A

TREATISE ON WILLS

BY

THOMAS JARMAN, ESQ.,

IN THREE VOLUMES.

VOLUME I.

FIFTH AMERICAN, FROM THE FOURTH LONDON EDITION, WITH NOTES AND REFERENCES TO AMERICAN DECISIONS.

BY

JOSEPH F. RANDOLPH AND WILLIAM TALCOTT

OF THE NEW JERSEY BAR.

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TO THE

HONORABLE THEODORE RUNYON,

CHANCELLOR OF NEW JERSEY,

WHOSE READY MEMORY, QUICK INSIGHT, THOROUGH LEARNING AND INVARIABLE COURTESY GIVE HIM AN HONORABLE NAME AND PLACE AMONG THE EQUITY JUDGES OF AMERICA, THIS EDITION OF

JARMAN ON WILLS

IS RESPECTFULLY DEDICATED BY THE

AMERICAN EDITORS.

NOTE

TO THE FIFTH AMERICAN EDITION.

THE notes of the American editors are distinguished by Arabic figures, with the exception of the five notes at the conclusion of Chapter III., which are distinguished by the first five letters of the alphabet, in capitals. The annotations of the English editors are distinguished by the letters of the alphabet. In presenting to the American bar the fourth edition of the London work, the American editors have given the text and notes of the London edition *verbatim*, and it has therefore seemed desirable to preserve in this edition the brackets in the text and notes, which have been used by the English editors to distinguish their additions to and alterations of the original work of Mr. Jarman.

PREFACE

TO THE FIFTH AMERICAN EDITION.

THE new American edition of JARMAN ON WILLS, for which the notes, (by the American editors,) in the following volumes were prepared, was about to be published more than a year since, when the announcement of the fourth English edition made further delay expedient. The American Editors are now able, by arrangement with the English publisher, to print the present edition from the advance sheets of the fourth London edition, and thus to put it into the hands of the American bar as soon as it reaches their English brethren, or sooner. The two English volumes will appear together toward the end of the winter, and simultaneously with the third and last American volume. The second volume is now in press, and should appear early next year.

The additions and changes made by the editor of the fourth English edition have added much to the high value of the original work, and keep it, what it has always been, the great model and quarry from which all other recent works on wills have been cut.

The aim of the American editors has been to add to this most excellent book a complete array of American decisions. In this effort they have not spared pains nor expense. They have endeavored to examine and note every reported case in every state and federal report. This has required great labor, and has been done honestly and carefully. In some parts of the book, where the English writers have only touched on an important subject, (like TESTAMENTARY CAPACITY,) or where there is no recent text book including American cases, (as in the matter of CHARITABLE USES,) large additions have been made by long

and full citations from important cases, in the hope that in this shape the book may better serve those who have not within their reach all other books.

No one can justly withhold his praise and admiration from the splendid work of the learned author and his English editors. If the ever increasing labors of American lawyers are in some degree made lighter by these annotations, they will look, perhaps, indulgently upon the unknown American workmen, and not call their additions to such a book presumption.

JOS. F. RANDOLPH,
WM. TALCOTT.

JERSEY CITY, N. J., December, 1879.

PREFACE

TO THE FIRST ENGLISH 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 labor 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 apprecia-

tion 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 labor has been willingly incurred, in order to avoid encumbering 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.

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.

By what local law wills are regulated.

A will of fixed or immovable property is generally governed by the *lex loci rei sitæ*;[1] 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

Realty ruled by *lex loci rei sitæ*.

1. All questions as to the capacity of the testator, his power to make a disposition of the property, and what forms and solemnities are required in the execution of his will, as far as this class of property is concerned, must be governed by the law of the place where such property is situated. Story Confl. Laws, § 474; 4 Kent 513; 2 Id. 429; Flood on Wills 243; 1 Redfield on Wills 397; Williams *v.* Saunders, 5 Cold. (Tenn.) 60; Calloway *v.* Doe, 1 Blackf. 372; Robertson *v.* Barbour, 6 Mon. 523; Crofton *v.* Ilsley, 4 Greenl. 134; Potter *v.* Titcomb, 22 Me. 300; Bailey *v.* Bailey, 8 Ohio 239; Kerr *v.* Moon, 9 Wheat. 565; Darby *v.* Mayer, 10 Wheat. 465; Morrison *v.* Campbell, 2 Rand. 209; U. S. *v.* Crosby, 7 Cranch 115; Varner *v.* Bevil, 17 Ala. 286; Cornelison *v.* Browning, 10 B. Mon. 425; Richards *v.* Miller, 62 Ill. 417; Norris *v.* Harris, 15 Cal. 226, 252. But see McCune's Devisees *v.* House, 8 Ohio, 144, 145; Thieband *v.* Sebastian, 10 Ind. 454; Swearingen's Adm'r *v.* Morris, 14 Ohio St. 424.

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*)[2] And, of course, lands in England *belonging to a

But in case the will shows no intention to charge the realty to the exclusion of the personalty, after the payment of debts, it will be held that the intention of the testator is that the estate shall be administered as provided for in the state where the will was admitted to probate. Harris *v.* Douglass, 64 Ill. 466.

In Ohio, before the title of a devisee of real estate, under a will made in another state, can be considered complete, the will must be admitted to record there. Wilson's Ex'rs *v.* Tappan, 6 Ohio 172.

(*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 Bowman *v.* Reece, Pre. Ch. 577; Drummond *v.* Drummond, 3 B. P. C., Toml. 601; Brodie *v.* Barry, 2 Ves. & B. 131.

2. *Quære*, whether this statement is not too broad as to the *construction* of such wills. It is probably correct as to the requisites attending their execution to give them *validity*. See 2 Greenl. Ev., § 671, where Mr. Greenleaf remarks that "in the *interpretation* of wills, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule is that it is to be interpreted by the law of that place at the time the will was made." As to *interpretation*, Mr. Justice Story also considers the rules of construction generally to be identical for both wills of immovables and movables, unless there be clearly evidence within the instrument that the testator actually had in mind the *situs*. Story Confl. Laws, § 479, h. It would seem to be settled now, however, in England and the United States, that in matters that concern the succession to personalty, the *lex domicilii* of the deceased is to control, while on the other hand it is maintained that as far as the descent and heirship of realty is concerned, the *lex rei sitæ* determines it finally. Whart. Confl. Laws, § 561; 1 Redfield on Wills 398; Potter *v.* Brown, 5 East 130; Price *v.* Dewhurst, 4 Myl. & C. 76; De Bonneval *v.* De Bonneval, 1 Curteis 856; Enohin *v.* Wylie, 10 H. L. Cas. 1; Dixon *v.* Ramsay, 3 Cranch 319; Kerr *v.* Moon, 9 Wheat. 565; Ennis *v.* Smith, 14 How. 400; Harrison *v.* Nixon, 9 Peters 483; Grattan *v.* Appleton, 3 Story C. C. 755; Moultrie *v.* Hunt, 23 N. Y. 394; Deseshats *v.* Berquier, 1 Binney 336; Bascom *v.* Albertson, 34 N. Y. 584; Gilman *v.* Gilman, 52 Maine 165; Swearingen *v.* Morris, 14 Ohio St. 424; Johnson *v.* Copeland, 35 Ala. 521; Abston *v.* Abston, 15 La. An. 137; Hill *v.* Townsend, 24 Texas 575; Danelli *v.* Danelli, 4 Bush. 51; Barnes *v.* Brashear, 2 B. Mon. 380; Richards *v.* Miller, 62 Ill. 417; Banta *v.* Moore, 2 McCart. 97; Flood on Wills 241; In re Bruce, 2 Cr. & J. 436; Thompson *v.* Advocate-General, 12 Cl. & Fin. H. L. Cas. 1; Attorney-General *v.* Napier, 6 Ex. Rep. 217; Coppin *v.* Coppin, 2 P. Wms. 291; Birtwhistle *v.* Vardill, 5 Bsrn. & Cr. 451; U. S. *v.* Crosby, 7 Cranch 115; McCormick *v.* Sullivant, 10

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

In regard to personal, or rather movable property, the *lex domicilii* prevails, (*d*) [that is to say the law of the country in which the testator or intestate was domiciled at the time of his death. (*e*)[3] By a modern statute, indeed (*f*) some material exceptions (affecting chiefly the mode of execution by British subjects dying after 6th August, 1861, of wills of personal estate) are made to the general rule: but in most respects the rule still holds good, and will, therefore, be most conveniently dealt with before adverting in detail to the statutory exception.] Movables by *lex domicilii*.

If, then, a British or foreign subject dies domiciled in England, his personal property in England, in case he was intestate, will be distributed according to the English law of succes- Domiciled Englishman.

Wheat. 192; Darby *v.* Mayer, Id. 465; Dunbar *v.* Dunbar, 5 La. An. 158; Cutter *v.* Davenport, 1 Pick. 81; Holman *v.* Hopkins, 27 Texas 38; Hosford *v.* Nichols, 1 Paige 220; Applegate *v.* Smith, 31 Mo. 166; Lucas *v.* Tucker, 17 Ind. 41; Bloomer *v.* Bloomer, 2 Bradf. 339. Who would be entitled in a case in which the testator had devised his real estate to his next of kin, would be determined by the law of his domicile. Story Confl. Laws, § 479, h; Potter *v.* Titcomb, 22 Maine 300. So, also, if the will should designate a particular class or description of persons to take under it, they would be determined by the law of the place where the will was made and the testator was domiciled. Richards *v.* Miller, 62 Ill. 417.

(*c*) See Doe d. Birtwhistle *v.* Vardill, 5 B. & Cr. 438. [As to land in Italy, 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*. [Enohin *v.* Wylie, 10 H. L. Cas., pp. 19, 24, per Lords Cranworth and Chelmsford, following Preston *v.* Melville, 8 Cl. & F. 1, diss. Lord Westbury.]

(*e*) Bremer *v.* Freeman, 10 Moo. P. C. C. 306; *i. e.*, the law as it stood at the death; subsequent changes between death and the grant of probate or administration being disregarded. Lynch *v.* Paraguay, L. R., 2 P. & D. 268.

3. 4 Kent 513, 514; McConnell *v.* Wilcox, 1 Scam. 373; Smith *v.* Union Bank, 5 Peters 518; Irving *v.* McLean, 4 Blackf. 52; Meese *v.* Keefe, 10 Ohio 362; Bempde *v.* Johnstone, 3 Vesey 198; Somerville *v.* Somerville, 5 Vesey 750; In re Roberts' Will, 8 Paige 519; Turner *v.* Fenner, 19 Ala. 355; Harrison *v.* Nixon, 9 Peters 483; Bloomer *v.* Bloomer, 2 Bradf. 339; Williams on Ex'rs (6th Am. ed.) 1626; Chamberlain *v.* Chamberlain, 43 N. Y. 424; McCune's Devisees *v.* House, 8 Ohio 144; Moultrie *v.* Hunt, 23 N. Y. 394. In Nat *v.* Coons, 10 Mo. 543, it is said that if a will be made in one state by a testator, who afterwards moves into Missouri, his will will not be valid in Missouri unless executed in accordance with the laws of Missouri. But if in accord with those laws, it will be valid in Missouri without republication. A copy of probate of such a will from the courts of such other state is of no force or effect in Missouri.

(*f*) 24 and 25 Vict., c. 114.

sion; (*g*)[4] and if he left a will, his testamentary capacity [(both as regards personal status (*h*) and the bequeathable quality of the property willed,] (*i*) and the construction of the instrument, (*k*) (whether this be made in the testator's native or in his adopted country, or elsewhere, and wherever he may have died,) must be tried by the law of England. And it is scarcely necessary to observe, that stock in the public funds is undistinguishable in this respect from other personal property. (*l*) And the movable property *of such a person, which is out of England at the time of his death, will also, it seems, generally

(*g*) Thorne *v.* Watkins, 2 Ves. 35; Bempde *v.* Johnstone, 3 Ves. 198; Balfour *v.* Scott, 6 B. P. C. Toml. 550; Bruce *v.* Bruce, Id. 566, 2 B. & P. 229, n.

4. If a person die intestate, the rights of the next of kin as to personal property will be determined by the laws of the place where the intestate was domiciled, but the laws of the place where such personalty is situate will regulate the court and the mode of administration. 1 Redfield on Wills 398; Goodall *v.* Marshall, 11 N. H. 88; Suarez *v.* Mayor, &c., of N. Y., 2 Sandf. Ch. 174; Ennis v. Smith, 14 How. 400; Jennison *v.* Hapgood, 10 Pick. 100; Fay *v.* Haven, 3 Metc. (Mass.) 109; Stevens *v.* Gaylord, 11 Mass. 264; Campbell *v.* Sheldon, 13 Pick. 8; Dawes *v.* Boylston, 9 Mass. 355; Harvey *v.* Richards, 1 Mason C. C. 381; Dawes *v.* Head, 3 Pick. 128; Dixon *v.* Ramsay, 3 Cranch 319; Stent *v.* McLeod, 2 McCord Ch. 354; Grattan *v.* Appleton, 3 Story C. C. 755; Richards *v.* Dutch, 8 Mass. 506; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280; Thomas *v.* Tanner, 6 Mon. 52; Atchison *v.* Lindsey, 6 B. Mon. 86; Potter *v.* Titcomb, 22 Maine 300; Porter *v.* Heydock, 6 Vt. 374; Holmes *v.* Remsen, 4 Johns. Ch. 460; Ferraris *v.* Hertford, 3 Curteis 468; Shultz *v.* Pulver, 3 Paige 182; Price *v.* Dewhurst, 8 Sim. 299; Spratt *v.* Harris, 4 Hagg. 408. "All questions of testacy or intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased." Per Lord Westbury, in Enohin *v.* Wylie, 10 H. L. Cas. 1; 31 L. J. Ch. 402; Lawrence *v.* Kitteridge, 21 Conn. 577; Grattan *v.* Appleton, 3 Story C. C. 755; Wilkens *v.* Ellett, 9 Wall. 740; Petersen *v.* Chemical Bank, 32 N. Y. 21; Harvard Coll. *v.* Gore, 5 Pick. 369. "It is of no consequence what is the country of the birth of the intestate, or of his former domicile, or what is the actual *situs* of the personal property at the time of his death; it devolves upon those who are entitled to take it according to the law of his actual domicile at the time of his death." Story Confl. Laws, § 481.

(*h*) Price *v.* Dewhurst, 8 Sim. 299, 4 My. & Cr. 76; Robins *v.* Dolphin, 1 Sw. & Tr. 37, 7 H. L. Ca. 390.

(*i*) Kilpatrick *v.* Kilpatrick, 6 B. P. C., Toml. 584, cit.]

(*k*) Anstruther *v.* Chalmer, 2 Sim. 1; [Reynolds *v.* Kortwright, 18 Beav. 417; Boyes *v.* Bedale, 1 H. & M. 798; Peillon *v.* Brooking, 25 Beav. 218.]

Domicile as affecting legacy duty.—(*l*) 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 domicile, alienage, &c. [Where the domicile of the testator is foreign it is now settled beyond question that under no circumstances whatever is legacy duty payable. In re Bruce, 2 Cr. & J. 436, 2 Tyr. 475; Hay *v.* Fairlie, 1 Russ. 117; Logan *v.* Farlie, 1 My. & Cr. 59, re-

speaking, follow the domicile; but this, of course, depends on the laws of the state in which the property is situate, which may not

versing the decision 2 S. & St. 284; Arnold *v.* Arnold, 2 My. & Cr. 256; Commissioners of Charitable Donations *v.* Devereux, 13 Sim. 14; Thompson *v.* Adv.-Gen., 12 Cl. & Fin. 1, 13 Sim. 153, 9 Jur. 217; In re Coales, 7 M. & Wells. 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 representatives 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; In 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 foreign representative, but no representative has 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: the duty was held not payable, 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 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 domicile, which was supposed in D. P. 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 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, everything necessary to found a specific claim on the part of the Crown, 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 domicile being English,) and they remain undetermined if the will has not been proved in this country.

Estates pur autre vie.—Estates *pur autre vie* are realty; the question whether they are liable to duty is therefore independent of the question of domicile. Chatfield *v.* Berchtoldt, L. R., 7 Ch. 192.

Succession duty.—Succession duty, like legacy duty, is payable only where the deceased was domiciled in this country (Wallace *v.* Att.-Gen., L. R., 1 Ch. 1); but the property once received by the executor and invested here upon the trusts of the will, any subsequent devolution (as on the death of a tenant for life) confers a succession which attracts the duty. Att.-Gen. *v.* Campbell, L. R., 5 H. L. 524.

Probate duty.—The question of probate duty does not depend on domicile,

(though the codes of many civilized states do)(*m*) accord with our own in this particular.[5] Sometimes, however, a difficulty occurs in the application of the principle, from the fact that the foreign state, though it recog*nizes 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 domicile. For instance, the French law does not, like our own, permit a man to bequeath his entire property away from his wife and children. (*n*) Now, if a Frenchman dies domiciled in England, is it quite clear that his movable 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 domicile by mere residence, and some other more decided acts of self-expatriation, such as that of becoming the naturalized subject of another state. (*o*)

Domiciled foreigner.

It follows, from the same rule, that if any person, whether a British subject or a foreigner, dies whilst domiciled abroad, the law of the place which at his death constituted his home will regulate the distribution of his movable (*p*) property in

but (except in the case of personal estate appointed under a general power, which is expressly made subject to probate duty by 23 and 24 Vict., c. 15, § 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; Fernandes' Executors' case, L. R., 5 Ch. 314; Att.-Gen. *v.* Pratt, L. R., 9 Ex. 140. As to certain Indian securities, see 23 and 24 Vict., c. 5.]

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

5. But the property to which this rule is applicable must be purely personal, for if it savors even of the realty, it will be controlled by the *lex loci*. Thompson *v.* Adv.-Gen., 12 Cl. & Fin. H. L. Cas. 1; Att.-Gen. *v.* Napier, 6 Ex. Rep. 217.

(*n*) *Vide post* p. *5, note (*y*).

(*o*) Liv. 1, tit. 1, ch. 2, § 17.

Leaseholds are governed by the lex loci.—(*p*) The word *movable* 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 movable and immovable 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

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; (*q*) and if he left a will, the same law will determine its validity [both as regards personal competence in the testator (*r*) and the bequeathable nature of the property willed,] (*s*) and will also re*gulate the construction (*t*) of such will, 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 domicile. And, by parity of reasoning, the English court *will* grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though invalid and incapable of operation as an English will. Thus, (*u*) probate was granted 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*.[6]

person; so that, if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law. [See Freke *v.* Lord Carbery, L. R., 16 Eq. 461. It is shown in Bacon's Abr., tit. Leases, how it happened that leaseholds were held to pass to the executor. A lease for years was only a contract between lessor and lessee; and lessee, if evicted, could only recover damages in a *personal* action against lessor, not the possession. The benefit of such a contract of course passed to the executor; and though lessees were afterwards held entitled to recover the possession itself, no change was made in the rule of succession.

Since, then, the rule *mobilia sequuntur personam* is inapplicable to leaseholds, it follows (subject to 24 and 25 Vict., c. 114, § 2, presently stated, and which speaks of "personal" estate,) that to dispose of leaseholds a will must be executed according to 1 Vict., c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here, and will enable the executor to sell leaseholds (Hood *v.* Lord Barrington, L.R., 6 Eq. 218,) will nevertheless not operate on the beneficial interest. The title of the executor is from the probate: the beneficial interest will devolve as undisposed of.]

(*q*) Somerville *v.* Lord Somerville, 5 Ves. 750; and see Hogg v. Lashley, 6 B. P. C. Toml. 577.

[(*r*) In re Osborne, 1 Deane 4, 1 Jur. N. S. 1220; In re Maraver, 1 Hagg. 498.

(*s*) Kilpatrick *v.* Kilpatrick, 6 B. P. C. 584, cit.; Doglioni *v.* Crispin, L. R., 1 H. L. 301.]

(*t*) Bernal *v.* Bernal, 3 My. & Cr. 559, n. [Barlow *v.* Orde, L. R., 3 P. C. 164, (*lex loci* admitting illegitimate with legitimate children).]

(*u*) In re Maraver, 1 Hagg. 498. As to the law of Spain respecting testamentary dispositions, see Moore *v.* Budd, 4 Hagg. 346.

6. The validity of a will of personal property being determined by the law of the domicile of the testator, it is held that a will of *personalty* void by the law of the domicile of the testator is void everywhere, notwithstanding that its execution may be in accordance with the law of the place where the property is located. 2

Ancillary probate.

And it is the constant practice of the court here to grant [ancillary] probate of wills of [testators domiciled in foreign countries] which have been previously proved there, without inquiring [or permitting inquiry] into the grounds of the [foreign] proceeding, though the bulk of the property of the deceased testator should happen so be in England. (*x*)

Effect where probate is granted in error.

Where probate has been granted of an instrument eventually ascertained not to be testamentary according to the law of the domicile, 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 grant of probate 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 domicile. (*y*)[7]

Greenl. Ev., §§ 668, 669; Whart. Confl. Laws, § 561; Story Confl. Laws, § 473. And it would seem that where a person made a will valid in the place of his domicile at the time of its execution, but having changed his domicile before death and his domicile at death is where the will so executed is not valid, the will would be treated as a nullity. Yet if prior to his death he were to resume his domicile in the place where the will was executed, it would be held to be a valid and binding will, notwithstanding his change of domicile in the meantime. Hyman *v.* Gaskins, 5 Ired. 267; Dupuy *v.* Wurtz, 53 N. Y. 556; Moultrie *v.* Hunt, 23 N. Y. 394; Desesbats *v.* Berquier, 1 Binney 336; De Sobry *v.* De Laistre, 2 Harr. & J. 193; Crofton *v.* Ilsley, 4 Greenl. 139. But see Nat *v.* Coons, 10 Mo. 543. But now, by 24 and 25 Vict., c. 114, it is provided that the will need not be made according to the law of the domicile at the time of the death of the testator. But the will is valid if it be made according to the law of the place where it was made, or of the place where the testator was domiciled when the same was made, or of the laws then in force in that part of the British dominions where he had his domicile of origin. See Irwin's Appeal, 33 Conn. 128. See also Fleeger *v.* Pool, 1 McLean 189, as to the ruling in Tennessee on the question of the validity of a will made in Pennsylvania, and there proved under its laws.

