a sailor on ship-board) gave to his mother if alive his gold rings, buttons and chest of clothes, and to his loving friend F. (a shipmate), his red box, arrack *and all things not before bequeathed*, and made him sole executor. Sir *J. Trevor*, M. R., held, that the testator's share in a leasehold estate did not pass by these words.

Words "and all things" restricted by prior terms of description.

The circumstance of a specific or pecuniary legacy being given to the same legatee (*e*), or of the general bequest being followed

[(*a*) Cowp. 299, 15 Ves. 507.]

(*b*) See *Portman* v. *Willis*, Cro. El. 386, where it was held that leaseholds passed under a bequest of "the residue of my goods." See also *Anon.*, 1 P. W. 267.

(*c*) Co. Lit. 118, a.; [*Tilley* v. *Simpson*, 2 T. R. 659, n., per Lord *Hardwicke*. In *Gower* v. *Gower*, Amb. 612, 2 Ed. 201, running horses were held to pass as "goods and chattels."]

(*d*) 1 P. W. 302; see also *Boon* v. *Cornforth*, 2 Ves. 278; *Cavendish* v. *Cavendish*, 1 B. C. C. 467; *Porter* v. *Tournay*, 3 Ves. 311; [*Hunt* v. *Hort*, 3 B. C. C. 311; *Re Ludlow*, 1 Sw. & Tr. 29.

(*e*) See p. 718, n. (*o*).]

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by dispositions of particular portions of the personal property to other persons, has commonly been considered to favour the supposition, that such bequest was not to comprise the general residue.

Word "*effects*" restrained by the context.

Thus, in *Rawlings* v. *Jennings* (*f*), where the testator gave to his wife certain Bank stock, together with all his "household furniture *and effects, of what nature or kind soever,*" that he might be possessed of at the time of his decease; and then bequeathed certain stock and money legacies to other persons, Sir *William Grant*, M. R., held, that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue; observing, that part of the property being given to her afterwards (*g*), the word "effects" must receive a more limited interpretation.

Remark on *Rawlings* v. *Jennings*.

The words here were very general, but the manner in which the testator, after making the bequest in question, had gone on to give specific and pecuniary legacies, (though he did not complete the disposition of his personal estate by a residuary clause,) seemed hardly reconcileable with the supposition, that the prior gift to the wife was intended to embrace the general residue, as it is more natural, though certainly not invariable, for a testator to reserve his residuary disposition until the end of his will (*h*). Had the decision rested solely on the bequest of the Bank stock to the wife, its soundness would have been questionable; for the argument, that the express gift of part shows that a legatee is not to take the remainder, admits of this answer, that the testator may have intended to place him in the favoured position of a specific legatee pro tanto (*i*).

Word "goods" restrained by the context.

[Again, in the case of *Wrench* v. *Jutting* (*k*), where a testator bequeathed "all his household furniture, plate, linen, china,

(*f*) 13 Ves. 39.

(*g*) But, according to the statement of the will in the report, the only other bequest to the wife is of the Bank stock, which is *anterior*; [see *Parker* v. *Marchant*, 1 Y. & C. C. C. 304, where Sir *J. K. Bruce*, V. C., observed upon this case, that perhaps the word "household" belonged to the word "effects" as much as to the word "furniture;" which would of course have a restrictive effect, *Marshall* v. *Bentley*, 1 Jur. N. S. 260; *Newman* v. *Newman*, 26 Beav. 220.]

(*h*) See 1 Russ. 149; [1 Y. & C. C. C. 301.]

(*i*) And, accordingly, see *Leighton* v. *Bailey*, 3 My. & K. 267, post; [*Hearne* v. *Wigginton*, 6 Mad. 119, post; *Brooke* v. *Turner*, 7 Sim. 671; *Rose* v. *Rose*, 17 Ves. 351.

(*k*) 3 Beav. 521. In *Collier* v. *Squire*, 3 Russ. 467, it was held, that stock did not pass under a bequest of the testator's house, with all his household furniture, plate, china, books, linen and every other *article* belonging to him, both in and out of his house, and which might not be in his will mentioned; the M. R. remarking that the testator could scarcely say of stock that it *might* not be mentioned or included in the articles specified.

[books, pictures and all other goods of whatever kind to A.," and then proceeded to direct that certain specified particulars of his property should be divided, after payment of his debts, as "follows: 50*l.* to B.; 100*l.* to C., &c.; 3,000*l.* to 4,000*l.*, or whatever remaining sum or sums, to A." Lord *Langdale*, M. R., said, that if the first clause had been the only one in the will, there would have been strong reason for extending the operation of the words "all other goods," &c.; but that the testator did not intend all his estate to pass was shown by his subsequently stating what were his intentions as to a particular part of it. Those words must, therefore, be restricted to goods ejusdem generis.

Remark on preceding cases.

In each of the two last cases, the dispositions of particular portions of the personal property, which followed the disputed clause, comprised a gift to the same person who was entitled under the first clause; that, at least, was the ground (however unsupported by the actual fact) upon which Sir *W. Grant* expressly went in the case before him, and where other persons are alone contemplated in the subsequent dispositions, the argument in favour of the restrictive construction is much weakened: for, as before observed, though the residuary clause is usually, it need not necessarily be the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it (*l*).]

Subsequent explanatory restrictive expressions.

A more forcible argument in favour of the restricted construction, however, occurs where the testator has added, to the equivocal words in question, terms descriptive of a particular species of property, which those words in their larger sense would comprehend (*m*). In such case, the adoption of the more comprehensive meaning would have the effect of rendering the super-

[(*l*) See *Rogers* v. *Thomas*, 2 Kee. 8; *Martin* v. *Glover*, 1 Coll. 269; *Arnold* v. *Arnold*, 2 My. & K. 365.

(*m*) In *Lewis* v. *Rogers*, 1 C. M. & R. p. 52, upon an assignment for the benefit of creditors of "all effects, stock, books and book debts," it was argued that "effects" must be confined to things ejusdem generis with those afterwards enumerated, but Lord *Lyndhurst*, C. B., seemed to deny the applicability of the rule to such a case, saying that the cases decided upon the rule were, where particular words were used, followed by general words; "in which case," added his Lordship, "the latter are held to extend only to matters ejusdem generis." But an examination of the authorities seems to show that neither the denial nor the subsequent statement of the rule are quite accurate.

Statement of the rule by Lord *Lyndhurst*.

An assignment of "all household goods, &c., and other estate and effects, of or to which" the assignor is "*then* possessed or entitled," or "belonging or due" to him, was held not to pass a contingent interest under a will, *Pope* v. *Whitcombe*, 3 Russ. 124; *Re Wright's Trusts*, 15 Beav. 367; but the ground of these decisions is distinct from that treated of in the text; see, too, *Ivison* v. *Gassiot*, 3 D. M. & G. 958.]

Assignment of goods to which assignor is *now* entitled, what passes.

added expression nugatory; and make the testator employ additional language, without any additional meaning.

Thus, in *Timewell* v. *Perkins* (*n*), where the will was in the following words:—"I give to M. T. all mortgages, ground rents, judgments, &c., *whatever I have or shall have at my death*, as plate, jewels, linen, household goods, coach and horses, for her use." Lord *Hardwicke* held, that goldsmiths' notes and bank bills did not pass under the bequest: for though there was no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which followed, "as plate, jewels," &c., confined and restrained them to things of the same nature; his Lordship observing, that it was so laid down in the case of *Strafford* v. *Berridge* (*o*).

"Goods, wearing apparel, of what nature and kind soever, except my gold watch."

So, in the case of *Crichton* v. *Symes* (*p*), where a testatrix bequeathed to A. and B., all her *goods*, wearing apparel, of what nature and kind soever, except her gold watch. Lord *Hardwicke* was of opinion, that the words were not intended to be a residuary clause; his Lordship observing, that the testatrix afterwards gave a legacy of 50*l.* to her executor, and that there was not the word *residue*. It had been insisted, he said, that the words "wearing apparel" explained the testatrix's meaning, as if she had said, all my goods, (to wit) my wearing apparel;" but wearing apparel must be construed the same as *and* wearing apparel, for there was no occasion to introduce wearing apparel, in order to except the gold watch, for if she had said "all my goods, except my gold watch," it would have done as well; and

(*n*) 2 Atk. 103; [and see per Sir *J. Romilly*, M. R., *Re Kendall*, 14 Beav. 611; contra, however, *Bridge* v. *Bridge*, 8 Vin. Ab. tit. Devise, O. b. pl. 13.

Principle in text applied to bequest of goods, &c., answering to a certain locality.

(*o*) Mos. 208,] 1 Eq. Ca. Ab. 201, pl. 14. A. bequeathed all his *goods*, chattels, *household* stuff, furniture, and *other things*, which were then, or should be, *in* his house at the time of his death. Decreed, that money in the house did not pass; for, by the words *other things*, should be intended things of like nature and species with those before mentioned; see also [*Sanders* v. *Earle*, 2 Ch. Rep. 98, cited in] *Anon.*, Finch, 8, where a bequest of all the goods and chattels, plate, jewels, household stuff and stock upon the ground, in and belonging to the testator's house in N., was held not to include a sum of money found in the house; *Roberts* v. *Kuffin*, 2 Atk. 113, where a bequest of all goods and things of every kind and sort whatever, which should be found in a certain closet, was held not to comprise a sum of money found in the closet; [and *Gibbs* v. *Lawrence*, 7 Jur. N. S. 134, 30 L. J. Ch. 170.] In *Sanders* v. *Earle*, and *Roberts* v. *Kuffin*, some stress was laid on the fact of a pecuniary legacy being bequeathed to the same legatee; [as to which, however, see ante, p. 716, n. (*i*). But a general gift of all in a certain locality "or elsewhere" includes the general personal estate, *Re Scarborough*, 6 Jur. N. S. 1166; and see *Swinfen* v. *Swinfen*, 7 Jur. N. S. 89.]

The several preceding cases illustrate the application of the principle stated in the text, to bequests of personal moveable property answering to a certain locality.

(*p*) 3 Atk. 61.

it was his opinion, that, as the words stood in the will, she intended to give only her wearing apparel, ornaments of her person, *household* goods and furniture, and no other parts of her personal estate; the testatrix here meant to give, not only what was properly clothes, but the ornaments of her person, and the exception of the gold watch showed the latitude of the expression.

In some instances, however, the argument in favour of the restricted construction, founded on subsequent expressions, descriptive of a particular species of property, has not been allowed to prevail against the force of the previous general words.

Subsequent expressions held not to be restrictive.

Thus, in the case of *Bennett* v. *Bachelor* (*q*), where a testator bequeathed unto P. (to whom he had before devised real estates, and had also given specific legacies) all his household goods, books, linen, wearing apparel and all other, not before bequeathed, *goods and chattels that he should be in possession of at the day of his decease*, except the plate and legacies before and thereafter given and bequeathed; and he also bequeathed to the said P. all monies due from his (the testator's) tenants, and other persons. Lord *Thurlow* held, that the whole residue passed by the bequest; observing, in reference to the latter words, that the testator might not know that the debts would pass by the words "goods and chattels."

Exception, where explanatory of doubtful words.

A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted.

Thus, in the case of *Hotham* v. *Sutton* (*r*), where A. having two sons and a daughter, B., C., and D., after bequeathing for

(*q*) 3 B. C. C. 29, 1 Ves. jun. 63; see also *Flemming* v. *Burrows*, 1 Russ. 276, post, p. 722.

(*r*) 15 Ves. 319. Compare this case with *Flemming* v. *Brook*, 1 Sch. & Lef. 318, where Lord *Redesdale*, on the authority of *Moore* v. *Moore*, 1 B. C. C. 127, held, that a bequest of "all my property, of whatever nature or kind the same may be, that may be found in A.'s house, except a bond of B. in my writing-box," did not pass a mortgage security, and another bond and certain bankers' receipts, which were in the house, on the ground, that choses in action had no locality for this purpose (a doctrine which is now well settled, 1 Ves. 273, 1 B. C. C. 127, 129, n.; [7 Beav. 1; but see 29 L. J. Ch. 486]); and his Lordship being of opinion that an exception in the will of one security was not sufficient evidence of the testator's intention to pass all the other choses in action.

Mortgage, bond, and bankers' receipts held not to pass as property *in a house*.

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their benefit, a sum of 12,700*l.*, Three per Cent. Consols, gave all the residue of her personal estate and effects to her youngest children, C. and D., as therein mentioned. A. on the day of making her will executed a codicil, and revoked so much of her will as related to the bequest to her son C., of a share of her "plate, linen, household goods, *and other effects, (money excepted,)*" and gave the whole thereof to her daughter. The question was, whether the revocation extended to the general residuary personal estate, or whether the words "and other effects" were not restrained by the prior terms to articles ejusdem generis. Lord *Eldon* decided in favour of the former construction. He observed, "The doctrine appears now to be settled, that the words "other effects" in general, mean effects ejusdem generis. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects ejusdem generis, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as ejusdem generis with plate, linen and household goods. The express exception of money out of the other effects shows her understanding, that it would have passed by those words; that express words were required to exclude it, and by force of that exclusion of the excepted article, she says, she thought the words of her bequest would carry things non ejusdem generis. This disposition must, therefore, be taken to comprehend all that she has not excluded, which is money only" (*s*).

"Household goods and other effects, money excepted."

[The converse of this case is where a testator has given certain things expressly "in addition to" or "besides" the equivocal bequest, which things would be comprised in such bequest if it received its more extended construction; the necessary conclusion is, that, according to the testator's understanding of the terms he has used, the additional things are not included in the general bequest. Thus, in *Steignes* v. *Steignes* (*t*), where the testator gave to his wife, "besides all moveables, plate, jewels, pictures, linen, &c. (except three books of miniatures and his whole library), 6,000*l.* South Sea Stock:" Sir *J. Jekyll*, M. R., said, that by the bequest of 6,000*l.* stock, besides all the moveables, the testator had shown, that, in his understanding of the

Express addition to doubtful words is restrictive.

[(*s*) See also *Bland* v. *Lamb*, 2 J. & W. 399, 409; *In re Crawhall's Trusts*, 2 Jur. N. S. 892, 895; *Reid* v. *Reid*, 25 Beav. 469; cf. *Re Hull's Estate*, 21 Beav. 314.

(*t*) Mos. 296.

[word, "moveables" would not comprehend stock. The consequence was, that though the word, if unrestrained by the context, would take in the whole purely personal estate, yet here it must be confined to corporeal moveables, to the exclusion of all matters of a like nature with the stock. Moreover, the testator had given away his debts in another clause (*u*).

Lord *Eldon's* statement of general rule.

But to return:] it will be observed, that Lord *Eldon*, in the case of *Hotham* v. *Sutton*, lays it down, that the words "other effects," in general, mean effects ejusdem generis (*x*); but such a position seems scarcely to accord with some subsequent decisions about to be stated; one of which, it will be seen, was determined by the same learned Judge who decided *Rawlings* v. *Jennings* (*y*), which case certainly carried the restricted construction to its extreme point; and probably was in Lord *Eldon's* view, when he advanced the above dictum.

"And all effects whatsoever," not restricted by association with more limited terms.

Thus, in the case of *Campbell* v. *Prescott* (*z*), where a testator gave to his sons A. and J. all his sugar-house, cupola and merchandize stock, with jewels, plate, household goods, furniture *and all effects whatsoever*, and appointed them executors; Sir *W. Grant*, M. R., held, that the whole personalty passed under this clause; remarking, that there was no case for the restrictive sense attempted to be put upon the words "all my effects whatsoever."

"Plate, &c., and effects that I shall die possessed of."

So, in the case of *Michell* v. *Michell* (*a*), Sir *J. Leach*, V. C., held, that the personal estate of a testator passed under a bequest of all and singular his plate, linen, china, household goods, and furniture (*b*), *and effects that he should die possessed of.* His

[(*u*) The M. R. also said that the words "plate, jewels, pictures, linen," would not confine the generality of the word "moveables," though they were only corporeal things, for "&c." must signify, et cætera mobilia. Nor was the sense of it restrained by the exception. But though "et cetera" will not confine (see *Kendall* v. *Kendall*, post, p. 723), it will not enlarge, previous expressions, its meaning being, other things ejusdem generis, *Newman* v. *Newman*, 26 Beav. 220; or things appertaining to or connected with what was previously mentioned, *Twining* v. *Powell*, 2 Coll. 266.

(*x*) So per Lord *Redesdale*, *Stuart* v. *Marquis of Bute*, 1 Dow, 84, 87; but the position is questioned by Sir *J. K. Bruce*, V. C., in *Parker* v. *Marchant*, 1 Y. & C. C. C. 295.]

(*y*) Ante, p. 716.

(*z*) 15 Ves. 503.

(*a*) 5 Mad. 69.

(*b*) The words "household goods," or "furniture," will include pictures hung up, and plate and house linen; [Amb. 605, 2 P. W. 419, 5 Russ. 312;] unless these words are used elsewhere in the will in contradistinction thereto; Pre. Ch. 251; [also tenant's fixtures, unless affixed to the freehold, 10 Sim. 186, Mos. 112, 1 P. W. 94; and prize medals, coins and trinkets, if framed and hung, or otherwise disposed for ornament, 21 L. T. 40, 5 Russ. 321; but not books, 3 Atk. 201, Amb. 605; [Mos. 112;] or wines [or other consumable articles;] 3 Ves. 311; [3 P. W. 334;] or goods belonging to the testator in the way of, [or used in carrying on], trade; 2 P. W. 302, 1 Ves. 97, Amb. 611; [7 D. M. & G. 55; or farming stock, 3 Jo. & Lat. 727, 29 L. J. Ch. 875; but in *Cornewall* v. *Cornewall*, 12 Sim. 303, Sir *L. Shadwell* held that books were articles of domestic

"Household goods," "furniture," and "household effects."

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Honor considered, that this construction of the word "effects" was aided by the subsequent words, "that I shall die possessed of," and observed, that the expression was not household goods, furniture and effects; but "household goods *and* furniture *and* effects," which imported a distinct sense in the word "effects."

"Spoons, &c., to A., and all other effects to B."

[And in *Hearne* v. *Wigginton* (*c*), before the same Judge, where, after giving several pecuniary legacies, a testator bequeathed his wearing apparel to A.; and to B. and C. two large silver spoons, one silver cream jug, six tea-spoons, one pair silver buckles; *and all his other effects* he willed to D. to be sold for his benefit: D. was held to be clearly entitled to the general residue; and that, although some of the particulars comprehended in it were not strictly speaking the subject of sale.]

"Or whatever else I may then be possessed of."

Again, in the case of *Flemming* v. *Burrows* (*d*), where a testator, after commencing his will with the words "As for such temporal estate as God in his mercy hath bestowed upon me, I give and dispose of the same as followeth;" devised certain lands to his natural son D., adding, "likewise my furniture, plate, books, and live stock, *or whatever else I may then be possessed of at my decease*, also my shipping and ropery concerns at W. and H.," he paying the debts. It was contended that these words were to be confined to articles ejusdem generis with those specified before, i. e. furniture, &c., with which they stood immediately

"Live and dead stock."

"Moveables."

"Plant and goodwill."

[ornament: now, this being the ground on which pictures are included in the word "furniture," that word ought also to include books, but it does not; so that Sir *L. Shadwell's* opinion is of doubtful authority. Of course books will be included in a bequest of furniture, if the testator's intention so to do can be collected from the will, *Ouseley* v. *Anstruther*, 10 Beav. 462; see also *Cole* v. *Fitzgerald*, 3 Russ. 301. And under the terms "household furniture, implements of household and articles of vertu," telescopes have been held to pass, 2 De G. & S. 425; as to a bust quære, 1 Beav. 189.] The words "household furniture and other household effects," it seems, extend to all that is in the house for use, consumption or ornament, and have been held to comprise pistols, apparatus for turning, models, pictures, organ, parrot, books, wines and liquors, but not a pony or cow, or a fowling-piece, unless used for domestic defence; [*Cole* v. *Fitzgerald*, 1 S. & St. 189; *S. C.* on appeal, 3 Russ. 301, and n.; *Stone* v. *Parker*, 29 L. J. Ch. 874; nor articles exclusively of personal ornament, 2 Kay & J. 635. But the circumstance that the article has been sent away for repair or sale, will not exclude it, 2 Jur. N. S. 514.] As to the words "live and dead stock," see 3 Ves. 311, 3 Mer. 190; [12 Beav. 357.] Growing crops, it seems, will pass under a bequest of stock of a farm, 6 East, 604, n.; or stock upon a farm, 8 East, 339; [but see 5 Russ. 12;] and see 1 Roper on Leg., by White, 249. ["Moveables," unrestrained, will take in all pure personalty, Mos. 296; and articles *temporarily* removed from a place will pass as articles *in* that place, 4 B. C. C. 537; but not articles permanently removed, 3 Mad. 276, 21 Beav. 548, 1 Jur. N. S. 250; nor articles intended to be, but never yet, taken thither, 2 De G. & S. 425. Under a gift of "plant and goodwill," the house of business held at rack-rent was decided to pass, *Blake* v. *Shaw*, 1 Johns. 732.

(*c*) 6 Mad. 119; see also *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17; *Baker* v. *Mason*, 2 Jur. N. S. 539.]

(*d*) 1 Russ. 276; see also *Sutton* v. *Sharp*, ib. 145.

associated, and also on the ground of their being followed by the mention of specific articles, which were already included, if the previous words amounted to a general residuary gift; but Lord *Gifford*, M. R., held, on the authority of and the reasoning in *Bennett* v. *Bachelor* (*e*), that these circumstances were inadequate to restrain the generality of the bequest.

"Monies, goods, &c., my property, which may remain," &c.

And, in the case of *Kendall* v. *Kendall* (*f*), where a testator, after bequeathing to his wife an annuity, proceeded thus:—"I also bequeath to my said wife all monies, goods, chattels, clothing, &c., my property which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death." Sir *J. Leach*, M. R., held that the residue, which consisted principally of stock, passed by these words; his Honor considering, that the words "clothing," &c., did not qualify the preceding general words.

"Wines and property."

[In *Arnold* v. *Arnold* (*g*), the testator, who was in India and made his will there, "bequeathed to his wife 1,000*l.*; also his wines and property in England," and gave other legacies. Lord *Cottenham*, then M. R., held that all the testator's property in England (which was found by the Master to consist of wines, stock, cash at his banker's, and other particulars), went to the wife. It was obvious, said his Lordship, that the mere enumeration of particular articles, followed by a general bequest, did not of necessity restrict the general bequest, because a testator often threw in such specific words, and then wound up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted.

"Jewels, plate, &c., and other goods."

Lastly, in *Parker* v. *Marchant* (*h*), where a testator concluded his will with the following clause: "And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines and other goods, chattels and effects whatsoever as her own goods and chattels for ever. And I do hereby appoint my said wife sole executrix of this my will." Sir *J. Knight Bruce*, V. C., referring to the rule laid down by Lord *Eldon* in *Church* v. *Mundy* (*i*), declared that the wife was entitled to the general residue under the above clause. The learned Judge, amongst other reasons aiding his conclusion, adverted to

(*e*) Ante, p. 719.

(*f*) 4 Russ. 360. [See also *Avison* v. *Simpson*, 1 Johns. 43.

(*g*) 2 My. & K. 365.

(*h*) 1 Y. & C. C. C. 290; see also *Stratton* v. *Hillas*, 2 D. & War. 51, a very special case. Where the expression which follows the specific enumeration is unambiguous, as "all other the rest of my *personal estate*," there is still greater difficulty in limiting its meaning, *Martin* v. *Glover*, 1 Coll. 269.

(*i*) 15 Ves. 406, stated ante, p. 628.

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[the circumstance that the general terms followed the specific. A contrary order, however, does not necessarily lead to a contrary result: for in *Fisher* v. *Hepburn* (*k*), where a testator expressed himself as follows: "As to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china and furniture, I give, devise and bequeath the same to my wife, for her own use and benefit;" Sir *J. Romilly*, M. R., held the wife entitled to the general residue. "The latter words," he said (*l*), "are not words of restriction; they are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a *videlicet*, a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles." The case here referred to by the M. R. was probably that of *Bridge* v. *Bridge* (*m*), where a testator, after bequeathing certain legacies, gave the remainder of his estate, viz., his Bank stock, India stock, and S. S. stock and S. S. annuities, to A., and made him sole executor." Lord *King* held that the words under the *videlicet* did not restrain the general words, "but were added by way of enumeration or description of the main particulars whereof the estate consisted; and the rather, because immediately after follow the words, 'and I do hereby make him sole executor.'"]

Special terms *following* the general, not necessarily restrictive.

Defective enumeration.

General remark on preceding cases.

These cases indicate the disposition of the Judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context, for considering them as used in a special and restricted sense.

It is to be observed, however, that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favour of the restricted construc-

[(*k*) 14 Beav. 627.

(*l*) Citing Sir *W. Grant*, *Cambridge* v. *Rous*, 8 Ves. 26.

(*m*) 8 Vin. Abr. Devise, O. b., pl. 13; and see *Chalmers* v. *Storil*, 2 V. & B. 222; *Nicholas* v. *Nicholas*, Taml. 269; *Ellis* v. *Selby*, 7 Sim. 352; *Everall* v. *Browne*, 1 Sm. & Gif. 368; *Choyce* v. *Ottey*, 10 Hare, 443; *Banks* v. *Thornton*, 11 Hare, 176; *Re Goodyar*, 1 Sw. & Tr. 127, 4 Jur. N. S. 1243; see also *Reeves* v. *Baker*, 18 Beav. 372; *Armstrong* v. *Buckland*, ib. 204; see, however, per Sir *J. Romilly*, M. R, *In re Kendall*, 14 Beav. 611. In *Att.-Gen.* v. *Wiltshere*, 16 Sim. 38, the general terms, "all the property of which I am possessed," were held to be restricted to property in a particular place by force of the context, especially by the sentence "the property above referred to is at A." And in *Wylie* v. *Wylie*, 29 L. J Ch. 341, 6 Jur. N. S. 259, the generic term was restricted by its being described as "in ready money and bank billets." See also *Slingsby* v. *Grainger*, 7 H. of L. Ca. 273, 28 L. J. Ch. 616, 5 Jur. N. S. 1111.]

tion, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective.

Effect where will also contains general residuary clause.

To this ground may be referred the case of *Woolcomb* v. *Woolcomb* (*n*), where the testator gave to his wife all the furniture of his parsonage house, and all his plate, household goods, *and other goods*, (except books and papers,) and all his stock within doors and without, and all his corn, wood, and other goods, belonging to his parsonage house; and gave the residue of his personal estate to J. The question was, whether ready money, cash, and bonds, should pass to the wife. It was contended, that the devise of all the testator's goods should carry all his personal estate; omnia bona being words of the largest extent and signification, with regard to personals. To which it was answered, that if the devise of all the testator's goods were to be taken in so large a sense, it would disappoint the bequest of the residue; that the words "other goods" should be understood to signify things ejusdem generis with *household* goods, in order that the whole will might take effect. And of that opinion was Lord Chancellor King.

[So again in the case of *Lamphier* v. *Despard* (*o*), where a testator, after devising certain real estates to his wife, bequeathed to her "all his household furniture, plate, house-linen, and all other chattel property that he might die seised or possessed of;" and after giving various legacies the testator appointed A. his executor and residuary legatee; Lord *St. Leonards*, then Chancellor of Ireland, said that the latter words must be held to mean all other chattel property ejusdem generis; and he partly relied on the subsequent residuary gift. His Lordship was also of opinion, however, that the words would clearly not pass money; so that the clause could not be a general bequest of the entire personal estate.

Effect of a general bequest of residue.

A residuary gift of personal estate (*p*) carries not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee: for a testator is supposed to give his personalty away

(*n*) 3 P. Wms. 112, Cox's ed.; [see *Marks* v. *Solomons*, 19 L. J. Ch. 555.

(*o*) 2 D. & War. 59; see also *Stuart* v. *Marquis of Bute*, 1 Dow, 73; *Barrett* v. *White*, 24 L. J. Ch. 724, 1 Jur. N. S. 652; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Gibbs* v. *Lawrence*, 7 Jur. N. S. 134, 30 L. J. Ch. 170.

(*p*) As to real estate see ante, p. 610.

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[from the former only for the sake of the latter (*q*). It has been said, that, to take a bequest of the residue out of the general rule, very special words are required (*r*), and accordingly a residuary bequest of property "not specifically given," following various specific and general legacies, will include lapsed specific legacies (*s*). And a gift of all a testator's personal estate, *except* certain specific sums of stock and money, followed by a bequest of those particulars, was held, in *Evans* v. *Jones* (*t*), to include some of the specific legacies which had failed. And in *James* v. *Irving* (*u*), where the bequest was of "everything real and personal, &c., *except* the S. shares, which were not to be sold until after the death of A:" Lord *Langdale*, M. R., held, that the exception of the shares was only for the purpose of postponing the sale, and that they passed by the bequest.

So, in *Markham* v. *Ivatt* (*x*), a gift of "all the residue of testatrix's freehold and leasehold hereditaments, estate and premises, whatsoever and wheresoever, not thereinbefore otherwise disposed of," was held not to be confined by a previous direction, that a reversionary interest in certain specified leaseholds, should "form the residue of her leasehold estates," but that other leasehold property also passed thereby. And in *Bernard* v. *Minshull* (*y*), where, under a general power of appointment (*z*), a married woman bequeathed the whole fund to her husband, but requested him after reserving a specified part for his own use, to dispose of the rest as would best carry out her wishes often expressed to him; and then bequeathed all other her property to her husband. The trust having failed for uncertainty, it was held that the husband was entitled not only to the sum which he was specially allowed to reserve, but also under the residuary clause to the entire remainder of the fund.

What will suffice to exclude any portion of the personalty from a residuary gift.

However, if the words of the will are sufficient to show that the testator intended the residuary bequest to have a limited effect, it scarcely requires any authority to prove that the presumption in favour of the residuary legatee will be effectually

[(*q*) Per Sir *W. Grant*, *Cambridge* v. *Rous*, 8 Ves. 25; see also *Leake* v. *Robinson*, 2 Mer. 393; *Reynolds* v. *Kortwright*, 18 Beav. 427.

(*r*) Per Lord *Eldon*, *Bland* v. *Lamb*, 2 J. & W. 406; see also *Cunningham* v. *Murray*, 1 De G. & S. 366, rev. on app. 12 Jur. 547.

(*s*) *Roberts* v. *Cooke*, 16 Ves. 451; see also *Clowes* v. *Clowes*, 9 Sim. 403.

(*t*) 2 Coll. 516.

(*u*) 10 Beav. 276; see also *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17; *Sheffield* v. *Lord Orrery*, 3 Atk. 286; *Thompson* v. *Whitelock*, 4 De G. & J. 490.

(*x*) 20 Beav. 579.

(*y*) 1 Johns. 276.

(*z*) Vide ante, p. 650.

[rebutted; the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

In *Davers* v. *Dewes* (*a*) a testator gave part of his plate to A., and declared that he intended to dispose of the residue thereof, and of the goods and furniture in C. house, by a codicil; he then bequeathed the residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil, to A. The testator made two codicils without disposing of the reserved articles, but Lord Chancellor *King* was of opinion that being expressly reserved to be disposed of by a codicil, those articles could not pass by the devise of the residuum by the will.

Again, in the case of *Attorney-General* v. *Johnston* (*b*), where, after giving legacies to a considerable amount, the testator gave to a hospital 100*l.*, "that is, if there remained enough of his personal estate to satisfy it; but if not, or in case there remained but little, then the 100*l.* to the hospital should not be paid; and the *small remainder* of his personal estate should be left to his executor," in trust for charity schools; "so as it was likewise his will, that if his personal estate should sufficiently reach towards satisfying all the legacies by him bequeathed and above mentioned, that his said executor should also dispose of the remainder in favour of" the charity schools. Lord *Camden*, C., held that legacies to a large amount which had lapsed did not pass by the residuary bequest. He looked upon the bequest to be specific, contingent, and conditional; that is, "In case my estate turns out to pay all my other legacies, and there should be a little more, then I give that little."

Lastly, in the case of *Wainman* v. *Field* (*c*), (which on account of the similarity of the *form* of the bequest to that in *Evans* v. *Jones* (*d*), well illustrates the rule,) a testator bequeathed to trustees all his personal estate, (except such parts as were particularly disposed of, "and also except such leasehold estates as he should be entitled to at his decease; which leasehold estates he declared it to be his intention to exonerate from the payment of his debts and legacies,") upon trust to pay debts, funeral expenses, and legacies; "and in case there should be any residue of his said personal estate (except as aforesaid) beyond what

[(*a*) 3 P. W. 40. See also *Ludlow* v. *Stevenson*, 1 De G. & J. 496, (gift of "property not otherwise disposed of" restricted by context.)

(*b*) Amb. 577.

(*c*) Kay, 507; see also *Russell* v. *Clowes*, 2 Coll. 648.

(*d*) 2 Coll. 516, referred to ante.

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[should be sufficient for the payment of his said debts and legacies," he gave the same to A. The will then contained a devise of the testator's freehold estates, and a bequest of his leaseholds, which was void for remoteness: and the question being whether the leaseholds passed by the residuary bequest, Sir *W. P. Wood*, V. C., held that they did not. "The rule," said the learned Judge, "must be to ascertain whether or not the exception is merely for the purpose of making the particular bequest. In this case it cannot be for the sole purpose of devising the leaseholds to other persons; it is also expressly to prevent the trustees taking them upon the trusts of the will:"—"and if I were to hold the contrary, I must decide that, the bequest having failed by reason of remoteness, the leasehold estate must be brought back into the trusts of the residue, of which the first is to pay the debts and legacies, whereas the testator has said in the preceding clause that it is to be exonerated from the payment of those debts and legacies."

Effect of failure of bequest of an aliquot portion of residue.