(*x*) In re Read, 1 Hagg. 474; [Hare *v.* Nasmyth, 2 Add. 25; In re Gaynor, 4 No. Cas. 696; Enohin *v.* Wylie, 10 H. L. Ca. 1; In re Earl, L. R., 1 P. & D. 450; Miller *v.* James, L. R., 3 P. & D. 4; In re Cosnahan, L. R., 1 P. & D. 183.]

(*y*) 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 leaves only ascendants.

7. In the United States this is true of real as well as personal estate, as in the various states there is no distinction made

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; (*z*) [or the English *court may remit a case for the opinion of a court in any other part of the British dominions, (*a*) or of a court in any foreign country with which there is a convention for that purpose.] (*b*) 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. (*c*)[8]

Foreign law, how ascertained.

between wills of real and personal estate. In many of the states it is provided by statute that the probate of the will is conclusive as well in regard to real estate as to personalty, and cannot be inquired into in any other court. In other states the probate is but *prima facie* evidence that a will of real estate was duly executed. Dublin *v.* Chadbourne, 16 Mass. 433; Hardy *v.* Hardy, 26 Ala. 524; Bailey *v.* Bailey, 8 Ohio 239; Tompkins *v.* Tompkins, 1 Story C. C. 554; Tarver *v.* Tarver, 9 Peters 180; Hegarty's Appeal, 75 Penn. St. 512; Smith *v.* Bonsall, 5 Rawle 80; Coates *v.* Hughes, 3 Binney 498; Harven *v.* Springs, 10 Ired. 180; Darbey *v.* Mayer, 10 Wheat. 470; Barker *v.* McFerran, 26 Penn. St. 211.

[(*z*) Harrison *v.* Harrison, L. R., 8 Ch. 346; *i. e.*, of an advocate practising in the particular foreign country, study elsewhere of its laws is insufficient. Bristow *v.* Sequeville, L. R., 5 Ex. 275; In re Bonelli, 1 P. D. 69.

(*a*) 22 and 23 Vict., c. 63; acted on in Login *v.* Princess of Coorg, 30 Beav. 632.

(*b*) 24 Vict., c. 11.]

(*c*) 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; Martin *v.* Lee, 9 W. R. 522. But the court here is bound by a previous judgment *in re* of the foreign court, Doglioni *v.* Crispin, L. R., 1 H. L. 301.]

8. It would seem to be but reasonable, if not absolutely necessary, to determine, in the case of a foreign will of personalty, the law of the country where the testator was domiciled, else the principle that the movables should follow the law of the domicile, might be wholly subverted. The more important question, however, would appear to be how the court is to be informed as to what the law of the foreign domicile is. In Baron de Bode *v.* Reginam, 10 Jur. 217, it was held by Lord Denman, C. J., Williams, J., and Coleridge, J., concurring, that for that purpose it was competent to examine counsel learned in the law of the foreign country, who might testify as to the contents of a statute, without any effort to account for the non-production of the statute, although it is a written document. This is undoubtedly a very common method of proving foreign law. But it can hardly be deemed a perfectly safe course. The testimony of experts on any subject seldom agrees, as is known to all practitioners, and it is, to some extent, proverbial that an expert testifies invariably in favor of the party who has called him. Lawyers, well versed in the learning of their profession, do not always agree as to the significance or force of the statute law. What certainty, then, could be attached to the testimony of "an advocate versed in such law," when called upon to testify as to the *lex domicilii*, in the case of a foreign will? The British Parliament has taken a proper step in the enactment of the 24

As a will, in regard to movable property, is construed according to the law of the domicile, there is, it will be observed, nothing on the face of it which gives the peruser the slightest clue as to the nature of

Vict., ch. XI., which provides the method for informing the Superior Courts of Great Britain as to what the foreign law is on any point which may arise in those courts. See Whart. Confl. Laws, § 771, *et seq.* See the remarks of Justice Story on this point. Story Confl. Laws, § 636; also, of Mr. Greenleaf, 1 Greenl. Ev., §§ 486 to 489. But when foreign law is to be proved in any case it is to be proved as fact, and the determination whether there be such law or not must in each case depend upon the testimony then given as to such fact. Kline *v.* Baker, 99 Mass. 253; Knapp *v.* Abell, 10 Allen 485; Bowditch *v.* Soltyk, 99 Mass. 136; Uhler *v.* Semple, 5 C. E. Gr. (N. J.) 288; Campion *v.* Kille, 1 McCart. 229; Ball *v.* Franklinite Co., 3 Vroom 102; Delafield *v.* Hand, 3 Johns. 310; Francis *v.* Insurance Co., 6 Cowen 404, 429; Lincoln *v.* Battelle, 6 Wend. 475; Dollfus *v.* Frosch, 1 Denio 367; Talbot *v.* Seeman, 1 Cranch 1, 38; Haven *v.* Foster, 9 Pick. 111, 129; Palfrey *v.* Portland, S. & P. R. R. Co., 4 Allen 55; Brackett *v.* Norton, 4 Conn. 517; Mostyn *v.* Fabrigas, Cowp. 174; Freemoult *v.* Dedire, 1 P. Wms. 429; Male *v.* Roberts, 3 Esp. Rep. 163; Smith *v.* Blagge, 1 Johns. 238; Legg *v.* Legg, 8 Mass. 99; Territt *v.* Woodruff, 19 Vt. 182; Taylor *v.* Bank of Illinois, 7 Mon. 576; Barrows *v.* Downs, 9 R. I. 446; Bryant *v.* Kelton, 1 Tex. 434; McDeed *v.* McDeed, 67 Ill. 545; Rape *v.* Heaton, 9 Wis. 328; Walsh *v.* Dart, 12 Wis. 635; Nelson *v.* Bridport, 8 Beav. 527; Baltimore and Ohio R. R. Co. *v.* Glenn, 28 Md. 287; Gardner *v.* Lewis, 7 Gill 377; De Sobry *v.* De Laistre, 2 Har. & J. 191; Norris *v.* Harris, 15 Cal. 226; 1 Chitt. Plead. 219; 1 Phill. Ev. 301, 2, n.; Daniell Ch. Pr. (4 Am. ed.) 95, 864; 1 Greenl. Ev, §§ 486, 488; Best Ev., § 33; Id., § 513. However, a question arises, when one learned in the foreign law testifies as an expert in regard to that law, whether the evidence given by the witness shall be given to the court for its information *as law*, or to the jury to be passed upon by them. It would seem that if the witness testify as to the existence of a foreign statute, or its general construction, his testimony is to be addressed to the jury, and they are to pass upon it as upon any other fact in the case. Kline *v.* Baker, *ubi supra;* Moore *v.* Gwynn, 5 Ired. L. 187; Dyer *v.* Smith, 12 Conn. 384; Ingraham *v.* Hart, 11 Ohio 255; Holman v. King, 7 Metc. 384. But see the remarks of Fowler, J., in Ferguson *v.* Clifford, 37 N. H. 98, where he says: "Foreign laws are to be proved as facts, by evidence addressed to the court and not to the jury." But if the testimony consists wholly of a written document, as a statute or judicial opinion, it is to be addressed to and passed upon by the court. Kline *v.* Baker, *ubi supra;* Ennis *v.* Smith, 14 How. 400; Owen *v.* Boyle, 15 Maine 147; Church *v.* Hubbart, 2 Cranch 187; State *v.* Jackson, 2 Dev. 563; People *v.* Lambert, 5 Mich. 349; Bremer *v.* Freeman, 10 Moore P. C. 306; Di Sora *v.* Phillipps, 10 H. L. Cas. 624; Haven *v.* Foster, 9 Pick. 111, 129; Ely *v.* James, 123 Mass. 36; Lockwood *v.* Crawford, 18 Conn. 370. But if it be an unwritten law or custom of the foreign country it must be proved by the parol testimony of an expert. Ennis *v.* Smith, *ubi supra;* McRea *v.* Mattoon, 13 Pick. 53, 59; Haven *v.* Foster, *ubi supra;* Frith *v.* Sprague, 14 Mass. 455; Consequa *v.* Willings, 1 Peters C. C. 229; Territt *v.* Woodruff, *ubi supra;* Tyler *v.* Trabue, 8 B. Mon. 306; Barrows *v.* Downs, 9 R. I. 446; Bryant *v.* Kelton, *ubi supra;* McDeed *v.* McDeed, 67 Ill. 545; Dyer *v.* Smith, 12 Conn. 390; Nelson *v.* Bridport, *ubi supra;* De Sobry *v.* De Laistre, 2 Har. & J. 191; Baltimore

the laws by which its construction is regulated; it may have been made in England, be written in the English language, the testator may

and Ohio R. R. Co. *v.* Glenn, 28 Md. 287. But it is not necessary that the person called to testify to the foreign law should be a lawyer. All that will be required will be that the court be satisfied that the party produced as a witness actually knows the law as to which he is about to give evidence. Hall *v.* Costello, 48 N. H. 176, 179; Pickard *v.* Bailey, 26 N. H. 152; Dyer *v.* Smith, 12 Conn. 390; Vander Donckt *v.* Thellusson, 8 Q. B. 812. Proof of the law by an attorney of the foreign state or country was held not to be sufficient. Van Buskirk *v.* Mulock, 3 Harr. (N. J.) 184. But where such attorney was himself a defendant in chancery, his testimony in connection with a printed copy of the laws of his state was received. Condit *v.* Blackwell, 4 C. E. Gr. (N. J.) 193, 196. In the United States it has been frequently held, that in one state the printed statutes of a sister state, published by authority of the state whose statutes they purport to be, may be read in evidence as the law of such state. Territt *v.* Woodruff, 19 Vt. 182; Lockwood *v.* Crawford, 18 Conn. 371; Taylor *v.* Bank of Illinois, 7 Mon. 576; McDeed *v.* McDeed, 67 Ill. 545. The states of the union may admit, as evidence, the public acts of each other, without the authentication required by the act of congress; with such authentication they *must* be admitted. Taylor *v.* Bank of Illinois, *ubi supra*. It may be questioned whether the judge has the right himself to consult the foreign law when he is not satisfied with the testimony given by the witness. See remarks of Lord Chelmsford, in Di Sora *v.* Phillipps, 10 H. L. Cas. 624; and in United States of America *v.* McRae, L. R., 3 Ch. Ap. 86, Lord Chelmsford said: "I do not see that there is any impediment to an English judge, with the act of congress before him, construing it for himself without further aid, just as he would an English act of parliament." But it appears to be held in the Goods of Dormoy, 3 Hagg. 767, that the proper course is for the ambassador to certify the law of the country he represents. See Best on Evidence, §§ 33 and 513. In case no testimony is offered as to what the law in question is, it will be taken by the court to be the same as the *lex fori* on the same subject. Chase *v.* Insurance Co., 9 Allen 311; Dollfus *v.* Frosch, 1 Denio 367; Palfrey *v.* P. S. & P. R. R. Co., *ubi supra;* Adams *v.* Way, 33 Conn. 432; Bay *v.* Church, 15 Conn. 18; Rape *v.* Heaton, *ubi supra;* Shepherd *v.* Nabors, 6 Ala. 631; High Appl't, 2 Doug. (Mich.) 515; Norris *v.* Harris, 15 Cal. 226. The witness will give his understanding of what the law means and of its applicability to the case at bar, in addition to testifying as to the words of the statute. Cocks *v.* Purday, 2 C. & K. 269. And it appears that he will be permitted to refresh his memory as to the law by reference to the statute itself, though the jury must pass upon the fact exclusively from the evidence of the witness. Barrows *v.* Downs, 9 R. I. 446; Sussex Peerage, 11 Cl. & Fin. 85. In the Sussex Peerage, 11 Cl. & Fin. 115, it was remarked by Lord Brougham: "The witness may refer to the sources of his knowledge, but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the house the book of the law, for the house has not the organs to know and to deal with the text of that law, and, therefore, requires the assistance of a lawyer who knows how to interpret it." See Condit *v.* Blackwell, 4 C. E. Gr. (N. J.) 193. In a recent case in Massachusetts it is said: "The laws of another state are not laws of this commonwealth, which our citizens are bound to know, or of which our courts have judicial knowledge; but they are facts of which both citizens and courts must be informed as of other facts. As

have described himself as an Englishman, (*d*) 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.[9]

Execution of will of movables.

[As in other respects, so with regard to its execution, a will of movables must, as a general rule, be tried by the law of the testator's domicile at his death. So that an English court will not grant probate of the will of a testator domiciled in England, unless it be executed according to the law of England; (*e*) nor of a testator domiciled abroad, unless it be executed according to the law of the foreign domicile. (*f*) In Bremer *v.* Freeman, (*g*) the testatrix was an English subject resident at Paris, *and executed a will conformably

foreign laws can only be known as far as they are proved, no evidence of them can be admitted at the argument before this court which was not offered at the trial, or otherwise made part of the case reserved. When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. But the qualifications of the experts, or other questions of competency of witnesses or evidence, must be passed upon by the court; and when the evidence admitted consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the court alone. And if the evidence is uncontradicted, and will not support the action, it is the duty of the court so to instruct the jury." Kline *v.* Baker, 99 Mass, 253, 254.

(*d*) 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 domicile.

9. The mere *residence* of a British subject in a foreign country at the time of making his will, and his decease, did not, in the case of a testator dying before August 1st, 1861, render a will valid because it conformed with the law of the country where he so resided. The distinction between *residence* and *domicile* has become immaterial by stat. 24 and 25 Vict., c. 114, § 1, as to a subject of Great Britain making a will out of the kingdom, and dying since August 6th, 1861. Wms. Ex'rs (6th Am. ed.) 435.

[(*e*) Countess Ferraris *v.* M. of Hertford, 3 Curt. 468, 7 Jur. 262, 2 No. Cas. 230; Croker *v.* M. of Hertford, 4 Moo. P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150.

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

(*g*) 10 Moo. P. C. C. 306. The case was a curious one; for the law of France does not permit a foreigner to acquire a domicile there, so as to affect the mode of making a will, without license from the government; in other words, without such license the foreigner may make a will according to the law of his original domicile. In France, therefore, the English will would have been held good (see Sug. R. P. S., p. 404; Collier *v.* Rivaz, 2 Curt. 855; *secus* as to intestate succession, 1 Ch. D. 270), and it had in fact been pronounced valid on that ground by the Prerogative Court (1 Deane, 192.)

to English law; but probate of it was refused on the ground that she was domiciled in France, and that the will was not valid according to French law.

To obviate such questions with regard to testators dying after 6th August, 1861, it is enacted by 24 and 25 Vict., c. 114, that (§ 1) every will and other testimentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his death) shall as regards *personal* estate be held to be well executed for the purpose of being admitted to probate if the same be made according to the forms required *either* by the law of the place where the same was made *or* by the law of the place where such person was domiciled when the same was made, *or* by the laws then in force in that part of her majesty's dominions where he had his domicile of origin: and (§ 2) that every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his death) shall as regards *personal* estate be held to be well executed, and shall be admitted to probate if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made. By § 3 no will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same; (*h*) nor (§ 4) is the act to invalidate any will or other testamentary instrument as regards *personal* estate which would have been valid if the act had not been passed, except as such will or instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by the act.

Lord Kingdown's act.

Thus, for the purpose of British probate, a choice is given among several forms of execution, all in addition (§ 4) to that which alone was formerly sufficient; and, in terms, the act is directed only to modes of execution; but it has been held that a testamentary instrument, depending on the act for the validity of its execution, must also depend for its legal effect on the

—its effect on the legal operation of wills.

[(*h*) In re Rippon, 32 L. J., Prob. 141, 3 Sw. & Tr. 177; In re Reid, L. R., 1 P. & D. 75. This section also excludes the further question whether resumption of the former domicile restored the will. Story Confl., ch. XI., § 473; Wms. Ex'rs, p. 352, n. (*h*), 6th ed.

local *law on which its execution is rested. Thus, in Pechell *v.* Hilderley, (*k*) a British subject with an English domicile died in 1867, leaving a will and codicil, neither of which was executed according to the law of England, but the codicil (though not the will) was well executed according to the law of Italy, where it was made. By that law, as proved in the case, it could not stand alone without the will, and did not set up the will, although endorsed upon and referring to it. It was argued that the codicil being well executed according to the act, its legal effect must be determined by the *lex domicilii*, and that according to that law the codicil republished and made good the will. (*l*) But Lord Penzance held otherwise. Whether such would be the effect of applying the English law in the manner proposed, he said it was not necessary to discuss, for he was of opinion that in determining the question whether any paper was testamentary, regard could be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries could only result in conclusions conformable to neither. The court therefore pronounced against both documents.

—affects British subjects only.

The act affects British subjects only, (*m*) and can only be enforced where the property in question is locally situate within British jurisdiction. Foreign courts are not bound to recognize the act in determining whether a given instrument is a valid will of personal property within their own jurisdiction: and thus the personal property, British and foreign, of a British subject may be distributable according to two distinct laws. (*n*) Therefore], the necessity of conforming in the testamentary act to the law of the ultimate domicile, is still an important doctrine to the numerous British residents in foreign countries; and it appears that the circumstance of the contents of the will indicating that the testator contemplated returning to England (but which intention he never executed,) (*o*) [or even an express declaration that he intends to retain his domicile of origin,] (*p*) is insufficient to exclude the law of his domicile ascertained by the facts of the case. (*q*)[10]

Suggestions as to wills of Englishmen domiciled abroad.

(*k*) L. R., 1 P. & D. 673.

(*l*) *Vide post* ch. VI., § 4.

(*m*) Including subjects by naturalization, In re Gally, 1 P. D. 438; In re Lacroix, 2 P. Div. 94.

(*n*) See Sug. R. P. S. 405–6: being the very result which the rule "*mobilia sequuntur personam*" was established to prevent, 1 H. L. Ca. 15.]

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

[(*p*) In re Steer, 3 H. & N. 594.]

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

10. But if a person having left his domicile with intention of acquiring another dies *en route* and before the new domicile be acquired, his property will be distributed in accordance with the law of

If an Englishman, domiciled abroad, has real estate (including *in this definition property held by him for terms of years) 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 movable) 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. (*r*)

As to Scotland.

Such questions may arise, and indeed have most frequently arisen, in regard to the property 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. (*s*) Thus, in Balfour *v.* Scott, (*t*) 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. (*u*) It was determined, however, that he was entitled to take his share without complying with that obligation, the case being regulated as to the movable property by the English law.

In Drummond *v.* Drummond (*x*) a person domiciled in England had real estate in Scotland, upon which he granted a heritable bond to

the former domicile. Story Confl. Laws, § 481. Munroe *v.* Douglass, 5 Madd. 379; Smith *v.* Croom, 7 Fla. 81; Clark *v.* Likens, 2 Dutch. 207. But see In re Toner, 39 Ala. 454, where the domicile was held to be a fixed domicile, although the party claimed to be *in itinere*.

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

(*s*) In Scotland there [was formerly] no direct power of disposing of real estate by will, but if there was a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should enure. Per Sir W. Grant in Brodie *v.* Barry, 2 V. & B. 132. [But by 31 and 32 Vict., c. 101, § 20, land in Scotland may now be disposed of directly by will.] 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, to whom the English court grants administration. (In re Johnston, 4 Hagg. 182.)

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

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

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

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. (*y*)

Speaking of these two cases, Sir Wm. Grant has observed—

"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 domicile 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 domicile and the real estate had been in Scotland."

[But by the law of Scotland, as of England, real estate is only a subsidiary fund for the payment of movable debts; and if the Scotch heir of a domiciled Englishman has paid them, the law of the domicile allows him to recover against the personal estate. (*z*) Conversely, English rules of marshaling in favor of legatees will not be applied so as to throw on Scotch real estate debts of a domiciled Englishman, to which it could not be made liable by the *lex loci*. (*a*)

In all these cases, the claim of the Scotch heir to exoneration, or his liability to be charged was enforced by English courts in distributing the personal estate only where the laws of both countries agreed in conceding the claim or imposing the charge.

[(*y*) But an express direction by a testator domiciled in England for payment of all his debts out of a specified fund will include the heritable bond. Maxwell *v.* Maxwell, L. R., 4 H. L. 506. Locke King's Acts (*post* ch. XLVI.,) do not extend to Scotland. 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.* Hoare, 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.

(*z*) Earl of Winchelsea *v.* Garetty, 2 Keen 293.

(*a*) Harrison *v.* Harrison, L. R., 8 Ch. 342.

Even before Lord Kingsdown's act, a will of personalty made under a power formed an exception to the general rule, *mobilia sequuntur personam;* for if executed in the particular form *required by the power, it was, as it will still be, good without reference to the testator's foreign domicile, because the appointee takes, not under the instrument exercising, but under the instrument creating the power; (*b*) and the latter instrument is to be construed according to the law of the place where it is executed, if it deals with movables, and according to the *lex loci rei sitæ* if with immovables. (*c*)[11] However, in D'Huart *v.* Harkness, (*d*) where by an English instrument power was given to appoint a money fund "by will duly executed," it was held that this did not mean any one particular form of will recognized by the law of this country, but any will entitled to probate here, and that the will of the donee, having been admitted to probate, was, *therefore*, a good exercise of the power. Thus it came back to trying the validity of the will by the law of the testatrix's domicile. (*e*) She was domiciled abroad, and her will conformed to the law of her domicile. If she had been domiciled here, the will would not have been a valid appointment. (*f*) But if a power requires a will to be executed in a particular form, a will executed in that form may be a valid appointment, though not executed according to the law of the domicile. (*g*)

Will under a power is not governed by *lex domicilii*,

Another exception to the general rule exists where by treaty between this country and the country of domicile it is agreed that the English law shall prevail. Thus subjects of the Ottoman Empire cannot dispose of their property by will, but

—nor where there is a treaty to the contrary.

(*b*) Tatnall *v.* Hankey, 2 Moo. P. C. C. 342; In re Alexander, 1 Sw. & Tr. 454, n., 29 L. J., Prob. 93; In re Hallyburton, L. R., 1 P. & D. 90.

(*c*) Story Confl., ch. VIII.; 3 Burge, pt. 2, ch. 20.]

11. Wms. Ex'rs (6th Am. ed.) 438; 1 Redfield Wills 270; Jones *v.* Jones, 3 Mer. 161; Stevens *v.* Bagwell, 15 Ves. 139; Van Wert *v.* Benedict, 1 Bradf. 114; Wallace v. Att.-Gen., L. R., 1 Ch. Ap. 1; In re Lovelace, 4 De G. & J. 340; In re Wallop's Trust, 1 De G., J. & S. 656; In re Hallyburton, L. R., 1 P. & D. 90; Tatnall *v.* Hankey, 2 Moo. P. C. C. 342; Flood on Wills 300; Taylor *v.* Meade, 4 De G., J. & S. 597; Theobald on Wills 6. But see Crookenden *v.* Fuller, 1 Sw. & Tr. 441.

[(*d*) 34 Beav. 324, (case before Lord Kingsdown's act.)

(*e*) It is presumed that the will was proved in the ordinary way, and not merely on an allegation that it was in execution of a power (Barnes *v.* Vincent, 5 Moo. P. C. 201.) The latter proceeding would have decided nothing, and would have given the court of construction no ground on which to build its argument, *vide post* ch. II.

(*f*) In re Daly's Settlement, 25 Beav. 456.

(*g*) Per Romilly, M. R., 34 Beav. 328.

by treaty, English subjects domiciled there are allowed to do so, and their wills must be executed according to the English law. (*h*)

Domicile, how ascertained.

A statement of some of the more important rules for ascertaining the domicile of a testator or intestate, and a reference to some of the cases of most frequent occurrence, may here be made. (*i*)

Domicile of origin

The law attributes to every one as soon as he is born *the domicile of his father, if he be legitimate, and the domicile of the mother, if illegitimate. This is the domicile of origin, and is involuntary.

—of choice.

Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act.[12]

Recurrence of domicile of origin.

When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance

(*h*) Maltass *v.* Maltass, 3 Curt. 234, 1 Rob. 67, 7 Jur. 135, 8 Jur. 860, 2 No. Cas. 33, 3 No. Cas. 257.]

(*i*) See Lord Westbury's judgment, Udny *v.* Udny, L. R., 1 H. L. Sc. 441. By stat. 24 and 25 Vict., c. 121, rules are made for determining the question of domicile as between this country and any other with which the sovereign may have entered into a convention for that purpose As to the operation of this act see Sugd. R. P. S., p. 405.

Domicile is distinct from allegiance or nationality, per Lord Westbury, L. R., 1 H. L. Sc. 459; Brunel *v.* Brunel, L. R., 12 Eq. 298.

12. Both the fact and the intention must concur, in order to change the original domicile. Hart *v.* Horn, 4 Kas. 232; Hallowell *v.* Saco, 5 Greenl. 143; Richmond *v.* Vassalborough, Id. 396; Ringold *v.* Barley, 5 Md. 186; Plummer *v.* Brandon, 5 Ired. Eq. 190; Brown *v.* Smith, 15 Beav. 444. On this point it was remarked by Sir H. J. Fust, in Craigie *v.* Lewin, 3 Curt. 435, "The important question is, what is necessary to constitute a change of domicile? There must be both *animus et factum*—that is the result of all the cases. This case must depend on its own circumstances; the *principle* on which it is to be determined is the same in all cases, and that principle, extracted from all the cases, is this, that a domicile once acquired remains until another is acquired, or that first one abandoned. I admit all that has been said in *this* case, that length of time is not important, for one day will be sufficient, provided the *animus* exists." And it appears that where there has been an undoubted domicile of origin continued through a series of years, it is necessary that there should be clear evidence of an intention to abandon it, accompanied by acts sufficient to establish a new domicile, in order to overcome the presumption that the old domicile continues. Crookenden *v.* Fuller, 1 Sw. & Tr. 441. But the declarations that it is not the intention of the party to renounce the original domicile cannot overcome the intention and facts collected from the acts of the party. In re Steer, 3 Hurl. & N. 594. The intention to change is a question of fact and not of law. Fitchburg *v.* Winchendon, 4 Cush. 190. When a change of domicile is alleged the presumption of the law is that the domicile of origin remains the true domicile until residence elsewhere has been shown by the party who alleges

of the domicile of choice, but it revives and exists whenever there is no other domicile (as when the domicile of choice is in fact abandoned (*k*) with the intention of never returning,) and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicile of choice. (*l*) Domicile of choice is constituted by residence freely chosen and intended to continue for a non-limited period; and length of residence is a most important ingredient from which to infer the *animus manendi*.] (*m*)

Where an Englishman or Scotchman divides his time about equally between the two countries, the actual domicile is sometimes difficult to be ascertained, from the absence of preponderating evidence in favor of either. Such was the case of Lord Somerville, (*n*) a Scotchman by birth and extraction, originally domiciled in Scotland, who [was elected a representative peer for Scotland], 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 domicile remained unchanged, and, consequently, the succession to the personal property of the deceased nobleman (who had died intestate) was to be governed by the law of Scotland. The argument in favor of the English domicile was urged on behalf of the relations of the half-blood, whom the law of Scotland excluded. Had the deceased nobleman had no *original domicile in either of the two countries, which in his later life he alternately made

Divided residence.

the change. Ennis *v.* Smith, 14 How. 400; Burnham *v.* Rangeley, 1 Wood. & M. C. C. 7; Prentiss *v.* Barton, 1 Brock. 393; Brown *v.* Ashbough, 40 How. Pr. 260; Maxwell *v.* McClure, 6 Jur. (N. S.) 407. And the *onus* is upon the party who impugns the original domicile. Crookenden *v.* Fuller, 1 Sw. & Tr. 441. Though a man leave his original domicile and reside elsewhere, yet unless his intention to change his domicile be clearly proved, he will not lose his domicile of origin. Capdevielle *v.* Capdevielle, 21 L. T. (N. S.) 660; Adams *v.* Evans, 19 Kans. 174. In order to lose such domicile and acquire a new one, the person must intend *quatenus in illo exuere patriam*. It will not be sufficient for him to take a house in the new country, although there be not only the probability, but also the belief on his part, that he will remain there the rest of his life. Moorhouse *v.* Lord, 10 H. L. Cas. 272; Drevon *v.* Drevon, 10 Jur. (N. S.) 717.

(*k*) The intention without the act of abandonment is insufficient. In re Raffenell, 3 Sw. & Tr. 49, 32 L. J., Prob. 203.

(*l*) King *v.* Foxwell, 3 Ch. D. 518.

(*m*) Cockrell *v.* Cockrell, 25 L. J., Ch. 732; Doucet *v.* Geoghegan, 9 Ch. D. 441.]

(*n*) 5 Ves. 750, [and see Forbes *v.* Forbes, Kay 353. The duties of an English peer as such do not prevent his acquiring a foreign domicile. Hamilton *v.* Dallas, 1 Ch. D. 257. For the purposes of succession a man cannot have more than one domicile. Ib.]

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 question would be, whether this state of things did not let in the original (*i. e.*, in the case supposed, the foreign) domicile.[13]

13. A man's domicile is *prima facie* the place of his residence, but this may be rebutted by showing that such residence is either constrained or transitory. The question of domicile is always a question of fact, and in each case the conclusion must be arrived at from a careful consideration of everything connected with the case, from which not only the *factum*, but also the *animus* of the party concerned may be proved. Story says a domicile is "a residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time." Story Confl. Laws, § 43. Colt, J., however, says: "A definition of domicile is difficult, if not impossible." Hallet *v.* Bassett, 100 Mass. 170; and Shaw, C. J., says: "No exact definition can be given of domicile; it depends on no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case." Thorndike *v.* Boston, 1 Metc. 245; and the same learned judge also says:— "Actual residence, that is, personal presence in a place, is one circumstance to determine the domicile, or the fact of being an inhabitant, but it is far from being conclusive." Sears *v.* Boston, 1 Metc. 251. Again, it is said, in opinion of the judges of the Supreme Court of Massachusetts, that "there are certain well-settled maxims on this subject. These are, that every person has a domicile somewhere; and no person can have more than one domicile for one and the same purpose at the same time. It follows from these maxims that a man retains his domicile of origin till he changes it by acquiring another; and so each successive domicile continues until changed by acquiring another. And it is equally obvious that the acquisition of a new domicile does at the same instant terminate the old one." 5 Metc. 588, 589. Lord Wensleydale defines domicile, "Habitation in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention." Whicker *v.* Hume, 7 H. L. Cas. 164. Beasley, C. J., says: "The prosecutor in this case is the owner of much valuable real estate situated in this state; he has resided here and been protected by our laws for many years; it is not pretended that he has had, or now has, any intention to return to his own country at any fixed period; under these circumstances his legal domicile is evidently in this state." State, Beckett, *v.* Collector of Bordentown, 3 Vroom 192. The prosecutor in this last case was a foreign-born resident of New Jersey, who had not been naturalized, and it was urged that he had no domicile in New Jersey. What "resident of this state" means in California, stated Rix *v.* McHenry, 7 Cal. 89. To constitute a legal domicile there must be actual residence, and at the same time the intention of making that residence the home of the party. Hiestand *v.* Kuns, 8 Blackf. 345; McClerry *v.* Matson, 2 Ind. 79; Burgess *v.* Clark, 3 Ind. 250; Wayne *v.* Greene, 21 Me. 357; Turner *v.* Buckfield, 3 Greenl. 229; Henrietta Township *v.* Oxford Township, 2 Ohio St. 32; McKowen *v.* McGuire, 15 La. Ann. 637; Leach *v.* Pillsbury, 15 N. H. 137; State *v.* Daniels, 44 Id. 383; Boardman *v.* House, 18 Wend. 512; Graham *v.* The Public Adm'r, 4 Bradf. 127; Hegeman *v.* Fox, 31 Barb. 475; Frost *v.* Brisbin, 19 Wend. 11; McIntyre *v.* Chappell, 4 Tex. 187; Horne *v.* Horne, 9 Ired. L. 99; Crawford *v.* Wilson, 4 Barb. 504; Foster *v.* Hall, 4 Humph. (Tenn.) 346; Douglas *v.* Douglas, L. R., 12 Eq. 617; 41 L.

[In cases of residence equally divided between two places, it has been said that the wife's constant residence in one of

J. Ch. 74; Dalhousie *v.* M'Douall, 7 Cl. & Fin. 817; Hart. *v.* Horn, 4 Kans. 232. It is well established that domicile and residence are not interchangeable terms; a man's domicile may be in one place and he may at the same time have a residence for the time being in another place. Tazewell Co. *v.* Davenport, 40 Ill. 197; Bartlett *v.* City of N. Y., 5 Sandf. 44; Matter of Hawley, 1 Daly 531; North Yarmouth *v.* West Gardiner, 58 Me. 207. See also Hampden *v.* Levant, 59 Me. 557; Alston *v.* Newcomer, 42 Miss. 186; Briggs *v.* Rochester, 16 Gray 337; Harvard College *v.* Gore, 5 Pick. 370; Bell *v.* Pierce, 51 N. Y. 12; Walcot *v.* Botfield, Kay 534. A party may have a residence which is originally intended to be for a special or limited period. This residence may, however, afterwards become general and permanent, and it will thereupon become his domicile from the moment that the *animus manendi* can be inferred. A domicile of choice must be one of perfect freedom, and not induced by any external necessity whatever. In the goods of the Duchess D'Orleans, 1 Sw. & Tr. 253. Though a man may have two domiciles for some purposes, he can have only one *for the purpose of succession*. In England it seems to be held that if a person has two residences, one in the country and the other in the metropolis, in each of which he spends a portion of his time, if he be under no obligation of duty to live in the metropolis he shall be considered to be domiciled in the country, but a merchant whose business is in the metropolis shall be held to be domiciled in the city and not at his country residence. Per Lord Alvanley, 5 Ves. 789. But in the United States it would seem to be different. See opinion of Davis, J., in Gilman *v.* Gilman, 52 Maine 176, where it is said: "If the merchant was originally from the country, and he keeps up his household establishment there, his residence in the city will be likely to have the characteristics of a temporary abode. While if his original domicile was in the city and he purchases or builds a country house for a place of summer resort, he will not be likely to establish any permanent relations with the people or the institutions of the town in which it is located." In New Jersey it is held that a person having a fixed domicile in another state coming into New Jersey for part of the year with his family and servants, to reside at a house owned by him there, does not thereby change his domicile and become an inhabitant of New Jersey. State *v.* Ross, 3 Zab. 517. See also Leonard *v.* Stout, 7 Vroom 370, where the same doctrine is held as to a person having a fixed domicile in New Jersey, who spends part of the year in New York. But see also opinion of Runyon, C., in Stout *v.* Leonard, 8 Vroom 492, to the effect that such resident of New Jersey loses his domicile in New Jersey upon returning to New York for the winter. See also Gilman *v.* Gilman, 52 Me. 165; Harvard Coll. *v.* Gore, 5 Pick. 370; Frost *v.* Brisbin, 19 Wend. 11; Bartlett *v.* City of New York, *ubi supra*. A residence once obtained continues in law without intermission until a new one is gained. Cadwallader *v.* Howell, 3 Harr. (N. J.) 138; Gilman *v.* Gilman, 52 Me. 165; Abington *v.* North Bridgewater, 23 Pick. 170; Thorndike *v.* City of Boston, 1 Metc. 242; Kilburn *v.* Bennett, 3 Metc. 199; Littlefield *v.* Brooks, 50 Me. 475; Jennison *v.* Hapgood, 10 Pick. 77; Isham *v.* Gibbons, 1 Bradf. 69; Clark *v.* Likens, 2 Dutch. 207; Trammell *v.* Trammell, 20 Tex. 406; Parsons *v.* City of Bangor, 61 Me. 457; Reed's Appeal, 7 Penna. St. 378; Carey's Appeal, 75 Penna. St. 201. "A man can have but one domicile at the same time for the same purpose." Colt, J., in Hallet *v.* Bassett, 100 Mass. 170; Gilman *v.*

them is strong evidence of *animus* in favor of domicile in that place.] (*o*)[14]

"The question of domicile," said Lord Loughborough, in the case of Bempde *v.* Johnstone, (*p*) "*prima facie*, is much more a question of fact than of law. The actual place where a person is, is *prima facie*, to a great many purposes, his domicile. 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 connections, 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."

Gilman, *ubi supra;* Abington *v.* North Bridgewater, *ubi supra.* Davis, J., says: "An intention to dispose of his property according to the laws of any place, does not tend to fix the testator's domicile there. Nor does the fact that he described himself in his will as of a particular city and state make any difference." Gilman *v.* Gilman, 52 Me. 177. See also Jopp *v.* Wood, 34 Beav. 88.

[(*o*) Forbes *v.* Forbes, Kay 364. But see per Wickens, V.-C., Douglas *v.* Douglas, L. R., 12 Eq. 647.]

14. In the following cases it is held that the domicile of the husband is also the domicile of the wife: Davis *v.* Davis, 30 Ill. 180; Greene *v.* Greene, 11 Pick. 410; Hackettstown Bank *v.* Mitchell, 4 Dutch. 516; Hanberry *v.* Hanberry, 29 Ala. 719; Williams *v.* Saunders, 5 Coldw. (Tenn.) 60; McAfee *v.* Kentucky University, 7 Bush 135; Dow *v.* Gould & Curry S. M. Co., 31 Cal. 629; Dalhousie *v.* M'Douall, 7 Cl. & Fin. 817. But the wife may acquire a different domicile from that of the husband. Irby *v.* Wilson, 1 Dev. & B. Eq. 568. But *contra*, Dolphin *v.* Robins, 5 Jur. (N. S.) 1271. The domicile of the wife will be determined by that of the husband. Harrison *v.* Harrison, 20 Ala. 629. And it appears that a *feme covert* living apart from her husband has not the power to change her domicile. In re Daly, 25 Beav. 456. A, in 1862, was appointed to the U. S. army from Indiana, where his parents then resided, and where he had, up to that time, resided. His father afterwards went to Baltimore to reside, and subsequently was domiciled in Salt Lake City. In 1867 A married B in Florida, her residence being in New York city. After the marriage A went to various places in the U. S. on active service, and in 1869 was appointed Indian agent for New York, and was stationed at Dunkirk, where in that year B died, leaving a child six days old. A opposed the probate of the will of B, on the ground that her domicile and his was in Indiana, and that, by the law of that state, the will was revoked by the birth of the child. It was held that the *onus* was on A to show that the domicile of B was in Indiana; that this was not sufficiently shown, and that the will was properly admitted to probate. Ames *v.* Duryea, 61 N. Y. 609.

(*p*) 3 Ves. 201 [Udny *v.* Udny, *sup.*; Stevenson *v.* Masson, L. R., 17 Eq. 78.

[If the residence is "constrained" by external necessity, as by the duties of military or naval service; (*q*) or of a temporary political (*r*) or judicial (*s*) office; by imprisonment, (*t*) or by flight from civil commotion or revolution; (*u*) it will not confer *a domicile. So, neither an ambassador (*x*) nor a consul (*y*) loses his original domicile by residence in the foreign country where he is accredited. But if a consul engage in trade there, his character of consul is, for some purposes at least, merged in that of merchant. (*z*) And if, being already domiciled in a foreign country, a man be appointed by his own sovereign ambassador (*a*) or consul (*b*) in that country, his original domicile is not thereby restored *quoad* succession to personal property. On the other hand, a life employment abroad in the public service alters the domicile. (*c*)[15]

Residence of necessity,

—in public service, &c.

(*q*) Phillim. Dom., p. 79. Persons entering the military service of a *foreign* state acquire the domicile of that state. Ib. Where, as in the United Kingdom, different laws prevail in different parts, a domicile in one, as Jersey or Scotland, is not altered by entering the military or naval service of the kingdom. In re Patten, 6 Jur. (N. S.) 151; Brown *v.* Smith, 15 Beav. 444. But service under the East India Company gave an Indian domicile. Bruce *v.* Bruce, 2 B. & P. 229; Forbes *v.* Forbes, Kay 356. However, with a few immaterial differences, the stat. 1 Vict., c. 26, was made law in India by an act of council, No. 25, A. D. 1838, and applies to all wills made on or after 1st February, 1839. And by the Indian succession act (Act. X.), 1865, succession to immovable property in India is regulated by the law of India; that to movables by the law of the domicile. See Macdonald *v.* Macdonald, L. R., 14 Eq. 60.

(*r*) Att.-Gen. *v.* Pottinger, 6 H. & N. 733, 747, Governor of the Cape and of Madras.

(*s*) Att.-Gen. *v.* Rowe, 1 H. & C. 31, Chief Justice of Ceylon.

(*t*) Phillim. on Dom., p. 87.

(*u*) De Bonneval *v.* De Bonneval, 1 Curt. 856.

[(*x*) Story Confl., § 48; Phillim. on Dom., p. 79.

(*y*) Sharpe *v.* Crispin, L. R., 1 P. & D. 611.

(*z*) Phillim. on Dom., pp. 124, 125. By the rules of their service, British consuls are forbidden to take part in mercantile affairs. Sharpe *v.* Crispin, L. R., 1 P. & D. 617.

(*a*) Heath *v.* Sampson, 14 Beav. 441; Att.-Gen. *v.* Kent, 1 H. & C. 12.

(*b*) Sharpe *v.* Crispin, L. R., 1 P. & D. 611.

(*c*) Commissioners of Inland Revenue *v.* Gordon's Executors, 12 Cas. Court Sess. 657. The cases decided on service with the East India Company, *sup.*, n. (*q*), are to the like effect.]

15. The house of an ambassador is regarded as part of the territory which he represents. It makes no difference, therefore, how long he may stay in the country to which he is accredited, his domicile remains unchanged. But if a consul engage in business, he will, on that account, be divested of his official prerogatives in this respect, and he will acquire a domicile at the place where he resides and conducts his business. Whart. Confl. Laws, § 49. But if a person resident and domiciled in a foreign country accept an

—as trader.

One who settles as a trader in a foreign country will thereby commonly acquire a domicile in that country; (*d*) nor is the contrary to be inferred merely because, being a British subject, he has the benefit of treaties which, without making special provision for testamentary questions (*e*), secure to him certain immunities and privileges, and because he invariably acts and regards himself as an Englishman. (*f*)[16]

Officer on half-pay.

Nor will his being an officer in the British service on half-pay, and (in order to retain his pay) requiring and obtaining leave of absence, (*g*) nor being an officer on unlimited furlough, subject to a positive obligation to return to duty when ordered, (*h*) prevent his acquiring a domicile other than British; though such an obligation would be strong to rebut any presumption that a domicile was contemplated in a foreign country where the obligation could not be enforced, for an intention contrary to duty is not to be presumed. (*i*)

Residence 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.] (*k*)[17]

appointment in the foreign service of another country, that will not destroy his domicile. Warrender *v.* Warrender, 2 Cl. & Fin., H. L. Cas. 488; Pitt *v.* Pitt, 36 Sc. Jur. 522.

[(*d*) Cockrell *v.* Cockrell, 2 Jur. (N. S.) 727; 25 L. J., Ch. 730; Allardice *v.* Onslow, 12 W. R. 397; Doucet *v.* Geoghegan, 9 Ch. D. 441.

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

(*f*) Moore *v.* Budd, 4 Hagg. 346.]