It is to be remembered that when the disposition of an aliquot portion of the residue itself fails from any cause, such portion will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of. In illustration of this well-settled rule it will suffice to mention the case of *Skrymsher* v. *Northcote* (*e*), where a testator gave his residuary estate equally between his two daughters; but in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave 500*l.* to H., and "the remainder of that moiety" to the other sister. The testator revoked the gift of 500*l.* without making any fresh disposition of it, and Sir *T. Plumer*, M. R., held that it went to the next of kin. "Residue," said his Honor, "means all of which no effectual disposition is made by the will, *other than* the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole."

So in case of a gift of the "residue" of a definite sum.

Upon an analogous principle, where a testator is dealing with a fund which he estimates at a certain amount, it is indifferent whether, after disposing of certain portions, he specifies the

[(*e*) 1 Swanst. 566; see also *Lloyd* v. *Lloyd*, 4 Beav. 231; *Green* v. *Pertwee*, 5 Hare, 249; *Humble* v. *Shore*, 7 ib. 247; *Gibson* v. *Hale*, 17 Sim. 129; *Simmons* v. *Rudall*, 1 Sim. N. S. 115; *Mitford* v. *Reynolds*, 1 Phill. 185; as to which last case, however, see 16 Sim. 105.

[remainder by stating its amount, or by comprising it under the term "residue." In either case, if the disposition of any portion fails, it will lapse, and not pass as part of the "residue" (*f*).

Secus, where the amount is unascertained;

But when the fund is unascertained the exception cannot apply, and the general rule as to the comprehensiveness of a residuary bequest prevails. For example, where a testator, having a power over a fluctuating sum of stock, appointed portions of it to different persons, and gave the residue, after deducting the legacies given thereout, in trust for his son; the fund being subject to debts, and the amount it would produce by a sale uncertain till it was sold, Sir *J. Romilly*, M. R., held the gift of the residue to be not specific, but merely residuary, and subject to all the incidents of a common residue (*g*).

or the gift appear to be residuary in its nature.

And, generally, unless some special reason can be found in the will for a contrary construction, a particular residue will embrace lapsed bequests in the same way as a general residue. And, therefore, in *De Trafford* v. *Tempest* (*h*), where a testator gave to his widow certain chattels which, at his decease, might be at, or in, or about his house, at T., and bequeathed to his son all his household and other furniture, plate and chattels, not thereinbefore otherwise disposed of, which at his decease might be at, in or about his said house; and afterwards bequeathed his residuary estate to other persons: it was held by the Master of the Rolls that chattels, whereof the bequest to the testator's widow had lapsed, fell into the particular residue and passed to his son.]

"Residue," whether confined to particular fund.

Sometimes it has been a question, whether the word "residue" comprises the general personal estate, or is confined to the undisposed-of portion of a certain property or fund, which the testator had just before made applicable to specific and partial purposes.

As in the case of *Boys* v. *Morgan* (*i*), where the testator, after bequeathing certain property to E. M., and directing her to avoid expenses in his funeral, added, "I guess there will be found sufficient in my bankers' hands to defray and discharge my debts,

[(*f*) *Easum* v. *Appleford*, 5 My. & Cr. 56; *Page* v. *Leapingwell*, 18 Ves. 463; *Wright* v. *Weston*, 26 Beav. 429. According to *Hunt* v. *Berkley*, Mos. 47, the lapsed legacy would pass by a general residuary bequest in the same will.

(*g*) *Petre* v. *Petre*, 14 Beav. 199.

(*h*) 21 Beav. 564, and see *Vivian* v. *Mortlock*, 21 Beav. 252; *Booth* v. *Alington*, 6 D. M. & G. 613; *Mitchell* v. *M'Isaac*, 18 Jur. 672. So also in the case of appointments under powers, *Re Harries' Trust*, 1 Johns. 199.]

(*i*) 3 My. & Cr. 661; see also *Crooke* v. *De Vandes*, 9 Ves. 197, [11 Ves. 330. The cases of *Wilde* v. *Holtzmeyer*, 5 Ves. 811, *Wilson* v. *Wilson*, 11 Jur. 794, and *Holford* v. *Wood*, 4 Ves. 76, are examples of a restricted construction of the words "all I am possessed of," "remainder," and "personal estate;" see also *Att.-Gen.* v. *Goulding*, 2 B. C. C. 428.]

which I hereby desire Mrs. E. M. to do, *and keep the residue for her own will and pleasure.*" Lord *Cottenham* decided, that the word "residue" was not (as contended) confined to the fund in question; his Lordship being of opinion, that he was precluded from so limiting the term by the context of the will; from the whole of which it appeared, that the testator had assumed that the legatee would be the person interested in the bulk of his estate; and his Lordship also adverted to the direction to pay the debts, which were by law a charge on the general estate, out of the fund in question.

As words, in themselves the most general and comprehensive, may, we have seen, be narrowed by their juxta-position with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context, to embrace the general residue. In several instances, the word "money" (*k*) (which is often popularly used in a vague and inaccurate sense, as synonymous with *property*), has received this construction. [As where a testator has himself referred to stock specifically bequeathed as money, a bequest of "surplus

Word "money" held to extend to general residue.

"Money," to what it extends.

"Ready money."

"Cash."

(*k*) In its strict acceptation, "money" will, it seems, extend to bank notes, Ambler, 280; and no doubt to Exchequer bills and other documents payable to bearer; probably also to bills of exchange indorsed in blank, 1 B. & P. 648, 651, 4 B. & Ald. 1; and see 1 Rop. on Leg., by White, 252; [and it was held in *Shelmer's case*, Gilb. Eq. Rep. 200, that money lent on mortgage passed by a bequest of "money belonging to a testatrix at her death:" for "money," said *Gilbert*, C. B., "is a genus that comprehends two species, viz. ready money and money due, i. e., the money in the owner's own hands, and his money in the hands of anybody else." But money in the hands of a stakeholder to abide an event which does not happen in the testator's lifetime, will not pass by a bequest of his "money" in a will, 7 D. M. & G. 55.] In *Moore* v. *Moore*, 1 B. C. C. 127, it was held, that a bequest of "all my goods and chattels in Suffolk" did not comprise bonds in the testator's house, which was in that county, they having no locality for this purpose, though constituting bona notabilia. [And, since all choses in action (except Bank of England notes, Amb. 68; 7 Sim. 671; but not excepting country bank notes, 7 Sim. 671) are equally incapable of acquiring a locality, 7 Beav. 1, it follows that none of the choses in action mentioned above as ordinarily included in the term "money," can pass by a bequest of money in a particular place. Although money at a banker's is in fact a debt due from the banker, 2 H. of L. Ca. 31, and will pass under a bequest of "debts," 1 Mer. 541, n.; 1 Phill. 361; 16 M. & Wels. 321; yet the terms "ready money," or "money in hand," do also sufficiently describe such money, and generally will pass it, 1 Jur. 401, 1 Y. & C. C. C. 290, 1 Phill. 356; 5 Russ. 12; but not money in the hands of an agent, 1 Y. & C. C. C. 290; 3 Jo. & Lat. 565 (see however 11 Sim. 55, and 23 L. J. Ch. 496); nor unreceived dividends on stock, the warrants for which have neither been received nor demanded, 3 De G. & S. 462. Money in a banker's hands on a deposit account, whether originally withdrawable at pleasure, on producing the deposit note, or after expiration of notice to withdraw, will also pass by a bequest of "money," or "ready money," 7 D. M. & G. 55, 1 Johns. 49.

"Cash" is a stricter term than money. In *Beales* v. *Crisford*, 13 Sim. 592, it was held that a promissory note, payable to order, was not included in "cash or monies so called" (i. e. "cash or money commonly called cash.") Nor would it pass as "ready money," 1 Johns. 49.

[money" will include an undisposed-of interest in the same stock (*l*). The question has most frequently arisen where the residue has consisted wholly or chiefly of stock in the public funds, and the result has generally been due either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money;" or, secondly, where he has shown a clear intention to make a complete disposition of all his personalty, and that intention can only be effectuated by adopting the enlarged interpretation of the word "money." For it is clear that if the word be used without any explanatory context, it will be construed in its strict sense (*m*): à fortiori, if the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property in question. As where an officer on service, after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson, it was held that a reversionary interest in stock did not pass (*n*).

Where testator has charged funeral ex-

Of the first class of cases alluded to, we have an instance] in *Legge* v. *Asgill*(*o*), where a testatrix, after bequeathing 200*l.*

[(*l*) *Newman* v. *Newman*, 26 Beav. 218.

(*m*) See *Shelmer's case*, Gilb. Eq. Rep. 202; *Hotham* v. *Sutton*, 15 Ves. 327; *Gosden* v. *Dotterill*, 1 My. & K. 56; *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17; *Lowe* v. *Thomas*, Kay, 369, affirmed 5 D. M. & G. 315; *Larner* v. *Larner*, 3 Drew. 704; *Cowling* v. *Cowling*, 26 Beav. 449; and, accordingly, it has been held that a legacy of stock does not come within the description of a "pecuniary legacy," *Douglas* v. *Congreve*, 1 Kee. 410: though in *Barclay* v. *Maskelyne*, 5 Jur. N. S. 12, stock legacies were held upon the context to be within a clause revoking "all monies bequeathed" to the legatees.]

"Securities for money."

But the words "securities for money" will include stock in the funds even without the aid of the context, 4 Ves. 725; 1 S. & St. 500; [1 Jur. 234; 21 L. J. Ch. 843,] but as to Bank stock, quære, ib.; [certainly, however, they will not include shares in an insurance, 21 L. J. Ch. 843, or canal company, 10 Beav. 547; nor an I O U given for goods sold, 1 Jo. & Lat. 475; 23 L. J. C. P. 137; but a bill of exchange or promissory note is a "security for money" in the legal and proper sense of the words, per Sir *E. Sugden*, C., ib.; (see, however, as to a promissory note 4 Y. & C. 572): so, also, a policy of assurance on the life of a debtor is a "security," and will pass as a "debenture," 1 Ll. & Go. 291.

"The funds."

"The funds," or "the public funds" generally means funded securities guaranteed by the government as consols, reduced annuities, long annuities, 27 L. J. Ch. 448; and "foreign funds" has been held to mean securities guaranteed by foreign governments, 23 Beav. 543. But "funds" will not include Bank stock, 7 H. of L. Ca. 273, 2 Jur. N. S. 1176, 25 L. J. Ch. 573; 28 ib. 616, 5 Jur. N. S. 1111; nor East India stock, under 3 & 4 Will. 4, c. 85, 4 Kay & J. 704; nor unfunded Exchequer Bills, 8 L. J. O. S. Ch. 38; unless there is nothing more appropriate to answer the bequest, 16 Beav. 300. As to Irish government debentures, see 2 D. & War. 239.

(*n*) *Borton* v. *Dunbar*, 1 Gif. 221, affirmed 6 Jur. N. S. 1128, 30 L. J. Ch. 8.]

(*o*) T. & R. 265, n., [and cited 4 Russ. 369.

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penses on "money."

Long Annuities amongst several persons in specific legacies, proceeded to give a debt of 2,935*l.* due to her, to A. for her separate use; and added, "*I believe there will be sufficient money to pay my funeral expenses,*" which she desired might be plain. The testatrix afterwards made a codicil to her will, commencing with the following words:—"*If there is any money left unemployed,* I desire it may be given in charity. My watch and piano-forte I give to C. The most useful of my clothes to be given to my present servant," and she concluded with some directions respecting the key of a trunk. The question was, whether the general residue, including the reversion of one-fourth of a sum of 10,000*l.* secured by a settlement, passed by these words. Lord *Eldon* considered, that under the will, and especially having regard to the charge of the funeral expenses, the word "money" was intended to comprise the entire personal estate; and his Lordship was of opinion, that it was impossible to put a different construction upon the same word in the codicil.

[So, in *Rogers* v. *Thomas* (*p*), where a testatrix, after giving various pecuniary and specific legacies, "bequeathed to the inhabitants of T. Row *all which might remain of her money* after her lawful debts and legacies were paid; and she went on to give other specific and pecuniary legacies: Lord *Langdale*, M. R., considered the charge of debts and legacies sufficient evidence of the testatrix's intention to include the general residue in the bequest of "all which might remain of her money."

Where there is a bequest of legacies, and a gift of the residue of testator's *monies.*

Indeed, the authorities seem to decide that wherever a will contains bequests of legacies chargeable on the general residue, and there follows a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not *expressly* charged the legacies on his "money." Thus, in] *Dowson* v. *Gaskoin* (*q*), where a testatrix, after bequeathing certain specific and pecuniary legacies, concluded her will as follows: "I appoint A. and B. my executors, and bequeath 200*l.* to each for their trouble, and whatever remains of money I bequeath to E. D.'s five children." At the date of the testatrix's will and of her death, her personal estate consisted principally of stock, which, it was contended, would not pass under the word "money;" but Lord *Langdale* observed

[(*p*) 2 Kee. 8; see also *Kendall* v. *Kendall*, 4 Russ. 360; *Phillips* v. *Eastwood*, 1 Ll. & Go. 291; *Barrett* v. *White*, 1 Jur. N. S. 652, 24 L. J. Ch. 724; *Grosvenor* v. *Durston*, 25 Beav. 99; *Stocks* v. *Barré*, 1 Johns. 54. But this principle will not govern cases where the bequest following such charge is of *ready* money, *Re Powell*, 1 Johns. 49.

(*q*) 2 Kee. 14.

that the [words "whatever remains of money" must signify a remainder at some time, or after some operation upon the sum of which the remainder was contemplated. Was it to be the sum existing at the date of the will, or the remainder of that sum, or of any subsequent sum which might exist at the death of the testatrix, or after payment of her debts and legacies? There was no intimation that she intended the money (literally so called) to be first applied in payment of debts and legacies; and no reason could be given why the Court was to apply it first, or to make an apportionment for the purpose of wholly or partially defeating what seemed to be the intention of the testatrix. And he decided that the stock in question passed by the will (*r*).

Not if there be a distinct residuary bequest;

But the inference to be drawn from the charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money" (*s*): and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge. Thus, in the case of *Willis* v. *Plaskett* (*t*), where a testatrix made her will as follows: "I first direct my funeral expenses to be paid, and the remainder of what monies I die possessed of to be equally divided between A. and B. I also give to the said A. all my wearing apparel, trinkets and all other property whatsoever and wheresoever that I may die possessed of:" Lord *Langdale*, M. R., thought that, having regard to the latter part of the will, he was prevented, notwithstanding the direction for payment of his debts, from giving to the word monies its extended meaning. Here, besides the distinct residuary bequest, there was a separate bequest of specific chattels, (and that not by way of exception from the gift of "monies" (*u*),) showing that the testatrix did not intend to include her whole personal estate in that gift.]

—— or other

So, in the case of *Hastings* v. *Hane* (*x*), where a testator, after

[(*r*) See also *Lynn* v. *Kerridge*, West's Ca. t. Hardwicke, 172, (a strong case, as there was there a general residuary bequest); *Lowe* v. *Thomas*, 5 D. M. & G. 319; *Langdale* v. *Whitfield*, 4 Kay & J. 426, 436. These cases appear to overrule *Gosden* v. *Dotterill*, 1 My. & K. 56.

(*s*) Per Sir *J. Leach*, M. R., in *Collier* v. *Squire*, 3 Russ. 475.

(*t*) 4 Beav. 208; and see *Woolcomb* v. *Woolcomb*, 3 P. W. 112, stated ante, p. 725. But see and consider *Chapman* v. *Reynolds*, 29 L. J. Ch. 594, 6 Jur. 440, especially with reference to the weight there attributed to the fact that the testatrix had no "money" in the strict sense. Vide post, p. 736, n. (*f*).

(*u*) See per Sir *G. J. Turner*, L. J., *Lowe* v. *Thomas*, 5 D. M. & G. 317.]

(*x*) 6 Sim. 67.

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bequeathing certain specific and pecuniary legacies, directed A. and B. to "divide equally any monies which may remain *to my account* after payment of the aforesaid sums and my debts." It appeared that the testator had certain accounts with his bankers and other persons; and Sir *L. Shadwell*, V. C., held that the bequest was confined to the balances owing to the testator on these accounts, and did not comprise the general residue, observing that he was bound to give a meaning to the words "to my account."

Indication of a contrary intention.

Where there is a clear intent to dispose of the whole personal estate.

[The second class of cases indicated above is illustrated by the case of *Waite* v. *Coombes* (*y*), where a testator, after declaring himself desirous of making a settlement of his affairs, appointed A. and B. his "executors to take and receive all *monies* that might be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if necessary, to be by them placed in the British funds or otherwise laid out" upon security and held in trust: Sir *J. Parker*, V. C., thought the whole will pointed to a complete disposition of the personal estate, and that, at all events, a sum of consols in question in the cause passed under the word "monies." It was argued that the direction "to place in the British funds" proved that the testator could not have meant to include the consols in the bequest of "monies," that direction being wholly inapplicable to them; but the V. C. thought, that to consider that this direction destroyed the generality of the word "monies," as applicable to the stock, would be to take advantage of a slip of the testator in wording his will, while his meaning was obvious; that if he intended his executors to invest monies not then invested à fortiori he must have intended monies which he had himself invested to pass by the will, if the words were sufficient to carry them, as he (the V. C.) thought they were (*z*).

Unless forbidden by the context.

But here again it is to be observed, that if the context clearly shows that the word is used in its strict sense, it will not receive the more popular construction, merely on the strength of even an expressed intention to dispose of all the estate.] Thus, in the case of *Ommanney* v. *Butcher* (*a*), where a testator, after commencing his will in the following form: "I, A. B., considering in what manner I should have my fortune disposed of, in case

[(*y*) 5 De G. & S. 676.

(*z*) But the mere fact of "money" being so disposed of, (e. g. to one for life, with limitations over,) as to necessitate an investment, will not suffice to extend the natural purport of the word, *Lowe* v. *Thomas*, Kay, 369, 5 D. M. & G. 315; *Larner* v. *Larner*, 3 Drew. 704.]

(*a*) T. & R. 260.

of my death, do make this my will:"—bequeathed numerous stock, and a few money legacies; and after disposing of some books and other specific articles, he directed the remainder of his books, and his jewels, plate and household furniture to be sold; and desired that his clothes and linen might be divided between his servants: he then gave a small pecuniary legacy to his executors; and added, "*in case there is any money remaining*, I should wish it to be given in private charity." Sir *T. Plumer*, M. R., was of opinion, that the concluding clause did not comprehend the general residue; but was to be considered as applying to the residue of the produce of those articles which the testator had directed to be sold, after providing for the payments which were ordered to be made. The clause directing the sale and the clause disposing of the "money" did not stand in immediate connection; [and the M. R. owned there was difficulty in knowing what the testator meant: but he relied on the circumstance, that, up to a certain extent, all the dispositions in the will were legacies of stock; the testator therefore had distinguished where he meant stock to be the subject of his disposition, and the context showed that in the clause in question he was not adverting to the stock. To construe the word "money" to mean stock would be to alter the words of the will contrary to the context.

Other cases of the extended use of "money."

The modes in which a testator may attach a particular meaning to the word "money" are, of course, infinite. In the case of *Glendening* v. *Glendening* (*b*), where a testator bequeathed to his wife "the interest of his money and the use of his goods (*c*) for her life:" at her death he gave various pecuniary legacies, "and the remainder of his property to be equally divided between his brothers and sisters; his wardrobe to be equally divided between his brothers:" Lord *Langdale*, M. R., held that the wife was entitled to a life interest in the general residue (consisting of money in the funds, a small sum of cash and a few chattels), except the wardrobe (*d*). "He gives the interest of the money," said the learned Judge, "and the use of his goods to his wife for life; and at her death he gives certain pecuniary

[(*b*) 9 Beav. 324. See also *Whateley* v. *Spooner*, 3 Kay & J. 546.

(*c*) No reliance appears to have been placed by the Court on this word.

(*d*) The distinct gift of the wardrobe, not by way of exception from the money, would have been an argument for a contrary conclusion (see ante, p. 733), if the rest of the will had not, in the opinion of the M. R., made the intention manifest.

[legacies, and the remainder of his property to his brothers and sisters. What is the time to which he here refers? I think that, looking at the structure of this will, it refers to the wife's death."

Whether the nature of the residuary property affects the meaning of the word "money."

In none of the cases has it actually been decided that the word "monies" will, by force of the context, include leaseholds or specific chattels, such as horses, plate and the like. But it cannot be doubted, but that where the testator has, upon the face of his will, shown an intention to use the word in the enlarged sense, property of that species must be comprised in it, unless he has also by the same means afforded evidence that he intended to enlarge the meaning of the word only to a more limited extent (*e*). This is a necessary consequence of the general rule, that the state of a testator's property cannot be looked at for the purpose of putting a construction upon his will (*f*), and is, moreover, supported by the observations of Lord *Eldon*, addressed to the particular subject in *Gaskell* v. *Harman* (*g*).]

Informal words held to pass general residue.

Other cases may be adduced, in which the general residue of a testator's personal estate has been held to pass under very informal words. As in *Leighton* v. *Bailie* (*h*), where a testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after funeral expenses, &c., paid, to give to W. B., now at school, towards equipping him to any profession." By another testamentary paper she bequeathed the sum of 500*l.* to W. B. It was held by Sir *J. Leach*, M. R., that under the indorsed memorandum, W. B. was the general residuary legatee.

[Again, in *Hodgkinson* v. *Barrow* (*i*), a testator, having several children by different marriages, gave his real and personal estate to trustees, upon trusts that did not exhaust the whole interest, but "confiding in them to fulfil any memorandum he might attach" to his will: by a codicil, after reciting the settlement made on his second marriage, "he directed that whatever sums might come to the children of that marriage, or the children of his former marriage, with the exception of such sums as

[(*e*) *Langdale* v. *Whitfield*, 4 Kay & J. 426, 436.

(*f*) See ante, p. 394; *Gosden* v. *Dotterill*, 1 My. & K. 56; and per Sir *R. Kindersley*, V. C., *Barrett* v. *White*, 1 Jur. N. S. 652, 24 L. J. Ch. 724. Secus, if the bequest be specific, *Gallini* v. *Noble*, 3 Mer. 691.

(*g*) 11 Ves. 504.]

(*h*) 3 My. & K. 267; [see *Surtees* v. *Hopkinson*, 18 L. J. Ch. 188; *Wiggins* v. *Wiggins*, 2 Sim. N. S. 229; *Duhamel* v. *Ardovin*, 2 Ves. 162.

(*i*) 2 Phill. 578.]

[might come in right of their respective mothers, that his trustees would take the whole of his real and personal property into their consideration, and have an estimate made"—"and his will was to divide to every child its due share and proportion, also taking into consideration" monies received by the children by way of advancement. Lord *Cottenham* held, reversing the decision of the V. C, that the reversionary interest in the real and personal property passed by the codicil.]

CHAPTER XXIV.

FORCE AND EXTENT OF PARTICULAR WORDS OF DESCRIPTION.

"Tenements and hereditaments," include what.

THE most comprehensive words of description applicable to real estate are *tenements* and *hereditaments;* as they include every species of realty, as well corporeal as incorporeal (*a*).

"Lands."

The word "lands" is not equally extensive; for though, generally, it includes as well the surface of the ground as every thing that is on and under it, as houses and other buildings (*b*), mines, &c., yet it seems that the term will not, proprio vigore, comprehend incorporeal hereditaments, as advowsons, tithes, &c., unless there is no other real estate to satisfy the words of the devise (a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial). Thus, it seems that if a man devise all his lands in A. and he has no other real estate there than tithes, they will pass (*c*). So if he devises a certain manor, and has only a fee farm rent issuing out of it, such rent will pass (*d*).

Whether it includes houses.

But though a devise of *lands* will, unaided by the context, carry *houses* (*e*), or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses the term in contradistinction to *house*.

As where (*f*) A. having a messuage at L. and a messuage and lands at W. devised his house at L. with all other his lands, meadows, pastures, with their appurtenances, lying in W., the house at W. was held not to pass.

The observation is equally applicable to other words of description, any of which may be diverted from their ordinary signification, by being placed in contrast or opposition to others (*g*).

[(*a*) Co. Lit. 6 a, 19 b, 20 a, 154 a.]
(*b*) *Ewer* v. *Heydon*, Moore, 359, pl. 491.
(*c*) See *Ritch* v. *Sanders*, Styles, 261.
(*d*) *Inchley* v. *Robinson*, 2 Leon. 41, pl. 57.
[(*e*) Co. Lit. 4 a.]
(*f*) *Heydon's Will*, 2 And. 123; [*S. C.* nom. *Ewer* v. *Heydon*, Cro. El. 476, 658.]
(*g*) See *Hockley* v. *Mawbey*, 1 Ves. jun. 143; and *Doe* d. *Ryall* v. *Bell*, 8 T. R. 579, stated post, p. 751.

"Premises."

The word *premises* properly denotes that which is before mentioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers (*h*). Thus (*i*), where a testator devised a certain messuage and the furniture in it to A. for life, and after A.'s decease, gave the said messuage *and premises* to B., the latter devise was held to carry the furniture as well as the messuage to B., on the ground that the word *premises* included all that went before. [But the word is popularly used, without reference to what is before mentioned, in the general sense of houses, land and the like; and accordingly, in *Doe* d. *Heming* v. *Willetts* (*k*), *Wilde*, C. J., said he thought that it would be sufficient to pass land.]

"Messuage."

The word *messuage* has been variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

In an early case (*l*) it is laid down, that the grant of a messuage did not include a garden, but was confined to the house, "and the circuit thereof," and it was thought that the words "messuage or tenement" must receive the same construction, the word "tenement" being in such case used as synonymous with messuage; it was said, however, that it would have been otherwise if the expression had been messuage *and* tenement; indeed, one of the Judges (*Weston*) expressed an opinion, that a garden would pass by the name of a messuage *or* tenement, if they had been held together.

[But in the case of *Carden* v. *Tuck* (*m*), a devise of a messuage was held to include the garden as well as the curtilage, the garden being, as was said, as well for necessity as pleasure; and

(*h*) *Doe* d. *Biddulph* v. *Meakin*, 1 East, 456. This doctrine was advanced in the judgment, and is indeed unquestionable; but the case did not turn precisely on the question. A. devised a messuage or tenement, lands, buildings and premises, then in his own possession, and all other his real estate whatsoever, to his wife for life. And after her decease, he devised *the said messuage or tenements, buildings, lands and premises*, to his son W. in fee. The question was, whether the devise to W. included all that was given to the wife, or only the premises in his own occupation; and it was held, that it included all. The point, therefore, was not so much, whether the word "premises" included the whole antecedent subject, as whether the testator, having used precisely the same words as those by which he had described the property in his own occupation, was not to be understood to mean to confine the devise in question to that property. If the devise were not so restrained, there were other words sufficient to carry the reversion in dispute, without calling in aid the word *premises*.

(*i*) *Sanford* v. *Irby*, [4 L. J. Ch. O. S. 23,] cor. Lord *Gifford*, M. R.; [see *Doe* d. *Bailey* v. *Sloggett*, 5 Exch. 107.

(*k*) 7 C. B. 709; and see *Ross* v. *Veal*, 1 Jur. N. S. 751; *Lethbridge* v. *Lethbridge*, before the Ls. Js., March 16th, 1861, not yet reported.]

(*l*) Moore, 24, pl. 82, [Dal. 29.

(*m*) Cro. El. 89; *S. C.* nom. *Chard* v. *Tuck*, 3 Leon. 214, pl. 283.

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[again, in *Smith* v. *Martin* (*n*), the Court held that a garden might be said to be parcel of a house, and by that name would pass in a conveyance.]

In *Hearn* v. *Allen* (*o*), two acres of land [occupied with the messuage, but distant four miles from it,] were held *not* to pass under a devise of a messuage cum pertinentiis. On the other hand, in *Gulliver* d. *Jefferies* v. *Poyntz* (*p*), two closes of meadow and six acres of arable land were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, &c., that stands upon or belong to the said messuages." The property had, it seems, been conveyed to the testator by the description of "a messuage or tenement with the appurtenances;" but it is clear, that extrinsic evidence of this nature was inadmissible to enlarge the established import of the words of the devise (*q*). The influence which this circumstance appears to have had in the determination certainly weakens its authority, and it is probable that the same construction would not now be adopted. At this day, indeed, the distinction suggested in the early cases (*r*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on (*s*); and it is clear, that even the word messuage would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it (*t*).

"House."

"House I live in and garden."

In *Doe* d. *Clements* v. *Collins* (*u*), it was held, that under a devise of "the house I live in and garden," stables and a yard, which were in a ring fence that inclosed the whole, and a coal pen which was on the opposite side of the road near the house, and both which were in the testator's own occupation, were included. The coal pen was used in his trade, as well as for the purposes of his family. It was admitted, that the question as to the coal pen was doubtful; but, considering that it was in the testator's own occupation, was used by him partly for domestic

[(*n*) 2 Saund. 400; see also *Hill* v. *Grange*, Plowd. 170 a; *Bettisworth's case*, 2 Rep. 32 a; *Lord Grosvenor* v. *Hampstead Junction Railway Company*, 1 De G. & J. 446.]

(*o*) Cro. Car. 57; *S. C.* Litt. Rep. 5, nom. *Kene* v. *Allen*.

(*p*) 2 W. Bl. 726, 3 Wils. 141.

(*q*) *Doe* d. *Brown* v. *Brown*, 11 East, 441, ante, p. 387.

(*r*) *Thomas* v. *Lane*, 2 Ch. Ca. 26, Keilw. 57, where it is said that *messuage* extends to the curtilage, though not to the garden; but that *domus* comprises only buildings.

(*s*) See Mr. Justice *Ashurst's* judgment in *Doe* d. *Clements* v. *Collins*, 2 T. R. 502; [and Co. Lit. 5 b, where Lord *Coke* says, "By the grant of a messuage *or* house, *messuagium*, the orchard, garden and curtilage do pass; and so an acre or more may pass by the name of a house."]

(*t*) See *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375; also Shepp. Touchst. 94.

(*u*) 2 T. R. 498; [*Ashurst*, J., seems to treat the case as if the word "appurtenances" had been in the will; see ib. p. 502.]

purposes, and was annexed to no other tenement, the Court thought it passed.

Case in which "house" was held to include land.

There is indeed a case (*x*), in which a devise of the testator's house at C. was held to include land; on the ground, it should seem, that the devisee was directed to be at the charge of house-keeping, servants' wages and coach-horses, to the number that the testator had maintained; and it appearing that he had a small piece of land, which he had employed to raise hay and corn for the house, and which was ploughed with the coach-horses (*y*). The Court, therefore, thought that as everything was to be carried on as it was in his lifetime, and the same style of living observed, the lands, the profits whereof had been used to be applied to the maintenance of the house, should continue to be so applied.

However strong these circumstances may be as affording conjecture, they seem not to amount to that species of evidence on which to found a judicial exposition of the testator's intention (*z*).

Direction to erect mansion house held to include formation of suitable grounds.

[But where a testator directed his trustees to erect a mansion house, and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot, the question being whether this will authorized the formation of a garden and pleasure grounds; Sir *L. Shadwell*, V. C., said that, knowing something, as he did, of what the residence of a country gentleman ought to be, it would be the grossest of all possible absurdities if it were to be held that a bare mansion house and offices, erected out of a muddy field, should be considered a fit residence for the owner of such an estate. And he thought there must of necessity be accommodation in the way of pleasure grounds, and a pretty approach in which every English eye took a delight (*a*).

"House," "cottage," what amounts to.

So much for the comprehensiveness of the word house. The converse question is, what kind of tenement will satisfy this and other similar terms. In the case of *Doe* d. *Hubbard* v. *Hubbard* (*b*), it was held, that the word "cottage" (defined by Lord *Coke* (*c*) to be a little house without land to it) was satisfied by a tenement partitioned off from a larger cottage and having a

(*x*) *Blackborn* v. *Edgley*, 1 P. W. 600, 2 Eq. Ca. Ab. 324, pl. 27.

(*y*) The Court assumed that there was a direction that the horses should continue to plough the lands; but the will, as stated in the report, contains no such clause.

(*z*) See 2 B. & P. 308.

[(*a*) *Lombe* v. *Stoughton*, 18 L. J. Ch. 400.

(*b*) 15 Q. B. 227.

(*c*) Co. Litt. 56 b. "A cottage is a small dwelling-house," *Doe* v. *Sotheron*, 2 B. & Ad. 638.

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[separate entrance, though not including an upper room under the same roof.]

"Appurtenances."

It has been sometimes a question what will pass under the denomination of *appurtenances* to a messuage or house. [Appurtenances, strictly so called (*d*), pass without being mentioned, with the things to which they are appurtenant; according to the maxim "accessorium sequitur suum principale" (*e*). But many things are not, in this strict sense, appurtenant which have, nevertheless, been allowed to pass as such, under an express gift of "appurtenances" in a will (*f*). Thus, in the case of *Boocher* v. *Samford* (*g*), where a testator devised "the tenement with the appurtenances in which H. B. dwelleth in Ebley," it was held, that lands that had been held with the house sixty years passed, though not strictly appurtenant.]

In *Doe* d. *Lempriere* v. *Martin* (*h*), a devise of the testator's copyhold messuage, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., and then in his own possession, was held to include a small piece of land, being the site of several cottages pulled down by the testator, who had laid the ground open to his court yard, and then occupied it with the house, though his estate in the two was different.

Gardens, &c., held to pass as "appurtenances" to a house.

But in a subsequent case (*i*), a direction by the testator that his steward should enjoy his mansion-house, *with the appurtenances*, for one year after his death, was held to extend to orchards, but not to fifty or sixty acres of land, which the testator had kept in his own hands with the house. And this construction was corroborated by the fact of there being, in another part of the same will, a devise of this property "with the lands and grounds," showing that the testator had the distinction in view. *Eyre*, C. J., seemed to think that without this additional ground, if they had found a house situated in a park, which had been always occupied with it, being, as it were, an integral part of the thing, it might have proved the intention of the testator to pass the whole together.

This would be carrying the construction of the word very far. At all events, it is not to be doubted, that whatever is necessary

[(*d*) Co. Lit. 121 b.
(*e*) Co. Lit. 151 b, 152 a.
(*f*) So also in a deed, *Doe* d. *Norton* v. *Webster*, 12 Ad. & El. 442; per *Tindal*, C. J., *Hinchcliffe* v. *Kinnoul*, 5 Bing. N. C. 25; though perhaps with less latitude than in a will, *Ongley* v. *Chambers*, 1 Bing. 496, per Lord *Gifford*; *Bryan* v. *Weatherhead*, Cro. Car. 18, per *Hobart*, C. J.
(*g*) Cro. El. 113.]
(*h*) 2 W. Bl. 1148; but see *Hearn* v. *Allen*, Cro. Car. 57, 708.
(*i*) *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53; see also *Harwood* v. *Higham*, Godb. 40.

to the commodious enjoyment of the house will in general pass under the word "appurtenances (*k*);" à fortiori, if then actually enjoyed with it by the person in whose occupation the house is described to be; though in some of the cases more weight has been given to this circumstance than it seems fairly entitled to. It is not likely that at this day the word would be carried beyond its ordinary acceptation (*l*).

"Lands appertaining to" a house, &c.

[There is, however, a difference between the devise of a house and the *appurtenances*, and of a house with the *lands appertaining thereto*, and a wider signification is due to the latter than to the former expression. For although lands cannot properly be appurtenant to a house (*m*) or to other lands (*n*), yet it is clear, from the expression itself, that *some* lands are intended, and therefore the primary sense of the word being inapplicable, it becomes necessary to resort to a popular or secondary sense. Thus, in the case of *Hill* v. *Grange* (*o*), (which was a decision on a deed, and therefore a stronger case than if the instrument were a will,) it was held that the demise of a messuage, "with all lands appertaining thereto," comprised all lands usually occupied with or lying near to the messuage; for when "appertaining" was placed with the said other words, it could not be taken in any other sense, and therefore it should there be taken, not according to the true definition of it, because that did not stand with the matter, but in such sense as the party intended it. And in *Hearn* v. *Allen* (*p*), the Court, while holding that the lands in dispute were not included by the term "cum pertinentiis," said it would have been otherwise if it had been "cum terris pertinentibus."]

"Thereunto belonging."

The construction of the words "thereunto belonging" has come under discussion in several recent cases.

Thus, in *Ongley* v. *Chambers* (*q*), where a testator devised the

(*k*) See *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Hobson* v. *Blackburn*, 1 My. & K. 571; [for this purpose, however, the word is altogether unnecessary, *Hinchcliffe* v. *Kinnoul*, 5 Bing. N. C. 1, 6 Scott, 650, and the cases already cited. Compare *Worthington* v. *Gimson*, 29 L. J. Q. B. 116, 6 Jur. N. S. 1053.

(*l*) See *Doe* d. *Norton* v. *Webster*, 12 Ad. & Ell. 442; *Pheysey* v. *Vicary*, 16 M. & Wels. 494; *Evans* v. *Angell*, 26 Beav. 202.

(*m*) Plowd. 169 a, 170. A fortiori, if one be freehold and the other copyhold, *Yates* v. *Clincard*, Cro. El. 704.

(*n*) Co. Lit. 121 b; 8 B. & Cr. 141; 6 Bing. 161.

(*o*) Plowd. 170 a.

(*p*) Cro. Car. 57, ante, p. 740; see also *Gennings* v. *Lake*, Cro. Car. 168; *Higham* v. *Baker*, Cro. El. 16, per *Anderson*, C. J.]

(*q*) 8 J. B. Moo. 665, 1 Bing. 483; see also *Doe* v. *Holtom*, 5 Nev. & M. 391, 4 Ad. & Ell. 76; [*Bodenham* v. *Pritchard*, 1 B. & Cr. 350. In *Marshall* v. *Hopkins*, 15 East, 309, a house and nineteen acres of land, all held by the testator under one title, and which at a former period of his ownership had been, but at the date of the will were not, in one and the same occupation,

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rectory or parsonage of Minster, with the messuages, lands, tenements, tithes, hereditaments and all and singular other the premises *thereunto belonging*, with the appurtenances; it was held that, by the effect of these words, the devise operated on certain lands which had been purchased by the owners of the rectory between the years 1607 and 1632, and had been since uninterruptedly occupied with it, and had been in various leases described as belonging to the rectory; for though not, strictly speaking, appurtenant to the rectory, they had become, by unity of title and concurrent occupation, joined to the rectory, and might be taken in popular acceptation as belonging thereto. Lord *Gifford*, C. J., referred to several old cases and text books in which it was laid down that lands, which had been occupied with a house for ten or twelve or even five or six years, might pass as parcel of or as belonging to such house.

Devise of manor and lands thereunto belonging.

So, in the case of *Doe* d. *Gore* v. *Langton* (*r*), where a testator, in 1801, devised all his "manor or reputed manor of Barrow Minchin, in the county of Somerset, together with the mansion-house, called Barrow Court, thereto belonging, and the park; and also all and singular his freehold messuages, lands, tenements and hereditaments *thereunto belonging*, situate in the parish of Barrow Minchin and Barrow Gurney," to certain uses. The testator gave to his executors all arrears of rent which should be due from any tenant or tenants of his *estate in the parish of Barrow*, upon trust to lay out the same in repairing the farm-houses and buildings appurtenant thereto, and in draining the lands. The testator also charged two small annuities on *his estate at Barrow*. The question was, whether the devise comprised a farm, which had been purchased by the testator in 1800, and which was situate in the parish of Barrow Minchin and Barrow Gurney, and adjoined to and was in some parts intermixed with the ancient Barrow estate. Lord *Tenterden*, C. J., considered that the words "thereunto belonging" were to be referred to the manor, and not to the park. These words are, he observed, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or a field with reference to the ownership, we say it belongs to such a one, meaning thereby that it is the property of that person; if with reference to any estate of a particular name, we say it belongs

[were held to pass by a devise of "all that my messuage, dwelling-house or tenement, with all lands, hereditaments and appurtenances thereto belonging."]

(*r*) 2 B. & Ald. 680.

to such an estate, as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in and a part of that parish or township; and so with reference to a manor, we say it belongs to such a manor, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word "part," and not in the strictly legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof. His Lordship adverted to the fact (which had been proved in evidence), that the gamekeeper of the manor had, both before and after the purchase of the lands in question, been in the habit of shooting over them. Having regard to this circumstance, (which he considered important, as showing that the lands belonged to the manor in the popular sense to which he had alluded,) and having regard also to the circumstance, that the bequest of the rents in arrear to be expended in repairing and improving any part of the estate, and the charge of the annuities, would clearly comprise the lands in question, (which the testator could not intend to be united to the rest of the property for some purposes, and not for all,) his Lordship and the rest of the Court came to the conclusion that the farm in question passed.

"Thereto adjoining."

[In the recent case of *Josh* v. *Josh* (*s*), the question was what passed by the description of "the piece of land adjoining" a house and premises previously described; whether it comprised several contiguous fields, each one situated beyond the other, and forming with the house and premises the whole of the testator's real property, or was limited to the single field next to the house and premises: and it was held to comprise the whole. *Cockburn*, C. J., in the course of his judgment, observed that the testator did not say the piece of *my* land, but simply the piece of land; and that the words "thereto adjoining" were as consistent with the larger construction as with the other; for the whole of the land was in the strictest sense adjoining, for it was all contiguous.]

"Farm."

The word *farm* is construed according to its obvious meaning, [as including houses, lands and tenements (*t*), of every tenure (*u*).

Falsa demon-

In determining what property is comprehended in the terms

[(*s*) 5 C. B. N. S. 454.
(*t*) Co. Lit. 5 a.
(*u*) *Doe* d. *Belasyse* v. *Lucan*, 9 East, 448.

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stratio non nocet.

[used to describe the subject of devise, frequent recourse is had to two rules of construction, one of which is expressed by the maxim "Falsa demonstratio non nocet cum de corpore constat," the other by the maxim "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."

Meaning of the rule.

The first rule means that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only (*x*)."

Devise of "freehold houses in A. street, London." The word freehold rejected.

Thus, in the case of *Day* v. *Trig* (*y*), where one devised "all his freehold houses in Aldersgate-street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass.

"House called 'the corner house' in A., in the tenure of B." The tenure rejected.

So, in the case of *Blague* v. *Gold* (*z*), where a testator, having two houses in A., one called "The Corner House," in the tenure of B. and N., the other adjoining thereto and in the tenure of H., devised "his house called 'The Corner House' in A., in the tenure of B. and H.:" the testator having no house in the joint tenure of B. and H., it was held that the description by tenure was mere surplusage and might be rejected.

Leaseholds misdescribed as freehold held to pass.

Again, in the case of *Doe* d. *Dunning* v. *Lord Cranstoun* (*a*), where a testator recited that one part of his *freehold* lands, namely, those lands which he held in the parishes of A., B. and C., were held for a considerable period of time by his father's ancestors in the male line, bearing the name and arms of D., as hereditary proprietors of the same; he therefore devised "the *freehold* lands, which he held in the three parishes aforesaid," to M. The testator had lands in each of the three parishes named, answering to the given description in every respect ex-

[(*x*) Per *Alderson*, B., *Morrell* v. *Fisher*, 4 Exch. 591; see also Wigram, Wills, pl. 67.

(*y*) 1 P. W. 286, vide ante, p. 646.

(*z*) Cro. Car. 447, 473.

(*a*) 7 M. & Wels. 1; see also *Welby* v. *Welby*, 2 V. & B. 187; *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366; *Vicars Choral of Lichfield* v. *Eyres*, Sir W. Jo. 435, Cro. Car. 546, 2 Roll. Ab. 52, pl. 26. So in *England* v. *Downs*, 2 Beav. 523, 536, where there was an assignment of all the household goods, and all other the effects of the assignor, the particulars whereof were stated to be set forth in an inventory thereunto annexed, and there was in fact no inventory, it was held, the deed was not void for want of it, and that the chattels might be ascertained aliunde. See also *Whateley* v. *Spooner*, 3 Kay & J. 542.

[cept that in the parishes of B. and C. there were leaseholds only. Upon the principle stated above, the Court of Exchequer held that the leaseholds passed by the will.

Extension of the rule.

In the application, however, of the principle contained in this rule, the Courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the facts of the case, that of two particulars of which the description is composed, though each, separately considered, finds some corresponding subject, yet] the one is applicable to a larger portion of the testator's property than the other, thereby raising the question whether the more limited term be restrictive of the other, [or expressive only of a suggestion or affirmation. The question is one more of construction than of law; for it is clear that, if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description.

Question where parts of the description are not co-extensive.

Limited term rejected where property is described as an entire subject;

Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his *farm* called A., or his *house* in a particular place, or his B. estate, or the like, then, although he adds a clause to the effect that the farm, house or estate is in the occupation of a particular tenant, or is situate in a particular county, and it turns out that such clause is true only of a part of the farm, or house, or estate, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent of the testator (*b*).]

—as "my farm."

Thus, in the case of *Goodtitle* d. *Radford* v. *Southern* (*c*), where a testator devised all that his farm, called *Trogues Farm*, situate in the parish of D., *now in the occupation of A. C.* The question was, whether two closes, part of *Trogues Farm*, but *not* in the occupation of A. C., passed by this devise. It was held that the devise comprehended the whole of *Trogues Farm*, which was a plain and certain description, and was not affected by the defective description of the occupation.

So, in *Down* v. *Down* (*d*), where A. devised all his farm and lands, called *Colt's-foot Farm*, situate in or near the parishes of D., W. and T., *now on lease to Mary Field, at the yearly rent of* 150*l.* It was held that a close of seven acres, called *Williamspring*, which was a part of *Colt's-foot Farm*, but was excepted

[(*b*) See per Lord *Ellenborough*, *Roe* d. *Conolly* v. *Vernon*, 5 East, 80.]

(*c*) 1 M. & Sel. 299; see also *Paul* v. *Paul*, 2 Burr. 1089, 1 W. Bl. 255.

(*d*) 1 J. B. Moo. 80, 7 Taunt. 343.

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out of *Mary Field's* lease, as well as out of a subsequent lease granted by the testator to another person, passed (*e*); the Court being of opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the occupation of *Mary Field*.

Distinction where the reference to the occupancy precedes that to the name.

But though a devise of "my farm called A. in the occupation of B." is not, under these circumstances, limited to that part of the farm which is in the occupation of B., yet perhaps it does not follow that the same construction would be given to a devise of "all my farm in the occupation of B. called A." In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of *Woodden* v. *Osbourn* (*f*), where A., having lands called *Hayes* Lands, which extended into two vills, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes* Lands, to J. S., it seems to have been held that the part which was in *Cranfield* did not pass. Unless a reference to locality be more restrictive than a reference to occupation (*g*), this case seems to warrant the distinction suggested. [It is to be observed, however, that *Popham*, C. J., and *Gawdy* and *Yelverton*, JJ., went on to say, that if the words had been "all his lands called *Hayes* Lands, in the parish of *Cokefield*," (thus reversing the order,) nothing had passed but the land in *Cokefield* (*h*). And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation is discountenanced by the case of *Doe* d. *Beach* v. *Earl of Jersey* (*i*).

Where subject of devise described as "a house" fol-

Next, with regard to the devise of a "house," it was decided in *Chamberlaine* v. *Turner* (*k*), where a testator devised "the house or tenement wherein W. N. dwelt, called the White Swan,

(*e*) The farm consisted of about 172 acres.

(*f*) Cro. El. 674; see also *S. C.* nom. *Tuttesham* v. *Roberts*, Cro. Jac. 22; and Lord *Ellenborough's* judgment in *Roe* d. *Conolly* v. *Vernon*, 5 East, 78. The principal point in the case in *Croke* seems to have been whether the Hayes Lands, being so restricted in the devise to J. S., was subject to the same restriction in a subsequent devise of it as *Hayes* Lands generally; and the decision, of course, was in the affirmative. As to words of description being narrowed by the effect of the general context, see *Doe* d. *Harris* v. *Greathed*, 8 East, 91.

(*g*) See *Doe* d. *Beach* v. *Earl of Jersey*, 1 B. & Ald. 559. stated infra.

[(*h*) In *Stukeley* v. *Butler*, Hob. 171, it is said "it is vain to imagine one part before another; for though words can neither be written nor spoken at once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence;" see also *Doe* v. *Galloway*, 5 B. & Ad. 50.

(*i*) 1 B. & Ald. 550, 3 B. & Cr. 870.

(*k*) Cro. Car. 129. The court seems to have treated the case as if the words had been "in the occupation of W. N.," which might perhaps be restrictive, where the terms actually used would not; see per Lord *Hardwicke*, 3 Atk. 9; see also *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 227, per *Erle*, J., and Lord *Campbell*, C. J.

[in Old-street," and it appeared that W. N. occupied only the entry or alley of the said house and three upper rooms in the same, divers other persons occupying other parts, that the whole house passed.

lowed by terms applicable to part only.

An instance of the similar use and effect of the word "estate" is presented by the case of *Doe* d. *Beach* v. *Earl of Jersey* (*l*), where A. devised all that her "*Britton Ferry* estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereunto belonging, and of which the same consists." In a subsequent part of the will, after describing another estate, she added, "which, as well as my *B. F.* estate, is situate, lying and being in the county of Glamorgan." It turned out that part of the *B. F.* estate was situate in the county of Brecon; but it was found by special verdict that the whole had been known by the name of the *Britton Ferry* estate for fifty years before the death of the testatrix; and it was held that the whole passed (*m*).

"Estate."

A different construction, however, prevailed in the case of *Hall* v. *Fisher* (*n*), where a testator devised "all that *freehold* farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me." It appeared that the person from whom the testator claimed the Wick Farm, which was all freehold, had sold a small portion of it, but had continued to occupy it as part of the Wick Farm, under a demise from the purchasers, and to treat it as such, and that the testator had let the whole to W. Eeley. There was therefore a sufficiently certain description, in accordance with the testator's undoubted intention, and corresponding in every particular but the word freehold with the actual state of the property; but Sir *J. Knight Bruce*, V. C., said he could not view the case as one of what was called falsa demonstratio; that if the word "freehold" had been omitted, the probability was, the leasehold in question would have been held to pass; but that there was a subject here which properly answered the description given in the will. Unless words descriptive of tenure are to be considered more restrictive than those which describe locality or occupation, this case shows that much caution is required in applying the rule under discussion to any given case (*o*).]

Different construction in *Hall* v. *Fisher*.

[(*l*) 1 B. & Ald. 550.]

(*m*) Observe the agreement between the principle of these cases and that of those which are cited in connection with the subject of uncertainty, as illustrative of the rule that a *false* addition does not vitiate a devise; see also *Doe* v. *Nicklesss*, 4 Jur. 660.

[(*n*) 1 Coll. 47.

(*o*) See also *Stone* v. *Greening*, 13 Sim. 390; *Quennell* v. *Turner*, 13 Beav. 240; *Emuss* v. *Smith*, 2 De G. & S. 722.]

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Subsequent reference to occupancy does not extend devise.

As a subsequent reference to the occupancy does not limit a devise of a farm by name to the lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of "my *Trogues* Farm, in the occupation of A.," lands of another farm in the occupation of A. would unquestionably not pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel (*p*).

Effect of one devise on construction of another in the same will.

[Parts of a description which, if the will contained no other devise than that to which they belong, would be rejected as falsa demonstratio, sometimes derive a restrictive force from another devise in the same will, with which they would otherwise stand in contradiction. Thus, in the case of *Higham* v. *Baker* (*q*), where a testator devised his farm called Whiteacre, and the lands to the same belonging, then in the tenure of W., to A., and devised his farm called Blackacre, and the lands to the same belonging, to B.; and it appeared that there were 100 acres of land belonging to Whiteacre, and no land belonging to Blackacre, but that the testator had let Whiteacre with 60 acres of the land belonging to it, and the remaining 40 acres with Blackacre: it was clear that only so much of the land belonging to Whiteacre as was in the tenure of W. was devised to A.

So, in the case of] *Press* v. *Parker* (*r*), where a testator devised to A. his messuage in the parish of H., wherein he then lived, with the yard, back estate and premises thereunto belonging, *part of which was then in his* (*the testator's*) *own occupation*, and other part whereof was in the occupation of C. and M.; and he devised to B. his front messuage in K.-street, in the parish of H. aforesaid, with the appurtenances, *then in the occupation of E.*, with a right of way to the yard adjoining, and the use of the pump, &c., in the yard. The question was, whether a coal-cellar passed to A. or B. It was within the range of the house devised to B., but was in the occupation of the testator, who had put up a partition between it and B.'s premises, the entrance being from his own house. It was held that the cellar, being in the testator's occupation, passed to A.; the intention, it was thought, being manifest to give to A. whatever was so occupied. [But *Best*, C. J., said if the latter devise had stood alone, the

Whether devise passed all that was occupied by the person described.

(*p*) See *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550; [*Hall* v. *Fisher*, 1 Coll. 47; *Doe* d. *Renow* v. *Ashley*, 10 Q. B. 663.]

(*q*) Cro. El. 16.

(*r*) 10 J. B. Moo. 158, 2 Bing. 456.

[words *in the occupation of E.* might have been deemed mere words of description.]

In connection with the subject of the construction of words referring to occupancy, it may be here observed, that in the case of *Doe* d. *Templeman* v. *Martin* (*s*), where a testator devised all his messuage, the Ark Cottage, gardens and lands at S., rented to Mrs. S., *and others;* and it was attempted to confine the devise to a particular property at S., forming a distinct purchase made by the testator, of which Mrs. S. was the principal occupant; the devise was held to comprise all the lands situate at S., by whomsoever rented, including a considerable farm, in the occupation of a tenant, not Mrs. S.; the suggestion, that the testator could scarcely mean to describe a large property in such terms (omitting the name of the tenant), not being allowed to prevail against the clear import of the words of the will.

[But, secondly, it must be observed that in the cases where terms of occupancy or locality were not allowed by reason of their inapplicability to particular portions of the subject to exclude them from the devise, those portions bore but a small proportion to the whole; and they must not be understood to warrant the proposition that such terms are never restrictive.] Where the bulk of the property is not in the occupation of the person or in the locality described, and especially *if it be not described by a name comprehending the whole* (*t*), a different rule seems to prevail: [for it is a well-settled canon of construction,] that where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

Devise not extended to a subject, there being another more exactly answering it.

As in the case of *Roe* d. *Ryall* v. *Bell* (*u*), where a testator devised all his copyhold estates situate at G., *which he became*

(*s*) 4 B. & Ad. 770; [conf. *Chester* v. *Chester*, 3 P. W. 55, where an attempt was made to limit the sense of "elsewhere" by reference to previously specified places.

(*t*) That this circumstance, however, is not absolutely essential, but that the same result may follow from a precise description of the property, either by the names of the closes or by their metes and bounds, appears from *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43.]

(*u*) 8 T. R. 579; see also *Wills* v. *Sayers*, 4 Mad. 409; [*Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785, ante, p. 695;] and see the rule exemplified in cases treated of, ante, p. 408; but see *Doe* d. *Newton* v. *Taylor*, 7 B. & C. 384, where a devise by A. of her moiety of all her late father's messuages, &c., situate, &c.,

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entitled to on the decease of his father. The fact was, that on the death of his father, the testator had taken possession of two copyhold estates at G.; one which his father had in his lifetime surrendered to him in fee, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. It was held, that as the latter estate was sufficient to satisfy the words, the former did not pass (*x*).

Again, it has been held (*y*), that a devise of lands at W., in the parish of C., "*which I purchased of S.*," did not include lands not at W., though purchased of S. in the parish of C. And in *Roe* d. *Conolly* v. *Vernon* (*z*), a surrender to the use of the testator's will of all the lands, &c., situate in certain specified places, which he held of the manor of W., *being of the yearly rent to the lord in the whole of* 4*l.* 10*s.* 8½*d.*, *and compounded for*, was held to be confined to copyholds compounded for, though the rent specified exceeded the amount of rent paid for the compounded copyholds, but did not correspond with the amount paid for the whole.

So, in the case of *Doe* d. *Parkin* v. *Parkin* (*a*), where a testator, seised of a house and five acres of land in his own occupation, and of an inn and nine acres of land in the same place, not so occupied, devised all his messuages, tenements, lands, grounds, hereditaments and premises situate at or in the township of A., in the parish of B., and then in his own occupation, with the appurtenances, to certain uses, the Court held that these words were clearly restrictive, and, consequently, that the inn did not pass.

In the case of *Pullin* v. *Pullin* (*b*), a testator, reciting that he was seised in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds within and holden of the manor of the Prebendary of Islington, *and all which lands, &c., were subject to a mortgage thereof made by him to R.*

was held to extend as well to lands which had been the property of the father, and had been devised by him to a granddaughter, from whom they had descended to the testatrix, as to those which had descended to her immediately from him. In this case, the terms used were equally applicable to both properties.

(*x*) [See also *Wilkinson* v. *Bewicke*, 1 Eq. Rep. 12.] But a devise of lands, which the testator had from time to time "purchased," has been held to apply to lands which he had received in exchange, and not (as contended) to be confined to those which he had bought with money; the word "purchase" admitting, it was considered, of application to what was purchased for money or lands. *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820.

(*y*) *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550.

(*z*) 5 East, 51.

(*a*) 5 Taunt. 321.

(*b*) 10 J. B. Moo. 464, 3 Bing. 47; see also *Wilson* v. *Mount*, 3 Ves. 191.

(minutely referring to the mortgage), gave and devised all his said freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, *not in mortgage to R.*, did not pass under this devise, but were included in a general devise in a subsequent part of the will of the residue of his freehold, copyhold and leasehold estates; the Court being of opinion that the testator intended to confine the former devise to the property in mortgage to R. It seems that a contrary construction would have left the residuary clause nothing to operate upon; but this circumstance was not relied on, and seems indeed entitled to little weight, as the clause embraces copyholds as well as freeholds, and the testator had no copyholds except those in mortgage. The testator's expressions certainly indicated that he considered the mortgage as extending over the whole subject devised.

[And in the case of *Morrell* v. *Fisher* (*c*), where a testator devised "all his leasehold farm-house, homestead, lands and tenements at Headington, held under Magdalen College, Oxford, and then in the possession of T. B. as tenant to him," it was contended, that two pieces of land at Headington, containing together twelve acres and being leasehold, held of the College, but not in the possession of T. B., passed by this devise. But the Court of Exchequer were of a contrary opinion, there being other lands which fully answered the description.]

This principle is applicable [to descriptions of property by its tenure as freehold, copyhold or leasehold (*d*); and generally to all terms of the description of property, personal as well as real (*e*), but it] has most frequently been applied to terms of local description.

Description applied to a subject not strictly falling within it, for want of a more appropriate one.

Thus, if a testator have property *in*, and property *contiguous to* a particular street or parish, it is clear that a devise of houses or buildings in that street or parish will carry the former to the exclusion of the latter (*f*); though if he had had no property in the street or parish, the contiguous property might have passed. Thus, in the case of *Doe* d. *Humphreys* v. *Roberts* (*g*), where a

[(*c*) 4 Exch. 591.

(*d*) *Doe* v. *Brown*, 11 East, 441, and cases cited ante, p. 749, n. (*o*).

(*e*) *Ridge* v. *Newton*, 2 D. & War. 239; *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Slingsby* v. *Grainger*, 7 H. of L. Ca. 273; 28 L. J. Ch. 616.]

(*f*) See *Doe* d. *Browne* v. *Greening*, 3 M. & Sel. 171; [*Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Oakes* v. *Oakes*, 9 Hare, 666. But where a house, with the appurtenances, is described to be in a certain place, lands quasi appurtenant to the house will pass, though not in that place, *Boocher* v. *Samford*, Cro. El. 113; and see *Moser* v. *Platt*, 14 Sim. 95.]

(*g*) 5 B. & Ald. 407; [*Baddeley* v.

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testator devised all that his messuage or dwelling-house, with the appurtenances, situate in High-street, in the town of *Holywell*, wherein his mother inhabited, and nearly opposite to the White-horse Inn, together with the shop adjoining the said messuage, *and all and every his buildings and hereditaments in the same street*, to A. It appeared that the testator had only one house in High-street, and that was occupied by his mother; but he had two cottages in a lane called Bakehouse-lane, behind the house, from which it was separated by a road wide enough to admit carriages; but there was no thoroughfare in the lane, and the only entrance to it was out of High-street, under an arch a little below the testator's house. It was held that these cottages passed under the devise, the Court relying much on the fact that the testator had no other property which could answer to that part of the description; and there being, it was thought, a clear intention to pass some property in the street in addition to the house; and as there was no access to them but from the street, it was considered that the cottages might, without much impropriety, be described as situate in the street.

It is observable, that if the cottages in question had not passed under this devise, there was a general clause which would have comprised them, so that the construction was not induced by an anxiety to avoid intestacy.

"At, in or near," how construed.

So, in the case of *Doe* d. *Ashforth* v. *Bower* (*h*), where a testator devised all his messuages, tenements or dwelling-houses, and buildings, situate *at, in or near* Sing Hill, in Sheffield, which he had lately purchased from the Duke of Norfolk. The testator had six houses at Sheffield, all purchased from the Duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Sing Hill, and the remaining two about four hundred yards therefrom. The testator had redeemed the land tax for all the houses by one contract. It was held, that the devise did not comprise the two latter houses, part only of the description applying to them, and *there being other houses to which the whole of the description did apply.*

Devise of lands in one county not applied to lands in another county.

It is clear that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not

Gingell, 1 Exch. 319; *Goodright* d. *Lamb* v. *Pears*, 11 East, 58; *Nightingall* v. *Smith*, 1 Exch. 879; *Doe* d. *Campton* v. *Carpenter*, 16 Q. B. 181.]

(*h*) 3 B. & Ad. 453. [See also *Attwater* v. *Attwater*, 18 Beav. 330. The case of *Newton* v. *Lucas*, 6 Sim. 54, is generally cited in support of the same position; but the final decision was given, under the particular circumstances, in favour of the greater comprehensiveness of the devise, 1 My. & Cr. 391.]

pass; though the result be (the will being subject to the old law) to suppose the testator to make a devise which could have no effect (*i*). And though a testator may show by the context of his will, that he uses a local appellation in a peculiar and extraordinary sense, yet this hypothesis will not be adopted upon slight and equivocal grounds.

Thus, where (*k*) the devise was of a testator's lands, "in Leverington," and it appeared that there was within the parish of this name a district called Leverington's Parson's Drove, for which a chapel of ease had long ago been endowed, and that the testator had lands in the parish which were within the chapelry, and lands in the parish which were not; it was contended, that this devise was to be confined to the latter, on the ground that the testator had himself distinguished the parish and the chapelry by describing himself to be "of Leverington," and one of his devisees as being of "Leverington's Parson's Drove:" but the Court held, that the lands in the parish, whether in the chapelry or not, passed by the devise; Lord *Denman* observing, that though if the description of locality had been "Leverington's Parson's Drove," that would have been exclusive of every other part of the parish; yet the use of the larger term did not exclude the less.

[But in a case (*l*) where a man was seised of land in a vill and in two hamlets of the same vill, and devised all his lands in the vill, and in one of the hamlets by name, it was held that nothing of the land in the other hamlet should pass; for the naming of the one hamlet argued his intent fully.]

"Estates in or near L., near M."

In regard to proximity, it has been decided that a devise of estates, situate "in or *near* Latchingdon, near Maldon," did not include a close which was situate four or six miles from Latchingdon, and *in* the town of Maldon (*m*).

Effect where there is property of another answering to the description.

Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A., devises his manor, called South Dale, in A. Now, supposing that there was

(*i*) *Miller* v. *Travers*, 1 Moo. & Sc. 342, [8 Bing. 244; *Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Moser* v. *Platt*, 14 Sim. 95.]

(*k*) *Doe* d. *Edwards* v. *Johnson*, 5 Nev. & M. 281.

[(*l*) *Anon.*, 3 Dy. 261, pl. 27.]

(*m*) *Doe* d. *Dell* v. *Pigott*, 1 J. B. Moo. 274, 7 Taunt. 552; see also *Doe* v. *Bower*, 3 B. & Ad. 453.

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in A. no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale; but if it should turn out that there was in A. a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or in respect of wills operating under the recent statute, he might have contemplated the subsequent acquisition of a devisable interest in such manor.

Devise of "rents and profits" passes the land.

[A devise of the rents and profits of lands passes the land itself both at law and in equity (*n*); a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits (*o*). Before the late act, however (*p*), and without words of inheritance, no more than an estate for life passed by these words (*q*).

"Ground rent" held to include reversion.

But in the particular case] where a testator, seised or possessed of a reversion in fee or for years, to which rent was incident, devised or bequeathed his "ground rent," not only the rent, but the reversion would pass (*r*); as he was considered, when speaking of the ground rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit.

Advowson will pass under "rents and profits."

[A devise of rents and profits includes an advowson (*s*); and with it of course the right of presentation in case the living is vacant, unless the will devotes the "rents and profits" to purposes which can be answered only by money or money's worth: as the augmentation of poor livings (*t*), investment in lands (*u*), or the maintenance of children (*x*); in which case the right of presentation to a void living, not being the subject of profit, will result to the heir. If the living is not void the future right of presentation may be sold for the purposes of the will, like any other species of property (*y*).

[(*n*) Co. Lit. 4 b; *Parker* v. *Plummer*, Cro. El. 190; *South* v. *Alleine*, 1 Salk. 228; *Doe* d. *Goldin* v. *Lakeman*, 2 B. & Ad. 42; *Johnson* v. *Arnold*, 1 Ves. 171; *Baines* v. *Dixon*, ib. 42.

(*o*) Per Lord *Cranworth*, *Blann* v. *Bell*, 2 D. M. & G. 781.

(*p*) 1 Vict. c. 26, s. 28; *Plenty* v. *West*, 6 C. B. 201.

(*q*) *Hodson* v. *Ball*, 14 Sim. 571, and see *Belt* v. *Mitchelson*, Belt's Suppl. to Vesey, sen. 227. But an indefinite bequest of the income of personal estate passes the absolute interest, *Humphrey* v. *Humphrey*, 1 Sim. N. S. 536.]

(*r*) *Kerry* v. *Derrick*, Moore, 771, Cro. Jac. 104; *Maundy* v. *Maundy*, 2 Stra. 1020, 2 Barn. K. B. 202, Ca. temp. Hard. 142, Fitz. 70, 288; *Kay* v. *Laxon*, 1 B. C. C. 76; [and see *Ashton* v. *Adamson*, 1 Dr. & War. 198.

(*s*) *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477, 7 B. P. C. Toml. 522; *Sherrard* v. *Lord Harborough*, Amb. 167, per L. C.

(*t*) *Kensey* v. *Langham*, Ca. temp. Talb. 143.

(*u*) *Sherrard* v. *Lord Harborough*, Amb. 165.

(*x*) *Martin* v. *Martin*, 12 Sim. 579.

(*y*) *Cooke* v. *Cholmondeley*, 3 Drew. 1.

Devise of "use and occupation."

[A devise of the "free use" (*z*), or of the "use and occupation" (*a*) of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless there are other parts of the will which clearly call for the more limited construction (*b*).]

Customary freeholds pass as copyholds.

It is clear that customary estates, held by copy of Court Roll, although not at the will of the lord, as in the case of proper copyholds, will pass under the denomination of copyholds, and not, unless from special circumstances, under that of freeholds (*c*).

Question whether one moiety or both moieties passed.

Where (*d*) a testator, having a fee-simple in possession in one moiety of lands called H., and the reversion in fee in the other, devised "All that my part, purpart and portion of and in the tenement called H.," with other lands, "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," it was held, that both moieties passed.

[(*z*) *Cook* v. *Gerrard*, 1 Saund. 181, 186, e.

(*a*) *Whittome* v. *Lamb*, 12 M. & Wels. 813; *Rabbeth* v. *Squire*, 19 Beav. 70, 4 De G. & J. 406. "Occupation is not living and residing:" per Lord *Eldon*, *Fillingham* v. *Bromley*, T. & R. 536.

(*b*) *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Stone* v. *Parker*, 29 ib. 874.]