16. If a person enter a state with the intention of remaining only if he find some employment, he does not thereby acquire a domicile in that state. Ross *v.* Ross, 103 Mass. 575. Compare Brown *v.* Ashbough, 40 How. Pr. 260. Nor will a person who leaves his own country and goes to another country for the purpose of trade or acquiring a fortune there, acquire a domicile in the latter country by mere residence, however long he may remain there. Jopp *v.* Wood, 34 Beav. 88.

[(*g*) Cockrell *v.* Cockrell, 25 L. J., Ch. 730. See also Commissioners of Inland Revenue *v.* Gordon's Executors, 12 Cas. Court Sess. 657.

(*h*) Att.-Gen. *v.* Pottinger, 6 H. & N. 733, 747; Forbes *v.* Forbes. Kay 359. *Secus*, if the furlough be for a limited period. Craigie *v.* Lewin, 3 Curt. 435, 7 Jur. 519, 2 No. Cas. 185.

(*i*) Hodgson *v.* De Beauchesne, 12 Moo. P. C. C. 285.

(*k*) See Hoskins *v.* Matthews, 8 D., M. & G. 13; and per Wood, V.-C., Kay 367.]

17. It would seem that residence in any given place on account of one's health, ought not to affect the former domicile, as such residence would clearly be *ex necessitate*, and as intimated, *ante* n. 13, such residence cannot be one of choice. Therefore it is probable that so long as one remained in any place solely for health's sake, he would not be held to be domiciled there, and in case of his death, his estate would undoubtedly be distributed in accordance with the law of his former residence. The fact of its being a residence

*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 domicile 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 favor of the mother's domicile;[18] 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. (*l*)

Domicile of children.

ex necessitate would unquestionably be negatived by declarations of the party showing *animus manendi*, and such *animus* would probably be inferred from the party remaining in such place after a competent physician had pronounced him so far recovered as to render it safe for him to depart. Still *v.* Woodville, 38 Miss. 646; Dupuy *v.* Wurtz, 53 N. Y. 556. So, too, if the residence be not on account of health, but merely for pleasure.

18. In a recent case in New York it was held that the domicile, as well as the habitation of infants, follows that of the father, and after his death that of the mother, until her remarriage; also that the mere fact of being at a place is *prima facie* evidence of having a domicile there. Ryall v. Kennedy, 40 N. Y. Superior Court 347. It has also been held in New York that upon the death of the father the mother may change the domicile of the child. If she marry again she would take the domicile of her second husband, but that of the child would remain unchanged. Her control over that would be gone. Brown *v.* Lynch, 2 Bradf. 214. So, too, in West Virginia. She cannot render the estate of the child subject to the law of succession and distribution of the state into which she may move. Mears *v.* Sinclair, 1 W. Va. 185. And in Tennessee. Allen *v.* Thomason, 11 Humph. (Tenn.) 536.

(*l*) Pottinger *v.* Wightman, 3 Mer. 67; but see Story, § 46. [The general rule is well known that infants and married women cannot change their domicile by their own acts. See Kay 353, Robins *v.* Dolphin, 1 Sw. & Tr. 37, in D. P. 29, L. J., Prob. 11; In re Daly's Settlement, 25 Beav. 456; Yelverton *v.* Yelverton, 29 L. J., Matr. 34. So in the case of one lunatic from infancy. Sharpe *v.* Crispin, L. R., 1 P. & D. 611. But the scope of this treatise does not admit of a full exposition of the law of domicile; this will be found in books specially devoted to the subject; and see Hayes & Jarman Conc. Forms of Wills, p. 543, 8th ed., by Dunning.]

*CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

Ambulatory nature of wills.

A will is an instrument by which a person makes a disposition (*a*) of his property to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life.[1] It is this ambulatory quality which forms the characteristic of

[(*a*) Where one by will said, "I propose to give the residue by codicil, or otherwise to let it devolve as if I had died intestate," and he left no codicil, he was held not to have disposed of the residue. Ash *v.* Ash, 10 Jur. (N. S.) 142.]

1. A will is defined by Johnson, J., in Tomkins *v.* Tomkins, 1 Bailey 96, to be a declaration of a man as to the manner in which he would have his estate disposed of after his death. The words "will" and "testament" are held in these days to be synonymous, and are used interchangeably in the law. However, by the civil law, such an instrument was recognized as a testament only when an executor was made by and named in the instrument. An old writer says: "A testament is the full and complete declaration of a man's mind, or last will of that he would have to be done after his death; * * * and this is sometimes called a will, or last will." Shep. Touch. 399. "At one time the word 'testament' or the combined form, 'will and testament,' applied strictly to a bequest of chattels, 'will' having been employed to signify a devise of realty, although Littleton states that 'a man may devise by testament his lands and tenements.'" Flood on Wills 56. See also 2 Black. Com. 373; Id. 493. Blackstone, however, confuses the terms, although in the main distinguishing between devises of lands and bequests of chattels; thus he says (2 Com. 493), "a man may *devise* the whole of his *chattels*." See also Shep. Touch. 400. An old author of repute says that "a testament taken strictly according to the definition thereof, differeth from a last will, yet not as opposite thereto, but only as the species differeth from the genus, for every testament is a last will, but every last will is not a testament. A last will is a general word, and agrees with each several kinds of last wills or testaments; but a testament, properly so called, is only that kind of last will wherein an executor is named." Godolph. Orph. Leg. 5; Flood on Wills 57. The word "will" is understood to include *prima facie* all instruments of a testamentary character which could go to make the will. Crosby *v.* MacDoual, 4 Ves. 610; Gordon *v.* Lord Reay, 5 Sim. 274; Aaron *v.* Aaron, 3 DeG. & Sm. 475. Bacon says: "According to some, a will is the declaration of the mind, either by word or writing, in disposing of an estate, and to take effect after the death of the testator." 7 Bac. Abridg., tit. Wills, 299, a. See also Estate of Wood, 36 Cal. 75, 80; Ragsdale *v.* Booker, 2 Strobh. Eq. 348, 352; McGee *v.* McCants, 1 McCord 517, 522; Lucas *v.* Parsons, 24 Ga. 640; Jackson *v.* Betts, 9 Cow. 208. Blackstone says

wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing

that the power to make a will is "a right given to the proprietor of continuing his property after his death in such persons as he shall name." 2 Black. Com. 490. If the instrument has no operation *inter vivos*, but depends for its operation entirely upon the death of the maker to consummate it, it must be regarded as a will. Carey *v.* Dennis, 13 Md. 1. The appointment of an executor may be, by the will, delegated to another. Hartnett *v.* Wandell, 60 N. Y. 346. A date is not a material part of a will. If it have no date, or if the date be a wrong one, the will may still be a good will. And parol testimony is admissible to prove the actual time of its execution. Wright *v.* Wright, 5 Ind. 389; Deakins *v.* Hollis, 7 Gill & J. 311. But when the will is dated, the presumption is that it was made at the time of its date. Sawyer *v.* Sawyer, 7 Jones L. 134. Nor is it necessary that a will should show where it was made. This is a matter *dehors* the will, and may be proved like any other fact. Succession of Hall, 28 La. Ann. 57. Before the passage of the recent wills act in England (1 Vict., c. 26,) there was little formality required as to the execution of a will of personalty or as to the form of the instrument, but any writing which could have been established as having been made by the testator *animo testandi* was admitted to probate as a will. But prior to the recent wills act devises of real estate in England were required to be in writing and attested by at least three credible witnesses. The recent wills act has, however, placed all wills on the same footing. In the United States statutes similar to the wills act generally prevail. 4 Kent 501; 1 Redf. on Wills 4, 168; Wms. Ex'rs (6th Am. ed.) 6, 7, 8; Best on Evidence, § 222; Theobald on Wills 64; Walkem on Wills 9. The *onus* is upon the proponent of the will to establish all those facts which the statute requires, in order to impress upon the instrument a testamentary character. Roberts *v.* Welch, 46 Vt. 164. A codicil is a supplement to a will, by which the will is either enlarged or restricted. It may add to or subtract from, alter, explain, confirm, re-execute, revive or re-publish any will with which it can be incorporated. There may be many codicils, but there can be but one will. "A codicil also is in writing or by word, as a testament is." Shep. Touch. 399. In the old English law a codicil was understood to be a will in which no executor was named, and was accordingly defined by Godolphin to be "the just sentence of our will, touching that which we would have done after our death *without the appointing of an executor*," and was by him called "an unsolemn last will." Godolph., pt. 1, ch. 6, § 2. But its more modern sense is as given above, and in the modern sense it is part of the will, all making but one, testament. Wms. Ex'rs (6th Am. ed.) 8. See the case of Sherer *v.* Bishop, 4 Bro. C. C. 55, for a good illustration of the principle that the will and all codicils together make but one testament. See also Day *v.* Croft, 4 Beav. 561; Warwick *v.* Hawkins, 5 DeG. & Sim. 481; but see, to contrary effect, Hall *v.* Severne, 9 Sim. 515; Fuller *v.* Hooper, 2 Ves., Sr., 242. In construing a will with codicils, all the papers are to be taken together, as parts of one instrument, and if there be a codicil, which appears to have been executed and attested at the same time and place with the will itself, it would undoubtedly be taken to constitute a part of the original will. Negley *v.* Gard, 20 Ohio 310. An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or a codicil, and is therefore not entitled to probate. In the goods of Fraser, 39 L. J., Prob. 20; 2 L. R., P. & D. 40; 21 L. T. (N. S.) 680.

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 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. (*b*) The contingency will generally attach to every part of the will; *e. g.*, to a clause revoking former wills. (*c*) But a codicil in other respects contingent will be admitted to probate if it expressly confirms the will, for this operates as a re-execution of the will. (*d*) A reference to some impending danger is common to most of these cases, *and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as where he says, "Should anything happen to me on my passage to W., I leave," &c.; (*e*) or only the reason for making a will, as where he says, "In case of accident, being about to travel by railway, I bequeath," &c. (*f*) A will may also be made contingent on the assent of another person. (*g*)[2]

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

(*c*) In re Hugo, 2 P. D. 73.

(*d*) In re Da Silva, 30 L. J., Prob. 171.

[(*e*) Roberts *v.* Roberts, 1 Sw. & Tr. 337, 31 L. J., Prob. 46; In re Porter, L. R., 2 P. & D. 22; In re Robinson, Id. 171; Lindsay *v.* Lindsay, Id. 459; In re Hugo, 2 P. D. 73.

(*f*) In re Thorne, 4 Sw. & Tr. 36, 34 L. J., Prob. 131; In re Dobson, L. R., 1 P. & D. 88; In re Martin, Id. 380.

(*g*) In re Smith, L. R., 1 P. & D. 717.]

2. A contingent or conditional will is one that is to take effect upon the happening or not of some event; or upon a certain set of circumstances being or not being in existence in such and such a time named, or during a certain period. In the goods of Porter, L. R., 2 P. & D. 22. A person intending to go to Ireland, made his will in these words: "If I die before my return from my journey to Ireland, I direct that my house and land at T., and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and thereout all my debts and funeral charges be paid. Item—£1000 to A out of the said money arising by the said sale, and £100 to B." The testator, after the making of this will, went to Ireland, but returned to

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

England, lived some years afterwards and died. It was held by Lord Hardwicke that the will was contingent, depending upon the event of the testator's returning to England or not; as he did return, the will could have no effect, but was void. Parsons *v.* Lanoe, 1 Ves., Sr., 190. See also In the goods of Graham, 41 L. J., Prob. 46; 2 L. R., P. & D. 385; In the goods of Newton, 42 L. J., Prob. 58. The will of a mariner, commencing, "Instructions to be followed if I die at sea or abroad," is conditional. Lindsay *v.* Lindsay, 2 L. R., P. & D. 459; 42 L. J., Prob. 32. In Todd's Will, 2 Watts & S. 145, it was held that an instrument by which a party disposed of his property in case he should not return from a journey then contemplated, could not be admitted to probate as a will, after his subsequent return and death. See also In the goods of Smith, L. R., 1 P. & D. 717; Turner *v.* Scott, 51 Penna. St. 126; Frederick's Appeal, 52 Penna. St. 338; Ritter's Appeal, 59 Penna. St. 9; Wagner *v.* McDonald, 2 Harr. & J. 346. Nor can a will be admitted to probate, at least to overthrow the rights of a wife subsequently married, which was made in contemplation of a change of residence, and stated that it was made to prevent disputes that might arise after the death of the maker. Jacks *v.* Henderson, 1 Desaus. 543. In Kentucky a will saying, "If I never get back home I leave you everything I have in the world," was held to be a contingent will, and as the husband returned home it could not be taken as his will after his death. Maxwell *v.* Maxwell, 3 Metc. (Ky.) 101. See also Augustus *v.* Seaboldt, Id. 155; Dougherty *v.* Dougherty, 4 Id. 25; Tarver *v.* Tarver, 9 Peters 174. In New York a testatrix commenced her will with these words: "According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of E," &c.; it was held that the words "according to my present intention" expressed the occasion of making the will, and not a condition on which the will was to depend, and it was therefore admitted to probate. Ex parte Lindsay, 2 Bradf. 204; Thompson *v.* Connor, 3 Bradf. 366. In Damon *v.* Damon, 8 Allen 192, a testator made a will as he was about to depart for Cuba. The will began as follows: "In the name of God, amen. I, J. W. D., being about to go to Cuba, and knowing the dangers of voyages, do hereby make this my last will and testament," &c. The first item was thus: "First. If, by casualty or otherwise, I should lose my life during this voyage, I give and bequeath to my wife A," &c. He then went on to give other specific devises. He went to Cuba, returned, lived two or three years and died. The will was admitted to probate. Hoar, J., said, in delivering the opinion, "There seems to be no reason, upon principle, why an instrument cannot be made which is to take effect as a will, only on the happening of a contingency named in it. As every devise or legacy, and the appointment of an executor may be made conditional, if the same condition applies to all, it may be as well annexed to the entire instrument as to a single provision; and the happening of the condition can then be ascertained when the will is offered for probate. But there are two points to be settled before a will can be rejected from probate on the ground that it is a conditional will, and that the condition has failed; first, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which lead him to make a testamentary provision; and secondly, if the

interest independent of the power (*h*) or a power not expressly referred to (*i*) 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.

Where the will is in terms clearly contingent, and the contingency has failed, the will cannot either as to real estate, (*k*) or, since 1 Vict., c. 26, as to personal estate, (*l*) be set up, but by some act amounting to a re-execution of it. (*m*) Without some such act it is a nullity, and a previous will stands unrevoked. (*n*)[3] When on the death of the testator the event is still in suspense, general probate will be granted at once. (*o*) Of course the question still remains open what effect the will is to have.[4]

language clearly imports a condition, whether it applies to and affects the whole will or only some parts of it. We are of opinion that the condition (in this will) does not affect any other than the first clause of the will, and that the will is therefore entitled to probate." 1 Redf. on Wills 176, *et seq.*; Walkem on Wills 257, *et seq.*; Flood on Wills 431, *et seq.*

(*h*) Southall *v.* Jones, 1 Sw. & Tr. 298, 28 L. J., Prob. 112, 30 Beav. 187; Sing *v.* Leslie, 2 H. & M. 68.

(*i*) In re Wilmot, 29 Beav. 644; Bruce *v.* Bruce, L. R., 11 Eq. 371.

(*k*) Parsons *v.* Lanoe, 1 Ves. 190, 1 Wils. 243.

(*l*) Roberts *v.* Roberts, *sup.*; In re Winn, 2 Sw. &. Tr. 147. *Secus*, before 1 Vict., c. 26, Burton *v.* Collingwood, 4 Hagg. 176; Strauss *v.* Schmidt, 3 Phillim. 209.

(*m*) In re Cawthron, 33 L. J., Prob. 23.

(*n*) In re Robinson, L. R., 2 P. & D. 171.

3. Although the careful preservation of the instrument, after the contingency has become impossible, would tend to show that the testator meant it not as a contingent will, yet the courts are very cautious as to the admitting of such wills to probate. The proper test as to whether such a will is contingent or not is the question whether the disposition of the property depends upon the happening of some event mentioned in the will, or whether the *imminence* of the event is *simply the reason* for the making of the will. In the first case it would be wholly contingent; in the second it would not. In the goods of Porter, L. R., 2 P. & D. 22. A will made in Africa, and commencing, "In the event of my death while serving in this horrid climate, or any accident happening to me, I leave," &c., was held not to be conditional on the death of the testator happening in Africa. In the goods of Thorne, 34 L. J. (N. S.), P., M. & A. 131. A testator, by three letters, gave certain testamentary directions: "In case I should die on my travels." He returned and lived many years afterwards. By subsequent acts he recognized the papers two years before his death. It was held that his return was not such a defeasance as to invalidate the disposition of his property directed by the letters. Strauss *v.* Schmidt, 3 Phillim. 209. See also Ingram *v.* Strong, 2 Phillim. 294.

(*o*) In re Cooper, 1 Deane Eccl. R. 9. It is presumed, though it is not so stated in the report, that the children were minors. See also In re Bangham, 1 P. D. 429.

4. Where the deceased directed that his will was to take effect only in the event of his son dying under twenty-one years of age, and his daughter dying under that age, and unmarried, and then went on to leave various legacies, and appointed an executor, general probate

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. (*p*) 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. (*q*)[5]

Joint will.

of the will was decreed, although both the children were then living. In the goods of Cooper, Dea. & Sw. 9.

(*p*) In re Stracey, 1 Deane Eccl. R. 6, 1 Jur. (N. S.) 1177.

[(*q*) In re Raine, 1 Sw. & Tr. 144.]

5. "A joint will is, as its name imports, one single instrument made by two or more testators, and such a will is entitled to probate as that of the survivor of the testators, because, being joint, it is *a* will and *the* will of all and each of the parties." Flood on Wills 431. In the goods of Stracey, Dea. & Sw. 6. But it is said, in Schumaker *v.* Schmidt, 44 Ala. 454, that such a will is entitled to a separate probate on the death of each testator, as his will. But if the will so provides, and the disposition made of the property requires it, the probate should be delayed until the death of both or all the testators. It has been held that an agreement to make mutual wills is valid, and after the death of either of the parties is irrevocable. Izard *v.* Middleton, 1 Desaus. 116; Rivers *v.* Rivers, 3 Id. 190. There seems to be some confusion in the authorities in the use of the expressions joint and conjoint. Some hold that a conjoint or mutual will is one made by two testators by distinct papers. Yet the term conjoint is used in the reports in speaking of a single instrument in the nature of a will made by two or more testators. Dufour *v.* Pereira, 1 Dick. 421. It has been held that there could not be such a thing as a conjoint or mutual will. Earl Darlington *v.* Pulteney, 1 Cowp. 260. But there are authorities which would seem to indicate that this doctrine may go no further than to deny that a conjoint or mutual will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the conjoint or mutual testators. One ground of objection to such an instrument as testamentary is its irrevocability by either party at will. Yet such a will may be enforced in equity as a contract. See the subject discussed by Bradford, surrogate, in Ex parte Day, 1 Bradf. 476. In the latter case it was decided that a conjoint will may be admitted to probate upon the death of either party, as his will. And it also seems from this same decision that such an instrument is revocable as a will, though irrevocable as a compact. Gould *v.* Mansfield, 103 Mass. 408; Schumaker *v.* Schmidt, 44 Ala. 454; Evans *v.* Smith, 28 Ga. 98; Clayton *v.* Liverman, 2 Dev. & Bat. L. 558. It is held that by the Roman-Dutch law the mutual will of a husband and wife is to be read as the separate will of each. Denyssen *v.* Mostert, 4 L. R., P. C. 236; 8 Moore P. C. C. (N. S.) 502. And the dispositions of each are to be treated as applicable to his or her half of the joint property. Ib. In such case each is at liberty to revoke his or her part of the will during the life of the co-testator, with or without communication with the co-testator, and even after the co-testator's death. But if the spouse who dies first has bequeathed any benefit in favor of the survivor, and has afterward limited the disposal of the property in general after the death of the survivor, then it appears that the survivor, having accepted such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. Ib. But it is held in

Separate wills of separate properties.

If a testator makes separate wills of separate parts of his property, they need not all be proved together, (*r*) unless one incorporates another, as by expressly confirming it. (*s*)

Will in pencil or with blanks valid.

A will may be written in pencil. (*t*) But where a printed form was filled up partly in ink and partly in pencil, and the writing in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the ink

Alabama that such an instrument is clearly revocable. Schumaker *v.* Schmidt, *ubi supra.* But in Kentucky it is held that there must be a joint revocation; a revocation by either one separately would not be held to be a revocation of the will. Breathitt *v.* Whitaker, 8 B. Mon. 530. A will made jointly by husband and wife, devising property of which he alone was owner, was, on his death, sustained as *his* valid will. Rogers, Applt., 11 Me. 303. But a writing purporting to be a will executed by two persons, disposing of all their property jointly, is not a joint will, nor is it a separate one. Clayton *v.* Liverman, 2 Dev. & B. L. 558. But when two persons agree to make mutual wills *it seems* that bad faith in one, either in failing to make his will, or destroying it, after it has been made, will not prevent the probate of the will of the other party. Bynum *v.* Bynum, 11 Ired. L. 632. In the case of Lewis *v.* Scofield, 26 Conn. 452, two sisters made a joint will in the following language: "We, P. & L. H., do make and ordain this our last will and testament in manner and form as follows, viz.: That in the event of the death of either of us, testators, the surviving sister shall have and hold for her own use and benefit, to dispose of in any manner whatever that shall seem most expedient, all of the real and personal estate we shall be possessed of." L. H. died, and the court of probate approved the will as the separate will of L. H. It was objected upon the part of the heirs-at-law of L. H. that the will, by reason of its joint execution, was not a valid instrument. On appeal the will was held to be the valid will of L. H., and the decree of probate was affirmed. Hinman, J., reviewed the English authorities, and then said: "In this case the will does not profess to have any operation except upon the property of the sister who may first die. Why should the circumstance that her sister executed the will with her be permitted to affect this disposition in any way? We do not consider the authorities as at all decisive against the probate of such an instrument as is before the court in this case; and as the point has not to our knowledge ever been raised before in this state, we feel at liberty to decide it upon the reason and good sense of the case as it appears to us." In Walker *v.* Walker, 14 Ohio St. 157, it is held that a joint will is unknown to the law of Ohio, and is inconsistent with the policy of its legislation. And such a will cannot be taken to be the joint will of both the parties, nor the separate will of either. Brinkerhoff, J., said: "It seems to us that the recognition of the valid existence of such a will would be so fruitful of practical difficulties as to render it wiser and better to ignore their cause than to attempt to meet and overcome them." 1 Redf. on Wills 182; Wms. Ex'rs (6th Am. ed.) 10; Walkem on Wills 170.