(*c*) *Roe* d. *Conolly* v. *Vernon*, 5 East, 83; *Doe* d. *Cook* v. *Danvers*, 7 East, 299.

(*d*) *Doe* d. *Phillips* v. *Phillips*, 1 T. R. 105.

CHAPTER XXV.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

I. *General Rule in regard to Vesting.*
II. *Devises construed to be vested, notwithstanding Expressions of a contrary aspect.*
III. *Devises contingent by express Terms, notwithstanding absurd consequences.*
IV. *Question, whether Contingency applies to one or all of several Limitations.*
V. *Vesting of Legacies charged on Land.*
VI. ——— *Personal Legacies.*
VII. ——— *Residuary Bequests.*

General rule as to vesting.

I. THE law is said to favour the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift, immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person in esse simply (i. e. without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest.

If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting or point merely to the deferred possession or enjoyment.

It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B. (between whom the entire fee-simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder.

Devises of reversions and remainders.

On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying without issue, this is construed as an immediate disposition of the testator's reversion or remainder; though, upon the face of the will, the devise presents the aspect of an executory gift, to arise on a general failure of issue, which would clearly be void (*a*), unless, indeed, the will were subject to the newly-enacted rules of testamentary construction, in which case the words would refer to issue living at the death. If the contingency described corresponds precisely with the event which determines the existing estate tail, no difficulty exists in applying this rule of construction; but it frequently happens, that the terms used by the testator do not completely answer to the event in question; as, for instance, where the reference is to issue generally, and the subsisting estate is restricted to issue of a particular marriage or sex. In such cases, the reasonable conclusion would seem to be that the discrepancy arises merely from an inaccuracy in the description of the reversion or remainder, and that it does not show a different interest to have been in the testator's contemplation; and such, accordingly, seems to have been the prevailing doctrine of the cases (*b*).

Words in default, or for want, of object of prior estates, how construed.

It is to be observed, also, that where *a remainder* is limited *in default* or *for want* of the object or objects of the preceding limitation, these words mean, on the failure or determination of the prior estate or estates, and do not (as literally construed they would) render the ulterior estate contingent on the event of such prior object or objects not coming into existence. In short, they signify all that is comprehended in the word "remainder," being merely an expression employed by the testator in carrying on the series of limitations (*c*). The ulterior estate, therefore, is

(*a*) Ante, p. 230.

(*b*) *Wellington* v. *Wellington*, 1 W. Bl. 645, 4 Burr. 2165, post; *French* v. *Caddell*, 3 B. P. C. Toml. 257, post; *Jones* v. *Morgan*, Fea. C. R. 329; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409. The case of *Banks* v. *Holme*, 1 Russ. 394, n., indeed, favours a more rigid construction; but Lord *Eldon's* strictures upon this case, in *Morse* v. *Lord Ormonde*, 1 Russ. 405, afford ground to infer that it did not coincide with his own opinion. The strict rule there adopted certainly exacts from testators more of technical correctness than it has been usual to require, and clearly would not now be followed; [see further as to the above cases, Vol. II., pp. 464, 475.]

Whether words importing failure of issue refer to determination of subsisting estates tail.

(*c*) In a former publication, the writer contented himself with simply stating this position, and a single case in support and illustration of it, conceiving that the rule of construction was too well established to be called in question; but subsequent experience taught him

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a vested remainder, absolutely expectant on the failure or determination of the prior estate.

Thus, it has been decided (*d*) that, where lands are devised to the first and other sons of A. successively in tail, *and, in default of such sons,* to the daughters of A. in tail, although it should happen that A. has a son or sons, yet on his or their subsequently dying without issue, the devise in remainder to the daughters takes effect.

So, where (*e*) a testator devised to E. for life, and, after her decease, to the first and every other son of her body lawfully to be begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and, in default of such issue of E.,* then to M.; it was held, that the devise to M. was a vested remainder, expectant on the determination of the prior successive life estates of E. and her sons and daughters, (the will being subject to the old law,) and those estates having expired *by the death of E.'s only daughter,* M.'s remainder fell into possession.

Again, where (*f*) A. devised certain lands to D. for life; remainder to a trustee, to preserve contingent remainders; remainder to the first and other sons of D. and their heirs, *and, for want of such issue,* to J. for life, with remainders over; it was held that the sons of D. took successive estates tail, with a vested remainder.

It is clear, too, that where real estate is devised to A. in tail, and, in case he shall die without issue, then to B. in fee, and it happens that A. dies in the testator's lifetime, leaving issue, the ulterior devise to B. is held to take effect, although, literally, the contingency on which such devise is made dependant has not occurred; the intention being, it is considered, that the ulterior devise shall confer a vested remainder on B., which is *absolutely*

that it has not obtained so ready and unanimous an assent in the profession as, from the state of the authorities, was to have been expected. Indeed, even so recently as the case of *Ashley* v. *Ashley*, 6 Sim. 358, the Master reported that, under a devise to A. for life, with remainder to her children, and, for want of such issue to B., the devise to B. failed on A. having a child,—a conclusion which the Vice-Chancellor appears to have regarded as too plainly untenable for serious refutation. The reluctance to acquiesce in a construction at once so reasonable, and so well sustained by authority, is remarkable, but probably is to be ascribed to the yet lingering influence of the long-exploded case of *Keene* v. *Dickson*, 1 B. & P. 254, n., where a contrary construction prevailed; and serves to show that the uncertainty produced by contradictory decisions is not easily dispelled.

(*d*) *Doe* v. *Dacre*, 1 B. & P. 250, 8 T. R. 112.

(*e*) *Goodright* v. *Jones*, 4 M. & Sel. 88.

(*f*) *Lewis* v. *Waters*, 6 East, 336.

to take effect in possession on any event which removes the prior estate out of the way (*g*). The case just suggested, however, cannot now arise under a will made or republished since 1837, as a devise in tail contained in such a will does not, by the recently-enacted law, lapse by the death of the devisee in the testator's lifetime, leaving issue.

Rule where prior estate takes effect, but is determined in a different manner.

Where, however, the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails.

As where (*h*) the devise was to A. for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name, and in case he or they refused, then that devise to be void, and in such case the testator devised the lands over. A. survived the testator, complied with the condition, and then died without issue; and it was held in B. R., on a case from Chancery, and ultimately in the House of Lords, that the limitation over did not arise (*i*).

Devise during widowhood, with devise over on marriage.

An exception to this rule, however, may seem to exist in a case, which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and if she shall marry*, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.

Devise over extended by implication to determination by death.

In *Luxford* v. *Cheeke* (*k*), which is a leading authority for this doctrine, the testator devised to his wife for life, *if she should not marry again, but if she did*, then that his son H. should presently after his mother's marriage enjoy the premises, to him and the heirs of his body, with remainders over. The widow

[(*g*) *Hutton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Doug. 337.]

(*h*) *Amhurst* v. *Donelly*, 8 Vin. Ab. 221, pl. 21, 5 B. P. C. Toml. 254; see also *Sheffield* v. *Lord Orrery*, 3 Atk. 282, post, p. 762.

(*i*) Compare this case with *Avelyn* v. *Ward*, 1 Ves. 420, and *Doe* v. *Scott*, 3 M. & Sel. 300, stated ante, p. 613, in which the lapse of a prior estate, on whose contingent determination the subsequent estate was to arise, was held not to defeat the subsequent estate. In order to reconcile these cases with *Amhurst* v. *Donelly*, we must infer, that, in the latter case, had the estate of A. and his sons failed by lapse, the devise over would have taken effect. Pari ratione, it must be concluded, that had the prior devisee in those cases survived the testator and performed the condition, the devise over (if the whole interest had not been absorbed as it was by the first devisee) would not have taken effect.

(*k*) 3 Lev. 125.

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died without marrying again; but it was held, that the remainder took effect.

Gordon v. *Adolphus* (*l*) was a case of the same kind. The bequest was to the testator's wife "during her natural life, that is to say, so long as she shall continue unmarried; *but in case she shall choose to marry*, then and in that case" it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was considered by Lord *Camden*, and afterwards by the House of Lords, that the bequest over was not contingent on the event of the marriage of the wife. In these cases, therefore, the widow takes an estate durante viduitate, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect, at all events, on its determination, and not conditional limitations dependant on the contingent determination of a prior estate for life.

In *Lady Fry's case* (*m*), Lord *Hale* said, it was all one as if the estate had been devised to the widow for life, and if she married, then to remain, which had been but an estate quamdiu sola vixerit. If, however, the devise had been framed in the manner suggested by this eminent and excellent Judge, the case would have been brought into very close resemblance to the case of *Sheffield* v. *Lord Orrery* (*n*), where a different construction prevailed. There A. devised his house, &c., to his wife for life, upon this express condition, only that *if she should marry again*, then the house, &c., should go forthwith to his eldest son and his issue. Lord *Hardwicke* held, that it was a contingent limitation to the son, to take effect only on the wife's marrying again. In *Luxford* v. *Cheeke*, he said, the penning was different; there, after the devise, were added these words, "if she do not marry again," which restrained the original limitation, and were the same as if they had been to the wife for life, "if she so long continued a widow." Here there were no such words in the original limitation; and though his Lordship added, "but I do not lay much weight on this," and proceeded to comment on other grounds for the construction, yet the remarks above quoted have always been considered as pointing out the true principle of the decision.

Devise over on marriage again, strictly construed.

[Again, in *Pile* v. *Salter* (*o*), where the testator bequeathed the

(*l*) 3 B. P. C. Toml. 306; [see also *Brown* v. *Cutter*, T. Raym. 427.]

(*m*) 1 Vent. 203; see also *Jordan* v. *Holkham*, Amb. 209, where Lord *Hardwicke* took a distinction between a devise during widowhood, and if she marriepagain within a limited time.

(*n*) 3 Atk. 282.

[(*o*) 5 Sim. 411.

interest of certain monies to his wife as long as she remained his widow, but upon her marrying again he bequeathed to her one third of all his property not otherwise disposed of, and the remaining two thirds to be equally divided between his nieces. The widow died without having married again, and Sir *L. Shadwell*, V. C., held that there was an intestacy, as it would be absurd to give her one third of the property in the event of her death.

In *Browne* v. *Browne* (*p*), Sir *W. P. Wood*, V. C., said that *Sheffield* v. *Lord Orrery* and *Pile* v. *Salter* were determined on their own special circumstances, and that in the case before him, where the terms of gift were similar to those in *Gordon* v. *Adolphus*, he was concluded by the authorities which had determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate is to be extended by implication, so as to take effect on the determination of that estate by death.]

Devise over extended by implication.

On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate durante viduitate, must generally be considered, when he subsequently refers to the marriage, to describe the determination *by any means* of that estate, and, consequently, the gift over is a vested remainder expectant thereon (*q*). On the other hand, where a testator first gives an absolute estate for life, and then engrafts thereon a devise over to take effect on the marriage of such devisee for life, [or where the gift over is such as to make it unlikely that it was intended to take effect on death as well as on marriage,] the conclusion is, that the devise over is not to take effect unless the contingency happens (*r*).

General conclusion from the cases.

[(*p*) 1 Johns. 210, 213.]

(*q*) The question whether the event of not marrying is or not interwoven in the original gift, may be difficult of solution. In *Meeds* v. *Wood*, 19 Beav. 215, a testator gave real estate to his executor in trust for E. for her life, and directed the executor to pay her the rents every six months, "provided that if E. should marry," then over. The M. R. admitted the distinction taken in the text, but thought the direction to the executor to pay E. the rents limited the previous gift to so long as she remained a spinster, since "it was obvious the testator intended the rents to be paid to her herself," and if she married, she would no longer be entitled to receive them, except by the intervention of a trust for her separate use, which was inconsistent with the intention; he therefore held that the gift over took effect on the death of E., though she had never been married. In *Bainbridge* v. *Cream*, 16 Beav. 25, where a testator gave lands to his wife for life, but if she married again he revoked them, and at her death or second marriage gave the lands to trustees for sale, the produce to be divided among certain persons (naming them), "or such of them as should be living at the *death* of his wife;" the wife married again, and the trustees sold; and it was held by the M. R. that the proceeds were divisible immediately, notwithstanding the widow was still living.]

(*r*) In one case, a devise which, in express terms, extended to widowhood only, was held to be enlarged by impli-

Devise over on bankruptcy, &c. extended by implication to case of death.

[Another exception (if it may be so called) to the general rule exists in those cases where a devise is made to one for life or until he become bankrupt or insolvent, with a remainder over in case of bankruptcy or insolvency happening: here, also, it seems the true construction is that the remainder will take effect after the determination of the previous estate whether by bankruptcy, insolvency or death (*r*).]

Devises vested, notwithstanding expressions of seeming contingency.

II. The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A. a vested estate in fee-simple, subject to the prior chattel interest given to the trustees, and, consequently, on A.'s death, under the prescribed age, the property descends to his heir-at-law; though it is quite clear that a devise to A., if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only (*s*).

Boraston's case.

A leading authority for this construction is *Boraston's case* (*t*),

cation to the period of the vesting in possession of a remainder limited thereon. The devise was to the testator's wife for her life, provided she remained a widow; but if she married a second husband, to I., *when he should attain his age of twenty-three years;* and it was held, that the widow had an estate till I. attained twenty-three, though she married again, *Doe* d. *Dean and Chapter of Westminster* v. *Freeman*, 1 T. R. 389, 2 Chitty's Cas. temp. Lord Mansfield, 498.

[(*r*) *Etches* v. *Etches*, 3 Drew. 441.

(*s*) *Grant's case*, cited 10 Co. 50; Sugd. Law. of Prop. 291; *Alexander* v. *Alexander*, 16 C. B. 59. However, the decision of this last point was expressly avoided by the Judges in *Phipps* v. *Ackers*, 9 Cl. & F. 583; and see *Tapscott* v. *Newcombe*, 6 Jur. 755.]

(*t*) 3 Rep. 19; see also *Mansfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4, Gilb. Eq. Rep. 36; [*Doe* d. *Morris* v. *Underdown*, Willes, 293;] *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 228; *Denn* d. *Satterthwaite* v. *Satterthwaite*, 1 W. Bl. 519; *Doe* d. *Weedon* v. *Lea*, 3 T. R. 41; *Doe* d. *Wight* v. *Cundall*, 9 East, 400; *Edwards* v. *Symonds*, 6 Taunt. 213; [*Farmer* v. *Francis*, 2 Bing. 151;] *Goodright* d. *Revell* v. *Parker*, 1 M. & Sel. 692, (leaseholds;) *Warter* v. *Hutchinson*, 5 Moore, 143, 2 B. & Bing. 349, 3 D. & Ry. 58, 1 B. & Cr. 721; [*Jackson* v. *Majoribanks*, 12 Sim. 93; *Milroy* v. *Milroy*, 14 ib. 48; *Parkin* v. *Knight*, 15 ib. 83; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40; *Smith* v. *Spencer*, 6 D. M. & G. 631; but see *Bastin* v. *Watts*, 3 Beav. 97, where, however, the point was not argued; and *Blagrove* v. *Hancock*, 16 Sim. 371, where the V. C. did not notice the question.]

which was as follows:—A testator devised land to A. and B. for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years; and *when* the said H. should come to his age of twenty-one, then to him, his heirs and assigns for ever. H. died under twenty-one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the Court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H. attained the age of twenty-one, remainder to H. in fee; and that the adverbs of time, *when*, &c., did not make any thing necessary to precede the settling (*i. e.* the vesting) of the remainder, but merely expressed the time when it should take effect in possession.

Word "when" referred to determination of prior estate.

The most recent case of this class is *Doe* d. *Cadogan* v. *Ewart* (*u*), where a testator devised his real estate to trustees, upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after her attaining that age*, then upon trust for his said daughter, her heirs and assigns for ever; but in case his said daughter should depart this life without leaving issue, then the testator devised the said real estate over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.

Words "from and after" similarly construed.

It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the principle, for the material fact, and that which constitutes the special characteristic of this class of cases, is, that there is a prior interest extending over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate *instanter* to B., with the exception of a partial interest carved out for some (no matter what) purpose.

Remark on preceding cases.

Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms

Words of apparent contingency referred to the possession merely.

(*u*) 7 Ad. & El. 636, 3 Nev. & P. 197.

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Words of apparent contingency referred to possession merely.

which, literally construed, would seem to make such ulterior interest depend on the fact of the prior interest taking effect; in such cases, it is considered, that the testator merely uses these expressions of apparent contingency, as descriptive of the state of events, under which he conceives the ulterior gift will fall into possession; (the supposition being, that the successive interests will take effect in the order in which they are expressed), and not with the design of making the vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession.

Thus, in the case of *Webb* v. *Hearing* (*x*), where a testator devised to his son F. after the death of his wife; *and if his three daughters, or either of them, should overlive their mother and F., their brother, and his heirs,* (which was construed to mean heirs of his body,) they to enjoy the same houses for the term of their lives, remainder to R. and J.; it was held, that the remainder to R. and J. was not contingent on the event of the daughters surviving their mother and brother; the words only showed when it should commence, [which was well enough performed.]

So, in an early anonymous case (*y*), where the devise was to K. in tail, remainder to J. for life, and in another clause it was declared, that "if K. died without issue, *and J. be then deceased,*" then, and not otherwise, the testator gave the land to N. and his heirs; the Lord Keeper, it is said, decreed it for N., although J. survived K., because the words, "if J. be then deceased," seemed to be put in to express the testator's meaning, that J. should be sure to have it for her life, and that N. should not have it till she was dead; and also to show when N. should have it in possession.

So, in the case of *Pearsall* v. *Simpson* (*z*), where a legacy was given in trust for the testatrix's sisters and their children; and after the deaths of both her said sisters and their children, if any, to pay the interest to her brother-in-law, S., during his life, and from and after his decease, *in case he should become entitled to such interest,* then over to some cousins. Though S. died in the lifetime of the testatrix's sisters, it was held that the gift to the cousins took effect, Sir *W. Grant,* M. R., being of opinion

(*x*) Cro. Jac. 415. According to the facts represented, it does not appear that the remainder, if contingent, was defeated, as only two of the daughters are stated to have died in the lifetime of their brother: [and the concluding words of the report are somewhat equivocal. See also *Napper* v. *Sanders,* cited 3 Atk. 781.]

(*y*) 2 Vent. 363.

(*z*) 15 Ves. 29.

that it was not contingent on the event of the sister's husband becoming entitled to the interest. "It was doubtful (he said) whether S. would live to become entitled to the interest. The testatrix, giving the capital over after his death, recollects that he may not live to take the interest; but if he does, she makes his death the period at which the cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if *he* ever takes."

Here no violence was done to the obvious meaning of the words, as it is impossible to read the whole sentence continuously, "from and after his decease, in case he should become entitled to such interest," without seeing that the words of contingency, "in case," &c., refer merely to the period of possession, denoting that that should take place at his death, if he happened to live to become entitled.

Remark on *Pearsall* v. *Simpson.*

So, in *Massey* v. *Hudson* (*a*), where a testator devised to his wife for life, charged with an annuity to E., subject also to 300*l.* to be paid to V., her executors, administrators or assigns, within twelve months after the decease of E., *in case the said E. should happen to survive testator's wife*, with interest from the death of E. E. died in the testator's lifetime, and in the lifetime of his wife. Sir *W. Grant*, M. R., thought it too clear for argument, that the words, "in case E. shall survive my wife," did not constitute the condition on which the legacy was to become payable, but only related to the time of payment, which was, in that event, to be postponed to the end of a twelvemonth after the death of E.

[The case of *Franks* v. *Price* (*b*) presents an instance both of an apparent and also of a real contingency in the same will. There a testator devised to A., B., &c., for their lives, with remainder to M. and N. for their lives, share and share alike; "and in case either of them should, *after the deaths of A., B.*, &c., die without issue," then to the survivor for life; and if M. "should, after the deaths of A., B., &c., die *before N., leaving issue male of his body*," then one moiety of the estates was to go as therein mentioned; "and in case of such death in manner aforesaid of M. before N., and M.'s leaving issue male," the tes-

(*a*) 2 Mer. 130. [See also *Key* v. *Key*, 4 D. M. & G. 73; *Wright* v. *Wright*, 21 L. J. Ch. 775; *Walmsley* v. *Vaughan*, 1 De G. & J. 124; *Tuer* v. *Turner*, 18 Beav. 185.] Compare these and the preceding cases with *Holmes* v. *Cradock*, 3 Ves. 317, stated post; [and see *Davis* v. *Norton*, 2 P. W. 390, first point.

(*b*) 3 Beav. 182, 5 Bing. N. C. 37, 6 Scott, 710.

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[tator gave one moiety of his personal estate to be laid out in land, to be conveyed and settled to the uses thereinbefore directed of his real estates, "on the issue of M., *on the contingency* aforesaid." The testator made a similar disposition, mutatis mutandis, of the other moiety in case of the death of N. after the deaths of A., B., &c., leaving issue male. Lord *Langdale* thought that the words "after the deaths of A., B., &c.," did not import contingency, but were merely words of reference, showing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession till those prior gifts became satisfied or inoperative; but that from the words used with reference to the event of M. dying before N., leaving issue male, and with reference to the event of N. dying before M., leaving issue male, and even from the care taken to repeat the words as applied to the case of M. and N. respectively, that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

Sir *W. P. Wood's* statement of the result of the authorities.

The result of the authorities is thus clearly summed up in a recent case by Sir *W. P. Wood*, V. C. (*c*). "The true way of testing limitations of that nature is this: can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited?' Take the simplest case: a limitation to A. for life, remainder to B. for life, and upon the decease of B. *if A. be dead*, then to C. in fee. There the limitation to C. is apparently made contingent on the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interests previously limited to him, the Court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life interest* (*if any*), to C. in fee. That is an intelligible principle of construction: but in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, 'and if, at the death of B., A. shall have died under the age of twenty-one,' or 'without children,' then to C. in fee, here in either case room is left for contingency. The condition of A.'s dying in the first case under twenty-one, and in the second, without children, is an event which may or may not have hap-

[(*c*) *Maddison* v. *Chapman*, 4 Kay & J. 719.

[pened when the life-estates in A. and B. are determined; and until it has happened, the limitation over is contingent, not merely in appearance but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply."]

Devise, if A. shall attain twenty-one, contingent; —otherwise, if a limitation over in alternative event.

And although (as already hinted) there is no doubt that a devise to a person, [when, or] if he shall live to attain, [or at,] a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at the age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter* (*d*).

Thus, in *Edwards* v. *Hammond* (*e*), where A. surrendered the reversion in fee in customary lands to the use of himself for life, and, after his decease, to the use of his son H. and his heirs and assigns for ever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always, and under the condition, nevertheless, that *if H. died before he attained that age*, then the premises to remain to A. in fee; it was held, that though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to H., subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

To A. when he attains twenty-one, and if he die before, then over.

The same construction prevailed in the case of *Doe* d. *Hunt* v. *Moore* (*f*), where the devise was to M. "*when* he attains the age of twenty-one years," to hold to him, his heirs and assigns for ever; *but in case he should die before he attained* the age of *twenty-one* years, then over; Lord *Ellenborough* observed, that this being an immediate devise, and not, as in some of the other cases, a remainder, formed no substantial ground of distinction. The estate vested immediately, whether there was any particular interest carved out of it to take effect in possession in the mean time or not.

(*d*) Even independently of this particular rule, it is obvious that a limitation over disposing of the property to another, in case of the prior devisee dying under certain circumstances, always supplies an argument in favour of the prior devisee taking an immediately vested interest; *Smither* v. *Willock*, 9 Ves. 233; *Peyton* v. *Bury*, 2 P. W. 626; *Murkin* v. *Phillipson*, 3 My. & K. 257; though the contrary is sometimes contended.

(*e*) 3 Lev. 132, 2 Show. 398, and stated from the record, 1 B. & P. N. R. 324, n.

(*f*) 14 East, 601.

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To children at twenty-one, with devise over on death under twenty-one.

Again, in *Doe* d. *Roake* v. *Nowell* (*g*), where the devise was to the testator's nephew R. for life, remainder to and amongst his children equally *at the age of twenty-one*, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one; and in case R. should die without issue, or such issue should die *before twenty-one*, then over. R. levied a fine during the minority of his children, which raised the question whether their shares were contingent or vested, or, in other words, whether they were destructible by the act of R. or not. It was held in B. R., and ultimately in the House of Lords, that the remainders were vested in the children on their births. [From this case, also, it appears, that it makes no difference whether the devise be to an individual or to a class.]

Effect where another event is associated.

This rule of construction, it seems, applies not only where the devise over is limited so as to take effect simply and exclusively on the happening of the event on which the prior devise is apparently made contingent, but also where some other event is associated.

Thus, in *Bromfield* v. *Crowder* (*h*), the devise was to certain persons for life, and then to J. if he should live to attain the age of twenty-one years; and in case he died before he attained that age, *and his brother C. should survive him*, then over. On a case from the Rolls, the Court of C. P. certified that J. took a vested fee. Sir *James Mansfield*, C. J., relied much on the authority of *Edwards* v. *Hammond*, which he said was on all fours with this.

Doctrine of preceding cases applicable to executory trusts.

The construction also obtains where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration.

Thus, in the case of *Phipps* v. *Williams* (*i*), where a testator devised his real estates to trustees, upon trust to convey certain lands to his godson A. when and so soon as he should attain his age of twenty-one years; *but in case he should depart this life before he should attain the said age of twenty-one years, without leaving issue of his body*, then the lands in question were to go

(*g*) 1 M. & Sel. 327, 5 Dow, 202; see also *Doe* d. *Dolley* v. *Ward*, 9 Ad. & El. 582, 1 P. & Dav. 568; [*Greene* v. *Potter*, 2 Y. & C. C. C. 517.]

(*h*) 1 B. & P. N. R. 313; [affirmed in D. P., see 14 East, 604, Sugd. Law of Prop. 286.]

(*i*) 5 Sim. 44; [*S. C.* in D. P. nom. *Phipps* v. *Ackers*, 9 Cl. & F. 583; *Stanley* v. *Stanley*, 16 Ves. 491. So where personal estate is directed to be invested in the purchase of land, *Jackson* v *Majoribanks*, 12 Sim. 93.]

according to the disposition of his residuary estate. Sir *L. Shadwell*, V. C., on the authority of the preceding cases, held that A. took an immediate interest under this devise, observing that the only distinction here was that the legal estate was vested in trustees, which made no substantial difference.

It is impossible, however, to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralizing this clause, is itself not without expressions which favour the suspension of the vesting.

Construction controlled by express declaration that devisees shall not take vested interests.

Thus, where (*k*) a testator devised a certain estate to his wife during her widowhood, remainder to A. (his nephew) for life, remainder to the children of A. in fee, as tenants in common, and if there should be no child of A. living at his wife's death or second marriage, then over; and, by a codicil of even date, the testator directed that neither A. nor any issue of A., should, *by virtue of his will, take or be considered as entitled to a vested interest, unless they should respectively attain the age of twenty-one years;* and that, in case of the death of any of such children under such age, then the share of such child or children so dying should go to the surviving brothers and sisters, or brother or sister, their, his or her heirs and assigns, *upon their respectively attaining the age of twenty-one years.* It was contended that the testator, by the clause respecting the vesting, intended not to postpone the vesting, but merely to declare when the shares should become absolute and indefeasible, as was shown by the survivorship clause, which otherwise was superfluous, and, accordingly, that the children took vested interests, subject to be divested on their dying under twenty-one. The Court of Exchequer, however (on a case from Chancery), certified an opinion that the vesting was postponed until the age of twenty-one. Sir *L. Shadwell*, V. C., on confirming the certificate, observed that the concluding words showed that the testator had the same intention at the end as at the beginning of the instrument.

Declaration postponing earlier vesting, by fixing a future period.

The rule of construction under consideration is also excluded by a declaration that the devisee shall take a vested interest at

(*k*) *Russel* v. *Buchanan*, 7 Sim. 628, 2 Cr. & Mee. 561; compare this case with *Bland* v. *Williams*, 3 My. & K. 411, stated post.

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the future period, as such a declaration obviously carries with it an implied negation of an earlier period of vesting (*l*).

Rule of preceding cases not applicable where condition is to be performed by devisee;

Nor, it seems, does the rule apply where the attainment of the prescribed age is not the only circumstance by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become liable to be divested; but there is a preliminary act to be done by the devisee, in the nature of a condition precedent, before his title accrues. Thus, in the case of *Phipps* v. *Williams*, already stated, the residue of the real estate was devised to trustees, upon trust to accumulate the rents until C. should attain the age of twenty-four years, and then to convey unto C., *upon his securing certain annuities* to the satisfaction of the trustees, the legal estate in the testator's freehold, copyhold and leasehold hereditaments; but in case the said C. should depart this life before he attained the age of twenty-four years, without leaving issue, then upon certain other trusts. Sir *L. Shadwell*, V. C., held, upon the principle above suggested, that the devisee derived no interest under the trust, until the attainment of the prescribed age, and the performance of the condition. [Upon appeal, Lord *Brougham* held, that as the terms of the devise involved no more than the law would have implied, namely, that the devisee must take subject to the annuities, there was no condition precedent, or indeed subsequent either: he admitted, however, that, if there had been, it would have made a great difference in the argument (*m*).]

But though the devise over has been generally considered as the characteristic of these cases, yet the construction was recently adopted (*n*), where there was no such devise, the words of the will being, "The rest of my property to be invested in land, and given to my grandson; when of age, to have a commission in the army regulars at twenty-one; to remain in the army seven years, *and not to be of age to receive this until he attains his twenty-fifth year*, and to be entitled to him and his male heirs, bearing the name of F. for ever." Lord *Langdale*, M. R., held, that the grandson took an immediate vested interest as tenant in tail in the land to be purchased, subject to be divested if he should not attain twenty-five; and, consequently, that the rents were applicable to his benefit during his minority.

(*l*) *Glanvill* v. *Glanvill*, 2 Mer. 38; [but see further on this point, s. 6, of this Chap. ad fin.

(*m*) 3 Cl. & Fin. 665, 9 Bligh, N. S. 430, nom. *Ackers* v. *Phipps*.]

(*n*) *Snow* v. *Poulden*, 1 Kee. 186.

[In this case, however, it may be conjectured that the Master of the Rolls, whose reasons are not reported, would place some reliance on the express direction in the will, that the property was to be "given to" the grandson, as constituting an immediate devise (*o*). At all events, it will not be safe to depend on the case as an indication that the principle of *Boraston's case*, and the others mentioned above, will be extended beyond the limits to which those authorities have already carried it. The doctrine has not met with approbation in recent times (*p*); and, in the case of *Festing* v. *Allen* (*q*), the Court of Exchequer expressly said that they did not feel inclined to extend it to cases not precisely similar. In that case there was a devise to trustees to the use of the testator's granddaughter for life, and after her decease to the use of her children who should attain the age of twenty-one years, if more than one, in equal shares as tenants in common in fee, and if but one, then to that one in fee; and for want of such issue, over. It was contended, on the authority of *Phipps* v. *Ackers*, that the children took vested estates in fee, subject only to be divested partially in case of other children coming into being, or wholly in case of death under twenty-one. But *Rolfe*, B., who delivered the judgment of the Court, said that in *Phipps* v. *Ackers*, and the cases there referred to, there was an absolute gift to some ascertained person or persons, and the Courts held that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested should be divested, and pass from the first devisee into some other channel; but that in the case under consideration there was no gift to any person who did not answer the whole of the requisite description. It was therefore decided that, as no child of the granddaughter had attained twenty-one when her estate determined, the remainder was defeated.

—nor to cases where the gift is to "the children who" shall answer a given description.

Again, in the case of *Bull* v. *Pritchard* (*r*), where a testator devised his freehold estates to trustees, in trust for his daughter M. during her life, for her separate use, and after her decease, he directed his trustees to convey the said estates "unto and equally between and among all and every the child and children of his said

[(*o*) And see *Peard* v. *Kekewich*, 15 Beav. 166; *Attwater* v. *Attwater*, 18 Beav. 330.

(*p*) See *Phipps* v. *Ackers*, 9 Cl. & Fin. 592.

(*q*) 12 M. & Wels. 279, 5 Hare, 573.

(*r*) 5 Hare, 567.

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[daughter M. who should live to attain the age of twenty-three years," in fee as tenants in common; "and, if there should be but one such child, then to such one child" in fee; "but, in case there should be no such child or children, or, being such, all of them should die under the age of twenty-three years without lawful issue, then upon trust" to convey to the persons therein named. Sir *J. Wigram*, V. C., said there were two classes of cases; one, where the devise was to a party at a given age, and the property was given over if he died under that age; the other, where the description of the devisee was such as to make the given age part of that description; and he held that this case fell under the second class. It was not, he added, necessary for him to say whether greater violence would be done to the language of the will in that case than was done in some of the cases of the first class, as, for example, in *Doe* v. *Moore* (*s*): the two cases were *in principle* widely different from each other. The Vice-Chancellor also held, that a clause contained in the will, directing the trustees to apply each child's share, or so much thereof as they might deem necessary, towards their maintenance, did not vary the case.

The same distinction between these two classes of cases was taken by Sir *L. Shadwell*, V. C. (*t*), and in a great measure formed the ground of the decision in *Duffield* v. *Duffield* in the House of Lords (*u*).

And lastly, in the case of *Stead* v. *Platt* (*x*), where a testator devised four-fifths of his lands to trustees for the maintenance, education and bringing up of his four children, until they should severally attain the age of twenty-five years, at which time and as they should severally attain that age, he gave, devised and bequeathed "unto such of his said children as should attain that age," each one fifth part of the property in fee; and then there followed a gift over to the survivors or survivor, if any of his said children should die before attaining the said age and should leave no issue, or in case any of them should die after that age and should leave no issue. It was contended, on the authority of *Boraston's case* and *Bromfield* v. *Crowder*, that the devise to the children was vested at the testator's death, liable only to be divested in case of their death before twenty-five. But Sir *J.*

[(*s*) See also, per Sir *W. Grant*, M.R., *Lcake* v. *Robinson*, 2 Mer. 386.
(*t*) *Newman* v. *Newman*, 10 Sim. 51.
(*u*) 1 D. & Cl. 268, 314, 3 Bli. N. S. 20; see also *Wills* v. *Wills*, 1 D. & War. 439; and see a similar distinction with regard to personal bequests, post.
(*x*) 18 Beav. 50.

[*Romilly*, M. R., decided that nothing vested in any child who died under twenty-five.

Devise to children living at death of A., and if A. die without issue over, held vested.

On the other hand, the case of *Doe* d. *Bills* v. *Hopkinson* (*y*) seems to support a different doctrine. There a testatrix devised her real estate to her two grandsons T. and W. for life, in equal shares; and after their decease she gave the share of T. "to such child or children as he should happen to leave living lawful issue at the time of his decease" as tenants in common in fee; and W.'s share in like manner to such of his children as survived him; but in case either of her two grandsons should happen to die without issue, then she gave his moiety to the survivor and a third grandson J. for life, with remainder to their issue in moieties as tenants in common in fee; and, in case both T. and W. should die and leave no issue, then the whole to J. for life, with remainder "to such child or children" as he should leave lawful issue at the time of his decease as tenants in common in fee; and in case all three grandsons should die without issue, "or if they or any of them should leave lawful issue, and such issue should die under the age of twenty-one years, and without lawful issue," then over. The Court of Q. B. were of opinion that the estate of each child vested at its birth, grounding themselves chiefly on the devise over being postponed until a general failure of all issue of the grandsons. By a contrary construction, they said, T. might have children who should die in his lifetime, leaving issue, and yet his moiety might go over to J., and such issue would be barred. This objection, however, would be met by holding T. to take an alternative contingent remainder in tail to himself in case he had no children living at his death (*z*).

So, in the case of *Riley* v. *Garnett* (*a*), a testator devised lands to trustees in fee, upon trust for the separate use of M. for life, with remainder to all her children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry, as tenants in common in fee. There was no gift over, but the testator empowered his trustees as to the lands "devised in trust for M. and her children as aforesaid, during the life of M., and after her death, in case she should have any child or children living at her death under twenty-one, then

[(*y*) 5 Q. B. 223. This case was argued Nov. 14th, and judgment given Dec. 5th, 1843. *Festing* v. *Allen* was argued May 3rd and June 5th, and judgment given Nov. 20th, in the same year, and neither case was cited in the other.

(*z*) See Vol. II., p. 450.

(*a*) 3 De G. & S. 629.

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[during the minority of such children" to grant leases. Sir *J. Knight Bruce*, V. C.: "I am of opinion, that, according to the true construction of the will upon the authorities preceding and including *Doe* v. *Nowell* (*b*), there is an immediate equitable devise to all the children of M., whether minors or not minors, living at the death of M., subject to the contingency of their estates being divested upon their death in minority respectively."

Gift to children of A. "who shall attain twenty-one," with a gift over if A leave no issue, held vested in children before twenty-one.

In the recent case of *Browne* v. *Browne* (*c*), Sir *J. Stuart*, V. C., denied the distinction between words referring to the person and words referring to the event, and refused to follow the decision in *Festing* v. *Allen*. The devise was of freehold, copyhold and leasehold lands to the testator's son William for life, with remainder equally between his children, who, being a son or sons should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, but if his son should die without leaving lawful issue, then to testator's grandson Richard Staples for life, and after the death of the grandson, to the use of all the children of the grandson who, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or marry, but in case Richard Staples should "die without leaving lawful issue," then over. The will also contained a direction, that every person entitled in possession should take the name of Browne, or, in default, that the property should devolve on the person next entitled, and also contained a clause declaring that it should be lawful for the trustees, after the death of the testator's son William, to receive the rents due and to accrue due, and apply them for the maintenance of the person next beneficially entitled. The testator's son William died without ever having had issue. The grandson afterwards died leaving one child, the plaintiff, then under age, who was held entitled to a vested estate. The learned Judge said that a simple gift to children at twenty-one, or who should attain twenty-one, was contingent, unless in some other part of the will there could be found expressions to qualify the words of contingency. "In the present case," said his Honor (*d*), "the language of the gift over in default of issue is upon principle and authority sufficiently large to show the testator's intention that the gift over should not take

[(*b*) The learned Judge did not notice the authorities succeeding that case, which, however, were cited in argument.

(*c*) 3 Sm. & Gif. 568.

(*d*) Page 590.

[effect if there were any children (for in cases like this the word issue is held to mean children) who should live to attain the age of twenty-one (*e*)."

In the subsequent case of *Ex parte Styan* (*f*), though it was not necessary to decide the question, Sir *W. P. Wood*, V. C., after noticing the conflicting decisions in *Festing* v. *Allen* and *Doe* v. *Hopkinson*, said "It is a question of serious difficulty whether any substantial distinction can be made between a gift to a class of children if they shall attain twenty-one, and a gift to all who shall attain twenty-one."

Remark on *Doe* v. *Hopkinson*, *Riley* v. *Garnett*, and *Browne* v. *Browne*.

Under these circumstances, although the judgment in *Festing* v. *Allen* seems to stand upon principles and upon authorities which it is beyond the reach of the last three decisions to controvert, yet those decisions must be considered as rendering it of doubtful authority. But considering that in *Riley* v. *Garnett* no reasons were given, and that both in *Doe* v. *Hopkinson* and *Browne* v. *Browne*, another construction could properly have been adopted, equally answering the purpose which led the Court to treat the estate of the children as vested, and that in *Browne* v. *Browne* some at least of the positions in the judgment are untenable, it may be doubted whether those cases would be considered entitled to any great weight when next the subject comes to be considered.]

[(*e*) The decisions are directly to the contrary; words importing failure of issue, introducing a gift over, have never been restricted to a particular class of issue; see *Doe* v. *Lucraft*, Vol. II., p. 442; and *Bryan* v. *Mansion*, ib. p. 443, *Boraston's case* and *Bromfield* v. *Crowder*, were therefore inapplicable to *Browne* v. *Browne*. Here, as in *Doe* v. *Hopkinson*, the remainder to the children, might have been held contingent with (by implication) an alternative contingent remainder in tail to the parent, which in substance would have given the same result as the decision of the V. C.

Other parts of his Honor's judgment are open to observation. At p. 586, the learned Judge says, "it seems unquestionable, that if there had been only one single child at the death of the tenant for life, who fully answered the description, and ten younger children under the age of twenty-one, who therefore then only imperfectly answered the description, each of those other ten would *successively on attaining the age of twenty-one*, long after the death of the tenant for life, take absolute and indefeasible estates as tenants in common in fee." Now in any view this seems incorrect. For first, assuming the estates of the children vested, subject to be divested; then as there were no cross executory limitations between the children, and as the fact of one child only attaining twenty-one, would have prevented the gift over taking effect, the estates of the other ten would have become vested immediately on the death of the tenant for life, and could never have been divested; and secondly, supposing the estates to the children contingent, then as a remainder when it once vests in possession, can never open and let in other devisees, (see ante, p. 239,) the child who attained twenty-one would alone have taken, and the other ten would have been shut out. All the observations at pp. 586, 587 of the report are therefore inapplicable; and to hold the estates vested deviated as much from the testator's intention, as to hold them not vested. The difficulty being caused by a rule of law which made it impossible in all events to give effect to that intention.

(*f*) 1 Johns. 387.]

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Devises *after* payment of debts.

It was at one period doubted whether a devise to a person *after* payment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge (*g*).

General remark on preceding cases.

The several preceding classes of cases clearly demonstrate that the Courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and, agreeably to the maxim, exceptio probat regulam, they confirm, rather than oppose, the doctrine that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider.

Estates limited in clear terms of contingency.

III. The first remark suggested by this class of cases is, that an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what it may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to those consequences.

Thus, in the case of *Denn* d. *Radcliffe* v. *Bagshaw* (*h*), where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and the heirs male of such first son, remainder to the other sons successively in tail, in like manner, remainder to testator's nephew in tail. M. had issue an only son, *who died in her lifetime*, leaving issue. Whether such issue was entitled under the devise in tail (*i*) to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter; and that, to accomplish this intention, the Court would either construe the estate of the daughter to be an estate

(*g*) *Barnardiston* v. *Carter*, 1 P. W. 505, 509, 3 B. P. C. Toml. 64; see also *Bagshaw* v. *Spencer*, 1 Ves. 142; and some very able opinions stated 1 Coll. Jur. 214. Those of Lord *Eldon* (then Sir *John Scott*) and Mr. *Fearne*, are particularly worthy of attention.

(*h*) 6 T. R. 512; see also *Wingrave* v. *Palgrave*, 1 P. W. 401, arising on the limitation of a term in a settlement.

(*i*) For such it clearly would have been. See infra.

tail, or hold that an estate tail vested in the son on his birth; and that the words, "if living at the time of her death," merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the Court (reluctantly, on account of the hardship of the case (*k*),) decided, that the son not having survived his mother, his estate never arose. Lord *Kenyon* observed, that the cases cited for him proceeded on informal words; whereas here correct and technical expressions were used throughout.

Devises held to be contingent, notwithstanding absurd consequence.

So, in the case of *Holmes* v. *Cradock* (*l*), where a testator devised freehold, copyhold, and leasehold estates to F., his heirs, &c., upon trust to pay testator's wife an annuity of 100*l.* for her life, and to pay the residue of the annual profits to testator's son W. during the life of his mother; and if his son should happen to die before his mother, without leaving a widow or child, then in trust to pay all such profits to her for life, and subject to the said trusts, that the said F. should stand seised to the use of the testator's said son, his heirs and assigns, for ever, subject and chargeable with the legacies thereinafter given. In a subsequent clause he proceeded thus:—"And if my son shall die, *leaving my wife*, without leaving a wife or any child, after his death *and my wife's*, I give and bequeath," certain legacies, "which I charge upon my real estate, hereinbefore limited to my son and his heirs." The son survived his mother, and died without leaving wife or child; and Sir *R. P. Arden*, M. R., held, that the legacies did not arise, on the ground that he was not warranted in totally rejecting words, unless they were repugnant to the clear intention manifested in other parts of the will (*m*).

So, in the case of *Shuldam* v. *Smith*, lessee of *Matthews* (*n*),

(*k*) Persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the mean time, *leaving issue*, is in the testator's contemplation. It is probable that in general this event is overlooked; and that if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event.

Suggestion to persons taking instructions for wills as to suspending the vesting.

(*l*) 3 Ves. 317; [see also *Vick* v. *Sueter*, 3 Ell. & Bl. 219.

(*m*) But was there not ground to contend, on the principle of *Pearsall* v. *Simpson*, and that class of cases, (ante, p. 766,) that the devise might be read "if my son shall die without leaving a wife or child, then after his decease, *and after my wife's decease, if he shall die leaving my wife.*" There can be little doubt that Sir *W. Grant* would so have construed it. It is observable, that neither *Webb* v. *Hearing*, nor the anonymous case in Ventris, 363, was cited to Sir *R. P. Arden*, who relied much on *Calthorpe* v. *Gough*, cit. 3 B. C. C. 395, and *Doo* v. *Brabant*, 3 B. C. C. 393, 4 T. R. 703.

Remark on *Holmes* v. *Cradock*.

(*n*) 6 Dow, 22; [see also *Parsons* v. *Parsons*, 5 Ves. 578; *Dicken* v. *Clarke*, 2 Y. & C. 572; *Clarke* v. *Butler*, 13 Sim. 401; *Lenox* v. *Lenox*, 10 Sim. 400.]

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where a testator devised to certain persons for life, and after the death of the survivor unto all and every the children of his late sister C., by her three several husbands (naming them), *that should be then living*, and to their heirs and assigns, equally to be divided between them as tenants in common, and not as joint tenants: *and if there should be but one such child, and no issue of any of the other children then living*, then, and in that case, he devised his real estate unto such surviving child, his or her heirs and assigns for ever. At the death of the surviving tenant for life, one child of C. only was living, but there was issue of several of the other children. It was held by the House of Lords, reversing a decree of the Court of Exchequer in Ireland, that in this event the remainder in fee was undisposed of. Lord *Eldon* said, you cannot, by implication or supplying words, give the whole to one child, in an event in which the testator has said, that such one child shall not have it (*o*), nor divide the estate into different aliquot parts between one child and the issue of the others, where the testator has not told you what aliquot part is to be given to one, and what to the issue of the others. Lord *Redesdale* observed, that the testator had provided for the event of there being more than one child, and that of there being only one and no issue of the others then living. The third event, however, was that which had happened, and in that event there was no disposition.

Limitation over construed strictly and held to fail, event not having happened.

[And in the case of *Maddison* v. *Chapman* (*p*), where a testator directed that, when the youngest of his two daughters had attained twenty-one, his real and personal estate should be divided into three equal parts, one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; provided, that if either of his two daughters should die before a division of his property should have been made, and having no surviving issue, then the part of the deceased should go to the surviving sister. By a codicil, the testator provided that *if both his children should die in their minority* (*q*), and leave no issue, then in such case, and in such case only, he gave the whole of

(*o*) That is, not expressly, but constructively by giving to one, if there should be no issue of the others; for it is observable that, if it had stood upon the former part of the devise alone, the sole surviving child would clearly have taken.

[(*p*) 4 Kay & J. 709. See also *Coulthurst* v. *Carter*, 15 Beav. 421, fourth point; *Pride* v. *Fooks*, 3 De G. & J. 252.

(*q*) "Minority" was construed in its ordinary sense; not, as it was argued it should be, the time which should elapse before the youngest daughter attained twenty-one.

[his property to his wife for life with remainder over. The elder daughter attained twenty-one, but both died before the younger attained that age, and without having been married. It was held by Sir *W. P. Wood*, V. C., that whether the interests under the will were vested or not (*r*), and whether a reasonable motive could or could not be assigned for the condition upon which the testator had made the limitation over in the codicil to depend, that condition must be construed strictly, and that, this event not having happened, the limitation over failed. "The condition," said the V. C. (viz. the death of the elder daughter during minority), "is not merely an event essential to the determination of the interest previously given to her, but involves a further incident, which may or may not have happened when that estate is determined" (*s*). When I find a testator expressing this varied contingency, by his will giving an interest which may be determined by a death after minority, and by his codicil making a limitation over which is only to take effect in the event of death during minority, it is impossible to know what he intended, or to foresee what he would have said had it been called to his attention that the two limitations did not coincide."]

Where testator devises upon contingency, misconceiving the extent of his power of disposition.

The same rigid rule of construction prevails, where a testator has disposed of an estate in a certain event only, under the erroneous impression, that his power of disposition is confined to such contingency.

Thus, in the case of *Doe* d. *Vessey* v. *Wilkinson* (*t*), where lands had been settled on A. for life, remainder to trustees, to raise, in case W. or any of his issue should be living at her (A.'s) death, 1,000*l.* for such persons as A. should appoint, remainder to W. for his life, remainder to his children in tail, remainder to A. in fee. A. by will, reciting the settlement, gave the 1,000*l.* in case W. or any of his issue should be living at the time of her death, to B.. She then proceeded to declare, that "*in case neither the said W., nor any issue of his, should be living at the time of her decease, by which event the premises would devolve upon her and her heirs,*" then she gave the same to trustees for 500 years, to raise certain sums of money within six months after her decease; and from and after the expiration or other sooner determination of the said term, and subject thereto, the testatrix gave the premises to her brother for life, with remainder

[(*r*) The Court, however, thought they were vested, see post.

(*s*) See ante, p. 768.]

(*t*) 2 T. R. 209.

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to her (testatrix's) daughter C. in fee; but if she died before twenty-one, and without issue, to her son-in-law B. in fee, he paying certain legacies. W. *survived the testatrix*, and afterwards died without issue; and the question was, whether in that event the devises took effect. The Court agreed that the limitation of the term was void in event; and *Grose*, J., and *Ashurst*, J., held, that the devise of the inheritance was dependent on the same contingency. Mr. Justice *Buller* did not deny effect to the words of contingency, but confined them to the term, holding it be a vested devise of the inheritance, subject to a contingent term (*u*). The argument that the testatrix might not be aware of her power to dispose of the estate, in case of the death of W. without issue after her death, and that, had she been so, the whole of the will showed that she would have given it to W., was conclusively answered by Mr. Justice *Grose*, who said that, "if she was not aware of her power to give, she did not intend to give; and then the law gives it to the heir, and we cannot take it from him. If she had known her power to dispose of it, she possibly would have given it, and probably might, but she has not said so; and if we were to say so, it would be our will, and not hers."

Where holding the devise to be contingent, will defeat the declared object of the testator.

Still, however, where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the Court will struggle to avoid such a construction.

Thus, in the case of *Bradford* v. *Foley* (*x*), where the devise was in trust for the testator's son for life, and after his decease unto the first and every other son which he (the son) should have by any future wife in tail; remainder to the daughters of such future marriage in fee; with a proviso, that if his son should thereafter marry with any woman related in blood to M. his then wife, all the above uses, so far as they related to the issue of such future marriage, should cease and determine, it being the testator's stedfast resolution, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, should inherit any part of his said estate; and *in such case*, notwithstanding there should be issue of his said son by such future marriage, living at the time of his (testator's) decease, it was his will that neither they, nor either of them, should take

(*u*) As to this point, see infra, s. 4.

(*x*) Doug. 63. This case seems to be exactly the converse of *Driver* d. *Frank* v. *Frank*, 3 M. & Sel. 25.

any thing under his will; *but that* the trustees should stand seised to the use of his (the testator's) brother's children, living at his decease, and their heirs; and in case they should all die in his lifetime, or after his decease, without issue, then he devised his said real estate to his own right heirs: he meant such heirs only as should be in no ways related in blood to the said M., all of whom he thereby excluded from any right, title, or benefit, from his estate (*y*). The son died without marrying again. It was contended, that in this event the ulterior estates never arose; but the Court held, that the testator's brother's children were tenants in tail. Lord *Mansfield* said nothing could be clearer than that the testator meant that no child of M. should take in any event; and yet, according to that argument, such child, if there had been one, must have taken (as heir-at-law).

Remark on *Bradford* v. *Foley*.

The words in this case were certainly very strong, and to a Judge less disposed than Lord *Mansfield* to relax the strict rules of construction, they probably would have appeared to present an insuperable difficulty to holding the testator's brother's children to take in any other event than that of the son's future marriage, especially as this construction extended the devise beyond what was absolutely necessary to effectuate the testator's professed object, namely, the exclusion of the obnoxious persons. He might have intended the devise in question to take effect only in case such persons came in esse. The case, however, stands distinguished from the others before noticed, in the fact, that the devise in its literal terms was inconsistent with a scheme, not merely conjectured, but avowed by the testator (*z*).

[Of the same kind seems to be the case of *Quicke* v. *Leach* (*a*), where a testator devised lands to his wife until his son J. attained the age of twenty-five, "and in case his said son should attain his age of twenty-five and he (testator) should have any other child or children of his body living at the time of his death or that should be afterwards born alive," he devised his lands to trustees for 1,000 years upon the trusts thereinafter expressed; and subject thereto, to his son J. for life with remainders over in

(*y*) It seems that these words would not have amounted to a devise to the persons next in descent; *Goodtitle* d. *Bailey* v. *Pugh*, 3 B. P. C. Toml. 454. Consequently, a son or other relation of M., being the testator's heir, would have taken the reversion by descent, notwithstanding this clause. Nothing will exclude the heir, but an actual disposition to some other person.

[(*z*) This case is given by *Fearne* (C. R. 234), as an example of a limitation after a preceding estate, which preceding estate depends on a contingency which never happens, taking effect notwithstanding.

(*a*) 13 M. & W. 218.

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[strict settlement. The trusts of the term were declared to be for raising 5,000*l.* as portions for the testator's children other than the eldest, that he might happen to leave at his death; but if all his children except an eldest should die before their respective ages of twenty-five and twenty-one, then the sum of 5,000*l.* was not to be raised: "provided always, that in case the testator should leave no younger child or children, or being such, all of them should die before the said respective ages of twenty-five or twenty-one years, or in case the said sum of 5,000*l.* should be raised, then the said term of 1,000 years should cease, determine and be utterly void. J. attained the age of twenty-five, and was the only child whom the testator left surviving him; and under these circumstances the question was whether the devise of the term had failed. The Court of Exchequer held that it had not; for there were two circumstances by which the testator had satisfactorily shown that he intended the term to take effect at his death in all events; first, the clause of cesser provided that the term should cease on certain contingencies, one of which was the testator's not leaving any younger child. Such a proviso would be useless and unmeaning if, unless he left a younger child, the term was never to come into existence. A term which never *existed* could not possibly *cease* (*b*). The other circumstance was this: One of the trusts of the term was, that if the testator's wife should die before J. attained the age of twenty-five years, then the trustees should allow him a sum not exceeding 400*l.* per annum for maintenance. This trust could only be performed by means of the term, and therefore necessarily presupposed its existence: and it was a trust not made to depend by any necessary or reasonable construction of the words used on the event of there being a younger child.]

Vested gift not divested, unless all the events happen.

As a devise expressly made to take effect on a contingency will not arise unless such contingency happen, it follows à fortiori that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen (*c*). And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the

[(*b*) But the term was to "cease, determine and be *void*" upon any one of three alternatives, i. e., there being no younger children, their dying under age, or the money having been raised. Might not the words have therefore been read distributively?

(*c*) Co. Lit. 219 b;] *Doe* v. *Cooke*, 7 East, 269, ante, p. 487; *Doe* v. *Rawding*, 2 B. & Ald. 441, ante, p. 487; see also *Doe* d. *Usher* v. *Jessep*, 12 East, 288; [*Wall* v. *Tomlinson*, 16 Ves. 413; *Vulliamy* v. *Huskisson*, 3 Y. & C. 80.]

substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. Thus, if a devise be made to A., to be divested on a given event, in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come in esse, and answer the qualification which the testator has annexed thereto.

Thus, in the case of *Harrison* v. *Foreman* (*d*), where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties; and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir *R. P. Arden*, M. R., held, that the original gift was not defeated.

So, in *Sturgess* v. *Pearson* (*e*), it was held, that a gift to a person for life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favour of those who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives.

Devise not divested by contingent clause which failed.

And the same construction has sometimes been applied in cases, where the intention that the survivors (in whose favour the original gift was divested) should be living at the time of distribution, was less clearly marked.

As, in *Browne* v. *Lord Kenyon* (*f*), where the testatrix gave 1,000*l*., to which she was entitled by virtue of a deed of settlement (and which it seems was charged upon land), upon trust for several persons successively for life, and after the death of the survivor, upon trust to pay the principal to C.; but "if he be then dead" (which event happened), then to his two brothers in equal shares, *or the whole to the survivor of them*. Both the brothers survived the testator, and died pending the prior life interests. Sir *J. Leach*, V. C., held, that they took vested interests at the death of the testator, subject to be divested *if one only should survive the tenants for life;* though he intimated a

(*d*) 5 Ves. 207.

(*e*) 4 Mad. 411; [*Kimberley* v. *Tew*, 4 D. & War. 139; *Masters* v. *Scales*, 13 Beav. 60; *Peters* v. *Dipple*, 12 Sim. 101; *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; *Eaton* v. *Barker*, 2 Coll. 124; *Benn* v. *Dixon*, 16 Sim. 21; *Walker* v. *Simpson*, 1 Kay & J. 719;] and see *Hulme* v. *Hulme*, 9 Sim. 644, stated post.

(*f*) 3 Mad. 410; [*Wagstaff* v. *Crosby*, 2 Coll. 746.]

doubt, whether the testatrix did mean that either brother should take any interest without surviving the tenants for life; but his Honor said, the force of the expression was otherwise.

So, in the case *Belk* v. *Slack* (*g*), where a testator gave the residue of his real and personal estate to trustees, upon trust for A. for life, and after the decease of A. and B., he gave the same to C. and D., to be equally divided between them, share and share alike, *or to the survivor or survivors of them.* C. and D. both died in the lifetime of A. and B.; and it was held that their respective representatives were entitled to the several moieties of the residue.

[The two last cases have been treated by Lord *Campbell*, C., as turning on expressions clearly indicating that the date at which the survivorship was to be ascertained was the death of the tenant for life; and in *White* v. *Baker* (*h*), it was held by the full Court of Appeal that in the case of a gift to A. for life, and after the death of A. to B. and C. equally, and if either B. or C. die in the lifetime of A. the whole to the survivor; the survivorship is not, as in other cases, referable to the death of A., but, in the absence of indication to the contrary, refers to one of the persons B. and C. surviving the other, and therefore on the death of one in the lifetime of the other, the whole fund belongs indefeasibly to the latter whether he survives the tenant for life or not.

"Where," said Sir *G. Turner*, "there is a bequest to A. for life, and after his death to B. and C. or the survivor of them, some meaning must, of course, be attached to the words 'the survivor.' They may refer to any one of three events; to one of the persons named surviving the other; to one of them only surviving the testator; or to one of them only surviving the tenant for life: and in the absence of any indication to the contrary, they are taken to refer to the last event, as being the most probable one to have been referred to. But where, as in the present case, the bequest is to A. for life, and after his death to B. and C., and in case either of them dies in the lifetime of the other, the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other; and the

(*g*) 1 Kee. 238; see also *Jackson* v. *Noble*, 2 Kee. 590, post; [*Aspinall* v. *Audus*, 7 M. & Gr. 912; *Littlejohns* v. *Household*, 21 Beav. 29; *Page* v. *May*, 24 Beav. 323; *Cambridge* v. *Rous*, 25 Beav. 415; and see and consider *Gibson* v. *Hale*, 17 Sim. 129.

(*h*) 29 L. J. Ch. 577, 6 Jur. N. S. 209, 591, approving *Scurfield* v. *Howes*, 3 B. C. C. 90; and see *Antrobus* v. *Hodgson*, 16 Sim. 450.

[question is, not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used."

Another instance of strict construction being put upon a gift divesting a previous vested interest is furnished by the case of *Templeman* v. *Warrington* (*i*), where a testatrix bequeathed her residue in trust for A. for life, and after her death in trust for her children; but in case there should be but one child at A.'s death then to go to that one, and on failure of issue, as A. should appoint. A. had eleven children, three of whom died in her lifetime; and it was held that as there were more children than one living at A.'s death, the deceased children were not divested of the interests which they took under the primary gift.

And in *Strother* v. *Dutton* (*k*), where a testator gave to his daughter R. 1,000*l.* to be invested and the interest to be paid to her for her life, and at her death to be called in and distributed equally amongst her children; "in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living." R. had several children of whom four died in her lifetime without issue; and it was held that the shares which vested in them on their births, were not divested; for the gift in favour of the issue of the children who had issue, did not affect the shares of the children who died without leaving issue.]

Where a gift to several persons or such of them as shall be living at a certain time, is followed by limitations over, in case of their dying under alternative circumstances, (for instance, under twenty-one, leaving issue, and under twenty-one without issue,) these executory gifts are held to apply only to the shares of objects, who are living at the prescribed period; to decide otherwise would be to reduce the words, "or such of them as shall be then living," to silence (*l*).

[(*i*) 13 Sim. 267; see also *Bromhead* v. *Hunt*, 2 J. & W. 459; *Gordon* v. *Hope*, 3 De G. & S. 351; and *Terrell* v. *Cooke*, 5 L. J. Ch. N. S. 68; see also *Skey* v. *Barnes*, 3 Mer. 334; *Hope* v. *Potter*, 3 Kay & J. 212. But the improbability of the testator intending to make the vesting or indefeasibility of a legacy to a class, depend on whether one or two only of the class survive a given period, will be attended to by the Court where the original gift is in ambiguous terms, *Shum* v. *Hobbs*, 3 Drew. 101; *Daniel* v. *Gossett*, 19 Beav. 478.

(*k*) 1 De G. & J. 675. See also *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Etches* v. *Etches*, 3 Drew. 447, 2nd point.]

(*l*) *Howes* v. *Herring*, 1 M'Clel. & Y. 295. The rule, that estates vested are not to be divested unless all the events upon which the property is given over happen, seems to have been generally adhered to, although an absurd and whimsical intention be thereby imputed to the testator. See *Graves* v. *Bainbridge*, 1 Ves. jun. 562.

Question, whether contingency confined to particular estate, or extends to a series of limitations.

IV. When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them (*m*).

Contingency held to extend to whole line of limitations.

In *Moody* v. *Walters*, the limitations in a marriage settlement were to the husband and wife successively for life, remainder to the first and other sons in tail male; with remainder, *in case he (the husband) should die without leaving any issue male then born, and alive, and leaving his wife with child*, to such after-born child or children, if a son or sons: remainder to the brother of the settlor for 120 years, if he should so long live; remainder to trustees for preserving contingent remainders; remainder to his first and other sons in tail male, with reversion to the settlor in fee. Lord *Eldon* expressed a strong opinion (though the case was not decided on the point), that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it. Such, his Lordship thought, would have been the construction, had it been a will.

Contingency confined to particular estate.

Instances in which a contingency has been restricted to the immediate estate are of two kinds. First, where the words of contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others.

(*m*) *Davis* v. *Norton*, 2 P. W. 390; *Doe* d. *Watson* v. *Shipphard*, Doug. 75, stated Fea. C. R. 236; *Moody* v. *Walters*, 16 Ves. 283; [*Toldervy* v. *Colt*, 1 Y. & C. 240, 627, 1 M. & Wels. 250; the same rule applies to personalty, *Lett* v. *Randall*, 10 Sim. 112; *Fitzhenry* v. *Bonner*, 2 Drew. 36; *Cattley* v. *Vincent*, 15 Beav. 198; *Gray* v. *Golding*, 6 Jur. N. S. 474.]

As, in *Horton* v. *Whittaker* (*n*), where A., by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, *unless she happened to survive him*, want any assistance to enable her to live in the world, he devised his estates to trustees, in trust during the life of M., to pay the rents to his (the testator's) sisters T. and B.; and after the decease of W., *in case his* (*the testator's*) *sister M. should be then living*, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held, that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

Where the words are referable to particular estate only.

Secondly, The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate, in one uninterrupted series, in the nature of remainders, but assume the form of substantive independent gifts. As, in the case of *Lethieullier* v. *Tracy* (*o*), where A. devised land to his daughter for life, remainder to her first and other sons in tail; and, if she should depart this life without issue of her body *living at her death*, then he devised the land to trustees and their heirs, until N. should attain twenty-one, upon certain trusts. *Item—the testator gave and devised* the land in question to N., after he should have attained his age of twenty-one years, for his life, with remainders over. Lord *Hardwicke* held, that the contingency of the daughter dying without issue *living at her death* affected only the estate limited to the trustees until N. attained twenty-one, and not the subsequent limitations. His Lordship said, he took the words, "Item—I give and devise," &c., as a substantive devise, and not at all relative to the former devise to the trustees, on the contingency of the daughter dying without issue at her death.

Where the limitations of ulterior estates stand as independent gifts.

[So, in the case of *Pearson* v. *Rutter* (*p*), where a testator de-

(*n*) 1 T. R. 346; see also *Napper* v. *Sanders*, Hutt. 119; *Bradford* v. *Foley*, Doug. 63, stated ante, p. 782; [*Doe* d. *Lees* v. *Ford*, 2 Ell. & Bl. 970; *Doutty* v. *Laver*, 14 Jur. 188; *Darby* v. *Darby*, 18 Beav. 412.]

(*o*) 3 Atk. 774, Amb. 204; and see *Aislabie* v. *Rice*, 3 Mad, 256, 3 J. B. Moo. 358, 8 Taunt. 459, stated infra; but see *Doe* v. *Wilkinson*, 2 T. R. 209, ante, p. 781.

[(*p*) 3 D. M. & G. 398, 6 H. of L. Ca. 61, nom. *Grey* v. *Pearson*.

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[vised his messuage and farm at S. to trustees in trust for his grandson Robert in tail, and if he should die under age and without issue, then in trust for the testator's son Richard for his life, and after his decease, in trust for M. during widowhood, "and subject to the trusts hereinbefore thereof declared," in trust for A. and B.; Robert died without issue, but having attained twenty-one, so that the trusts in favour of Richard and M. failed (*q*); but Lord *Cranworth* held, that the ultimate trust was to be read independently of the former clause, upon the same principle that, in the case of *Lethieullier* v. *Tracy*, the "item" clause was treated as a fresh departure, and a start upon a new disposition.

And in the case of *Boosey* v. *Gardener* (*r*), where a testator bequeathed to his two sisters the interest of his Long Annuities for their lives, and in case of one or both of their deaths before his, he gave the whole interest in Long Annuities to his brother for life; at his death the testator gave half of the capital to his niece A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; *likewise* the testator bequeathed to his nephew S., his brother's son, if not further family, the other half; in case of further family, to be divided between them, not dividing the half left to A.: it was held that the bequest to the niece and nephew, were not contingent upon the deaths of the sisters in the testator's lifetime. Lord Justice *Turner*, in delivering judgment, said, he was not prepared to say, that if the question had depended only on the disposition in favour of the niece immediately following on the disposition in favour of the testator's brother, the interest of A. might not properly have been held to depend on the contingency, but that the disposition in favour of the nephew could not, upon a sound construction of the will, and having regard to the foregoing authorities, be held to be governed by the words of contingency, so far as the nephew was concerned; and if not as to him, neither could the disposition in favour of the niece; for the two dispositions were connected together, and formed part of one scheme.

Observations on word "item."

It is not, however, to be assumed that whenever the word "item," or "likewise," begins a sentence, it creates a complete severance of all that follows from the previously-expressed con-

[(*q*) Vide ante, p. 478.
(*r*) 5 D. M. & G. 122. See also *Quicke* v. *Leach*, 13 M. & Wels. 218; *Sheffield* v. *Earl of Coventry*, 2 D. M. & G. 551.

[tingency. It cannot be put higher than this, that such expressions make a primâ facie case for the disconnexion, which the context of the will may either maintain or rebut. Accordingly, in the case before Lord *Hardwicke*, he said, that if the legal estate had been given to the daughter and her issue, and then after these words the whole had been given to trustees, and all the subsequent limitations had been only declarations of that trust, in such case these words (of contingency) would have extended to the whole.