[(*r*) In re Astor, 1 P. D. 150.

(*s*) In re Harris, L. R., 2 P. & D. 83. See further on incorporation, *post* ch. VI.

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

writing alone was held to be the will. (*u*) A will is not invalid by reason of blank spaces having been left in it.] (*x*)[6]

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.[7]

(*u*) In re Adams, L. R., 2 P. & D. 367.

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

6. The English statute of frauds required a will to be in writing, but there was no reason, under that statute, nor is there under 1 Vict., c. 26, why a will written in pencil should not be held to be good. And in these later days there can be no question but that a will may be partially written and partially printed, engraved or lithographed. Temple *v.* Mead, 4 Vt. 535; Henshaw *v.* Foster, 9 Pick. 312. The method of recording the body of the instrument is not of great moment, the formality of the execution being the essential part. Nor will the leaving of blank spaces in the will render it void. But it is not desirable to leave blank spaces, especially just before the name of the testator, since the fraud to which the will would then lay itself open might be a reason for holding it void, as it might be considered that the object of such spaces was to enable the testator to add words to his will after its execution. And it has been expressly held that where there is unnecessary and unreasonable blank space between the conclusion of the will and the signature of the testator, the will is not legally executed, though it be made manifest that the testator had no intent to do anything more to the will after he had signed it. Soward *v.* Soward, 1 Duv. 126, 132, 134. No rule, however, can be laid down as to what space between the conclusion of the will and the signature of the testator is unreasonable; in this regard every case must depend upon its own circumstances. Ib. See also Tilghman *v.* Steuart, 4 Harr. & J. 156; 1 Redf. on Wills 165; Walkem on Wills 158, 177; Flood on Wills 122; Wms. Ex'rs (6th Am. ed.) 108, 146. It has been recently decided, in Pennsylvania, that a will which is wholly written and signed in pencil is "in writing," within the statute, and that such a will is unquestionably a valid will. Myers *v.* Vanderbelt, 84 Penna. St. 510. See also Philbrick *v.* Spangler, 15 La. Ann. 46.

7. Whether an instrument is to be considered as a will or not depends upon the intention of the maker. Lyles *v.* Lyles, 2 Nott & McC. 531; Means *v.* Means, 5 Strobh. 167; Brown *v.* Shand, 1 McCord 409; Estate of Wood, 36 Cal. 75. It is said by Smith, J., in Wright *v.* Brotherton, 2 Rawle 133, 134, "it is certainly indisputable that the intention of a testator, expressed in his will, and fairly drawn from it, must govern the construction of it; it is the pole-star in every will, and ought to be firmly adhered to, when it can be satisfactorily discovered." This intention is to be ascertained in three ways: 1. When it is expressed on the face of the instrument. 2. When the instrument, not being a will in form, but being a deed, letter, memorandum or other writing containing an actual disposition of

Instruments in the form of

Thus, (*y*) a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testa-

the estate, to take effect after death, is in effect and operation a will. 3. By parol proof, when the instrument is doubtful, and the intention cannot be collected from the face of the paper. McGee *v.* McCants, 1 McCord 517. But the general rule is that this intention must be gathered from the contents of the whole will. Wright *v.* Brotherton, 2 Rawle 133; Asay *v.* Hoover, 5 Penna. St. 21; Barker's Appeal, 72 Penna. St. 421; Olmstead *v.* Harvey, 1 Barb. 102; Parker *v.* Wasley, 9 Gratt. 477; Cook *v.* Weaver, 12 Ga. 47; Clark *v.* Preston, 2 La. Ann. 581; Jackson *v.* Hoover, 26 Ind. 511; Hawley *v.* Northampton, 8 Mass. 3; Lytle *v.* Beveridge, 58 N. Y. 592; Johnson *v.* M. E. Church, 4 Iowa 180; Augustus *v.* Seaboldt, 3 Metc. (Ky.) 155; Sorsby *v.* Vance, 36 Miss. 564; Davis *v.* Hayden, 9 Mass. 514; Wright *v.* Barrett, 13 Pick. 41; Guery *v.* Vernon, 1 Nott. & McC. 69; Tappan *v.* Deblois, 45 Me. 122; Stokes *v.* Tilly, 1 Stock. 130; Mullany *v.* Mullany, 3 Gr. Ch. 16; Lasher *v.* Lasher, 13 Barb. 106; Hall *v.* Chaffee, 14 N. H. 215; Bowly *v.* Lamont, 3 Harr. & J. 4; Gillis *v.* Harris, 6 Jones Eq. 267; Provost *v.* Provost, 12 C. E. Gr. 296; Capal *v.* McMillan, 8 Porter (Ala.) 197. A document commencing like a power of attorney, properly attested, and authorizing persons named therein to administer the estate, has been held to be a good will. Rose *v.* Quick, 30 Penna. St. 225. See also Ingram *v.* Porter, 4 McCord 198; Van Wert *v.* Benedict, 1 Bradf. 114. The same instrument has been held to be partly a deed and partly a will. Robinson *v.* Schly, 6 Ga. 515; Jacks *v.* Henderson, 1 Desaus. 543; see also Watkins *v.* Dean, 10 Yerg. (Tenn.) 321. It has been held that an endorsement of a promissory note may be testamentary in its character. The presumption, however, is against an informal paper, and in any event it devolves upon the party producing such a paper to prove not only that it is the act of the deceased, but that it was executed *animo testandi*. Combs *v.* Jolly, 2 Gr. Ch. 625; Collins *v.* Townley, 6 C. E. Gr. 353. See also Frew *v.* Clarke, 80 Penna. St. 170; Stein v. North, 3 Yeates 324; Turner *v.* Scott, 51 Penna. St. 126; Brunson *v.* King, 2 Hill (S. C.) Ch. 483; Winch *v.* Brutton, 8 Jur. 1086; 2 Story Eq., § 1069. See also Todd's Will, 2 Watts & S. 145; Frederick's Appeal, 52 Penna. St. 338; Anderson *v.* Pryor, 18 Miss. 620; Fort *v.* Fort, 3 Dev. L. 19; Duke *v.* Dyches, 2 Strobh. Eq. 353; Allison *v.* Allison, 4 Hawks 141; Ragsdale *v.* Booker, 2 Strobh. Eq. 348; Symmes *v.* Arnold, 10 Ga. 506; Rohrer *v.* Stehman, 1 Watts 442; Phipps *v.* Hope, 16 Ohio St. 586. On the rule that parol testimony will be received for the purpose of showing whether an instrument propounded as a will, which is not upon its face testamentary in character, is such, and if it appears from the surrounding circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, and in such case the particular form of the instrument is immaterial, an unattested writing in the following words:—"Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon"—was held to be testamentary and admitted to probate. Clarke *v.* Ransom, 50 Cal. 595. "Mrs. Sophie Loper is my heiress. G. Ehrenberg"—was held to be a will. Succession of Ehrenberg, 21 La. Ann. 280. In North Carolina an unattested writing in these words:—"It is my wish and desire that

(*y*) West's case, Mo. 177, pl. 314; Manly *v.* Lakin, 1 Hagg. 130; In re Dunu, Id. 488; Henderson *v.* Farbridge, 1 Russ. 479.

mentary operation.[8] As, in Hixon *v.* Wytham, (*z*) where A by indenture made between him on the one part, and B and C of the other part, in consideration of £5, bargained and sold to them certain lands in trust to sell after his decease, and

deeds, agreements, &c., held to be testamentary.

my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. David Outlaw"—was declared to be a will. Outlaw *v.* Hurdle, 1 Jones L. 150. In Alabama it has been held that an instrument may be a will, notwithstanding that some of its provisions are to operate as a contract *inter vivos*. Taylor *v.* Kelly, 31 Ala. 59. "It is required to the making of a good testament

8. Although the testator, through some want of information, or for other reasons, prepare his will similar to a deed, as, if he seal it, which is not essential to the will, or if it in other particulars resemble a deed, it is not in any particular of the same nature as a deed, and will have no validity or operation as a deed, but will be held to be a will if made *animo testandi*. It is probable that a seal is not requisite to a will in any state except New Hampshire. See Piatt *v.* McCullough, 1 McLean 69; Avery *v.* Pixley, 4 Mass. 460; Williams *v.* Burnett, Wright (Ohio) 53; Padfield *v.* Padfield, 72 Ill. 322. Though a will and deed are supposed not to be equivalent instruments, in some instances a deed has been given validity as a will, after the death of the testator, it being executed to take effect after the death of the grantor, although executed as and purporting to be a deed. Gillham *v.* Mustin, 42 Ala. 365; Millican *v.* Millican, 24 Tex. 426; Shepherd *v.* Nabors, 6 Ala. 631; Dunn *v.* Bank of Mobile, 2 Ala. 152; Mosser *v.* Mosser's Ex'r, 32 Ala. 551; Walker *v.* Jones, 23 Ala. 448; Symmes *v.* Arnold, 10 Ga. 506; Dudley *v.* Mallery, 4 Ga. 52; Hall *v.* Bragg, 28 Ga. 330; Frederick's Appeal, 52 Penna. St. 338; Carey *v.* Dennis, 13 Md. 1. See also Wheeler *v.* Durant, 3 Rich. Eq. 452; Ingram *v.* Porter, 4 McC. 198; Stewart *v.* Stewart, 5 Conn. 317; Wagner *v.* McDonald, 2 Harr. & J. 346; Gage *v.* Gage, 12 N. H. 371; Jacks *v.* Henderson, 1 Desaus. 543; Herrington *v.* Bradford, 1 Miss. 520; Allison *v.* Allison, 4 Hawks 141; Turner *v.* Scott, 51 Penna. St. 126. But see Ritter's Appeal, 59 Id. 9. It was said by Gibbons, J., "It matters not what the instrument is *called* by the author, as it is the intention apparent upon the face of it, that must give it its real character." Walker *v.* Jones, 23 Ala. 448, 456. In a case in Tennessee it is said that if the instrument, though in form a deed, duly acknowledged by the grantor, *and registered*, conveys no specific property of which the grantor is the owner, but only such as he may die seized and possessed of, it is a will. Watkins *v.* Dean, 10 Yerg. 321. See also Stevenson *v.* Huddleson, 13 B. Mon. 299. It is otherwise where the instrument conveys *specific* property then owned, although the time of enjoyment be postponed until after the death of the grantor. Wales *v.* Ward, 2 Swan 648; Swails *v.* Bushart, 2 Head 561. But if it be clearly evident that the intention of the maker was that the instrument should operate as a deed, it cannot be admitted to probate as a will, although it be wholly inoperative as a deed. Edwards *v.* Smith, 35 Miss. 197. In one case the instrument being in form a deed, containing a clause of warranty, though it conveyed by the words, "at my death I do hereby give and grant unto my son," &c., was held to be a deed and not a will, it being evident from all the circumstances that such was the intent of the grantor. Golding *v.* Golding's Adm'r, 24 Ala. 122 But see Milledge *v.* Lamar, 4 Desaus. 617.

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

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 the language was here changed to the first person) in favor 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 commencing as an indenture, but ending as a will.

So, in Green *v.* Proude, (*a*) 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. [9]

Instrument entitled "Articles of Agreement."

that he that doth make it have at the time of the making of it *animum testandi, i. e.*, a mind to dispose, and firm resolution to devise, and determination to make a testament; otherwise the testament will be void, for it is the mind, not the words, of the testator that doth give life to the testament." Shep. Touch. 404. An instrument cannot be allowed as a will unless the deceased intended to make a will, and knew that he was making it. Swett *v.* Boardman, 1 Mass. 258; Combs *v.* Jolly, 2 Gr. Ch. 625; Campbell *v.* Logan, 2 Bradf. 90; Brown *v.* Shand, 1 McCord 409. But to the opposite effect, see Carey *v.* Dennis, 13 Md. 1. As to statutory provisions in New Jersey for proper execution of a will, see The matter of McElwaine, 3 C. E. Gr. 499. But a bequest of all the property "to my heirs-at-law according to statute," leaves the property to be distributed as if the maker had died intestate. Rawson *v.* Rawson, 52 Ill. 62. A donation of future property contained in a marriage contract is not a legacy. It is a donation *inter vivos*, and at the death of the donor becomes a debt of his succession. Succession of McCloskey, 29 La. Ann. 237. But the will must be complete in itself, according to the requirements of the statute, and no parol testimony can be admitted as to conversations of the testator to show that the paper contains his real testamentary intent. Waller *v.* Waller, 1 Gratt. 454.

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

9. So, too, in a case in Georgia where the instrument was in form an agreement, beginning, "Know all men by these presents, that we, J. E. S. of the one part, and P. T. S. of the other part, have covenanted and agreed, and do covenant and agree, for the love and affection we bear each other, that whichever of us may be longest lived shall be the heir of the other," &c., it was held to be a will. Evans *v.* Smith, 28 Ga. 98. The parties to this testamentary agreement were sisters. See also Taylor *v.* Kelly, 31 Ala. 59.

Contemporaneous deed and will both held to be testamentary.

Again, in Peacock *v.* Monk, (*b*) 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 £4000 into the hands of B, to pay to A himself an annuity for life of £160, and afterwards to pay £1000 apiece to C and D if they survived him, and an annuity of £100 to E for life if she survived him, the residue to B. There was a proviso, that if the £160 annuity was in arrear, B should repay the £4000 to A, to be placed out in the joint names of A and B. (*c*) 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." (*d*) The case of Tomkyns *v.* Ladbroke, (*e*) 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 £5000, 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. Hogg *v.* Lashley, decided in D. P. (*f*) is confirmatory of the same principle; an instrument, executed in the form of a Scotch settlement, (for lands in Scotland were not then 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. [10]

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

(*c*) 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."

(*d*) 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. *26.]

(*e*) 2 Ves. 591.

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

10. Not only may a deed, but, in fact, any paper which is in existence at the time of the execution of the will, and duly identified by reference to it in the will, be incorporated into and taken as

Instrument in form of deed-poll, held testamentary.

Again, in Habergham *v.* Vincent, (*g*) 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 writ-

part of the will. However, if the paper be not in existence at the time of the execution of the will, it cannot be incorporated into it or taken as in any manner testamentary. Theobald on Wills 2; Countess Ferraris *v.* Lord Hertford, 3 Curt. 477; Aaron *v.* Aaron, 3 De G. & Sm. 475; In the goods of Sunderland, L. R., 1 P. & D. 198; In the goods of Mercer, L. R., 2 P. & D. 91; In the goods of Gill, Id. 6; Fesler *v.* Simpson, 58 Ind. 83; 1 Redf. on Wills 261; Wms. Ex'rs (6th Am. ed.) 130. In the goods of Hunt, 2 Rob. Eccl. Rep. 622, it was said, "You may incorporate an unexecuted paper into a duly executed will by a sufficiently clear and distinct reference to it, and in respect to which there can be no mistake." From this case it appears that a schedule or list of articles may be referred to in such a manner as to incorporate it into the will. In this case the testator bequeathed certain articles of plate specified in Schedules A and B, which were to be annexed to the document. He afterwards executed a codicil, in which no reference was made to these lists, but after his death two schedules were found, being marked A and B; these, though not in existence at the time of the execution of the will, were held to be a part of the will, being in existence before the execution of the codicil. Thompson *v.* Quimby, 2 Bradf. 449; Chambers *v.* McDaniel, 6 Ired. L. 226; Tonnele *v.* Hall, 4 N. Y. 140; Pollock *v.* Glassell, 2 Gratt. 439; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Wikoff's Appeal, 15 Penna. St. 281; Crosby *v.* Mason, 32 Conn. 482; Thayer *v.* Wellington, 9 Allen 283; Harvy *v.* Chouteau, 14 Mo. 587. But in other cases the papers have been held not to be incorporated into the will. See Bailey *v.* Bailey, 7 Jones L. 44; Grabill *v.* Barr, 5 Penna. St. 441; Zimmerman *v.* Zimmerman, 23 Penna. St. 375. In cases of reference to papers not a part of the will, such papers being unattested papers, the reference must be *distinct*, so as, with the assistance of parol evidence, when necessary and *properly admissible*, to exclude the possibility of mistake, and the reference must be to a paper already written, and not to one to be written. Chambers *v.* McDaniel, 6 Ired. L. 226, 229. In this case it is said by Daniel, J., "The law is, that if a testator, in his will, refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be so described as to manifest distinctly what the paper is that is meant to be incorporated, and in such way that the court can be under no mistake, and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will." The contents of the paper, so far as referred to in the instrument executed, become constructively a part of the latter, and in that respect they make together one instrument. Tonnele *v.* Hall, 4 N. Y. 140; Jackson *v.* Babcock, 12 Johns 389; Loring *v.* Sumner, 23 Pick. 98. But to the contrary effect, see Thompson *v.* Quimby, 2 Bradf. 449. In the case of Bailey *v.* Bailey, *ubi supra*, the testator made a deed in favor of S and left it with a person to be kept until the testator should call for it. The testator died without having called for the deed. By his will he provided, *inter alia*, "I give and bequeath to my son S, in addition to what I have given him by deed of gift," &c. It was held that this was not a sufficient reference to the deed to incorporate it into the will. In the case of Bethell *v.* Moore,

(*g*) 2 Ves., Jr., 204, 4 B. C. C. 355.

ing, 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 Wilson and Buller, JJ., that the second instrument was testamentary. Buller, J., 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. [11]

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 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.

Remark upon Habergham v. Vincent.

The question whether an instrument in the form of a deed operated as a will, was much discussed in Att.-Gen. *v.* Jones, (*h*) where A, by indenture dated March 25th, 1813, assigned for a nominal pecuniary

2 Dev. & B. L. 311, 316, it was doubted whether a paper not written by the testator becomes a part of his will by being referred to in a will written wholly by himself and deposited among his valuable papers.

11. It may be considered as settled that the form of the paper does not affect its title to probate, provided that it was the intention of the deceased that it should not take effect until after his death. Lyles *v.* Lyles 2 Nott & McC. 531; Boyd *v.* Boyd 6 Gill & J. 25; Wareham *v.* Sellers, 9 Id. 98. Lumpkin, J., said: "The doctrine is now too well settled to need argument or authority to sustain it, that an instrument may be in the form of a deed, signed sealed and delivered as such, still, if it discloses the intention of the maker respecting the posthumous destination of his property, and is not to operate until after his death, it is testamentary only." Johnson *v.* Yancey, 20 Ga. 707, 708. But if the instrument has never been *delivered* in the lifetime of the maker, and directs that the disposition of the property be made after his death, it must be held to be a will and not a deed. Ragsdale *v.* Booker, 2 Strobh. Eq. 348. It appears, also, that if a will be subsequently incorporated into a deed it will still remain a will, with all the functions of such an instrument in relation to all property to which, by its terms, it can apply, except that part of the property removed from its operation by the deed. Dawson *v.* Dawson, 2 Strobh. Eq. 34.

(*h*) 3 Price 368.

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 16th, 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; (*i*) 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 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," he said, "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, *dis-

Att.-Gen. *v.* Jones. Whether property professedly settled by deed was liable to legacy duty.

(*i*) It was merely for the use and benefit of A for life.

posing 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."

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 color 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 (*k*) 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 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!

Remarks upon Att.-Gen. *v.* Jones.

[(*k*) See Alexander *v.* Brame, 7 D., M. & G. 530; S. C., nom. Jeffries *v.* Alexander, 8 H. L. Cas. 594.]

*A similar question arose in Thompson *v.* Browne, (*l*) which was as follows: By an indenture of settlement dated August 19th, 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 £6090 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 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 of 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 Att.-Gen. *v.* Jones; but Sir C. C. Pepys, M. R., decided that the legacy duty did not attach. "The decision in Att.-Gen. *v.* Jones," he said, "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 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.*"

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

Although the remarks of the M. R. are expressed with great caution, they leave no doubt of his opinion of Att.-Gen. *v.* Jones [and when that case was cited to Lord St. Leonards in D. P., (*m*) he said, "That case is quite wrong."

(*l*) 3 My. & K. 32. [*23]

[(*m*) Brown *v.* Att.-Gen., 1 Macq. Sc. Ap. 85.

*[In Majoribanks *v.* Hovenden, (*n*) an instrument commencing with a recital, and having an attestation clause, like a deed-poll, and sealed, stamped, and registered, was held by the same learned lord not to be invested with a testamentary character by the mere 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 fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character.] [12]

Instrument sealed, stamped, and registered, not testamentary.