Effect of word "likewise."

And in *Taylor* v. *Pegg* (*s*), where a testator gave to trustees in trust for his son until he attained twenty-one, or was able to make a will himself, all his estate, lands, &c., and after a specific bequest of furniture to his wife, the testator bequeathed to her 20*l.* a year so long as she should continue his widow if his son were living, and if his son should die before twenty-one, he empowered his wife to hold his estate for her life, if she continued his widow, but if she should intermarry, he gave her only 10*l.* a year for her life, if his son should be then living. *Likewise* he empowered two other trustees at the death of his wife to sell his real and personal estate, and distribute the proceeds to his wife, his nephews and nieces, and others. It was held by the M. R., notwithstanding the word "likewise," that the power of sale was governed by the same contingency as the gift to the widow, viz. the death of the son under twenty-one. Referring to *Boosey* v. *Gardener*, the learned Judge said he was satisfied that it was not the intention of the Lords Justices to establish this proposition, that wherever the word "likewise" occurred, the contingency which governed the previous gift was not to govern that which followed, if the subject-matter was clearly connected.]

Vesting of bequests of personal estate.

V. The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty. Whatever difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the Ecclesiastical Courts, who possessed, and still possess, in common with Courts of Equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate. Pecuniary legacies charged on land (*t*)

Legacies charged on land.

[(*s*) 24 Beav. 105.

(*t*) Leaseholds are not land for this purpose, *Re Hudsons*, 1 Dru. 6; nor is money to arise from the sale of land, *Re Hart's Trust*, 3 De G. & J. 195.]

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are, so far as they come out of the real estate, to be considered as dispositions pro tanto of that species of property.

A pecuniary legacy, whether charged on land or not, given to a person in esse simply, i. e. without any postponement of payment, is, of course, vested immediately on the testator's decease. In regard to sums payable out of land in futuro, the old rule was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land if the devisee died before the time of payment (*u*); but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A., to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment (*x*); and that too, though interest in the mean time be given for maintenance (*y*). But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy will vest instanter; and, consequently, if C. die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A., in order that he may in the mean time enjoy the land free from the burthen (*z*). But either of these

Distinction where payment is postponed with reference to circumstances personal to devisee, and where for convenience of the estate.

(*u*) 2 Vern. 439; Pre. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2; [Pre. Ch. 290;] 3 Atk. 112; 1 Atk. 482. The ground of this rule, it should seem, was that the inheritance might not be unnecessarily burthened.

(*x*) *Gawler* v. *Standerwicke*, 1 B. C. C. 105, n., 2 Cox, 15; *Harrison* v. *Naylor*, 3 B. C. C. 108, 2 Cox, 247; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; but see *Jackson* v. *Farrand*, 2 Vern. 424, [1 Eq. Ca. Ab. 268, pl. 8; this case is said to have been termed anomalous by Lord *Hardwicke*, *Cotton* v. *Cotton*, ib. n., 1 Atk. 486.]

(*y*) *Pearce* v. *Loman*, 3 Ves. 135; [*Gawler* v. *Standerwicke*, ubi sup.]

(*z*) 3 P. W. 414; Cas. t. Talb. 117; 1 Eq. Ca. Ab. 112, pl. 10; Com. Rep. 716; 2 Atk. 127, 507; 3 Atk. 319; 1 Ves. 44; Amb. 167, 230, 266, 575; 1 B. C. C. 119, n., 124, n., 192, n.; Dick. 529; 1 B. C. C. 119; ib. 191; 9 Ves. 6; 4 Sim. 294; 2 Y. & C. 539; [2 Y. & C. C. C. 134; 3 Hare, 86; 7 ib. 334; 1 M. D. & D. 418; 2 ib. 177; and see *Remnant* v. *Hood*, 6 Jur. N. S. 1173.] In the case of *Oakeley* v. *Kitchener*, in Chancery, March, 1827 (with a MS. note of which the writer has been favoured), a testator devised to his wife an annuity for her life out of his real estate, and subject, thereto, devised his real estate to trustees for 500 years to raise his debts and legacies. He gave a legacy of 1,000*l.* to each of his four younger children, payable at twenty-one, as to sons, and twenty-one or marriage, as to a daughter, with interest in the mean time, to be applied for their maintenance. He also gave them a further legacy of 1,000*l.* each to be paid *within six months after the death of the wife*, payable at twenty-one, or marriage, as before, with interest from her death. There was (though the fact does not appear to be very material) a gift over of the respective legacies on the death of the sons before twenty-one, without issue, or the daughters unmarried, to the survivors. It was held, that the vesting of the second series of legacies was not postponed until the decease of the wife, and, therefore, did not fail by

MS. case of *Oakeley* v. *Kitchener*.

rules of construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency, which might, abstractedly viewed, appear to spring from considerations personal to the legatee, as in the case of a sum of money directed to be raised for a person at the age of twenty-one; yet the vesting will take place immediately on the testator's decease, if such be the declared intention (*a*). And if such intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete.

And here it may be observed, that it is a circumstance always in favour of the immediate vesting, that the testator has expressly given over the legacy to another in the event of the legatee dying under certain circumstances; the inference being, in such case, that the legacy is meant to be raised out of the land for the benefit of the original legatee, in every event, except that on which it was expressly given to the substituted legatee (*b*).

On the same principle, where a testator provides that, in the event of his legatee, or one of the legatees, if more than one, dying in his own lifetime, the legacies should not sink into the land, but be raised for the benefit of some other persons,—a strong argument is naturally suggested, that the testator must intend the legacies to be raised for the benefit of the legatee absolutely, or, in other words, that he should take a vested interest in case he does survive the testator (*c*).

the decease of the children during her life.

This case, it will be perceived, agrees with the general distinction stated in the text, as the charge was evidently postponed until the death of the annuitant for the convenience of the estate. [See also *Brown* v. *Wooler*, 2 Y. & C. C. C. 134. Of course it makes no difference in the construction, that the remainderman, whose interest is charged with the legacy, dies before the tenant for life. The interest passes, *cum onere*, to the heir. *Morgan* v. *Gardiner*, 1 B. C. C. 193, n.]

(*a*) *Watkins* v. *Cheek*, 2 S. & St. 199.

(*b*) *Murkin* v. *Phillipson*, 3 My. & K. 257, where A. bequeathed to his six grandchildren the sum of 50*l.* each, when the youngest should come of age, they to receive the interest in the mean time, when a certain estate should be sold, adding, "if either of those children should not live to come of age, nor have an heir born in wedlock, the said 50*l.* to be equally divided among the surviving children." One of the grandchildren attained twenty-one, married, and afterwards died, during the minority of the youngest grandchild, leaving a child. Sir *J. Leach*, M. R., thought that though there was, in terms, no gift until the youngest grandchild attained twenty-one, yet as interest was given in the mean time, and payment was postponed for the convenience of the estate, the interests were vested; and his Honor assented to the argument (which had been strongly urged at the bar), that as the ulterior gift showed that the legacy was intended not to sink into the land, if the legatee died under age, leaving a child, à fortiori it could not be meant that the legacy should sink into the land in the event of the legatee attaining twenty-one, and afterwards dying, leaving a child.

Case of *Murkin* v. *Phillipson*.

(*c*) *Lowther* v. *Condon*, 2 Atk. 127, 130.

[And, on the other hand, although the time of payment may appear to be fixed with a view to the convenience of the estate, for instance, six months after the death of an annuitant, yet, if the direction be to pay at that time to the legatees, "or such of them as shall be then living," it is clear that the representatives of one who dies before the annuitant cannot claim a share in the fund (*d*).]

When payable, no time of payment being fixed.

Sometimes a difficulty occurs in determining at what period a sum of money charged on land is to be raised, from the absence of expressions fixing the time of payment. The cases on this subject are not all reconcileable (*e*); but it seems that, generally, in such a case, the devisee would be entitled to have the money raised immediately. In the case of *Cowper* v. *Scott* (*f*), 1,500*l.* was to be raised, *within* six years after the testator's decease, out of the rents and profits, and interest at 4 per cent. in the mean time, for his two youngest daughters, one of whom dying under age, and within the six years, it was held to belong to her representative, on the ground that there was no precise appointment when it should be paid; the six years being mentioned as the ultimate time, and it was to be paid as much sooner as it could. But, if the testator have only a reversion in the lands charged, it is probable that the money would be held not to be raiseable until the reversion fell into possession. This principle has prevailed in several cases in regard to annuities (*g*).

Charges on reversions.

Rule where legacies are charged both on real and personal estate.

[Where legacies are charged both on real and personal estate, there, so far as the personal estate will extend to pay them, the case is governed by the rules of the Civil Law, and as if the legacy were to come out of the personal estate only; and, so far as the real estate is applicable to make up the deficiency in the personal, the case is governed by the same rules as if the legacy were charged on the realty alone (*h*).]

[(*d*) *Goodman* v. *Drury*, 21 L. J. Ch. 680; see *Bruce* v. *Charlton*, 13 Sim. 65.]

(*e*) See Mr. Cox's note to *Duke of Chandos* v. *Talbot*, 2 P. W. 612; but it is observable, that the cases cited by the learned Editor, as decided on the principle that portions "do not vest, if the children die before they want them," arose in reference to portions under settlements, where the effect of holding the portions to vest *instanter* would have been to give them to the father, in the event of the children dying at a very early age, contrary to the obvious spirit and design of such provisions. [And see Mr. Butler's note IV. to Fearne, C. R. 557.]

(*f*) 3 P. W. 119; see also *Wilson* v. *Spencer*, 3 P. W. 172; [*Emes* v. *Hancock*, 2 Atk. 507; *Hodgson* v. *Rawson*, 1 Ves. 44.] The case of *Norfolk* v. *Gifford*, 2 Vern. 208, [as explained in Raithby's note, went on a different ground.]

(*g*) *Ager* v. *Pool*, Dyer, 371 b; *Turner* v. *Probyn*, 1 Anstr. 66.

[(*h*) *Duke of Chandos* v. *Talbot*, 2 P. W. 602; *Jennings* v. *Looks*, ib. 276; *Prowse* v. *Abingdon*, 1 Atk. 482; *Re Hudsons*, 1 Dru. 6.]

Vesting of personal legacies.

Distinction where time is annexed to substance of gift, and where to time of payment only.

VI. We now proceed to consider the rules which regulate the vesting of personal legacies, the payment of which is postponed to a period subsequent to the decease of the testator. A leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instanter. Thus, where a sum of money is bequeathed to a person at the age of twenty-one years (*i*), or at the expiration of a definite period (say ten years) from the decease of the testator (*k*), the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative (*l*). As, in the case of *Sidney* v. *Vaughan* (*m*), where a testatrix bequeathed to A. 100*l*., to be paid to him within six months after he should have served his apprenticeship to which he was then bound. A. did not serve out his apprenticeship, but ran away from his master, and, after the expiration of the term, died intestate. It was held, by the House of Lords, that A.'s administratrix was entitled to the legacy, with interest from the expiration of six months.

So, in the case of *Chaffers* v. *Abell* (*n*), where a testator bequeathed certain sums of stock to trustees, to pay 40*l*. per annum to his daughter M. for life, and, after her decease, "to pay, assign and transfer the sum of 1,000*l*. stock equally amongst all and every the child and children of M., share and share alike, *to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years*" (*o*); and directed

(*i*) *Onslow* v. *South*, 1 Eq. Ca. Ab. 295, pl. 6; *Cruse* v. *Barley*, 3 P. W. 20; [*Re Wrangham's Trust*, 7 Jur. N. S. 15.]

(*k*) *Smell* v. *Dee*, 2 Salk. 415; [see also *Bruce* v. *Charlton*, 13 Sim. 65. Compare *Bromley* v. *Wright*, 7 Hare, 339, post, p. 799.]

(*l*) *Cloberry* v. *Lampen*, 2 Ch. Cas. 155, 2 Freem. 24; *Stapleton* v. *Cheales*, 2 Vern. 673, Pre. Ch. 317; *Harvey* v. *Harvey*, 2 P. W. 21; *Jackson* v. *Jackson*, 1 Ves. 217.

[(*m*) 2 B. P. C. Toml. 254.] It seems that if no interest were made payable on the legacy, the representative must wait until the legatee, if living, would have attained his majority; but if it carried interest, he would be entitled immediately. See *Crickett* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. W. 271.

(*n*) 3 Jur. 577; [see also *Wadley* v. *North*, 3 Ves. 364; *Williams* v. *Clark*, 4 De G. & S. 472; *Edmunds* v. *Waugh*, 4 Drew. 275; *Brocklebank* v. *Johnson*, 20 Beav. 205; *Re Bennett's Trust*, 3 Kay & J. 280; whence it appears that the Court is always anxious to find a gift independent of the direction to pay, or a direction to set apart a fund for payment of the legacy. But see *Shum* v. *Hobbs*, 3 Drew. 93.

(*o*) This is said to mean "when the youngest child that lives to the age of twenty-one attains that age." *Ford* v. *Rawlins*, 1 S. & St. 328; *Evans* v. *Pilkington*, 10 Sim. 412; see *Castle* v. *Eate*, 7 Beav. 296.]

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that, after the decease of his daughter, the dividends should be applied for the maintenance of the children. At the death of the testator, M. had four children, one of whom died before the youngest attained twenty-one. The youngest alone survived M. Sir *L. Shadwell*, V. C., held, that the four children took vested interests in the stock. There was, he observed, in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, "*when and so soon as the youngest of such children should attain his or her age of twenty-one years.*"

Superadded words of division or distribution.

Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are ingrafted on a gift, which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting. Thus, a bequest to A. and B. of 3,000*l.*, Navy £5 per Cent. Annuities, and all dividends and proceeds arising therefrom, to be equally divided between them, when they should arive at twenty-four years of age, has been held to vest the stock immediately in the legatees (*p*).

[The same rule is exemplified in those cases where payment is in terms postponed until the testator's debts are satisfied (*q*), or his assets realized (*r*), or an outstanding security is got in (*s*), or until certain real estate is sold (*t*), or money directed by the will to be laid out in the purchase of land is so laid out (*u*). And an immediate gift to several is not made contingent by a superadded direction for distribution between them equally as three barristers should think fit, the discretion not extending to authorize any alteration in the extent of the interests given to the legatees (*x*).

Immaterial that the words of division *precede* those of gift.

It is of course immaterial whether the gift precedes the direction to pay, or vice versâ. And, therefore, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter,

(*p*) *May* v. *Wood*, 3 B. C. C. 471.

[(*q*) *Small* v. *Wing*, 5 B. P. C. Toml. 66.

(*r*) *Gaskell* v. *Harman*, 6 Ves. 159, 11 Ves. 489. The position in the text seems to be warranted by Lord *Eldon's* observations in this case. The case itself was an extremely special one.

(*s*) *Wood* v. *Penoyre*, 13 Ves. 325 a.

(*t*) *Stuart* v. *Bruere*, 6 Ves. 529, n.; and see *Tily* v. *Smith*, 1 Coll. 434.

(*u*) *Sitwell* v. *Bernard*, 6 Ves. 522; see also *Hutcheon* v. *Mannington*, 4 B. C. C. 491, n., 1 Ves. jun. 365; *Entwistle* v. *Markland*, 6 Ves. 528, n.; *Whiting* v. *Force*, 2 Beav. 571; *Lucas* v. *Carline*, ib. 367; *In re Dodgson*, 1 Drew. 440.

(*x*) *Kavanagh* v. *Morland*, cited by Sir *W. P. Wood*, in *Maddison* v. *Chapman*, 4 Kay & J. 715.

[as and when they should respectively attain the age of twenty-one, share and share alike, "to whom I give and bequeath the same accordingly," Lord *Cottenham* held the legacy vested in the children on their birth (*y*).

The rule yields to a clear contrary intention.

But if it is clear from the language of the will that the attainment of a certain age is made a condition precedent to the vesting of a legacy, such legacy will be contingent notwithstanding a gift of the legacy distinct from the direction to pay; so that a gift to A., to be paid *in case* he attained the age of twenty-one *and not otherwise*, is contingent upon A.'s attaining that age (*z*). So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid (*a*), or until a sale directed thereby should be completed (*b*), or until assets in a foreign country should be actually remitted to the legatee (*c*), the intention was carried into execution, and the vesting as well as payment was held to be postponed (*d*).

Legacy in uncertain event.

And in all cases where] the payment or distribution is deferred, not merely (as in the cases just noticed) until the lapse of a definite interval of time, which will [or ought to] certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. This distinction was recognized in the case of *Atkins* v. *Hiccocks* (*e*), where a sum of 200*l.* was bequeathed to A., to be paid at her marriage, or three months afterwards, provided she married with consent; and Lord *Hardwicke* held, that A. having died unmarried, her representative was not entitled to the legacy.

Rule where the only gift is in the direction to pay, &c.

It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

[(*y*) *In re Bartholomew*, 1 Mac. & G. 354; and see *Livesey* v. *Livesey*, 3 Russ. 287, 542.

(*z*) *Knight* v. *Cameron*, 14 Ves. 389; *Lister* v. *Bradley*, 1 Hare, 10; see also *Hunter* v. *Judd*, 4 Sim. 455.

(*a*) *Bernard* v. *Mountague*, 1 Mer. 422.

(*b*) *Elwin* v. *Elwin*, 8 Ves. 546; *Faulkener* v. *Hollingsworth*, cit. ib. 558.

(*c*) *Law* v. *Thompson*, 4 Russ. 92.

(*d*) But not necessarily to the time when the debts have been *actually* paid, or the sale completed; for the Court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period. See the cases cited above, and see *Small* v. *Wing*, 5 B. P. C. Toml. 74. In *Birds* v. *Askey*, 24 Beav. 615, where there was a residuary gift, "after satisfying the trusts" of the will, to A. *if then living*,—one of the trusts being in favour of A. himself for life,—and it was decided that this meant if A. was living after provision had been made for the due execution of the will, the M. R. held that this was a duty which fell on the executors immediately on the testator's decease, and that the residue vested in A. at that time.]

(*e*) 1 Atk. 500; [and see *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Morgan* v. *Morgan*, 4 De G. & S. 164. Compare] *Booth* v. *Booth*, 4 Ves. 399, post, s. 7.

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Thus, in a leading case (*f*), where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, *upon his, her or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage with consent;* and the trustees were authorized to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the mean time. Sir *W. Grant,* M. R., held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five.

So, where (*g*) a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, on the youngest attaining twenty-one years, at her and my executor's discretion; such part being nevertheless reserved for her own use as may be thought convenient, and at her death, to be distributed as above directed;" Sir *J. Leach,* V. C., on the principle above stated, held, that children who died [infants (*h*)] before the youngest attained twenty-one, took no interest.

Effect where payment is postponed for convenience of fund.

But even though there be no other gift than in the direction to pay or distribute in futuro; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life; and, after his decease, to trustees, upon trust to sell, and pay, and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D. (*i*); as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life interest, the ulterior

(*f*) *Leake* v. *Robinson,* 2 Mer. 363; [*Meredith* v. *Tooke,* Hov. Sup. Ves. jun. 324; *Murray* v. *Tancred,* 10 Sim. 465; *Mair* v. *Quilter,* 2 Y. & C. C. C. 465; *Boughton* v. *James,* 1 Coll. 26; *Walker* v. *Mower,* 16 Beav. 365; *Gardiner* v. *Slater,* 25 Beav. 509. By the position in the text it is not to be understood, that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, is less favourable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but that a distinction is to be taken between these two cases on the one hand, and the case, mentioned above, of a gift of a legacy, with a superadded direction to pay at a future time, or upon a given event, on the other hand. Per Sir *J. Wigram,* V. C., 2 Hare, 17, 18.]

(*g*) *Ford* v. *Rawlins,* 1 S. & St. 328.

[(*h*) See *Leeming* v. *Sherratt,* 2 Hare, 14, stated post.

(*i*) Without any distinct indication of a contrary intention appearing independently of those words, *Wilson* v. *Mount,* 19 Beav. 292; *Daniel* v. *Gossett,* ib. 478.

legatees take a vested interest at the decease of the testator. [Sir *J. Wigram*, V. C., has expressed his entire concurrence in this doctrine (*k*), which is further supported by numerous authorities, as well in gifts to a class (*l*) as to individuals, and as well where there has (*m*), as where there has not (*n*), been a trust for sale interposed between the prior and ulterior limitations: the sale being intended only to facilitate the distribution, not to postpone the vesting.

Words seemingly contingent referred to the determination of a prior gift.

For example, in the case of *Blamire* v. *Geldart* (*o*), a testator bequeathed to his nephew A. 200*l.* Consols at his (the testator's) wife's decease, and made her his residuary legatee; and Sir *W. Grant*, M. R., held, that A.'s legacy became vested immediately on the testator's death, the wife, as residuary legatee, taking a life interest in that stock, so given to A.

So, in the case of *Cousins* v. *Schroder* (*p*), where a testator gave his real and personal property to his wife, for her life, and directed that, at the end of twelve months, next after his death, 1,000*l.* should be laid out in Government securities, in the names of trustees, in trust to pay the dividends to his daughter for life, and upon her decease to divide the capital amongst all the children of his daughter as they should attain the age of twenty-one; and the testator directed, that at the end of twelve months next after the decease of his wife, the further sum of 1,000*l.* should be laid out for the benefit of his daughter and her children upon the like trusts as the first 1,000*l.*; Sir *L. Shadwell*, V. C., held, that if the children lived to attain twenty-one they were capable of taking both sums of 1,000*l.*, although they died before the time of payment.

Again, in the case of *Bromley* v. *Wright* (*q*), a testator de-

[(*k*) 4 Hare, 398.

(*l*) *Smith* v. *Palmer*, 7 Hare, 225.

(*m*) *Bromley* v. *Wright*, ib. 334; *Day* v. *Day*, 1 Drew. 569; *Bayley* v. *Bishop*, 9 Ves. 6; *Parker* v. *Sowerby*, 1 Drew. 488, 17 Jur. 752. In the two last cases the property to be sold was real; but they are not less applicable on that account; *In re Hart's Trusts*, 4 De G. & J. 195.

(*n*) *Hallifax* v. *Wilson*, 16 Ves. 171; *Chaffers* v. *Abell*, 3 Jur. 578; *Watson* v. *Watson*, 11 Sim. 73; *Baynes* v. *Prevost*, 8 Jur. 506; *Packham* v. *Gregory*, 4 Hare, 396; *In re Wilson*, 14 Jur. 263; *Salmon* v. *Green*, 11 Beav. 453; *Homer* v. *Gould*, 1 Sim. N. S. 541; *Marshall* v. *Bentley*, 1 Jur. N. S. 786; *Strother* v. *Dutton*, 1 De G. & J. 675; *In re Bright's Trust*, 21 Beav. 67.

(*o*) 16 Ves. 314; see also *Medlicott* v. *Bowes*, 1 Ves. 207.

(*p*) 4 Sim. 23.

(*q*) 7 Hare, 334. But see *Beck* v. *Burn*, 7 Beav. 492; *Willis* v. *Plaskett*, 4 Beav. 208; *Chevaux* v. *Aislabie*, 13 Sim. 71; *Davidson* v. *Procter*, 19 L. J. Ch. 395, which appear to be undistinguishable from, and inconsistent with, the other cases. *Beck* v. *Burn* was doubted by Sir *R. T. Kindersley* in *Parker* v. *Sowerby*, 17 Jur. 752; and by Sir *J. Romilly* in *Adams* v. *Robarts*, 25 Beav. 658; and though constantly cited, appears never to have been followed.

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[vised his real and personal estate to trustees, in trust for his wife for life, and after her decease, in trust within, or at the expiration of, ten years from her decease, or from his own decease if he survived her, to sell and convert, and to invest the proceeds; the income of the fund so produced, and the rents and profits until the sale, to be held on the after-mentioned trusts. The testator then gave to A. an annuity of 100*l.*, for the term of ten years after the decease of the survivor of himself and his wife, for the use of A. and B., and in case of the decease of either of them, then for the survivor; and at the expiration of the term of ten years, he gave to A., if then living, 2,000*l.*, but if she should be then dead, to B., and the will contained a gift of the residue. A. and B. survived the testator, and both died before the expiration of the ten years; but it was held by Sir *J. Wigram*, V. C., that the legacies of A. and B. were vested; observing that the words of contingency were obviously introduced with a view to provide for a case between A. and B., and not between them and the estate: the postponement of the legacy was for the convenience of the estate, and was not personal to the legatees (*r*).]

On the same principle, the mere introduction into an ulterior gift of new words of disposition, has no effect in postponing the vesting.

Occurrence of new words of gift.

Thus, where a testator bequeaths personalty to trustees, in trust for A. for life, adding, "and after her decease, then I give," &c., these words do not postpone the gift to the posterior legatee until the decease of A., but merely show that that is the period at which it will take effect in possession (*s*).

Words seemingly contingent referred to the determination of a prior interest.

So, where a legacy is given to a person if, or provided, or in case, or when, (for it matters not which of these words is used (*t*),) he attains the age of twenty-one years (*u*), or marries (*x*), though such legacy standing alone and unexplained would clearly be contingent, i. e. would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the

[(*r*) Compare *Parr* v. *Parr*, 1 My. & K. 647, where, on a bequest of residue to be settled on A., so as to "devolve" in case of her death on her children, and if she should have none, then that she should bequeath it as she thought fit, it was held, that only those children who survived A. were entitled.]

(*s*) *Benyon* v. *Maddison*, 2 B. C. C. 75.

(*t*) 6 Ves. 243.

(*u*) *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389.

(*x*) *Elton* v. *Elton*, 3 Atk. 504.

testator and the future period in question is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's case* (*y*), that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests, for the purpose of protracting, not the vesting, but the possession only. Thus, in the case of *Hanson* v. *Graham* (*z*), where A. gave to his grandchildren B., C., and D., 500*l.* £4 per Cent. Annuities a-piece, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen with consent, and directed, that the interest of the said Bank Annuities should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir *W. Grant*, M.R., after a full and able examination of the authorities, held, on the principle above stated, that the legacies vested at the death of the testator.

Gift of intermediate interest.

So, in the case of *Lane* v. *Goudge* (*a*), where A. bequeathed certain £3 per Cent. Consols to L. for his (L.'s) second daughter, that he should have born, for her education till she should attain the age of twenty-one years; and, after she should attain to the said age of twenty-one years, the testator gave the said interest to her and her heirs for ever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at the age of seventeen (*b*).

(*y*) Ante, p. 764.

(*z*) 6 Ves. 239.

(*a*) 9 Ves. 225; see also 7 Ves. 421; [2 Freem. 24; Pre. Ch. 317; 13 Sim. 418; 1 Coll. 281; 2 Sm. & Gif. 212. *Taylor* v. *Bacon*, 8 Sim. 100, is apparently inconsistent with all the other authorities. And the case of *Butcher* v. *Leach*, 5 Beav. 392, is scarcely less difficult to reconcile with them, unless it was thought that the discretion given to the trustees in the last clause of the will made the bequest contingent till the legatees attained twenty-five, on the ground that, when they attained twenty-one, they might, if it were vested, claim immediate payment, and so prevent the exercise of the discretion.]

(*b*) See also *Love* v. *L'Estrange*, 5 B. P. C. Toml. 59. Compare these cases with *Batsford* v. *Kebbell*, 3 Ves. 363, where A. bequeathed to E. the dividends, which should become due after her death, upon 500*l.* £3 per Cent. Bank Annuities, until he should arrive at the full age of thirty-two years, *at which time* she directed her executors to transfer to him the principal sum for his own use. Lord *Loughborough* held, that the legacy failed by the death of E. under thirty-two; his Lordship observing, that the testatrix had drawn a clear distinction between the dividends and the capital. See also [*Billingsley* v. *Wills*, 3 Atk. 219;] *Sansbury* v. *Read*, 12 Ves. 75; *Ford* v. *Rawlins*, 1 S. & St. 328, ante, p. 798. These cases have been commonly considered as decided on the principle, that, where the interest or dividends alone are the subject of bequest until a particular time, and the principal is then, *for the first time*, to be taken out of it, the intermediate gift of the interest or dividends will not vest the capital: 1 Rop. Leg. p. 581, White's Ed. It must not too readily be assumed, however, that any given case falls within the principle, as the Courts have evinced no great inclination to extend it; and, in truth, in some of the cases of this class, the difference of expression was very slight. [And in the late case of

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[So, in a case (*c*), where a testator bequeathed to each of his daughters 1,800*l*., to be paid upon their respective days of marriage, subject to certain conditions in the will mentioned, together with interest from the time of his decease; Lord *Clare*, C. Ir., held that the legacies were vested. And, in the case of *Vize* v. *Stoney* (*d*), Sir *E. Sugden*, C. Ir., so decided the same point,—"A legacy," he said, "cannot be more or less contingent: the law recognizes nothing between a contingent and a vested legacy." Therefore, whatever the nature of the event upon which payment is directed to be made, a gift of the intermediate interest has always the same effect.]

Gift of interest favours vesting.

A gift of interest, eo nomine, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; but a mere allowance for maintenance out of, and of less amount than the interest, has, it seems, no such influence on the construction (*e*).

If, however, the *entire* interest is made applicable to maintenance, the argument in favour of the vesting exists in full force (*f*); [but] an annual allowance for maintenance, [although] equal in amount to [interest, yet, if not given as such, will not be] similarly regarded (*g*). [The gifts in such a case are perfectly distinct, and the title to the annual allowance actually given could not be affected by the interest on the legacy not amounting to so large a sum.

Whether gift of interest for *part* of the intermediate time vests the legacy.

It seems, however, though this is a point which can scarcely be considered settled, that the direction to apply the intermediate interest towards the maintenance of the legatee, need not extend to the whole time which must elapse before the period appointed for payment arrives. Thus, in the case of *Davies* v. *Fisher* (*h*), where a testatrix bequeathed her residuary personal estate in

[*Westwood* v. *Southey*, 2 Sim. N. S. 192, Sir *R. T. Kindersley*, V. C., denied the existence of any such principle. See also *Chaffers* v. *Abell*, 3 Jur. 578; *Baynes* v. *Prevost*, 8 Jur. 506; *Tribe* v. *Newland*, 5 De G. & S. 236; *Re Hart's Trust*, 3 De G. & J. 195.

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

(*d*) 2 D. & Wal. 659, 1 D. & War. 337.]

(*e*) *Pulsford* v. *Hunter*, 3 B. C. C. 416. See also *Leake* v. *Robinson*, 2 Mer. 387, ante, p. 798.

(*f*) *Fonnereau* v. *Fonnereau*, 3 Atk. 645; *Hoath* v. *Hoath*, 2 B. C. C. 3. See also 1 Russ. 220; 1 Taml. 18; [1 Hare, 10; 28 L. J. Ch. 7; 3 Kay & J. 503.

(*g*) *Watson* v. *Hayes*, 5 My. & C. 125; and see *Livesey* v. *Livesey*, 3 Russ. 287.

(*h*) 5 Beav. 201. The bequest was residuary; but the opinion of the M. R. seems to have been formed independently of that fact. In *Milroy* v. *Milroy*, 14 Sim. 48, the word "minority" was held under the circumstances to mean the time previous to the attainment by the youngest child of the specified age of twenty-five. See *Maddison* v. *Chapman*, 4 Kay & J. 709, 3 De G. & J. 536; *Lloyd* v. *Lloyd*, stated next page.

[trust for A. for life, and after his death in trust for his children, as they severally attained the age of twenty-five years, the income to be applied during their respective *minorities* for their maintenance; Lord *Langdale*, M. R., held, that this latter direction would, without more, give vested interests to the legatees. "The inference or implication," said the learned Judge, "arises from the direction to apply the interest; and, although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or implication in like manner, or to the mere time to which the direction applies. At that time the mode of enjoyment expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment" (*i*). However, the case did not rest entirely on this ground (*k*).

In the case of *Lloyd* v. *Lloyd* (*l*), the testator devised lands to trustees upon trust for his daughter for her life, and after her death upon trust to apply the rents "for and towards the maintenance, education and benefit of all and every the child and children of his said daughter during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell the lands, and pay the money arising therefrom to and amongst all and every such child or children, share and share alike, if more than one, and if but one then the whole to such only child." Sir *W. P. Wood*, V. C., decided, that a child who died under twenty-one, took no share. He seems to have considered that the words "during their minority," meant while any child was under age, so that a child having attained twenty-one still continued entitled to a share of income, and that when all had attained twenty-one, then the distribution was to be among those who should then be in receipt of the income; that it was plain the testator never intended that on a child dying under twenty-one, its representatives should receive its share of income until all attained twenty-one, and that this view took it out of the rule in *Hanson* v. *Graham*, that shares were vested when all intermediate interest and profits were given to the legatees.]

Where vesting

Where (*m*) the principal and interest are so undistinguishably

[(*i*) See also *Harrison* v. *Grimwood*, 12 Beav. 192.

(*k*) See post, p. 815.

(*l*) 3 Kay & J. 20; and see *Vorley* v. *Richardson*, 2 Jur. N. S. 363, 25 L. J. Ch. 335; and per Sir *J. Romilly*, *Sanders* v. *Miller*, 25 Beav. 156.]

(*m*) *Knight* v. *Knight*, 2 S. & St. 490; [*Re Thruston*, 17 Sim. 21; *Chance* v. *Chance*, 16 Beav. 572; *Morgan* v. *Morgan*, 4 De G. & S. 164.

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of interest as well as principal is postponed, legacy contingent.

blended in the bequest that both must vest, or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., as soon as they attained the age of twenty-one years, the sum of 200*l.*, with interest at the rate of 5*l.* per cent. per annum, Sir *J. Leach*, V. C., held, that there was no gift either of principal or interest until the daughter attained twenty-one.