The probate court (before which, 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; (*o*) and accordingly, in repeated instances, probate has been granted of such irregular documents, as the assignment of a bond by endorsement, (*p*)[13] receipts for

Rule in probate court as to instruments testamentary in *substance:*

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

12. Whatever be the *form* of the paper, or the language therein made use of, if intelligible, and if it be duly executed, it may operate as a will, but only on its appearing clearly that the intention undoubtedly was that it should take effect *after the death of the person executing it.* For the law is settled that if the paper contains a disposition of property to be made *after death,* though it were meant to operate as a settlement, a deed of gift, or a bond, though not intended to operate as a will, but as an instrument of different character, yet, if it cannot operate in the latter character it may in the former character. In the goods of Morgan, L. R., 1 P. & D. 214; Masterman *v.* Maberly, 2 Hagg. 247; Stewart *v.* Stewart, 5 Conn. 317, 320; Pitkin *v.* Pitkin, 7 Conn. 315; Powell on Devises 13, *et seq.* But it does not appear that it has been held that because the instrument cannot operate in the form in which it is made, it *must* operate as a will. Edwards *v.* Smith, 35 Miss. 197. It would seem that the principle upon which the effect of the instrument is to be determined is, that if there is proof either in the writing itself, or from undoubted evidence *aliunde,* first, that the party executing the paper intended to convey the benefits by the document which would be conveyed by it, if it were a will, and second that death was necessary to give it effect, then without reference to its form it may be admitted to probate. But in Stewart *v.* Stewart, *ubi supra,* the deed was held not to be testamentary from the fact that it was not made *animo testandi.* See also Bristol *v.* Warner, 19 Conn. 7; Swett *v.* Boardman, 1 Mass. 258; Combs *v.* Jolly, 2 Gr. Ch. 625.

(*o*) But now that all wills require attestation by two witnesses, the validity of an instrument as an actual disposition of property would, if not so attested, depend on the maintenance of its non-testamentary character. [Mitchell *v.* Smith, 33 L. J., Ch. 596.]

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

13. A memorandum in a paper in the following words: — "The above-named bonds were restored by A and are placed in the hands of B for the use of C after my decease"—was held to be testamentary, notwithstanding a delivery of the bonds had taken place in the donor's last

stock and bills endorsed, (*q*) a letter, (*r*)[14] marriage articles, (*s*) and promissory notes,[15] and notes payable by executors, in order to avoid the legacy duty, (*t*) [and cheques on a banker, (*u*) even though the testator made a subsequent will containing a clause revoking any former will or codicil.] (*v*) On the same prin-

—bills, notes, &c.

illness. Tapley *v.* Kent, 1 Robert. 400. An endorsement on a note made by the payee, directing that it should be paid to a third party, in case the payee died before the note was paid, the payee having died before the note was paid, was held to be testamentary. Hunt *v.* Hunt, 4 N. H. 434. Bonds executed and delivered to a third party, to be delivered after the death of the maker to the party in whose favor they are made, are mere voluntary gifts, *revocable* during the life of the maker, and can have no effect except as testamentary papers. Carey *v.* Dennis, 13 Md. 1.

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

(*r*) Drybutter *v.* Hodges, E. T., 1793; cit. 2 Hagg. 247; and see Passmore *v.* Passmore, 1 Phillim. 218; In re Mundy, 7 Jur. (N. S.) 52, 30 L. J., Prob. 85.]

14. But in a case in Maryland, where a paper written somewhat like a letter, said, "If I should not come to you again my son, M.W., shall pay," &c., it was held that this paper could not be admitted to probate as a will. Wagner *v.* McDonald, 2 Harr. & J. 346.

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

15. In Woodbridge *v.* Spooner, 3 B. & Ald. 233, where the deceased gave to the plaintiff a note to pay to him or his order, "on demand, the sum of £100, for value received, and his kindness to me," with a verbal agreement, on the part of the plaintiff, that the note should not be demanded until after her death, it was held that parol evidence could not be received to show that it was not given for a valuable consideration, and that such note did not operate by way of testamentary disposition. Gough *v.* Findon, 7 Ex. 48; Longstaff *v.* Rennison, 1 Drew. 28; Passmore *v.* Passmore, 1 Phillim. 216; Flood on Wills 312. In Georgia a father gave a note or bond in the following words:

"Due at my death to Haney Johnson the sum of twenty-five hundred dollars from the general fund of my estate, as a gift.

his
"LEWIS × YANCEY.
mark.

"*Test:* Lewis D. Yancey, Jr.

"The condition of the above bond or obligation is such that whereas for the fidelity and obedience, as well as the natural love and affection that I have for my daughter, Haney Johnson, I donate in the above manner what I design for her at my death. Given under my hand and seal," &c.

This instrument was held to be ambulatory, and revocable during life, and was therefore testamentary only. Johnson *v.* Yancey, 20 Ga. 707. In the case of Jackson *v.* Jackson's Adm'r, 6 Dana 257, the instrument was in form a promissory note, but it was sustained as testamentary. It was said in this case that the *form* of the instrument is immaterial, the only requisite being that the writing should show the intention of the maker to pass his effects, in whole or in part, *at his death*, to designated persons. On the other hand, enclosing a security and endorsing it "for A" has been held not to be a testamentary act. Plumstead's Appeal, 4 S. & R. 545.

(*t*) Maxee *v.* Shute, H. T., 1799; cit. 2 Hagg. 247; [and see 4 Ves. 565; Jones *v.* Nicolay, 2 Rob. 288, 14 Jur. 675; In re Marsden, 1 Sw. & Tr. 542.

(*u*) Bartholomew *v.* Henly, 3 Phillim. 317.

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

ciple, 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. (*x*)[16]

Instruments in the form of present or past gifts held testamentary.

[So papers in these words, "I wish A to have my bank book for her own use;" (*y*) "I hereby make a free gift to A of the *sum deposited," &c.; (*z*) "I have given all to A and her sons: they are to pay" certain weekly sums to "X and Y, and to divide the residue among themselves;" (*a*) have been held testamentary, chiefly upon collateral evidence, which is always admissible,(*b*) that they were executed with that intent.

Likewise deeds *inter partes*.

So, as at common law, instruments in the form of deeds *inter partes*, and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, have been held testamentary in the probate court.] (*c*)

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

But 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, probate will not be granted of it as a testamentary document.[17] Thus, where a minor

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

16. There would seem to be no difference between the construction to be given to an executory trust created by marriage articles and one created by will, except to such extent as the former is more emphatically the means of ascertaining the intention of those who created the trust. West *v.* Holmesdale, L. R., 4 E. & I. App. 543. Lord Eldon said, "The distinction between a covenant upon consideration of marriage and an executory trust under a will is new to me." Lincoln *v.* Newcastle, 12 Ves. 218.

[(*y*) Cock *v.* Cooke, L. R., 1 P. & D. 241.

(*z*) Robertson *v.* Smith, L. R., 2 P. & D. 43.

(*a*) In re Coles, L. R., 2 P. & D. 362.

(*b*) In re English, 3 Sw. & Tr. 586, 34 L. J., Prob. 5.

(*c*) In re Morgan, L. R., 1 P. & D. 214. And see cases, p.*18, nn. (*y*) (*z*).] See also In re Knight, 2 Hagg. 554; Shingler *v.* Pemberton, 4 Hagg. 356; both of which cases were before Thompson *v.* Browne, stated above.

17. Robey *v.* Hannon, 6 Gill 463, 477; Hamilton *v.* Peace, 2 Desaus. 79, 91; Hall *v.* Bragg, 28 Ga. 330; Moye *v.* Kittrell, 29 Ga. 677. But see Walker *v.* Jones, 23 Ala. 448. A paper not at all in form testamentary being offered for probate, the Orphans' Court refused to admit parol testimony to prove that it was made for a will by the deceased, and refused probate of the will; it was held that such testimony should have been admitted. Ware-

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. (*d*)

—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 a posthumous sale. (*e*)[18] 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

ham *v.* Sellers, 9 Gill & J. 98. Parol evidence of the *declarations* of the testator is admissible in such case. Witherspoon *v.* Witherspoon, 2 McCord 520. But, although the words be words of present gift, if the court be satisfied, by parol evidence, such being admissible in that case, that the testator intended the operation of the paper to be dependent upon his death, probate may be granted of it as a will. Robertson *v.* Smith, 2 L. R., Prob. 43; 22 L. T. (N. S.) 417. In Moye *v.* Kittrell, 29 Ga. 677, 680, Lumpkin, J., said: "The form of the instrument is that of a deed. And the form is evidence of the intention of the maker. * * * If the words were doubtful we should incline to that construction which would support the instrument."

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

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

18. The following letter, addressed to a friend, was held to be a good and valid will: "A thousand accidents may occur to me which might deprive my sisters of that protection which it would be my study to afford; and in that event I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss C. and her child in any manner that may appear most proper." The writer was just about to sail on a voyage to the West Indies. Morrell *v.* Dickey, 1 Johns. Ch. 153. But letters enclosed in a box which was delivered by the decedent to the party intended to be benefited, with directions not to open the box until after the death of the writer, while being held to be of a testamentary nature, were declared to be void. Warriner *v.* Rogers, 16 L. R., Eq. 340; 42 L. J., Ch. 581. In Grattan *v.* Appleton, 3 Story C. C. 755, a person living in New Brunswick wrote certain letters to one A, desiring on the death of the writer to make a certain disposition of the property of the writer in the hands of A. The writer of the letters died intestate, and his administrator brought suit to recover the money in the hands of A. Held that the letters were testamentary. Boyd *v.* Boyd, 6 Gill & J. 25.

shown by extrinsic evidence to have been so intended. (*f*)[19] 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 Nicholls *v.* Nicholls, (*g*) they proved not to have been written *animo testandi;* whilst, in the latter, the *animus* must be proved by the party claiming under it.[20]

[But, as already observed, an instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will. Therefore, where there was an agreement for a lease, which contained a provision for the distribution of the rent after the lessor's death among his grandchildren, of whom the lessee was one, it was held that this provision, being part of the consideration for which the lessee was to pay his rent, was irrevocable; it was therefore not testamentary. (*h*) The court was asked to grant probate only of a part of the document, namely, that which contained the provision in question: and as to this, Sir J. P. Wilde said he had met with no case where it had been done, although he by no means said it could not be done. And in fact in the case (there cited) of Doe *d.* Cross *v.* Cross, (*i*) where an instrument in the form of a power of attorney was given by a person abroad, whereby he appointed his mother to receive the rent of his lands for her own use, until he might return to England; or in the event of his death, he "thereby assigned and delivered to her the sole claim to his lands," but her occupancy was to cease on his return: this instrument was properly executed as a will, and was held to be a good will of the lands in question. The court was clear that there was no objection to one part of an instrument operating *in præsenti* as a deed, and another *in futuro* as a will.]

Instrument not made testamentary by postponing enjoyment.

Probate of *part* of an instrument.

—of a power of attorney.

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

19. In case an unfinished paper found among the papers of the deceased be offered for probate, parol evidence may be taken to prove whether or not it was intended by the deceased as a will. Witherspoon *v.* Witherspoon, 2 McCord 520.

(*g*) 2 Phillim. 180.

20. Lyles *v.* Lyles, 2 Nott & McC. 531; Wareham *v.* Sellers, 9 Gill & J. 98.

[(*h*) In re Robinson, L. R., 1 P. & D. 384. And see Patch *v.* Shore, 2 Dr. & Sm. 589.

[(*i*) 8 Q. B. 714.]

Probate, how far conclusive as to personalty.

The granting of probate is conclusive as to the testamentary character of the instrument in reference to personalty. (*j*) [Everything included in the probate copy, (*k*) but no word *besides, (*l*) must be taken 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 probate, 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. (*m*) 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. (*n*) Neither was 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 probate court, which, on being satisfied of the fraud, would direct probate to issue, omitting that part containing the bequest complained of. (*o*)[21] And practically this division of jurisdiction is continued as

(*j*) 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.* Frazer, 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.

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

[(*l*) Barneby *v.* Tassell, L. R., 11 Eq. 368. As to omission from the probate of scurrilous imputations on character, see In re Honywood, L. R., 2 P. & D. 251.

(*m*) The general presumption is that alterations in a will were made *after* its execution; see *post* ch. VII., § 2, *ad fin.*; but that was for the consideration of the Court of Probate.

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

(*o*) Allen *v.* Macpherson, 1 H. L. Cas. 191, 11 Jur. 785, affirming 1 Phillim. 133 and reversing 5 Beav. 469; Hindson *v.* Weatherill, 5 D., M. & G. 301. So the Court of Chancery had no jurisdiction to set aside a will of lands for fraud. The remedy was by ejectment. Jones *v.* Gregory, 2 D., J. & S. 83.]

21. "It is a legal consequence of the exclusive jurisdiction of the Court of Probate in deciding on the validity of wills of personalty, and granting admin-

between the chancery and probate divisions of the High Court of Justice, (*p*) the judges of the former division declining (in their discretion) to exercise the jurisdiction of the latter in matters of probate. (*q*)

istration, that its sentences pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right directly determined. Hence a probate, even in common form, unrevoked, is conclusive, both in the courts of law and of equity, as to the appointment of executor, and the validity and contents of a will, so far as it extends to personal property; and it cannot be impeached by evidence even of fraud. Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or that the will of which the probate has been granted was forged: for that would be directly contrary to the seal of the court in a matter within its exclusive jurisdiction. So the probate of a will conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled. In short, without the *constat* of the court of probate no other court can take notice of the rights of representation to personal property; and when that court has, by the grant of probate or letters of administration, established the right, no other court can permit it to be gainsaid." Wms. Ex'rs (6th Am. ed.) 616, *et seq.* "So, in Bouchier *v.* Taylor, 4 Bro. C. C. 708, Toml. ed., it was decided by the House of Lords, that after a sentence in the ecclesiastical court determining the question who are the next of kin of the intestate, and granting letters of administration to the person found to be such next of kin, the Court of Chancery is precluded from directing any issue to try that question. And this decision was held by Lord Lyndhurst, in Barr *v.* Jackson, 1 Phillim. C. C. 582, to be a binding authority for the proposition, that if the sentence of the ecclesiastical court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Chancery, between the same parties, for distribution. Upon this principle it was decided, in a modern case, that payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the deceased, notwithstanding the probate be afterwards declared null in the ecclesiastical court, and administration be granted to the intestate's next of kin; for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor as long as the probate was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it. Allan *v.* Dundas, 3 T. R. 129. When there is a question, whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments. In such a case, if a probate has been granted, *as of a will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper. The probate is also conclusive as to every part of the will in respect of which it has been granted: for example, in Plume *v.* Beale, 1 P. Wms. 388, where an executor proved a will of personal property, and then brought a bill in equity to be relieved against a particular legacy, on the ground of its having been interlined in the will by forgery, Lord Cowper dismissed the bill with costs, observing, that the executor might have proved the will

(*p*) Meluish *v.* Milton, 3 Ch. D. 27, 35.

(*q*) Pinney *v.* Hunt, 6 Ch. D. 98.

The court of probate act, 1857, (r) gives to probate, after citation of the heir and other persons interested, and proof in solemn form, the same effect with regard to realty as it

—as to realty,

in the ecclesiastical court, with a particular reservation as to that legacy. But though courts of equity are bound to receive, as testamentary, a will, in all its parts, which has been proved in the proper spiritual court, yet they may, in certain cases, affect with a trust a particular legacy or a residuary bequest, which has been obtained by fraud. For instance, if the drawer of a will should fraudulently insert his own name, instead of that of a legatee, he would be considered in equity as a trustee for the real legatee. And it has never been thought that courts of equity, by declaring a trust, in such cases, infringed upon the jurisdiction of the ecclesiastical courts. Again, although it is now settled that a will cannot, either before or after probate, be set aside in equity on the ground that *the will* was obtained by *fraud on the testator*, yet where *probate* has been obtained by *fraud on the next of kin*, a court of equity will interfere, and either convert the wrong-doer into a trustee, in respect of such probate, or oblige him to consent to a repeal or revocation of it in the court in which it was granted. Thus, in Barnesley *v.* Powell, 1 Ves., Sr., 119, 284, 287, the bill sought to be relieved against a paper writing, purporting to be the will of the plaintiff's father, under which the defendant, Mansel Powell, claimed, and which was not without evidence to support it, although there was strong suspicion of forgery. It was also sought to be relieved against several acts of the plaintiff since his father's death; such as the decree of the Court of Exchequer against him and a sentence in the Prerogative Court, wherein the plaintiff's consent to establish that will by a probate was obtained, and a conveyance and assurances made by him. Lord Hardwicke C. directed an issue, with a special direction on the decretal order, to know on what foundation the jury went, if they found against the will, whether upon forgery, or any particular defect in the execution; and his lordship, after making some observations, with respect to the relief against the decree of the Court of Exchequer, proceeded to remark, 'As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the will is found forged; for then the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged will, that fraud infects the sentence; against which the relief must be here. This is not absolute, but only to show the tendency of my opinion upon the equity reserved after the trial; for I should not scruple decreeing the defendant, who obtained that probate, to stand as a trustee in respect of the probate; which would not overturn the jurisdiction of that court.' After a very long trial by a special jury, a verdict was brought in against the will, with an endorsement that it was grounded on forgery, and not on any defect in the execution. Upon the equity reserved, Lord Hardwicke admitted that undoubtedly the jurisdiction of the wills of personal estate belonged to the ecclesiastical court, according to which law it must be tried, notwithstanding the will is found forged by a jury at law, upon the examination of witnesses; but there was a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the ecclesiastical court by his fraud, not upon the testator, but

(r) 20 and 21 Vict., c. 77, §§ 61, 62.

had before with regard to personalty. (*s*) But the granting of probate in common form has no effect as regards] real estate, either *freehold

the person disinherited thereby. That fraud in obtaining a will infected the whole; but the case of a will, of which the probate was obtained by fraud on the next of kin, was of another consideration." Wms. Ex'rs (6th Am. ed.) 619, *et seq.* "It may properly be remarked, in this place, that where a person has acted under a probate, and admitted facts material to its validity, a court of equity may interfere by injunction, and prevent such person from proceeding further to contravert the will in the ecclesiastical court. Further, a court of equity, by reason of its jurisdiction as a court of construction, may, under particular circumstances, so construe an instrument, of which probate has been obtained, as to render it ineffectual. Thus, in Gawler *v.* Standerwick, 2 Cox 16, a paper was proved in the spiritual court as a codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what *they understood* to be the will of the testator, when he was unable to speak, in favor of certain legatees; and a bill having been filed in equity, a question was raised whether they were entitled to their legacies under this paper proved as a codicil. Sir Lloyd Kenyon, Master of the Rolls, said that, as it had been proved in the spiritual court, he was bound to receive it as a testamentary paper; but having so done, *the court of equity was to construe it.* Now the effect of this codicil was only that the parties *understood* it to be the will of the testator that the asserted legatees should have legacies, and the heir promised to perform this; but the court could not convert the promise of the heir into the will of the testator; and his honor, therefore, thought that this paper, though testamentary, yet operated nothing. * * * So in Campbell *v.* Beaufoy, Johns. 320, a plea by an executor who has proved a will, that "the testator was at the date of his will, and also at the time of his death, domiciled in France, and that all the bequests of the personal estate affected to be made by it are by the law of France null and void," was held by Wood, V. C., to be a good plea in bar to a suit by a legatee under the will for payment of his legacy, and for administration of the personal estate of the testator. So in Loftus *v.* Maw, 3 Giff. 592, which there has already been occasion to state, a revoking codicil, though it had been admitted to probate, was not allowed, under the circumstances, to have any revoking effect. It must, however, be observed that an executorship or administratorship may be denied in pleading, by a plea of *ne unques executor* or *administrator*, notwithstanding *profert* of the probate or letters of administration; and it was held that this traverse, upon issue joined, must be tried by the country (on which issue the probate or letters will be conclusive evidence,) and not by the certificate of the Ordinary, as in cases of excommunication. And from its having been thus established that a probate is not conclusive in *pleading*, probably, grew the doubt which once existed, whether it was conclusive in *evidence*. Under the law before the passing of the court of probate act (1857), the jurisdiction of the ecclesiasti-

[(*s*) To bring a will within the purview of this enactment, it must be one which, both as to realty and personalty, is to be tested by the same considerations. For if there were any difference between them it would be absurd to enact that probate of one should be conclusive evidence of the validity of the other. Consequently it must be a will executed since and according to the stat. 1 Vict., c. 26. Campbell *v.* Lucy, L. R., 2 P. & D. 209.]

or copyhold: (*t*) [except (under the act of 1857) to furnish *prima facie* evidence of the validity and contents of the will.] (*u*). And, even with respect to personal estate, the granting probate

—as to personalty.

cal court was confined to goods and chattels; it had no power of administration over other property; and therefore its judgments would bind those only who claim an interest in personal property. Hence the probate was not conclusive evidence, or even, it should seem, admissible evidence, that the instrument was a will, so as to pass copyhold or customary estate, or so as to operate as a sufficient execution of a power to charge land. Again, it has already appeared, that to establish in evidence the will of a married woman made in execution of a power, probate of it in the court of probate is first necessary, in order to confirm judicially its testamentary nature. But formerly the production of such a probate would not alone have been sufficient to induce a court of equity to act upon it; for there were other special circumstances which might have been required to give the instrument effect as a valid appointment, viz., attestation, sealing, &c. with which circumstances the temporal courts did not trust the judgment of the spiritual court. The witnesses, therefore, to these facts, must have been examined in chief to prove that the will was the wife's act, &c.; and if an attestation were not required by the power, still her signature must have been proved. But by the 10th section of the new wills act all such additional varieties in the execution of testamentary appointments have, in effect, been abolished. Further, as the court of probate had no jurisdiction to authenticate a will, as far as it relates to real estate, it was held that the probate was no evidence at all of the validity or contents of a will, as to such property, not even when the original will was lost, except indeed as a mere copy. So on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity so as to be a bar to the prosecution. It must also be observed, that although the sentences of the court of probate are conclusive evidence of the right directly determined, yet they are not so of any collateral matter, which may possibly be collected or inferred from the sentence by argument. Therefore letters of administration which have been granted to a person as administrator of the effects of A. B, deceased, are not *prima facie* evidence of A B's death. Likewise, though no evidence was receivable to impeach the probate, or the letters of administration, being the judicial acts of a court having competent authority, yet it might be proved that the court which granted them had no jurisdiction, and that therefore their proceedings were a nullity. Thus it might, under the old law, be shown upon a plea of *ne unques executor* that the deceased had *bona notabilia* in divers dioceses; and that

(*t*) Hume *v.* Rundell, 6 Madd. 331. [See also Bonser *v.* Bradshaw, 5 Jur. (N. S.) 86; Loffus *v.* Maw, 3 Giff. 592. A will disposing of real estate only is not entitled to probate. In re Bootle, L. R., 3 P. & D. 177. *Secus*, if it appoints executors, though they afterwards renounce. In re Jordan, L. R., 1 P. & D. 555. If a will appointing executors be made in execution of a power, the appointment of executors taking effect under the power does not entitle the will to probate; for here the executors take nothing *jure representationis*. Tugman *v.* Hopkins, 4 M. & Gr. 389; O'Dwyer *v.* Geare, 29 L. J., Prob. 47; In re Barden, L. R., 1 P. & D. 325.

(*u*) Barraclough *v.* Greenhough, L. R. 2 Q. B. 612.]

of any paper has no other effect than to establish generally its claim to be received as testamentary; and it remains for the court of construction to determine the meaning and effect of the instrument thus stamped with a testamentary character. (*x*) The adjudication of this court may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property; (*y*) or to be in substance the same as [or in substitution for] another paper of which probate has been granted; (*z*) or that its provisions are invalid according to the law of a foreign country, which constituted the domicile of the maker at the time of his decease; (*a*) 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 Sir W. Grant, (*b*) 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 construction. (*c*) 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 founda*tion of all testamentary construction. Certainly, in recent times, no hesitation has been felt by the courts, in

consequently the bishop or other inferior judge had no jurisdiction to grant probate or administration; for this confessed and avoided, and did not falsify the seal of the Ordinary. So it may be proved that the supposed testator or intestate is alive; for in such case the court of probate can have no jurisdiction, nor their sentence any effect. And it may be shown that the seal attached to the supposed probate has been forged; for that does not impeach the judgment of the court of probate; or that the letters testamentary have been revoked; for this is in affirmance of its proceedings." Wms. Ex'rs (6th Am. ed.) 627, *et seq.*

[(*x*) In re Mundy, 30 L. J., Prob. 85.]

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

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

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

[(*b*) Sandford *v.* Raikes, 1 Mer. 651.

(*c*) See per Sir E. Sugden, Heron *v.* Stokes, 2 Dr. & War. 98; and per Lord Westbury, Gordon *v.* Gordon, L. R., 5 H. L. 276. 43 Barb 645

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." (*d*) It is true that Lord Cranworth expressed an opinion, that it was not competent for the court of construction on every occasion to look at the original will. 22 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 probate court with respect to the form of the probate copy in question.] (*e*)

As to probate of testamentary appointments.

Where a paper professed to be an appointment under a power, the ecclesiastical court applied to it the ordinary principles of testamentary law, without attempting, in that proceeding, to pronounce on its sufficiency as a due execution of the

(*d*) Per K. Bruce, L. J., 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.]

22. The authority of directly passing upon the validity of a will never belonged to the Court of Chancery, and was therefore never rightly exercised by it; yet it has always been competent to that tribunal to fix a trust upon any legacy or residue in cases of fraud. Upon application to the Court of Chancery for the construction of a will or for the payment of legacies thereunder, it has always proceeded on the presumption that the will had already been *proved* in the proper court. "The court," said Lord Langdale, M. R., in Ryves *v.* The Duke of Wellington, 9 Beav. 579, "does interfere for the protection of property *pendente lite* for probate and letters of administration and does perhaps sparingly and with great caution exercise some jurisdiction in some cases of fraud practiced in obtaining probate or in the spoliation of wills; but relief under a will produced is given only in the cases where grants have been made of probate or of letters of administration." See this case under the title In the goods of his late Majesty King George the Third, 3 Sw. & Tr. 199. "As long as the probate of a will remains unimpeached the will itself is not examinable—except for purposes of construction—in the Chancery Division of the High Court of Justice. Kerrick *v.* Bransby, 7 Bro. C. C. 437. The probate is conclusive evidence that the instrument was testamentary according to the law of the land, and also as to the title of the executors to all personal property of which the testator was capable of disposing. Again the Chancery Division cannot afford relief to legatees or devisees under a will defectively executed; for being mere volunteers they have no more equity than the next of kin or heir and where equity is equal the law will prevail." Flood on Wills 558, 559.

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

power under which it purported to be made. (*f*)[23] [This practice was indeed temporarily departed from, but was ultimately restored by the decision in Barnes *v.* Vincent, (*g*) in which it was held that probate ought to be granted 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. (*h*)[24] This, it was said, restored the ancient and landable practice of the ecclesiastical courts.] The granting of probate precluded the Court of Chancery from questioning the testamentary character of the paper. It remained for that court to determine whether the formalities prescribed by the power had been complied with, (*i*) [and whether, in other respects besides the testamentary character of the paper the power *had been duly exercised. (*k*)

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

23. Where a will is made under a power, it must be executed with the same formalities as any other will. And a will of this character must be proved, as an ordinary will is proved. If such will affects personalty only, the Court of Chancery will not permit it to be set up until it shall have been properly admitted to probate in a court competent to admit to probate. Picquet *v.* Swan, 4 Mason C. C. 443. If a will purports to execute a power, and it was evidently the intention of the testator to execute the power, but the power is not well created, or does not in fact exist at all, yet if the party had a right to dispose of the fund, the will should be admitted to probate as a mere will, for the authority of the testator to give the fund will come in to support his intended disposition of it. Southall *v.* Jones, 1 Sw. & Tr. 298.

[(*g*) 5 Moo. P. C. C. 201, 10 Jur. 233, 4 No. Cas. Supp. XXXI.; Tatnall *v.* Hankey, 2 Moo. P. C. C. 342; Paglar *v.* Tongue, L. R., 1 P. & D. 158; In re Fenwick, Id. 319.

(*h*) The case of In re Monday, 1 Curt. 590, seems therefore overruled.]

24. "With regard to a will alleged to have been made in execution of a power, and proof is produced of a power enabling the deceased to dispose of property by will, the court (of probate) is bound to decree probate of such a paper, and has no authority to inquire whether the will is in the form required by law for the due exercise thereof, or whether it has been exercised with the formalities required by the power. It is for the court of construction to decide whether the will is operative." Flood on Wills 560; De Chatelain *v.* Pontigny, 1 Sw. & Tr. 411, 29 L. J., P. & M. 147; Parkinson *v.* Townsend, 44 L. J., P. & M. 32. See observations of Sir H. J. Fust on Barnes *v.* Vincent (*supra*) in Este *v.* Este, 2 Rob. Eccl. Rep. 351.

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

[(*k*) Paglar *v.* Tongue, L. R., 1 P. & D. 158, where the question left was, whether the will, dated 1844, of a married woman who died in 1865, was a due exercise of testamentary powers given to her in the meantime.

But if no special formalities were prescribed, the granting of probate was final on that head. (*l*)

Judges of the probate court have pronounced the practice described above to be inconvenient, since it required them to grant probate of an instrument which, but for the existence and due execution of the alleged power (into which they were forbidden to inquire), did not amount even to the appointment of an executor. (*m*) It is probable, therefore, that under the judicature act, 1873, which gives equal jurisdiction to all the judges of the High Court, and directs that all questions "properly brought forward by the parties in any cause or matter" shall be completely disposed of in that cause or matter, (*n*) the judges of the probate division will, in a proceeding for probate, themselves determine whether the power has been well executed whenever the necessary parties are before them. (*o*) But where any of the parties entitled to be heard on those questions are not before the court (*e. g.*, persons who, under the instrument creating the power, claim in default of appointment), the former practice must be followed.]

Probate of wills of married women.

The question, whether any particular fund forms part of the separate estate of a testatrix, a *feme covert*, is differently situated. [There can be but two parties to this question, namely, the husband and the executor. (*p*) Both claim through the *feme covert* and both are necessarily before the court of probate; and since the judicature act, 1873, if not before, (*q*) that court ought to decide the question, whether there is separate estate or not, in all cases where the question is ready and properly presented for decision: and probate will be granted, not confined to the property decided to be separate, but including all over which the testatrix had a disposing power and which she has disposed of; thus leaving the question as it regards other items of property "to be decided at a future period."] (*r*) If no executor *is appointed, the court commonly grants a general

(*l*) Ward *v.* Ward, 11 Beav. 377. In Gullan *v.* Grove, 26 Beav. 64, the questions 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. See also D'Huart *v.* Harkness, 34 Beav. 324, *ante* p. *8.

(*m*) In re Hallyburton, L. R., 1 P. & D. 90; Paglar *v.* Tongue, Id. 158.

(*n*) Sect. 24, subs. 7.

(*o*) See per Jessel, M. R., In re Tharp, 3 P. D. 76.

(*p*) The executor represents the legatees, *ante* p. *26, n. (*j*)

(*q*) See cases cited In re Tharp, 3 P. D. 79, in all of which the decision *affirmed* that the property in question was separate property; but in Ledgard *v.* Garland, 1 Curt. 286, it appears that this was not thought to be the proper forum.

(*r*) In re Tharp, 3 P. D. 79.]

administration to the husband, and not a limited administration to the legatees under the appointment, (*s*) 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. 25

The facility with which loose papers were proved in the ecclesiastical courts was sometimes complained of by the judges of other courts, on whom has fallen the duty of expounding the jargon thus pronounced to be testamentary. (*t*) 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. (*u*) The exclusion, however, by the statute 1 Vict., of all testamentary papers which are not attested by two witnesses, has materially checked the evil which has been the subject of complaint; for it rarely happens that these informal and irregular papers are attested. The occurrence will also be [generally] 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 probate court, the whole matter relating to the sufficiency of the execution (so far at least as the personal estate is concerned) will [even independently of the judicature act, 1873] be brought within the jurisdiction of that court. (*x*)

Effect of 1 Vict., c. 26, in checking informal and irregular testamentary papers.

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

25. In Holman *v.* Perry, 4 Metc. 492, the will of a married woman, made in execution of a power reserved in an antenuptial contract, was admitted to probate without passing upon the effect of the will as to property not covered by the contract. In that case Dewey, J., said: "The probate of a will does not necessarily settle any question of title to real estate arising under such will. Questions of that character are to be settled by proper proceedings at law or in equity."

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

(*u*) 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.

(*x*) 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, § 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 Taylor *v.* Meads, 4 D., J. & S. 597.]

*CHAPTER III.

PERSONAL DISABILITIES OF TESTATORS. (a)

The general testamentary power over freehold lands of inheritance was originally conferred by the statute of 32 Hen. VIII., 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 and 35 Hen. VIII., 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 seized 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, com-

Exceptions 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 Wms. Ex'rs, pt. 1, bk. II., ch. 3.

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

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

prise all 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 32d 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*)[1]

As to wills of infants.

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

(*e*) Bishop *v.* Sharpe, 2 Vern. 469; Whitmore *v.* Weld, 2 Ch. Rep. 383; Hyde *v.* Hyde, Prec. Ch. 316; [Co. Lit. 896, n. (6).]

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

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

1. Prior to the recent wills act (1 Vict., c. 26,) the doctrine of the law was that infants who had attained the age of fourteen, if males, or twelve, if females, were capable of making wills of personal estate. "At these ages the Roman law allowed of testaments; and the civilians agree that our ecclesiastical courts follow the same rule. And as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. But this doctrine is not sustained by the authority of civilians only: books of considerable authority, written by common lawyers, mention twelve and fourteen for the same purpose: prohibitions have been refused by the King's Bench when applied for to restrain the ecclesiastical court from allowing wills made at such early ages, and there are several instances in which the doctrine has been recognized and adopted in the Court of Chancery. These ages are also selected by the law of England as those when infants of the respective sexes shall have the power of choosing guardians. In the case of Arnold *v.* Earle (MS. *coram* Sir Geo. Lee, 5th June, 1758, cited in 4 Burn. E. L. 45, n. (9) by Tyrwhitt), in the Prerogative Court of Canterbury, the will of a school-boy of the age of sixteen, in favor of his schoolmaster, was established, where no evidence of fraud, improper influence, or control was shown. But though no objection can be admitted to the will of an infant of

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. II., c. 24, § 8, which enabled any father, *within the age of twenty-one, or of full age*, who should

fourteen, if a male, or twelve, if a female, merely for want of age, yet if the testator was not of sufficient discretion, whether of the age of fourteen or four-and-twenty, that will overthrow the testament. No custom of any place can be good to enable a male infant to make any will before he is fourteen years of age. When an infant hath attained the age above mentioned, he or she may make a will without and against the consent of their tutor, father or guardian. If he or she hath attained the last day of fourteen or twelve years, the testament by him or her made in the very last day of their several ages aforesaid is as good and lawful as if the same day were already then expired. Likewise if after they have accomplished these years of fourteen or twelve, he or she do expressly approve of the testament made in their minority, the same by this new will and declaration is made strong and effectual. But the mere circumstance of an infant having lived some time after the age when he became capable of making a will cannot, without republication, give validity to one made during his incapacity. (Herbert *v.* Torhall, 1 Sid. 162)." Wms. Ex'rs (6th Am. ed.) 19, *et seq.;* Shep. Touch. 403; Swinb., pt. 2, § 2, pl. 6; Godolph., pt. 6., ch. 8, § 8; 2 Black. Com. 497; Smallwood *v.* Brickhouse, 2 Mod. 315; Dalby *v.* Smith, Comberb. 50; Hyde *v.* Hyde, Prec. Ch. 316; Anon., Mosely 5; Ex parte Holyland, 11 Ves. 10; Com. Dig., Devise, H 2; Bac. Abr., Wills, B 2; Walkem on Wills 20, *et seq.;* 1 Redf. on Wills 15, *et seq.* However there were many irreconcilable opinions on the subject of the testamentary age of an infant, which are to be found in the older books. Lord Coke named eighteen as the age (Co. Lit. 89 b, n. 83,) and others have claimed that it was seventeen, that being the age when, before the stat. 38 Geo. III, c. 87, an administration during the minority of an executor determined. Some state that the age is twenty-one, because none can be administrators until that age. In Perkins it is said that *four* is the age for making a will of personalty; yet it is hard to believe that this was the intended statement of the writer, and it is generally, and probably correctly attributed to a mistake of the press in omitting the figure X, it being most probable that XIIII. was the age intended. Swinb., pt. 2, § 2, note (*f*). But under the recent law (1 Vict., c. 26,) the wills of all persons under the age of twenty-one are absolutely null and void. "No wills made by infants—unless they happen to be soldiers or sailors in actual service—made, since the 1st of January 1838 are valid (1 Vict., c. 26, § 7,) nor can an infant now appoint a testamentary guardian of his children, nor exercise any power of appointment by will." Flood on Wills 367. It is appropriate to inquire what is to be deemed *actual service* in the case of a soldier or sailor. The first important case on this subject since the wills act, 1838, was that of Drummond *v.* Parish, 3 Curt. 522. In that case the decision arrived at by Sir Herbert Jenner Fust was that *actual service* was in the case of a soldier being *on an expedition*, and in that of a sailor being *at sea*. The recent legislation in the United States has tended toward the same standard of age requisite for the making of a will as that adopted by the recent wills act in England. In many of the states the power of making any will has been entirely denied to minors. In some of the states, on the other hand, a will of personalty may be made by a minor, although he is not capable so to dispose of realty. Some of the states still preserve the distinction

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; (*h*) 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. [2]

between male and female testators, by allowing a female to dispose of her property at a younger age than is permitted in the case of a male. In a large number of the states no distinction, however, is made either between wills of real and personal estate, or between male and female testators, and the age requisite in those states for the execution of a will is twenty-one years. This is the case in Ohio, Oregon, Pennsylvania, Delaware, Florida, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, Kentucky, New Jersey, North Carolina, South Carolina and Texas. In New York no will of realty can be made by any person who has not attained the age of twenty-one years, but personalty may be disposed of by will by males of the age of eighteen years, and by females of sixteen. The testamentary age is fixed at twenty-one for real estate, and at eighteen for personal estate, in the following states: Alabama, Arkansas, Missouri, Rhode Island, Virginia and West Virginia. But for construction of the statute in Alabama, see Banks *v.* Sherrod, 52 Ala. 267. In Colorado and California a valid will may be made by any person at eighteen, and in the former state, if it be of personalty only, the testamentary age is seventeen. In the District of Columbia and the States of Maryland, Vermont, Iowa, Minnesota, Kansas and Illinois, wills of real estate may be made by males at twenty-one and females at eighteen. Eighteen is the testamentary age fixed in Dakota, Nevada, Utah and Connecticut. The revised code of Georgia, § 2406, provides that infants under fourteen cannot make wills. In Kentucky a minor, however, may make a will in pursuance of a power specially given, and a father under twenty-one may by will appoint a guardian to his child. Gen. Stats. 1873, ch. 113, § 3. The statute of Wisconsin provides that the testamentary age must be twenty-one, except that in the case of a married woman a valid will may be made if she be eighteen or upwards. Stats. Wis. 1871, ch. 97, § 1. The statute of minors in Vermont provides that males shall attain majority at twenty-one and females at eighteen for all purposes. Goodell *v.* Pike, 40 Vt. 319. It is provided by statute in Texas that it must appear that the testator was twenty-one years of age and upwards when he signed the will. Laws 1873, arts. 5535, 5537. In Moore *v.* Moore, 23 Texas 637, it is said that "a person under the age of twenty-one cannot make a will." The South Carolina statute says that *infants* cannot make a will, and then proceeds: "No person under twenty-one can make a will of real estate." Rev. Stats. 1873, 442. It is provided by the statute of Iowa that all persons shall attain majority by marriage.

(*h*) This exception seems to be now inoperative: See Simpson on Infants 201, and stats. cited.

2. This power is no longer exercisable by an infant in England. See *ante* n. 1; Flood on Wills 367; 1 Vict., c. 26, § 7; Sug. P. 178. But in many of the United States this power is directly conferred by statute, the provision being generally copied from 12 Car. II., c. 24, 2 Kent 224, 227. See also Macknet *v.* Macknet, 9 C. E. Gr. (N. J.) 277, 295, 296; S. C., 11 C.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising

E. Gr. (N. J.) 258. The statute of 12 Car. II., c. 24, has been adopted in New Hampshire. Balch *v.* Smith, 12 N. H. 437. But it was never in force in Massachusetts. Wardwell *v.* Wardwell, 9 Allen 518, 519. The act of July 2d, 1822, in New Hampshire, which empowered the judge of probate to appoint guardians, did not take away the power conferred by 12 Car. II., c. 24. A father has no power at common law to appoint a testamentary guardian for his child, Metcalf, J., in Wardwell *v.* Wardwell, 9 Allen 518, 519. Under the statute, 12 Car. II., the father only could appoint such guardian. Balch *v.* Smith, *ubi supra.* But in the absence of directions by the father, the clearly expressed wishes of the mother will be regarded. In the matter of Turner, 4 C. E. Gr. (N. J.) 433. In this case it was said by Zabriskie, Ordinary, "The father has expressed no wish or preference in this matter, but the mother, the surviving parent, has. She had no power to dispose of the guardianship, and the disposition of it in her will is void; but it is an authentic expression of her wishes, and as such will be regarded by the court." See also Cozine *v.* Horn, 1 Bradf. 143; Foster *v.* Mott, 3 Id. 409. In Pennsylvania it has been held that an appointment of a testamentary guardian by a grandfather for his grandchildren cannot be made in derogation of the rights of the father. Yet if the grandfather devise certain estate to the grandchildren, on condition that a person named be their guardian and manage the estate, the father taking an interest under the will, the Orphans' Court will not appoint a guardian on application of the father. Vanartsdalen *v.* Vanartsdalen, 14 Penna. St. 384. Nor can a testator appoint a guardian for his brother's children; this power extends only to his immediate offspring. Brigham *v.* Wheeler, 8 Metc. 127. If the testator has exercised his right to appoint a guardian for his children, a probate court has no jurisdiction to appoint one. Holmes *v.* Field, 12 Ill. 424. Nor is it necessary for such a guardian to take out letters of guardianship; the authority to act comes directly from the will. Norris *v.* Harris, 15 Cal. 226. The powers and duties of testamentary guardians are a personal trust, and cannot be assigned. Balch *v.* Smith, *ubi supra.* Under the Massachusetts statute (Gen. Stat., ch. 109, § 5,) a testamentary guardian can only be appointed by a will executed in the manner provided for the execution of other wills. Wardwell *v.* Wardwell, 9 Allen, 518. On this point it was said by Metcalf, J.: "No form of execution being expressly prescribed by statute for wills appointing guardians, it is for the court to decide what that form shall be. And as there is no common law respecting this class of wills, we resort to the law prescribed by the legislature in the analogous cases of written wills of property. For aught that we perceive, the same reasons for requiring those wills to be attested by three witnesses apply to wills for the appointment of guardians. * * * It is not to be supposed that the legislature would purposely have prevented a father from bequeathing a shilling to his child, except by a will attested by three witnesses, and yet have given him power—a power withheld for more than two hundred years—to place a guardian over him during his minority, by a will attested by no witness, or by less than three." Wardwell *v.* Wardwell, 9 Allen 520, 521. The power of the surrogate extends only to the appointment of a guardian; he has no power over a testamentary guardian. But such guardians are always subject to the Court of Chancery. In the matter of Andrews, 1 Johns. Ch. 99. In this case Kent, C., said, "Every

directly; (*i*) and it is observable, that though the authority of guardians, appointed under the statute of Charles, does not *extend 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. (*j*) 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*)[3] Mental imbecility arising from advanced age,[4] or produced permanently or temporarily by excessive drinking,[5] 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.[6] [It seems, however, that a person born deaf and dumb,

guardian, however appointed, is responsible here (in chancery) for his conduct, and may be removed for misbehavior. It has repeatedly been declared that a testamentary or statute guardian is as much under the superintendence of the Court of Chancery as the guardian in socage." See also Wilcox *v.* Wilcox, 14 N. Y. 575.

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

(*j*) 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.