But the construction which suspends the vesting of the interest as well as the principal, inconvenient as it evidently is, will not be adopted, unless the intention be very clear. Thus, in the case of *Breedon* v. *Tugman* (*n*), where a testator bequeathed one third of his personal property to his wife; another third to his son, to be laid out in an annuity; and the other third to his daughter, adding, "and in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years," it was contended that the words "in case of my decease," imported contingency, and which, as in *Knight* v. *Knight*, extended to the interest as well as the principal, and that neither of them was vested until the age of twenty-five; but Sir *J. Leach*, M. R., said, that this was plainly an absolute gift to the daughter, and that the payment only was postponed; the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish between the time when she was to receive the interest, and the time when she was to receive the principal.

So a direction subjoined to a simple bequest of stock, that the "interest" shall be added to the "principal" [or accumulated] till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities (which term it was contended, pointed to the interest on the legacies) might fall in (*o*).

Effect where apparently contingent gift must be severed from the estate immediately.

[Again, a legacy to be severed from the general estate instanter, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. And, therefore, in the case of *Saunders* v.

(*n*) 3 My. & K. 289. This is the case of a residue, and therefore may seem to belong to the next section; but as the ground of decision seemed to connect it with *Knight* v. *Knight*, it has been stated here.

(*o*) *Stretch* v. *Watkins*, 1 Mad. 253. [See also *Blease* v. *Burgh*, 2 Beav. 226; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Bull* v. *Johns*, Taml. 513; *Oppenheim* v. *Henry*, 10 Hare, 441.

[*Vautier* (*p*), where a testator bequeathed his East India stock to trustees upon trust to accumulate the dividends until A. should attain his age of twenty-five years, and then to transfer the principal with the accumulated dividend to A., his executors, administrators and assigns, absolutely; it was contended on the authority of *Knight* v. *Knight*, that the legacy was contingent on A. attaining the specified age; but Lord *Cottenham*, on the principle stated above, held it vested, and decreed payment to A. when he was twenty-one years of age.

Rule in *Boraston's case* applies to personalty.

Here it should be observed that a bequest to a person, if or when he attains a particular age, will be vested if the whole intermediate interest, though not given to the legatee himself, is expressly disposed of in the meantime for the immediate benefit or furtherance of some other person or object. It is only an exception out of the whole property meant to vest in the legatee, whose interest is, therefore, in the nature of a remainder which vests immediately, and its actual enjoyment only is postponed. This is in conformity with the principle of *Boraston's case* (*q*), which, according to Sir *W. Grant*, M. R. (*r*), there was no ground to say ought to have been differently decided if it had occurred as to a pecuniary legacy.

Accordingly, in the case of *Lane* v. *Goudge* (*s*), where one of the bequests was to L. till his (L.'s) second daughter should attain the age of twenty-one years, and after she should attain that age to her absolutely; the same eminent Judge held that, supposing the gift to L. was for his own and not for his daughter's benefit, yet that the daughter took a vested interest.

After what has already been stated, it is scarcely necessary to add that if the enjoyment or application of the intermediate interest be not immediate the same result will not follow. Thus, a direction to accumulate the whole, or, after providing for the maintenance of the legatee during minority, the surplus interest of the sum bequeathed, and to pay the accumulation at the same time as the principal to the legatee or to some other person, will not render the legacy vested. The personal status of the legatee

[(*p*) Cr. & Ph. 240. See also *Greet* v. *Greet*, 5 Beav. 123; *Lister* v. *Bradley*, 1 Hare, 10; *Love* v. *L'Estrange*, cit. 6 Ves. 248; *Thruston* v. *Anstey*, 27 Beav. 335; *Oddie* v. *Brown*, 4 De G. & J. 185, 194. But compare *Festing* v. *Allen*, 5 Hare, 577, suggesting the limits of the doctrine.

(*q*) 3 Co. 16, ante, p. 764.

(*r*) 6 Ves. 247; and see *Blamire* v. *Geldart*, 16 Ves. 314, ante, p. 799. In *Laxton* v. *Eedle*, 19 Beav. 323, there is a contrary dictum of the M. R., which, however, appears unnecessary to the decision of that case.

(*s*) 9 Ves. 225; and see *Potts* v. *Atherton*, 28 L. J. Ch. 486.

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[himself is here clearly the only reason for postponing the gift until the specified period (*t*).

Effect of an express direction when the legacy is to "vest."

If the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word "vest" is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded; for a legacy cannot vest at two different periods (*u*).

In what cases "vested" means "indefeasible."

But a question generally arises in these cases as to the real meaning to be attributed to the word. If the testator has in other parts of the will treated the fund bequeathed as belonging to the legatee and spoken of his *share* therein before the specified period (*x*), or if he has given over the fund in case the legatee dies before the time named under particular circumstances (as without issue), from which it is to be inferred that the legatee is to retain it in every other case (*y*), the natural conclusion is, that the word is to be read as meaning "payable" or "indefeasible," and that the gift is vested, liable only to be divested on a particular contingency. So, if by reading the word literally there would be a simple repetition of a provision already in distinct terms made in another part of the will, it must be similarly construed (*z*).

In what cases literally construed.

But if the intermediate interest, accruing before the time named for vesting, is to be accumulated and paid at the same time as the principal fund (*a*); or if by the context a distinction is drawn between the terms "vested" and "payable" (*b*), the word "vest" must have its proper meaning.]

Vesting of residuary bequests.

VII. It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of

[(*t*) *Leake* v. *Robinson*, 2 Mer. 363; *Vawdry* v. *Geddes*, 1 R. & My. 203; *Scott* v. *Tyler*, 2 B. C. C. 431, 2 Dick. 714.

(*u*) *Glanvill* v. *Glanvill*, 2 Mer. 38, ante, p. 772; *Comport* v. *Austen*, 12 Sim. 246; *Wakefield* v. *Dyott*, 4 Jur. N. S. 1098.

(*x*) *Berkeley* v. *Swinburne*, 16 Sim. 275, a case of a residue, but not rested on that ground; *Poole* v. *Bott*, 11 Hare, 33, a case of real estate; *Walker* v. *Simpson*, 1 Kay & J. 713.

(*y*) *Taylor* v. *Frobisher*, 5 De G. & S. 191. Lord *Hardwicke* seems to have used the word in this sense in *Haughton* v. *Harrison*, 2 Atk. 330. Secus, without the particular circumstances, *Re Blakemore's Settlement*, 20 Beav. 214; *Re Morse's Settlement*, 21 ib. 174; *Rowland* v. *Tawney*, 26 ib. 67.

(*z*) *Re Morris*, 26 L. J. Ch. 688.

(*a*) *Re Thruston*, 17 Sim. 21; see also *Griffith* v. *Blunt*, 4 Beav. 248.

(*b*) *Ellis* v. *Maxwell*, 12 Beav. 104; see also *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Re Thatcher's Trusts*, 26 Beav. 365. In *Sillick* v. *Booth*, 1 Y. & C. C. C. 121, and *King* v. *Cullen*, 2 De G. & S. 252, the context gave to the word "vested" in a gift over upon death before vesting a sense corresponding to the word "payable" used in the primary gift. Conversely, it may be added, the word "paid" is sometimes construed to mean "vested," *Martineau* v. *Rogers*, 25 L. J. Ch. 398.]

holding it to be contingent, or, at least (and this is the material consideration), such *may be* its effect; for, in construing wills, we must look indifferently at actual and possible events.

Possible as well as actual events to be regarded.

Among the numerous cases which may be cited as illustrative of the leaning of the Courts towards the vesting of residuary bequests, is *Booth* v. *Booth* (*c*), where A. bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces B. and C., until their respective marriages, and from and after their respective marriages, to transfer their respective moieties. Sir *R. P. Arden*, M. R., held, that B. acquired a vested interest, although she died without having been married; his Honor relying much on the circumstance that it was the bequest of a residue.

So, in *Jones* v. *Mackilwain* (*d*), where a testator gave to trustees all his real and personal estate, upon trust for sale, and as to one moiety of the produce for the benefit of his daughter A. during her life, and, after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A., until they should severally attain his and their ages or age of twenty-one years, and as to all the said principal monies or produce of the testator's said real and personal estate *as and when they and each and every of them should attain his, her, and their respective age or ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under

(*c*) 4 Ves. 399. Compare *Atkins* v. *Hiccocks*, ante, p. 797; observing that there the bequest was pecuniary, and there was no gift of the interest in the meantime. The disinclination so to construe a will as to make a testator die partially intestate, was also admitted in *Lett* v. *Randall*, 10 Sim. 112, where, however, the V. C. considered himself forced into this undesirable conclusion by the ambiguity of the will; the testator having, in a certain event, made a bequest of the share of a deceased daughter to children *then* living in such a manner as to leave it doubtful whether he referred to the period of his own death, the death of his wife, or the happening of the contingency.

Here it may be noticed, that where (as often occurs) life interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word "then" is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not considered as referring to the period of the several prior interests; *Archer* v. *Jegon*, 8 Sim. 448; [*Wollaston's Settlement*, 27 Beav. 642; and the construction is the same though the person last named die in the testator's lifetime, *Olney* v. *Bates*, 3 Drew. 319; and see *Hetherington* v. *Oakman*, 2 Y. & C. C. C. 299; *Harvey* v. *Harvey*, 3 Jur. 949; *Cain* v. *Teare*, 7 ib. 567; *Widdicombe* v. *Muller*, 1 Drew. 443; *Cormack* v. *Copous*, 17 Beav. 397. Compare *Gaskell* v. *Holmes*, 3 Hare, 438; *Coulthurst* v. *Carter*, 15 Beav. 421; *Re Edgington's Trusts*, 3 Drew. 202.]

Word "then," to what period it refers.

(*d*) 1 Russ. 220.

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twenty-one, and Lord *Gifford*, M. R., held that they respectively acquired vested interests; his Lordship adverting to the fact of its being a residuary bequest, and that the yearly income was given to the children until the prescribed age.

After clear immediate gift, vesting not postponed by equivocal terms.

It seems, that where the testator first gives the residue in terms which would, beyond all question, confer a vested interest, the addition of equivocal expressions, of a contrary tendency, will not suspend the vesting. Thus, where (*e*) A. by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share, *and such portion not to be otherwise claimed or inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single —Sir *R. P. Arden*, M. R., held, that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatees should not have the command of the principal till the age of twenty-two; and his Honor laid some stress on the fact of the interest being given for maintenance.

So, where (*f*) a testator, after disposing of his real and personal estate in strict settlement, added that none of the devisees should take or come into possession before the age of twenty-five, this was held to refer to the actual possession only, and not to postpone the vesting.

But subsequent words may be explanatory.

But where the terms of the original gift, in favour of a class, are ambiguous in regard to the period of vesting, a clear intention to suspend the vesting, manifested in carrying on the gift to the class in the event of its consisting of a single object, will be decisive of the construction; as it is hardly supposable that the testator could mean to create a difference of this nature between a plurality of objects and an individual object. Thus, where (*g*) A. gave the residue of his estate, real and personal, to trustees, as to one-third, in trust for his daughter S. for life, and, after her decease, for the child or children of his said daughter, if more than one, share and share alike, to be paid, assigned and transferred to them by his trustees

(*e*) *Dodson* v. *Hay*, 3 B. C. C. 404—409. See also *Stretch* v. *Watkins*, 1 Mad. 253; [*Brocklebank* v. *Johnson*, 20 Beav. 205; but see *Shum* v. *Hobbs*, 3 Drew. 93.]

(*f*) *Montgomerie* v. *Woodley*, 5 Ves. 522. [See *Gosling* v. *Gosling*, 1 Johns. 265.]

(*g*) *Judd* v. *Judd*, 3 Sim. 525; [see also *Tracey* v. *Butcher*, 24 Beav. 438.

upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part *should become the property of such only child upon his or her attaining the age of twenty-five years*, and be transmissible to his or her heirs, executors or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over. Sir *L. Shadwell*, V. C., held that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift, in case she should leave more than one.

[The same argument would, without doubt, apply to a case where the ambiguity existed in the gift to the single object, the original gift in favour of the class being clearly conditional. But where no such ambiguity exists, it is of course not allowable, by inference from the original gift, to import a contingency into the alternative gift to the individual. This were to add words to the will, not to explain terms already existing in it; a course not warranted by the apparent singularity of the distinction made by the testator (*h*).

In the recent case of *King* v. *Isaacson* (*i*), the converse of the case of *Judd* v. *Judd* presented itself for decision; the question being, whether a clearly vested bequest to the single object imparted its own nature to ambiguous expressions contained in the prior gift to the class, when consisting of many. In that case, a testator gave the residue of his real and personal estate to trustees, in trust, as to two-thirds of the annual proceeds, for A. for life, and as to the remaining one-third, in trust for B. for her life; and in trust, after the decease of A. and B., or either of them, to convey, pay, assign, transfer and make over all the residue, in the shares following, i. e., upon the decease of A., to convey, &c., two-thirds unto and among all and every the child or children of A. as and when they should severally attain twenty-one, as tenants in common; and if there should be but one child of A., then to such only child, and to whom he gave the same accordingly; with similar trusts of the remaining third, mutatis mutandis, for the children of B. Sir *J. Stuart*, V. C., considering the general indisposition to hold a

[(*h*) *Walker* v. *Mower*, 16 Beav. 365. (*i*) 1 Sm. & Gif. 371.

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[bequest contingent, and looking to the absolute gift to an only child (which was clearly vested (*k*),) and to the direction to convey, which, he thought, was to be observed immediately on the decease of a tenant for life, held that the children took vested interests on the testator's death.

But terms clearly expressive of a contingency may by contrast have the very opposite effect on ambiguous expressions with which they are in juxta-position; a result which, if arising under different circumstances, is clearly not inconsistent with the argument relied on in the cases last mentioned. To this principle the case of *Eccles* v. *Birkett* (*l*) seems in some measure referable, where a testator gave his real and personal estate to trustees upon trust, subject to an annuity, to pay to *each* of his children *who* (*m*) should be living at the time of his decease, except his sons A. and B., *as and when* they should respectively attain the age of twenty-five years, the sum of 3,000*l.* absolutely, with power for the trustees to apply all or any part of the income for their maintenance until they should attain that age; and it was held by Sir *J. Knight Bruce*, V. C., that the legacies vested at the death of the testator.

Effect of exception of individuals from an apparently contingent gift.

Perhaps this decision (the grounds of which are not reported) was partly founded on the exception of A. and B. from the class of legatees, whereby, according to Sir *R. T. Kindersley*, V. C. (*n*), the testator might be considered to have shown that, except those two, he intended all his children to take.]

Attainment of particular age made part of the description of the objects.

The vesting is obviously postponed where the attainment to a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to *the* children *who* shall attain, or to *such* children *as* shall attain the age of twenty-one years; there being in such case no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*o*). So clear, indeed, is this point, that any difficulty can scarcely occur under a gift framed in the terms suggested, [for it seems that none of the circumstances, which in more ambiguous cases (as where the bequest is to the children *as and when* they attain the age of twenty-one years) not unfrequently explain away and neutralize the expressions which standing alone would

[(*k*) See *In re Bartholomew*, 1 Mac. & G. 354, ante, p. 797.

(*l*) 4 De G. & S. 105. See also *Bree* v. *Perfect*, 1 Coll. 128, post, p. 816.

(*m*) As to this, see the cases infra.

(*n*) *Parker* v. *Sowerby*, 1 Drew. 496. But it is not very easy to comprehend the force of the argument.]

(*o*) See *Newman* v. *Newman*, 10 Sim. 51.

[suspend the vesting, can operate to include as members of the class any who do not attain the prescribed age.]

Case of *Bull* v. *Pritchard*.

We have an example of this species of disposition in the case of *Bull* v. *Pritchard* (*p*), where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter M. for life, and after her decease to pay or transfer the same unto and among all and every the child and children of M., *who should live to attain the age of twenty-three years*, with benefit of survivorship, in case of the death of any of them under the age of twenty-three years, as tenants in common; and if there should be but one such child, then to such only child; and in case there should be no such child, *or, being such, all should die under the age of twenty-three*, then over to the testator's brothers and sisters. The trustees were empowered to lay out and apply the interest of each child's respective share towards their maintenance, notwithstanding such child's share should not be then absolutely vested. Lord *Gifford*, M. R., was of opinion that those children alone who attained the age of twenty-three were to take, and therefore the gift was void for remoteness; observing, that the attainment of the age of twenty-three years was made a condition precedent to the vesting of any interest in the children (*q*).

The terms of contingency must be contained in the very gift.

[The rule is not infringed by the case of *Bradley* v. *Barlow* (*r*), where a testator bequeathed 500*l.* to trustees upon trust for A. for life, and after her death to apply the interest for the maintenance of *such* child or children of A. *as* should be living at the time of her death until such children should attain their respective ages of twenty-one; and when and as they should respectively attain their said ages of twenty-one, in trust to pay the said 500*l.*, together with the unapplied interest, equally amongst *all the children* of A. *when and as* they should respectively attain the age of twenty-one years. Sir *J. Wigram*, V. C., thought that it scarcely admitted of doubt but that any child of A. who attained twenty-one in her lifetime would take a vested interest:

(*p*) 1 Russ. 213; [see also *Boreham* v. *Bignall*, 8 Hare, 131; and for cases of pecuniary legacies, *Bute* v. *Harman*, 9 Beav. 320, 16 ib. 168, n.; *Southern* v. *Wollaston*, 16 Beav. 166; *Hatfield* v. *Pryme*, 2 Coll. 204; *Farrer* v. *Barker*, 9 Hare, 737; *Little* v. *Daniel*, 12 Jur. 167. See also *Bickford* v. *Chalker*, 2 Drew. 327; *Re Payne*, 25 Beav. 556; and cases ante, p. 773.

(*q*) The decision of this point was necessary for the decree, which declared the testator's next of kin entitled; for the bill was filed by the father and mother of the only child that had then been born; and they might have had other children who would have been entitled if the gift to the children had not been void.

(*r*) 5 Hare, 589.

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[it was clear that the contingency implied by the first part of the bequest was a part of the maintenance clause, and referred solely to that.

Distinction between gift to *such* of a class *who*, and to a class *when* or *if* they attain a certain age.

But a gift or direction to pay to an indefinite class of persons *when and as* they attain the age is ambiguous; it does not necessarily, or, at least, so strongly as the description of the class before mentioned, tend to prevent the vesting in interest. The gift itself and the time of payment are not necessarily identical; though the gift itself is found in the direction to pay, the words may mean only to postpone the payment, without postponing the vesting of the gift. And though, when the gift is found or implied only on the direction to pay, and it is not otherwise affected or explained by the context of the will, the court may reasonably construe the direction to be only for the persons to whom the payment is directed to be made, and who are to receive at the time indicated, yet, as the meaning is ambiguous, and as the nature of the gift is only known by implication, we must look at other parts of the will with a view to discover whether they afford any further indication or explanation of the implied gift (*s*).] For instance, if a testator, after giving to the children of A. as and when they respectively attain the age of twenty-one years, goes on to dispose of the property in case there is no child who does attain the prescribed age, he affords a plausible ground for argument (founded on *Edwards* v. *Hammond* and that class of cases (*t*),) that the subsequent words explain the sense in which he intended the prior words to be understood, namely, that the interest of the legatees was merely liable to be divested on the event described; in other words, was to become absolute at (not to be postponed until) the prescribed age.

Gift on attaining certain age, held contingent.

However, in the case of *Vawdry* v. *Geddes* (*u*), where A. gave the residue of her estate and effects equally between her four sisters, and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, *and, upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal*, and in case of any of their decease under that age, leaving lawful

[(*s*) Per Lord *Langdale*, M. R., 12 Beav. 198.

(*t*) Ante, p. 769.]

(*u*) 1 R. & My. 203.

issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto. There was also a bequest in favour of the other children of the testator's sisters, in case of the death of any under twenty-two, without issue, or, being such, they should die before the principal of their respective shares should become payable. Sir *J. Leach*, M. R., held that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. His Honor thought that the case was governed by *Leake* v. *Robinson* (*x*); and that, even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested. He observed, that where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period.

Remarks on the case of *Vawdry* v. *Geddes*.

But did not the gift over, to which his Honor here refers, suggest a strong argument for the immediate vesting? Where a testator directs that, on a given event, the "shares" of persons before named shall go in a certain manner, there seems ground to infer that, in the alternative event, the property is to be retained by the legatees; à fortiori, where there are cross executory gifts disposing of the "shares" of dying objects, in an event in which, if the vesting be postponed, they would have no shares for the clause to operate upon. The construction adopted in the case just stated rendered the terms of the clause of substitution (for such it clearly was) inaccurate throughout (*y*).

Case of *Bland* v. *Williams*.

More weight, in favour of the immediate vesting, seems to have been ascribed to the argument derived from the gift over, in the case of *Bland* v. *Williams* (*z*), where the testator be-

(*x*) Ante, p. 798.

(*y*) See also *Mackell* v. *Winter*, 3 Ves. 236, and *Barker* v. *Lea*, Turn. & Russ. 413, in both which residuary bequests to children, on their attaining a particular age, were held to be contingent in the interim, though, in each case, there was a bequest over in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer to the time of payment rather than to the gift itself; [while in the latter there was a gift of the whole income for the maintenance of the legatees.] In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible; and one cannot help suspecting that the judgment of the Court was somewhat biassed by the actual event, which rendered the adopted construction convenient. If intestacy had happened to be produced by the postponement of the vesting in each instance, the adjudication probably would have been different.

(*z*) 3 My. & K. 411.

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queathed the residue of his estate and effects to trustees, upon trust to receive the annual income thereof, and thereout pay unto his daughter an annuity, and, after her decease, upon trust to apply the income for the maintenance of the children of his daughter until they should severally attain their ages of twenty-four years; and when and as they should respectively attain that age, then upon trust to pay, transfer, and convey all the said residue of his estate, with the interest, dividends, and proceeds thereof, as should not have been applied for their maintenance, equally unto and amongst all her said children, *when and as they should severally and respectively attain their said age of twenty-four years;* and in case any or either of her said children should happen to die before having attained that age, and without leaving lawful issue of his or her body, then in trust to pay, assign, transfer, and convey all the said residue of his estate unto *such of her said children as should live to attain his, her, or their respective ages of twenty-four years,* share and share alike, if more than one, and if but one, then the whole to that one child; but in case all and every of *her said children should happen to die under that age, and without leaving lawful issue,* as aforesaid, then upon trust to pay the annual income thereof unto certain persons. It was contended, that, under the trusts in favour of the daughter's children, the vesting was postponed until the age of twenty-four, and, consequently, the gift was too remote. Sir *J. Leach,* M. R., however, held, that the legatees acquired immediate vested interests:—"Whether, in a gift of this nature," said his Honor, "the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*a*). In this case, the gift over is not simply upon the death under twenty-

Vesting immediate by explanatory effect of gift over.

Remark on bequest over.

(*a*) Why not? A gift over to take effect simply on the event alternative to that on which the prior gift was apparently made to vest, *may* surely have the effect (if such be the intention collected from the whole will) of explaining that the original gift was to be divested in favour of the ulterior substituted legatee on the happening of the prescribed event. This, we may venture to affirm, would, with very little aid from the context, be generally the construction. No such distinction as the M. R. suggests is discoverable in the cases cited ante, (p. 769,) in which, under a devise to A., if he shall attain the age of twenty-one years, with a devise over, in case he shall die under that age, the devise over is (we have seen) held to denote that the prior words (instead of suspending the vesting ab initio) point merely at the period when it becomes absolute. The principle of these cases obviously applies to residuary bequests framed in such terms. [Where real and personal estates are included in the same gift, and the real estate is held to be vested, the personal property follows the same construction, *Farmer* v. *Francis*, 2 S. & St. 505; *Tapscott* v. *Newcombe*, 6 Jur. 755; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40.]

four, but upon the death under twenty-four, without leaving issue. If, upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four, without leaving issue: all the cases upon the subject, except the one before Lord *Gifford* (i. e. *Bull* v. *Pritchard*), are reconcileable with this distinction."

Remark on *Bland* v. *Williams*.

It is submitted, however, that [the case before Lord *Gifford* forms no exception to the rule as stated by Sir *J. Leach;* but that, on the other hand,] if his Honor's own decision in *Vawdry* v. *Geddes*(*b*), as well as that of his predecessor in *Barker* v. *Lea*(*c*), be brought to the test of the principle of construction here propounded, it will be found difficult to sustain them for the reasons already suggested. It would certainly be a convenient rule of construction to say, that whenever, under a residuary bequest to children as a class, the vesting is, in the first instance, postponed to a given age, and this is accompanied by a direction [which gives a discretion to apply the whole or a part of] the intermediate interest for their maintenance; after which the testator proceeds to dispose of the shares of children dying under the age in question, either absolutely or upon some contingency, to the survivors, or to children, or any other person, the gift over is to be considered as explaining the testator's intention to be, that, under the preceding words, the *absolute* ownership only should be suspended until the prescribed age, and that, in the mean time, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event; [and the tendency of the modern cases is almost uniformly in favour, if not absolutely confirmatory, of such a proposition.

Gift over held to favour vesting.

[Thus, in the case of *Davies* v. *Fisher*(*d*), where a testatrix gave the residue of her personal estate to trustees, in trust for W. D. for life, and after his decease, in trust for the children of the said W. D. as they severally attained the age of twenty-five years, equally to be divided between them, if more than one, and if but one then the whole to such one child, the income to be applied during *their respective minorities* by the guardian for the time being, of such children for their maintenance; and in case no child of the said W. D. should live to attain the age of twenty-five years, then in trust, as therein mentioned. Lord *Langdale*, M. R., held that the children of W. D. took an immediate vested

(*b*) Ante, p. 812.
(*c*) Ante, p. 813, n.
[(*d*) 5 Beav. 201; see also *Harrison* v. *Grimwood*, 12 Beav. 192.

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[interest in the residue. The decision was, indeed, in a great measure, founded on the gift of the intermediate interest (*e*); but with regard to the argument resting on the dicta of Sir *J. Leach* in the cases of *Vawdry* v. *Geddes*, and *Bland* v. *Williams*, to the effect that the gift over prevented the residue from vesting in the meantime, he cited authorities to show that such a proposition was untenable (*f*); and observed, moreover, that the gift over did, on the contrary, afford some evidence of an intention to devest after a previous vesting.

Again, in the case of *Bree* v. *Perfect* (*g*), where a testator bequeathed a sum of 3,000*l.* in trust for F. for life, and at her death to be equally divided among such of her children as should be living at the time of her death, as they respectively attained the age of twenty-one; but if F. should die without leaving issue, then the said sum was to be for C. for her life, and at her death to be equally divided among her children; Sir *J. Knight Bruce*, V. C., thought that taking the whole disposition together, and especially considering the terms of the limitation over, the shares vested in the children of F. on the death of the tenant for life (*h*).

It is to be observed, in the last case, that the failure of issue upon which the gift over was to take effect was coupled with a contingency independent (as far as express terms went) of failing to attain the prescribed age. The conclusion from such a limitation in favour of vesting, though less irresistible than where the contingency is expressly coupled with failure to attain the age (*i*), seems yet less open to question than where death under the prescribed age is the sole condition of the gift over: and] though some of the cases (we have seen) point to [the existence of a rule embracing all these cases,] yet the state of the authorities, on the whole, hardly warrants any general position of this nature.

Contingent interest transmissible—when.

Here, it may be observed, that a contingent interest will or

[(*e*) See ante, p. 802.

(*f*) *Skey* v. *Barnes*, 3 Mer. 340; see also *Davidson* v. *Dallas*, 14 Ves. 576; *Heron* v. *Stokes*, 2 D. & War. 115, per Sir *E. Sugden*, C.

(*g*) 1 Coll. 128. This being the case of a pecuniary legacy may perhaps be considered the stronger as an authority in favour of vesting. See also *Lang* v. *Pugh*, 1 Y. & C. C. C. 718. However, in *Lee* v. *Busk*, 14 Beav. 461, Sir *J. Romilly*, M. R., said he could not give to the same words a different construction when used in relation to a residue from that which he should when applied to a simple legacy.

(*h*) The V. C., therefore, thought that the class of children described by the words "such as should be living at the death of F." was not enlarged by the gift over. See accordingly the cases cited ante, p. 810. See also *Eccles* v. *Birkett*, 4 De G. & S. 105, ante, p. 810.

(*i*) The case of *Taylor* v. *Frobisher*, 5 De G. & S. 191, seems almost conclusive in favour of vesting under these circumstances. See also *Ridgway* v. *Ridgway*, 4 De G. & S. 271.]

will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects (*k*); and, consequently, such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time. Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age, and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.

Thus, where (*l*) a testator bequeaths his personal estate to A., and if he shall die without leaving issue, then over to B., in the event of B. surviving the testator, and afterwards dying in the lifetime of A., testate or intestate, his contingent or executory interest will devolve to his executor or administrator (as the case may be).

[So, in the case of *Leeming* v. *Sherratt* (*m*), where a testator gave his freehold and the residue of his personal property to trustees, upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom, so soon as his youngest child should attain the age of twenty-one, unto and equally amongst his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have; Sir *J. Wigram*, V. C., held that a child who attained his majority, but died before the youngest attained twenty-one, was, nevertheless, entitled to a share of the fund. The trustees, said the learned Judge, are trustees of the residue for all the testator's children upon the happening of an event, which in fact has happened, namely, the youngest child attaining twenty-one. He added, that if there was any case which decided as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happened, did not

[(*k*) *Read* v. *Gooding*, 21 Beav. 478.]

(*l*) *Pinbury* v. *Elkin*, 2 Vern. 758, 766; *King* v. *Withers*, Cas. t. Talb. 117, 3 B. P. C. Toml. 135; *Wilson* v. *Bayly*, ib. 195; *Barnes* v. *Allen*, 1 B. C. C. 181.

[(*m*) 2 Hare, 14. See also *Boulton* v. *Beard*, 3 D. M. & G. 608; *Brocklebank* v. *Johnson*, 20 Beav. 205; *In re Smith's Will*, ib. 197.

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[confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

The child whose share was in question in the last case had attained the age of twenty-one, and the V. C. thought that as the testator had postponed the division of the residue until his youngest child attained that age, no child who did not attain that age could have been intended to take a share therein (*n*). But if the bequest be not to a class but to named individuals, it seems the rule is different. Thus, in *Cooper* v. *Cooper* (*o*), a testator devised his real estate to trustees upon trust to raise out of the rents and profits an annuity of 100*l.* for his wife, and to apply the remainder for the maintenance of his said children (the testator had previously named them (till the youngest should attain twenty-one; then upon trust to sell subject to the annuity, and pay the monies arising therefrom unto and between his said children in manner following, that is to say, unto his said eldest son two-fifth parts, and one-fifth part to each of his other children (naming them). One of the children died under twenty-one. It was held by Sir *J. Romilly*, M. R., that the children's shares were vested at the testator's death and were not contingent on their attaining twenty-one. Referring to *Leeming* v. *Sherratt*, the learned Judge said, the distinction between that case and the present was this—in that case the class who were to take were the children who had attained twenty-one; that this was clear by the circumstance that the gift of the residue was not to take effect until the whole of the class had attained twenty-one, and therefore the class was to be ascertained at that time. Here if the devise had stopped at the word children, his Honor would have had no doubt that the case was governed by *Leeming* v. *Sherratt*, but the testator went on to say "in the shares and proportions following, that is to say." It was not, therefore, a gift to a class, but on the happening of a particular event, the residue was to be divided into four unequal shares to be given to four named individuals, and his Honor observed that (unlike what would have been the case if the gift had been to a class) the share of the deceased child,

[(*n*) See also *Parker* v. *Sowerby*, 1 Drew. 488, 496; *Lloyd* v. *Lloyd*, 3 Kay & J. 20, stated ante, p. 803.
(*o*) 7 Jur. N. S. 178.]

[if not vested in her, was undisposed of by the will; and he considered it to be a gift, on the youngest attaining twenty-one, to four specified persons, and that the circumstance that they constituted a class for whose maintenance the income of the fund was to be devoted before the happening of the event did not convert them into a fresh and distinct class.]

CHAPTER XXVI.

EXECUTORY DEVISES AND BEQUESTS.

Executory devise—what.

An executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; for it is well settled (and, indeed, has been remarked as a rule without an exception), that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise (*a*). It is necessary, therefore, in treating of this species of estate, first, to ascertain what constitutes a remainder. A remainder may be described to be an estate which is so limited as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument. It follows, that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (*b*) (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect *before* or *after*, and not *at* the expiration of such prior estate of freehold, is an executory devise.

Devise executory for want of a preceding freehold.

The first mentioned species of executory estate occurs, as well where the devise is future in its operation, from the non-existence of the object at the death of the testator, as where it is future in the express terms of its limitation. Thus, a devise to the children of A., who happens to have no child at the death of the testator (*c*), or to the heirs of the body of A., a person then living, is executory (*d*), for the reason suggested. The creation of a term of years, determinable with the life of the ancestor, to whose heirs the subsequent limitation is made, of course does

(*a*) *Purefoy* v. *Rogers*, 2 Lev. 39, 2 Saund. 380; *Reeve* v. *Long*, Carth. 310; *Goodright* v. *Cornish*, 4 Mod. 258.

(*b*) See *Key* v. *Gamble*, 2 Jones, 123; *Moore* v. *Parker*, 1 Ld. Raym. 37, Skinn. 558; *Doe* v. *Earl of Scarborough*, 3 Ad. & El. 2, 897.

(*c*) *Hopkins* v. *Hopkins*, Cas. t. Talb. 44; *Stephens* v. *Stephens*, ib. 228; *Gore* v. *Gore*, 2 P. W. 28, 2 Stra. 958; *Bullock* v. *Stones*, 2 Ves. 521.

(*d*) *Snowe* v. *Cutler*, 1 Lev. 135, T. Raym. 162; *Doe* v. *Carleton*, 1 Wils. 225; *Harris* v. *Barnes*, 4 Burr. 2157; *Doe* d. *Fonnereau* v. *Fonnereau*, Dougl. 487; *Doe* d. *Mussell* v. *Morgan*, 3 T. R. 763.

not vary the principle; a chattel interest being inadequate to support a contingent remainder (*e*). Thus, if lands are devised to A. for ninety-nine years, if he shall so long live, remainder to the heirs of the body of A., the fee-simple, subject to the term, descends to the heir-at-law of the testator during the life of A., at whose decease an estate tail vests in the heir of his body by executory devise. So, a devise to a person or persons, whether *in esse* or not, to take effect at a given period after the death of the testator, as to A. at the death of B. (a stranger), or at six months from the testator's decease, obviously belongs to the class of limitations under consideration (*f*).

Devise executory, notwithstanding prior freehold.

With respect to the cases in which the devise is executory, notwithstanding the creation of a prior estate of freehold, it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate must not be merely *liable* to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent), but it must be *necessarily* determinable before the taking effect of the ulterior devise. Thus, a devise to A. for life, and, after his decease, to the unborn children of B., is a contingent remainder in such children, because as A. *may* live until B. has a child, there is not necessarily any interval between the two estates; but, under a devise to A. for life, and after his decease, *and one day*, to the children of B., the children would take by executory devise, and the interval of a day, which would be undisposed of, would belong to the residuary devisee (*g*), if any, or if not, to the heir.

It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a remainder, that it wait for the regular expiration of such estate. Thus, in the case of a devise to A. for life, or in tail, with a limitation over to B., in case A. shall become entitled in possession to a certain estate, or shall omit to assume a certain name, this is an executory devise to B. (*h*).

(*e*) Vide supra, n. (*d*).

(*f*) *Reding* v. *Stone*, 8 Vin. Ab. 215, pl. 5; and see *Clarke* v. *Smith*, 1 Lutw. 798.

(*g*) Supra, p. 610.

(*h*) *Nicholl* v. *Nicholl*, 2 W. Bl. 1159; *Nicolls* v. *Sheffield*, 2 B. C. C. 215; *Doe* d. *Heneage* v. *Heneage*, 4 T. R. 13, stated supra; *Carr* v. *Earl of Erroll*, 6 East, 58, supra; *Stanley* v. *Stanley*, 16 Ves. 491, supra; *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 657.

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Executory devise in derogation of a preceding fee.

It will be apparent from what has been stated, that every devise to a person in derogation of, or substitution for, a preceding estate in fee-simple is an executory limitation. Thus, in the case of a devise to A. and his heirs, and if he shall die under twenty-one, and without issue (i. e. without issue living at his death), or if he shall die without issue living B., then to B.; in each of these cases the devise to B. is executory (*i*), in the same manner as if the fee, instead of being limited to A., had been suffered to descend to the heir-at-law of the testator, and the property had been simply devised to B. on either of such events; the only difference being, that in one case, the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeazance of a prior estate in fee.

The short but comprehensive definition of an executory devise before given, will be found to comprise every class of limitations of this nature, and, perhaps, will be more easily understood and remembered by the student, than the more elaborate classification which has been generally presented to him. A learned writer, whose labours on this subject are well known to the profession (*k*), has added to the distribution of the cases adopted by Mr. *Fearne* (*l*), several classes, two of which, though they clearly fall within the terms by which this species of interest has been before described, are sufficiently peculiar to entitle them to distinct notice.

(*i*) Cro. Jac. 592; Palm. 131; Gilb. 393; 2 Mod. 289; Pre. Ch. 67; ib. 486; 10 Mod. 419; Cas. t. Talb. 228; 8 Vin. Ab. 112, pl. 38; 1 B. C. C. 147; 3 T. R. 143; 2 B. & P. 324; 10 East, 460; 1 B. & Ald. 530; Ib. 713; 2 Ib. 441; [1 Eq. Ca. Ab. 186, pl. 1; 1 Wils. 105; Fea. C. R. 396; 10 B. & Cr. 201.] Many of these cases are stated supra.

(*k*) 2 Prest. Treat. on Abstracts, 139.

Mr. *Fearne's* position, that a condition or limitation must defeat the whole estate questioned.

(*l*) For which see *Doe* v. *Carleton*, 1 Wils. 225; [Fea. C. R. 400.] These two classes of cases show that Mr. *Fearne's* position (C. R. 251 and 530, 8th ed.), "that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder," must be received with some qualification. A condition properly so called, namely, which descends upon the heir, necessarily determines the whole estate, which is subject to it; but it is difficult to perceive upon what principle any objection can be advanced to an executory devise, to take effect in partial derogation of a preceding estate, on the ground that it defeats that estate in part only; and it is observable, that, in all the cases cited by this able writer in illustration of his doctrine, the limitation over was either defective in the terms of its creation (on which, however, some remarks will be found in the sequel (see *Corbet's* case, 1 Rep. 83, b; and other cases observed upon infra),) or was repugnant to the nature and incidents of the estate on which it was engrafted; or was contrary to the rule of law fixing the period within which such interests must be limited to arise.

Estate in fee or in tail reduced to an estate for life.

First, Where an estate tail, or an estate in fee-simple, is in some event reduced to an estate for life. As where (*m*) a testator devised real estate to his two daughters, their heirs and assigns; but if either of them should marry without the consent of his executors, the daughter so marrying should have an estate for life therein; if either of them should die unmarried, then R. to take it, paying the other daughter 500*l*. It was held, that on one of the daughters marrying without consent, her estate was cut down to an estate for life.

Estate partially defeated by executory limitation.

Secondly, Where an estate is limited in derogation of a preceding estate, and in *partial* exclusion of the same. As where (*n*) a testator devised certain lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, as one of them had attained twenty-one, and died unmarried, the survivor was entitled to his moiety for life.

Remark on *Hanbury* v. *Cockrell*.

As this case simply affirmed the validity of the devise over for life, leaving untouched the destination of the ulterior interest, it cannot, perhaps, be treated as a direct adjudication on the point for which it is here cited, [namely, that the estate originally devised was affected only to the extent necessary for the introduction of the life interest, and subject thereto remained in the prior devisee:] yet, upon principle, there can be, it is conceived, no doubt as to the doctrine in question; and which, indeed, has now the support of a more recent case, which appears to have decided, that where a devise in fee is followed by an executory limitation in fee, in favour of an object or class of objects not in esse, and who, in event, never come into existence, the first devise remains absolute.

Effect where executory gift never takes effect.

Substituted devise failing, first devise held to be absolute.

Thus, in the case of *Jackson* v. *Noble* (*o*), where a testator gave real and personal estate to his daughter A., and to two other persons, upon trust to permit A. to receive the rents and interest for life, for her separate use, and, after her decease, in trust to convey to her heirs, executors, &c.; but in case A.

(*m*) *Wright* v. *Wright*, 1 Ves. 409, Fea. C. R. 500.

(*n*) *Hanbury* v. *Cockrell*, 1 Roll. Ab. 835, Fea. C. R. 396.

(*o*) 2 Kee. 590.

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should marry, and have no child or children, then the property to belong to B.; or in case of his decease before A., then to his children. A. married, but had no child: B. died in her lifetime, without issue. Lord *Langdale*, M. R., held, that A. took an absolute equitable estate, with an executory gift over to B. and his children, and that B., having died in the lifetime of A., leaving no child, the title of A. remained undefeated.

So, if the executory devise were void on account of its remoteness, the prior devise would be absolute.

Case of *Doe* d. *Blomfield* v. *Eyre*.

[On the other hand, in the case of *Doe* d. *Blomfield* v. *Eyre* (*p*), M. S. having an exclusive power of appointing lands by will amongst her children, appointed them to her eldest son, J. B., in fee; but if J. B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J. B. and his brother both died in their father's lifetime, and it was held, that although the father could not take, yet the son lost the estate. *Parke*, B., in delivering the judgment of the Court, after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, said, "If a testator seised in fee were to devise a real estate to A. B. in fee, and to direct that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely was perfectly clear that if A. B. should die in the lifetime of J. S., he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate.' That which defeated the estate of J. B. was the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers." So that, in the case before the M. R., the condition upon which the property was to shift was read as containing the double event of the first taker dying at a given time, and of the ulterior devisee being then, or at least at some future time (*q*), in existence; in the last cited case the condition was understood as involving only the simple event of the death of the prior taker within the specified period.

Remark on the cases.

The cases may perhaps be reconciled on the following ground, namely, that where the testator has himself annexed certain

[(*p*) 5 C. B. 713, in Error; followed by *Kindersley*, V. C., *Robinson* v. *Wood*, 4 Jur. N. S. 625, 27 L. J. Ch. 726.

(*q*) See per Sir *J. Wigram*, V. C., *Salisbury* v. *Petty*, 3 Hare, 91.

[qualifications to the ulterior devisee, then, if at the specified time it is impossible for him ever to possess those qualities, there is no person who can ever bring himself within the description in the devise; and the subject of it remains with the prior devisee, because it appears *on the face of the will* that the benefits given by it were to shift only in favour of the individual named and described. But when the law, and not the testator, has imposed certain disabilities on the ulterior devisee (as by the mortmain laws), or if he is not an object of a power of which the will pretends to be an exercise in his favour; here, since, upon the will alone, and if there had been no such extrinsic disqualifications as above mentioned, the disposition would have been complete, the idea that the testator intended the first taker to retain the gift, after the specified event has happened, is excluded (*r*).

Where substituted gift void for remoteness, first devise absolute.

The case of a gift, void for remoteness, is distinct from either of the foregoing: for, even admitting that the condition contemplated by the testator involved the simple event only; yet, the law refusing permission to await that event for any purpose, it follows that the prior gift must, of necessity, remain absolute (*s*).]

Same rule as to personalty, where executory gift is for life only;

On the same principle, it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, subject to such executory gift for life, be absolutely entitled. And the case of *Taylor* v. *Langford* (*t*), seems to be an authority in point.

[(*r*) See accordingly per Sir *T. Plumer*, M. R., in *Whittell* v. *Dudin*, 2 J. & W. 286; and cf. *Tupper* v. *Tupper*, 1 Kay & J. 665.

(*s*) If the decision on the second point in *Carver* v. *Bowles*, 2 R. & My. 301, depended solely on the fact that the persons in whose favour the executory gifts over were attempted to be made were strangers to the power, that case would oppose the distinction suggested in the text. But even if they had not been strangers, there was the further ground for holding the prior gift to be unaffected (a ground to which the subsequent decision in *Kampf* v. *Jones*, 2 Kee. 756, was expressly referred), namely, that such gift over was void for remoteness. In this view both cases support the position taken in the text, and see *Courtier* v. *Oram*, 21 Beav. 91; *Webster* v. *Parr*, 26 Beav. 236; and ante, p. 275.]

(*t*) 3 Ves. 119. See also *Harrison* v. *Foreman*, 5 Ves. 207, and other cases stated ante, 785 et seq. But the recent case of *Joslin* v. *Hammond*, 3 My. & K. 110, shows that too much caution cannot be exercised in forming any such conclusion. In that case, a testator bequeathed to his wife A., whom he appointed executrix, the whole of his property, on condition of her paying to his mother 130*l.* per annum during her life, and added, "at the death of my dear wife A., the whole of the property to be equally divided amongst those of my children who may survive her;" and should his wife marry again, the testator directed that each of his children at the age of twenty-four be paid 400*l.*; should she not marry, he left them implicitly to her kind and indulgent care. No child of the testator survived the widow. It was contended, therefore, that the widow was absolutely entitled, on the ground

Case of *Joslin* v. *Hammond*.

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—where executory gift never takes effect.

[Similarly, where the second or substituted gift is a contingent bequest of the entire interest in the property, and not for life only, and such contingent and substituted bequest fails in event, the prior legacy, in derogation of which the same was to take effect, remains absolute. Thus, in the case of *Smither* v. *Willock* (*u*), where there was a bequest to the testator's wife for her life, and after her death to his brothers and sisters, named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying were to be divided between his or her children: one of the testator's brothers died in the widow's lifetime, without having ever had a child; and Sir *W. Grant*, M. R., held that his representatives were entitled to his share.]

Effect where absolute interests are first given, and then trusts declared of shares of certain objects.

It seems, too, that, where a testator, in the first instance, divides his property among his children, and then proceeds to declare certain trusts of his daughters' shares in favour of themselves and their children, these trusts are considered as defeating only pro tanto the absolute interests antecedently given to the daughters in common with the other children.

As, in *Whittell* v. *Dudin* (*x*), where the testator directed the residue of his property to be equally divided between his wife, and sons and daughters, subject, as to the shares of the daughters, to certain trusts for the benefit of themselves, and their children; Sir *T. Plumer*, M. R., held, that a daughter dying without a child, was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among his children, which would be frustrated if the shares of daughters were to go to the testator's next of kin as undisposed-of property, on their dying without children.

Qualifying

And the same construction prevailed in the case of *Hulme* v.

that the absolute interest which she would have taken under the first words of the will, was cut down to a life interest only in a certain event which had not happened; but Sir *J. Leach* considered that, upon the whole context of the will, it was the intention of the testator that in no event the wife should have other than a life estate. "If," said his Honor, "at her death, a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator, that, if his children died in the lifetime of his wife, leaving families, his widow, on her second marriage, should enjoy the whole property." His Honor did not advert to the annuity to the mother. [See *Lassence* v. *Tierney*, 1 Mac. & G. 551.

(*u*) 9 Ves. 233. See also *Hervey* v. *M'Laughlin*, 1 Pri. 264; *Green* v. *Harvey*, 1 Hare, 431; *Gray* v. *Garman*, 2 ib. 268, 274; *Salisbury* v. *Petty*, 3 ib. 86; *Yearwood* v. *Yearwood*, 9 Beav. 276; *In re Bright's Trust*, 21 ib. 67.]

(*x*) 2 J. & W. 279.

trusts operate pro tanto only.

Hulme (*y*), where a testator, in the first instance, made an absolute gift to all his children by his second wife, who should be living when the youngest should attain twenty-one. He then superadded a direction for settling the shares of the daughters, upon trust for them for life, and then for their children. One of the daughters having died childless, it was held, that her share belonged absolutely to her representatives. Sir *L. Shadwell*, V. C., observed, "The absolute gift remains, except so far as the direction for settling the shares of the daughters has taken it away, and it is not taken away in the case of a daughter dying without having children."

[In a recent case (*z*), the rule is thus stated by Lord *Cottenham*. "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee."

Rule for deciding whether there be an absolute gift in the first place.

It is in the determination of this previous question, whether, namely, the gift to the individual be absolute or qualified, that the real difficulty of these cases generally lies. The rule is, that, where the gift is in terms ambiguous, other parts of the will are to be looked at to see what the testator's intention was; but if there is a distinct positive gift, and the intention is express,

(*y*) 9 Sim. 644. See also *Billing* v. *Billing*, 5 Sim. 232; [*Ring* v. *Hardwick*, 2 Beav. 352; *Mayer* v. *Townsend*, 3 ib. 443; *Winckworth* v. *Winckworth*, 8 ib. 576; *Re Forster*, 1 M. D. & D. 418; 2 ib. 177; *Arnold* v. *Arnold*, 16 Sim. 404; *Eaton* v. *Barker*, 2 Coll. 124; *Dawson* v. *Bourne*, 16 Beav. 29; *Re Young's Settlement*, 18 Beav. 199; *Lyddon* v. *Ellison*, 19 ib. 565; *Gurney* v. *Goggs*, 25 ib. 334; *Corbett's Trust*, 1 Johns. 591; *Norman* v. *Kynaston*, 7 Jur. N. S. 129, 30 L. J. Ch. 189. In *Mayer* v. *Townsend*, where the primary gift was absolute to a daughter, followed by a direction to invest in trust for her, for her separate use for life, and after her death to her children, *with power to her to appoint a life interest to her husband*. It was contended, that the intention could not have been to give her an absolute interest, even if there were no children, because a husband surviving her might take the property absolutely. Lord *Langdale* apprehended there would be a great deal to say on that point; but it did not arise.

(*z*) *Lassence* v. *Tierney*, 1 Mac. & G. 561.

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[nothing that afterwards follows can affect the construction of the positive gift (*a*).

Same rule where gift is subject to a power which is extinguished.

Similar, in principle, to the cases last stated, is that of *Keates* v. *Burton* (*b*), in which it was decided that where there is a bequest of a legacy subject to be defeated by the exercise of a discretionary power, and that power is extinguished, the legacy becomes absolute.]

Executory interests not affected by acts of owner of precedent estate.

The essential quality in executory devises, which gave to the distinction between them and contingent remainders its chief importance was this,—that such interests were and still are not in general liable to be affected by any alteration in the preceding estate (*c*): while, on the other hand, as a contingent remainder must have taken effect, if at all, at the instant of the determination of the preceding estate, it followed, as a consequence of this rule, that any act by the owner of the prior estate of freehold, which amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders; the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. Hence the expediency and the practice of limiting an estate of freehold to trustees, between the particular estate and the contingent remainders; which interposed estate, by conferring on the trustees a right of entry, on the forfeiture of the prior estate of freehold, preserved the ulterior remainders.

Effect of stat. 8 & 9 Vict. c. 106, s. 8. Remark on estate for preserving contingent remainders.

[But now by the statute 8 & 9 Vict. c. 106, s. 8, all contingent remainders are rendered capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects, as if such determination had not happened. It is evident, however, that this enactment leaves unaffected the necessity for a contingent remainder taking effect, if at all, at the instant when the preceding estate expires by effluxion of time, or when it would have

[(*a*) *Jackson* v. *Forbes*, Taml. 88; *Campbell* v. *Brownrigg*, 1 Phil. 301; *Gompertz* v. *Gompertz*, 2 ib. 107; *Scawin* v. *Watson*, 10 Beav. 200; *Whitehead* v. *Rennett*, 22 L. J. Ch. 1020; *Lord* v. *Lord*, 3 Jur. N. S. 485; *Findon* v. *Findon*, 1 De G. & J. 380; *Waters* v. *Waters*, 26 L. J. Ch. 624, as to which quære; *Fullerton* v. *Martin*, 1 Drew. & Sm. 31.

As to the destruction of contingent remainders.

(*b*) 14 Ves. 434.]

(*c*) *Pells* v. *Brown*, Cro. Jac. 590. The destructibility of contingent remainders by the act of the owner of the prior estate of freehold, is now, in consequence of the recent alterations in the law, a doctrine of little practical importance. For such owner could have effected their destruction only by causing the forfeiture, surrender or merger of his own estate; acts, from the consequences of which contingent remainders are now protected.

[so expired, if not previously determined by forfeiture, surrender, or merger. It follows, therefore, that the estate for preserving contingent remainders is still as necessary as ever for all purposes, except that of preserving them from destruction by the act of the owner of the preceding estate of freehold: and for such purposes it would not formerly have been, and, therefore, would not now be,] sufficient to make the estate in question co-extensive with the original duration of such prior freehold; for, it is obvious, that the remainder may be of such a nature as to admit the possibility of its continuing in suspense or contingency after the determination of the particular estate of freehold. For instance, suppose freehold lands to be limited to A. for life, with remainder to such of the children of A. as shall attain the age of twenty-one years, it is evident, that in limiting an estate to trustees, for the purpose of preserving such remainder, their estate should be made to endure not only during the life of A., but also for the further period of the possible minority of one at least of the children of A., all of whom might happen to be under age at the time of A.'s decease, in which case, if the estate of the trustees were to terminate at the decease of A., the remainder to the children would, according to the doctrine before referred to, wholly fail.

Nature of limitation sometimes dependent on events happening in testator's lifetime;

As every devise operates according to the state of the objects at the death of the testator, it frequently happens that a limitation, which, on the face of the will, appears to be a contingent remainder, and which, according to the state of events at the date of the will, would have taken effect as such, becomes, by the effect of subsequent events happening in the testator's lifetime, an executory devise.

Thus, if lands be devised to A. for life, remainder to the future sons of B., and A. died in the lifetime of the testator, at whose decease no future son of B. is born, the devise will be executory, precisely as if it had been originally limited to the future sons of B., without any preceding freehold (*d*). The consequences of this event on the rights of the respective devisees might be very important; for if the devise had once operated to confer a contingent remainder, or, in other words, if A. had survived the testator, and had afterwards died before any future son of B. was born, the remainder to such future son would

(*d*) See *Hopkins* v. *Hopkins*, Cas. t. Talb. 228, 1 Atk. 581, 1 Ves. 268; *Doe* d. *Scott* v. *Roach*, 5 M. & Sel. 481.

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have failed by the determination of the preceding estate before it vested.

—and possibly even on subsequent events.

Where the limitation of a future interest, by way of executory devise, is followed by other limitations expectant thereon, in the nature of remainders, (which, of course, can only happen where the first executory estate is less than the fee-simple,) such subsequent limitations may, it is evident, according to events happening as well after as before the death of the testator, take effect either as remainders, or as executory devises. If, by the removal out of the way of the preceding limitation or limitations, by the death of the object or objects, or otherwise, before the happening of the contingency on which the whole line of limitations depends, a subsequent devisee is placed at the head of the train; his estate will, on the happening of such contingency, take effect as an executory devise, though had it retained its original position, such estate would have vested as a remainder.

Thus, in the case of *Doe* d. *Fonnereau* v. *Fonnereau* (*e*), where A. [having a reversion expectant on the decease of T.,] devised to the heirs male of the body of T., his eldest son, (who had an estate for life by deed,) and in default of such issue to his (testator's) second, third, fourth, and fifth sons successively, in tail male; it was held, that, if T. died leaving an heir male of his body, the limitation to A.'s next son took effect as a remainder expectant on the estate tail of such heir male; and that if he died leaving no male issue who survived the testator, it took effect immediately as an executory devise.

Executory devise may be changed into a remainder by events subsequent to testator's death.

[In this case the question whether the ulterior limitation was to operate by way of executory devise, or as giving a remainder, was, according to the state of circumstances at the testator's death, still open. It might have operated *either* way; and the subsequent events were only to decide between the two. But it is further settled, that even that which, according to the state of circumstances at the testator's death, can take effect *only* as an executory devise, may, by a change of circumstances after his death, but before its taking effect in possession, be converted into a remainder. This was decided in the case of *Doe* d. *Harris* v. *Howell* (*f*), where a testator devised real estates to his daughter for life, remainder to her son J. in fee; but in case the said J. should die before her, and she should have no other child living at her death, then as she should appoint. The daughter and her

(*e*) Doug. 487; [*Hopkins* v. *Hopkins*, Fea. C. R. 510.

(*f*) 10 B. & Cr. 191.

[son both survived the testator, and afterwards the son died in the lifetime of his mother, who afterwards had another son who survived her. It was decided by the Court of King's Bench, that though the limitation, (which for argument's sake, was supplied by implication (*g*),) to the children of the daughter other than J. could operate only as an executory devise at the time of the testator's death, yet that by J.'s death in his mother's lifetime that limitation was converted into a remainder.

But not a remainder into an executory devise.

But a limitation which has once operated as a contingent remainder can never, after the death of the testator, be changed into an executory devise (*h*).]

Effect where one of the several concurrent contingent remainders is subject to an executory devise.

Sometimes a limitation is so framed, as to take effect as a contingent remainder in fee in one event, and as an executory limitation engrafted on an alternative contingent remainder in fee in another event. Thus, in the case of *Doe* d. *Herbert* v. *Selby* (*i*), where the devise was to A. for life, and, after his decease to his children in fee, as tenants in common; and if A. should die without issue, or leaving such issue, and such child or children should die under twenty-one, or (which was read *and* (*k*),) without issue, then over to B. in fee. A. suffered a common recovery, and *died without issue;* and it was held, that, in the event which had happened, the limitation to B. would have taken effect as a contingent remainder, and consequently was destroyed by the recovery.

Observations upon *Doe* v. *Selby*.

It is not quite accurate to say in such a case as *Doe* v. *Selby*, that the limitation is a contingent remainder in one event, and an executory devise in the other. There were, in fact, two alternative contingent remainders in fee: one of which was subject to an executory limitation in favour of the same person, who would have been the object of the alternative remainder. Such a case is clearly distinguishable from that of a devise to A. for life; and if he shall die on the 1st of January, then, from one year afterwards, to B. in fee; but if A. shall die on any other day, then, immediately from the decease of A., to B. in fee. In the first event, the limitation to B. would take effect as an executory devise; and in the second, as a remainder: so that his interest would be destructible or not, by the act of A., according to the event.

[(*g*) But see ante, pp. 524, 525.

(*h*) 2 Prest. Abst. 172; *Hopkins* v. *Hopkins*, 1 Atk. 581; *Mogg* v. *Mogg*, 1 Mer. 703, 704, arg., and the decree as to the High Littleton estate.]

(*i*) 4 D. & Ry. 608, 2 B. & Cr. 926.

(*k*) Ante, p. 472; [and see *Doe* d. *Evers* v. *Challis*, 18 Q. B. 244.]

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Whether executory limitation to arise out of a contingent remainder is involved in its destruction.

If, in *Doe* v. *Selby*, the tenant for life had had children, i. e. born after the recovery, who had died under twenty-one, and without issue, the case would have raised a question, not, I think, hitherto decided, namely, whether an executory devise engrafted on a contingent remainder in fee, is involved in the destruction of such remainder. If an executory devise were derived out of the estate in defeazance of which it is limited to take effect, it is clear that, in such a case, it would be held to share the fate of the parent limitation, out of which it is to spring, and to all the accidents of which it would seem, therefore, to be necessarily subject. Accessorium sequitur naturam sui principalis (*l*). It would then present an exception to the position of the learned author of the Treatise on Contingent Remainders, that "an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate *out of which*, or after which, it is limited (*m*);" (to which, indeed, the case of an executory devise, *being preceded by an estate tail, does* [as he remarks himself] clearly form an exception (*n*).) But it is conceived, that the notion above suggested, though seemingly countenanced by the terms of this position, is not correct in point of law. An executory devise is not derived out of, or dependent upon, the estate which it supersedes. It is a future substantive, independent, limitation to arise on a given event; and the circumstance, that that event involves the failure of the objects of a preceding estate, is merely accidental (*o*).

Effect where defeasible and executory fee become vested in same person.

Here it may be observed, that where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not concurrent.

Thus, in the case of *Goodtitle* d. *Vincent* v. *White* (*p*), where a testator devised all his estate to his wife, in case his daughter (who became his heir) died under the age of twenty-one years. The wife died intestate; so that the daughter to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her mother, to the executory interest so created. The daughter died a minor, upon which the heir ex parte maternâ claimed the property under the

(*l*) 3 Inst. 139.

(*m*) Fea. C. R. 418.

(*n*) See ante, p. 230; [Fea. C. R. 423, 424.

(*o*) Cf. *Vincent Lee's* case, Moor, 269.]

(*p*) 15 East, 174; *Same* v. *Same*, 2 B. & P. (N. R.) 383. See also *Goodright* d. *Larmer* v. *Searle*, 2 Wils. 29; *Doe* d. *Andrew* v. *Hutton*, 3 B. & P. 643.

executory limitation, which claim was resisted by the heir ex parte paternâ, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled (*q*).

Curtesy attaches on a defeasible fee.

It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has generally all the incidents of an actual estate in fee-simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject only to a possibility. Therefore, in the case of *Buckworth* v. *Thirkell* (*r*), where a testator devised lands to trustees and their heirs, in trust for his granddaughter M. until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M., and her heirs and assigns, for ever; but in case M. should die before the age of twenty-one years, and without leaving lawful issue of her body, then over. M. died under age, without leaving issue living at her decease, *but having had a child born alive;* and it was held, that the husband (the father of such child) was entitled to an estate for life as tenant by the curtesy.

Unless estate be such as issue could *in no case* have inherited.

[But an exception exists where the prior estate is determined by executory devise over in case of the birth or existence of children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favour of the children themselves does not alter the case; since they would not, nor ever could, take by inheritance, but by purchase (*s*).

Same rule as to dower.

The general right to dower in similar cases is equally well established (*t*), and the same exception must exist here as in regard to curtesy; it being equally necessary in support of either claim that children of the marriage, if any such there be, may by possibility inherit (*u*).]

Executory bequest.

Here, it may be useful to observe, that no remainders can be

(*q*) The arguments in this case are replete with instructive learning.

(*r*) 1 Collect. Jur. 332, 3 B. & P. 652, n. [The same rule exists with regard to dower out of an estate tail, after failure of issue. Secus of an estate determined by condition at common law, *Payne* v. *Samms*, 1 Leo. 167, Goulds. 81; *Paine's* case, 8 Co. 34; *S. C.* 5 Vin. 315.

(*s*) *Sumner* v. *Partridge*, 2 Atk. 47; *Barker* v. *Barker*, 2 Sim. 249.

(*t*) *Moody* v. *King*, 2 Bing. 447; *Goodenough* v. *Goodenough*, 3 Prest. Abs. 372; *Smith* v. *Spencer*, 2 Jur. N. S. 778.

(*u*) Litt. s. 53.]

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limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory (*x*). An ulterior bequest of a term for years, after a prior limitation for life, owes its validity to this doctrine; the rule formerly being that, in such a case, the whole interest vested indefeasibly in the first legatee (*y*).

Thus, in *Manning's case* (*z*), where a man possessed of a term of years, devised it to B., after the death of A., the testator's wife, and directed that, in the meantime, she should have the use and occupation during her life: it was contended, that the devise to A. during her life gave her the whole term, and that, therefore, the devise over was void; but after much argument, three Judges held, that B. took not by way of remainder, but by way of executory devise. And it was ruled, that there was no difference between a gift of the land itself, and of the use or occupation or profits of the land.

Both Courts of Law and Courts of Equity are at this day constantly in the habit of entertaining suits, at the instance of an executory legatee, for the recovery of chattels, real as well as personal, and the latter, of pecuniary legacies, after a prior disposition for life, or other partial interest.

Successive interests in personal chattels.

In *Hoare* v. *Parker* (*a*), an ulterior legatee recovered, by action of trover, certain chattels which the legatee cestui que trust for life, since dead, had pledged to a pawnbroker, who had given a valuable consideration without notice; the rule being, that the property does not, unless sold in market overt, follow the possession of chattels capable of being identified (*b*).

Equitable remedy for their protection and recovery;

Courts of Equity, too, will enforce the actual delivery of specific chattels, which are of such a nature as that the loss cannot be compensated in damages; the value arising from considerations personal to the owner, as plate bearing family inscriptions, &c. (*c*). They will also, during the continuance of

(*x*) Fea. C. R. 402.

(*y*) *Horton* v. *Horton*, Cro. Jac. 74; *Woodcock* v. *Woodcock*, Cro. El. 795.

(*z*) 8 Rep. 95. See also *Doswell* v. *Earle*, 12 Ves. 473; *Theobalds* v. *Duffoy*, 9 Mod. 101; *Mallett* v. *Sackford*, 8 Vin. Ab. 89, pl. 5. See also *Lampett's* case, 10 Rep. 47; *Catchmay* v. *Nicholas*, Finch, 116; *Roe* d. *Bendale* v. *Summerset*, 5 Burr. 2608. That personalty may be subjected to the same modifications of ownership, by way of executory gifts, as land, see *Martin* v. *Long*, 2 Vern. 151; *Johnson* v. *Castle*, Winch, 116, 8 Vin. Ab. 104, pl. 2.

(*a*) 2 T. R. 376.

(*b*) See *Hartop* v. *Hoare*, 3 Atk. 44.

(*c*) *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. W. 389; *Fells* v. *Read*, 3 Ves. 70; *Lloyd* v. *Loaring*, 6 Ves. 773; *Lowther* v. *Lowther*, 13 Ves. 94; *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.

the prior interest, protect the rights of the ulterior legatee; but this protection is now confined to compelling the legatee for life to give an inventory; which, as observed by Lord *Thurlow*, is more equal justice than requiring security, which was the old rule; as there ought to be danger to require that (*d*).

—against bankruptcy. When trover will lie.

Where the legal title is in trustees, [the creditors of the person beneficially entitled for life cannot seize the chattels even in case of bankruptcy (*e*);] and if they have been taken in execution, the trustees may maintain trover for them (*f*). But where the first taker was clothed with the legal title, and his creditor had taken the chattels (which consisted of plate) in execution; on a bill by the legatee calling for their restoration to the house with which they were bequeathed, and for security and an inventory, Lord *Thurlow* felt much difficulty. On the one hand, if the Court could take away the articles, it was entitling the ulterior legatee to take from him the use, contrary to the testator's intention; and, on the other, if the creditors obtained the plate, they must succeed in applying it differently from the testator's intention: and there was, his Lordship said, a strong principle of justice for preserving the goods for the benefit of the person entitled, if the Court could so secure them. The point, however, was not decided, the case being disposed of on another ground (*g*).

It is clear, at all events, that the ulterior legatee might, on his interest falling into possession, have maintained an action of trover for the plate in question; or, if incapable of being compensated in damages, a suit in equity for its delivery. These cases suggest, that, wherever temporary interests are created in chattels personal, the whole legal property should be vested in trustees.

As personal property of this nature is thus preserved through any number of successive takers, for the benefit of the person entitled to the ulterior and absolute interest, it is evident that bequests of such property are within the dangers of, and are consequently subject to, the rule directed against perpetuities (*h*).

Consumable articles cannot be limited.

[But there can be no limitations of consumable articles: if the gift be specific (*i*), the first legatee for life or other limited in-

(*d*) 1 B. C. C. 279.

[(*e*) *Earl of Shaftesbury* v. *Russell*, 1 B. & Cr. 666.]

(*f*) *Cadogan* v. *Kennett*, Cowp. 432.

(*g*) *Foley* v. *Burnell*, 1 B. C. C. 274.

(*h*) Vide ante, p. 226.

[(*i*) If included in a residuary bequest they would of course be sold, and the interest of the proceeds enjoyed by the tenant for life, 3 Mer. 195.

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[(*k*) *Randall* v. *Russell*, 3 Mer. 194; *Andrew* v. *Andrew*, 1 Coll. 690; *Twining* v. *Powell*, 2 ib. 262; *Bryant* v. *Easterson*, 5 Jur. N. S. 166. This was formerly doubted, see *Porter* v. *Tournay*, 3 Ves. 314. The rule is not applicable to farming implements, *Groves* v. *Wright*, 2 Kay & J. 347, nor to articles of wearing apparel bequeathed by a testator to his widow for life, *Re Hall's Will*, 1 Jur. N. S. 974.]

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