3. See Note A, *post* p. 91.

4. See Note B, *post* p. 93.

5. See Note C, *post* p. 97.

(*m*) See Swinb., pt. 2, §§ 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.]

6. An old writer says: "A man that is both deaf and dumb, and that is so by nature, cannot make a testament. But a man that is so by accident may by writing or signs make a testament. And so may a man that is deaf or dumb by accident. And so also may a man that is blind." Shep. Touch. 403. Anciently it was believed that those who were born deaf and dumb were without ordinary mental powers, and if to this were added the affliction of blindness, not only among the common people but by the doctors of the law, the sufferer was classed as an idiot. Even Blackstone adopted this then prevalent error. He says: "But a man who is born deaf, dumb and blind is looked upon by the law as in the same state with an idiot: he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." 1 Com. 304. So again he says: "Such persons as are *born* deaf, dumb and blind; who, as they have always wanted the common inlets

but not blind, though *prima facie* incapable, (*o*) may be shown to have capacity, and to understand what is written down; (*p*) and this of

of understanding, are incapable of having *animum testandi*, and their testaments are therefore void." 2 Com. 497. But in these later times, when it has been shown how much of true intellect may be possessed by these unfortunate classes, and when it is well known that the great majority of them may be educated to the highest degree, the law will no longer look upon such as at all bereft of reason; far less would it class them with idiots. This disability of a testator, then, is not so much on account of his own lack of testamentary capacity, as of the abundant opportunity for fraud or imposition to be practised upon him. Both in England and the United States the will of a person deaf and dumb, or blind, or deaf, dumb and blind, would be admitted to probate, but the court would look with great jealousy at the transaction, and would require most unquestionable proof that the testator knew what disposition he was making of his property, and that the will produced was known to the testator to be in perfect accordance with his instructions. We learn from the old text-books of the ecclesiastical law, that it was then held that he who is blind cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will. Swinb., pt. 2, § 11; Godolph., pt. 1, ch. 11. The civil law, also, expressly required that the will should be read over to the testator, and approved by him in the presence of all the subscribing witnesses. In England and the United States it appears that the same strictness is not necessary, but that the requirement is only sufficient proof to the court that the testator knew and approved the contents of the will which he executed. Moore *v.* Paine, 2 Cas. Temp. Lee 595; Flood on Wills 393, 394. In one case the oath of the writer unsubstantiated was held sufficient to prove the identity of the will. In re Axford, 1 Sw. & Tr. 540. And it would appear unnecessary to prove that the *identical* paper which was executed by the testator was read over to him. Fincham *v.* Edwards, 3 Curt. 63. It was said by Washington, J., in Harrison *v.* Rowan, 3 Wash. C. C. 580: "If the testator knew what he was about, and was possessed of sufficient understanding to make a valid will, his acknowledgments to the witnesses and his direction to the executor to take charge of the will, amount to strong and persuasive evidence that he was acquainted with its contents." It is sufficient for the jury to be satisfied that the paper propounded as such *is* the last will and testament of the deceased. Clifton *v.* Murray, 7 Ga. 564. See also Carr *v.* McCamm, 1 Dev. & B. 276; Wampler *v.* Wampler, 9 Md. 540. In one case it was said by Richardson, J.: "I would not say that it is absolutely impossible (although it is so considered by great writers) that even a blind and deaf and dumb man can make a will." Reynolds *v.* Reynolds, 1 Speers 253, 257. It has been held that to establish the will of a person totally blind, or so nearly so as to be incapable of discerning writing, it must be proved that the will was read over to the deceased in the presence of the witnesses, *or that he was otherwise acquainted with its contents.* Fincham *v.* Edwards, 3 Curt. 63. See also Cunliffe *v.* Cross, 32 L. J. (N. S.) Prob. Cas. 60; Barton *v.* Robins, 3 Phill. 455, n.; Harrison *v.* Rowan, 3 Wash. C.

(*o*) Swinb., pt. 2, § 10.

(*p*.) Dickenson *v.* Blissett, 1 Dick. 268; In re Harper, 6 M. & Gr. 731, 7 Scott, N. R. 431. As to the evidence required, see In re Owston, 31 L. J., Prob. 177; In re Geale, 33 L. J., Prob. 125.

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

C. 580; Weir *v.* Fitzgerald, 2 Bradf. 42, 68; Wampler *v.* Wampler, 9 Md. 540; Martin *v.* Mitchell, 28 Ga. 382; Clifton *v.* Murray, 7 Ga. 564; Davis *v.* Rogers, 1 Houst. 44; Guthrie *v.* Price, 23 Ark. 396. A person who is blind may make a valid will. In the goods of Piercy, 1 Robert. Ecc. 278; Ray *v.* Hill, 3 Strobh. 297; Wampler *v.* Wampler, *ubi supra;* Weir *v.* Fitzgerald, *ubi supra;* Lewis *v.* Lewis, 6 Serg. & R. 489; Reynolds *v.* Reynolds, *ubi supra.* If the will be attested in the *constructive* presence of one who is blind, it must appear that he could have seen the witnesses sign had he had his eyesight. In the goods of Piercy, *ubi supra.* In Fincham *v.* Edwards, 3 Curt. 63, Sir Herbert Jenner Fust admitted the will to proof, saying: "Certainly when the court is asked to grant probate of a will of a party totally or almost blind, it must be shown to the satisfaction of the court that the contents of the will are conformable to the instructions and intentions of the deceased. Undoubtedly in this case the will is not proved to have been read over to the deceased. A reference has been made to Mr. Williams' treatise; but the case of Barton *v.* Robins, 3 Phill. 455, n., shows that it is not necessary that the actual will should be read over if there is proof that the party deceased knew the contents of it." As to the former state of the law in regard to the competency of deaf and dumb persons to execute contracts and wills, see Brower *v.* Fisher, 4 Johns. Ch. 441. As to the present state of the law on the same point, see Weir *v.* Fitzgerald, *ubi supra;* Potts *v.* House, 6 Ga. 324; Gombault *v.* Pub. Adm'r, 4 Bradf. 226. It has been held in England that where the will was made by a person who was born deaf and dumb, the court of probate will require evidence, on affidavit, of the signs made use of by the testator to communicate his wishes, and that he understood and approved of the provisions of the will, and such evidence will be closely scrutinized. In the goods of Owston, 2 Sw. & Tr. 461; In the goods of Geale, 3 Sw. & Tr. 431. So far has the old doctrine that persons deaf and dumb from their birth were idiots been overcome, that such persons are now admitted as witnesses in the courts, yet the burden of proof will be on the party producing the witness, to show that he is a person of sufficient understanding to comprehend the nature and requirements of his position. Greenleaf says: "This being done, a deaf mute may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas by writing, he will be required to adopt that as the more satisfactory, and therefore the better, method; but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs." 1 Greenl. Ev., § 366; 1 Best Ev., § 148.

[(*q*) Swinb., pt. 2, § 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.]

clearest proof that no imposition has been practised. This remark especially applies to wills executed by the inmates of lunatic asylums, (*s*) *or any other person habitually or occasionally afflicted with insanity.

Lunatics.

A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods;[7] 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 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.[8]

Fraud.

Undue influence over a weak mind.

(*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 sound of mind at the time. See 1 Dow 179; [Martin *v.* Johnston, 1 Fost. & Finl. 122; Nichols *v.* Binns, 1 Sw. & Tr. 239.]

7. See Note D, *post* p. 99.

(*t*) Swinb., pt. 2, § 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.

8. See Note E, *post* p. 131.

[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*)[9] A suspicion is justly entertained of a will conferring large benefits on the person by whom or

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

[(*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.) 330.

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

9. In the case of Durnell *v.* Corfield, 1 Rob. Ecc. 51, Dr. Lushington said: "The doctrine is that proof of the knowledge of the contents may be given in any form; that the degree of proof depends on the circumstances of each case; that in perfect capacity knowledge of contents may be presumed, but that when the capacity is weakened, and the benefit to the drawer of the will is large, the presumption is weaker, the suspicion is stronger; the proof must be more stringent, and the court must be satisfied of the knowledge of the contents beyond the proof of execution by the testator. I must add another consideration—the nature of the instrument executed—its simplicity or complexity. * * * I have always understood the doctrine to be, that, in case of suspicion (which depends upon all the circumstances of the case,) the proof is to be in proportion to the degree of suspicion. But it may be truly said, that the greater loss of capacity, the more stringent is the necessity for adequate proof of knowledge of contents." If from want of education or from bodily affliction the testator is unable to read, it must be proved that he knew the contents of the will; his execution or acknowledgment of the will is not sufficient. Barton *v.* Robins, 3 Phillim. 455, n. (*e*). "So it is an established rule in the spiritual court, that, where the capacity of the testator is doubtful at the time of execution, there must be proof of instruction, or of reading over, or other satisfactory evidence of some kind, that he knew and approved of the contents of the will. Billinghurst *v.* Vickers, 1 Phillim. 193; Ingram *v.* Wyatt, 1 Hagg. 382; Dodge *v.* Meech, Id. 620; Barry *v.* Butlin, 1 Curt. 637; Durnell *v.* Corfield, 1 Rob. 51; Jones *v.* Goodrich, 5 Moore P. C. 16; Mitchell *v.* Thomas, 6 Moore P. C. 137; Browning *v.* Budd, 6 Moore P. C. 430; Greville *v.* Tylee, 7 Moore P. C. 320. But this rule only applies, or at least only applies with any stringency, when the instrument is inofficious—*i. e.*, not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited. Brogden *v.* Brown, 2 Add. 449. In a modern case (Sankey *v.* Lilly, 1 Curt. 402,) a will had been propounded in a *condidit*, and the three attesting witnesses only had been examined. The testatrix was upwards of eighty years of age and very infirm; she was deaf and almost blind, and the instrument had been drawn up from directions given by the executor, who was partially the residuary legatee, and no instructions were proved to have been given by the deceased. Sir H. Jenner Fust pronounced against the validity of the will, not on the supposition of any fraud having been practised, but on the ground of failure of proof." Wms. Ex'rs (6th Am. ed.) 403, *et seq.* See also Harwood *v.* Baker, 3 Moore P. C. C. 282; Croft v. Day, 1 Curt. 784; Dufaur *v.* Croft, 3 Moore P. C. C. 136. The same rule as to knowledge of contents is laid down in the American cases as that maintained in the English cases above referred to. In Day *v.* Day, 2 Gr. Ch. (N. J.) 549, 552, it is said: "In this case it is without

by whose agent it was prepared, (*a*) or of a will in favor of a medical attendant in whose house the testator resided; (*b*) but it seems that this 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*) Such knowledge

Suspicion when will prepared by legatee, or in favor of medical attendant.

question that the testator did not read the will himself. It was not in his possession so as to afford him an opportunity; and if it had been, he was so weak and low as to be unable to do it. It is also clear that it was not read over to him. It must, then, be shown to the satisfaction of the court, that he was in some other way made acquainted with the contents of the instrument, and approved them. In this case the presumption of law fails; and it becomes the duty of the person offering the will, to show that the contents of the paper were fully made known to the testator. So if the testator is incapable of reading the will, whether the incapacity arise from blindness, sickness, or any other cause, the rule is the same, and the burden of proof is thrown on the person offering the will. 1 Swin. 96; 4 Burns Ec. Law 56. And in the case of Billinghurst *v.* Vickers, 1 Phill. Ec. Rep. 187, it was held that when the capacity to read is doubtful, it must be shown that the will was read over or that it conforms to the instructions given." See also Harrison *v.* Rowan, 3 Wash. C. C. 580; Harris *v.* Vanderveer's Ex'r, 6 C. E. Gr. (N. J.) 561; Lyons *v.* Van Riper, 11 Id. 337; Gerrish *v.* Nason, 22 Me. 438; Downey *v.* Murphey, 1 Dev. & B. 87; Stewart *v.* Lispenard, 26 Wend. 255; McNinch *v.* Charles, 2 Rich. 229; Tomkins *v.* Tomkins, 1 Bailey 92; Chandler v. Ferris, 1 Harr. (Del.) 454; Pettes *v.* Bingham, 10 N. H. 515; Wampler *v.* Wampler, 9 Md. 540. In Day *v.* Day, *ubi supra*, it was held that if it be established, either by direct evidence or by circumstances so conclusive as to admit of no reasonable doubt, that the will in question was truly copied from a previous will, with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing. Or if it can be shown that the will in question is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents. If, however, there are material departures from the provisions of such previous will, especially if the alterations be not in accordance with the known feelings of the testator toward one of the legatees in the previous will, then it must be clearly shown that the testator fully knew and understood such alterations in the subsequent will.

(*a*) Paske *v.* Ollat, 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; Cockroft *v.* Rawles, Id. 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 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.

is of course *requisite; (*d*) but it will be presumed if there is no evidence to the contrary, (*e*) and if capacity is duly proved. (*f*)[10]

d) Hastilow *v.* Stobie, L. R., 1 P. & D. 64.

(*e*) Fulton *v.* Andrew, L. R., 7 H. L. 448.

(*f*) 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.* Schœfle, 16 Jur. 909. And on both points, Boyse *v.* Rossborough, 6 H L. Cas. 1, 3 Jur. (N. S.) 373.

10. By the civil law a will written by a person in favor of himself was void. Dig. 48, tit. 10, § 15, and 34, § 8. But the law of England and of this country does not go to that extent. Although the will be drawn by the party to be benefited thereby that fact will not invalidate the will. Wills drawn by attorneys, as well as those drawn by medical attendants, conferring large benefits upon themselves, have been sustained. But they are closely scrutinized, and the party propounding them will be held to very clear proof that they express the voluntary disposition of the testators, free from any undue influence. Flood on Wills 400, *et seq.;* Walkem on Wills 150, *et seq.* In Delafield *v.* Parish, 25 N. Y. 9, Davies, J., says: "In regard to the effect of a will being written or procured by one interested in its provisions, the maxim, *qui se scripsit hæredem*, has imposed, by law, an additional burden on those claiming to establish a will under circumstances which call for the application of that rule; and the court, in such a case, justly requires proof of a more clear and satisfactory character." It is said by the court, in Crispell *v.* Dubois, 4 Barb. 398, "That though this rule of the civil law has not been adopted in our courts, yet they do demand satisfactory proof in such cases that the party executing the will clearly understood and freely intended to make that disposition of his property which the instrument purports to direct." In Barr *v.* Buttin, 1 Curteis 637, Mr. Baron Parke said: "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two: the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed. The latter is laid down by Sir John Nicholl, in substance, in Paske *v.* Ollatt, 2 Phill. 323; Ingram *v.* Wyatt, 1 Hagg. 388, and Billinghurst *v.* Vickers, 1 Phill. 187, and it is stated by that very learned and experienced judge to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of Baker *v.* Batt, 1 Curteis 125. Their lordships are fully sensible of the wisdom of this rule, and the importance of its practical application on all occasions; at the same time their lordships think it fit to observe especially as there has been some discussion on this point, towards the close of this inquiry, that some of the expressions reported to have been used by Sir John

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

In such cases *capacity* must be *proved*.

Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will, the presumption and *onus probandi* are against the instrument and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper, (Paske *v.* Ollatt, 2 Phill. 323), and that where the capacity is doubtful, there must be proof of *instructions, or reading over;* Billinghurst *v.* Vickers, 1 Phill. 143. If by these expressions the learned judge meant merely to say, that there are cases of wills prepared by a legatee, so pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator and that instructions proceeding from him, or the reading over the instrument by or to him are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood; in all probability the learned judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated as a rule of law, that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term '*onus probandi*' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution; from which the knowledge of, and assent to, the contents of the instrument are assumed; and it cannot be that the simple fact of the party who prepared the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition; a man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family, and a legacy of £50 to his confidential attorney, who prepared the will; would this fact throw the burden of proof of actual cognizance by the testator of the contents of his will on the party propounding it, so that if such proof were not supplied the will would be pronounced against? The answer is obvious; it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case; in some, of no weight at all, as in the case suggested, varying according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Now can it be necessary that *in all such cases*, even if the testator's capacity is doubtful, the pre-

estate, (*g*) and to the judge of the court of probate in the case of personalty, (*h*) 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.

cise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument? They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it." In such a case, where the testatrix was very old and near her end, and the will was largely in favor of the person procuring its execution, Wagner, J., said: "It is within the experience and observation of every one that old persons *in extremis* may be easily imposed upon by those in whom they confide. Where, therefore, a party standing in this relation to such a testator prepares a will in his own favor, it cannot but excite suspicion, and create in the minds of those who are called upon to pronounce on it a desire to have other evidence than proof of the execution of the instrument and the testable capacity of the deceased. Where a person is so sick, worn out and enfeebled that he is a mere passive instrument in the hands of those who produce the will, or where he allows others to control and dispose of his estate in order to escape their offensive dictation and annoyances, it is evident such a will ought not to be permitted to stand; and if the person in whose favor or through whose influence the will is made, either for his own benefit or that of others, is conscious, as an ordinary person will be presumed to be conscious, that an unjust result was being obtained in having the will made as it was, and such result is attained through the agency of other minds than that of the testator the will cannot be maintained. * * * * The clearest evidence is required that there was no fraud or mistake. The presumption is against the propriety of the transaction, and the *onus* of establishing the devise to have been voluntary and well understood rests upon the party claiming; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property. From the nature of the transaction undue influence is presumed, and the absence of it must be shown by the party sustaining the devise; but the presumption is one of fact, and not of law, and may be rebutted by proper evidence." Harvey *v.* Sullens, 46 Mo. 147, 151. Although there is no rule of law which prevents a person from bequeathing his property to his medical attendant, yet it is a very suspicious circumstance if a will be made by one suffering from a severe illness, in a secret and clandestine manner, and it confers a large benefit upon the then medical attendant of the testator. Ashwell *v.* Lomi, 2 L. R., P. & D. 477. In such case the *onus* will be upon the party benefited to maintain the will beyond question. Ib. Where there is a great change of disposition, and a total departure from former testamentary intentions long adhered to, it is material to examine the probability of the change, especially if at the time of making the

[(*g*) 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* ch. XIII.

(*h*) See Allen *v.* Macpherson, 1 H. L. Cas. 191, 11 Jur. 785.]

Inquisition *prima facie* evidence of testamentary incapacity.

It appears, that though an inquisition finding a man a lunatic is *prima 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. (*i*)

Lucid intervals.

The principle is very ably stated by Sir W. Wynn in his judgment in Cartwright *v.* Cartwright: (*k*) "If you can establish 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." 11

later disposition the capacity is doubtful, still more, if the person in whose favor the change is made, possessing great influence and authority over the testator, originates and conducts the whole transaction. Marsh *v.* Tyrrell, 2 Hagg. 84; see also Tyler *v.* Gardiner, 35 N. Y. 559. The position and conduct of the principal beneficiary toward the testator, especially at the time of the *factum* of the will, have an important bearing in this connection. Tyler *v.* Gardiner, *ubi supra*. Although the fact that the will was drawn by the principal legatee, or by one taking any great advantage under it will not of necessity invalidate it; yet the presumptions will be against such a will, and the court will require clear proof that the testator thoroughly understood its contents and freely executed it. Beall *v.* Mann, 5 Ga. 456. So, too, where it was written by the executor named in it, and the entire property was given to persons not of kin to the testator. Cramer *v.* Crumbaugh, 3 Md. 491. But it is not necessary that there be *direct* evidence that the testator knew the contents of the will; this may be satisfactorily proved by circumstantial evidence. Day *v.* Day, 2 Gr. Ch. (N. J.) 549.

(*i*) Hall *v.* Warren, 9 Ves. 605; In 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.]

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

11. The most serious question in this connection is, what is the distinction between a remission of the disease and a lucid interval? An eminent writer says: "By a lucid interval we are to understand a temporary cessation of the insanity, or a perfect restoration to reason. This state differs entirely from a remission, in which there is a mere abatement of the symptoms. Taylor Med. Jur. 651. The test as to a lucid interval appears to be different where a person is laboring under an insane delusion from that where the party is afflicted with habitual insanity unaccompanied with delusions. In the

[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, (*l*) or a belief in facts which an ordinary person would not

In what unsoundness of mind consists.

former case his sanity is to be tested by directing his attention to the subject matter of the delusion; in the latter by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals. Nichols *v.* Binns, 1 Sw. & Tr. 239. D'Aguesseau, in the case of the Abbé d'Orleans, said: "It must not be a superficial tranquility, a shadow of repose, but on the contrary a profound tranquility, a real repose; it must be not a mere ray of reason, which only makes its absence more apparent when it is gone—not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal—not a glimmering which joins the night to the day; but a perfect light, a lively and continued lustre, a full and entire day interposed between the two separate nights of the fury that precedes and follows it; and, to use another image, it is not a deceitful and faithless stillness which follows or forebodes a storm, but a sure and steadfast tranquility for a time, a real calm, a perfect serenity; in fine, without looking for so many metaphors to represent our idea, it must be not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration of health." Pothier on Obligations (appendix) 579. Dr. Combe, who will be universally received as a high authority on this class of diseases, says: "But however calm and rational the patient may appear to be during the lucid intervals, as they are called, and while enjoying the quietude of domestic society, or the limited range of a well-regulated asylum, it must never be supposed that he is in as perfect possession of his senses as if he had never been ill. In ordinary circumstances, and under ordinary excitement, his perceptions may be accurate and his judgment perfectly sound; but a degree of irritability of brain remains behind, which renders him unable to withstand any unusual emotion, any sudden provocation, or any unexpected and pressing emergency. Were not this the case, it is manifest that he would not be more liable to a fresh paroxysm than if he had never been attacked. And the opposite is notoriously the fact; for relapses are always to be dreaded, not only after a lucid interval, but even after a perfect recovery. And it is but just, as well as proper, to keep this in mind, as it has too often happened that the lunatic has been visited with the heaviest responsibility for acts committed during such an interval, which, previous to the first attack of the disease, he would have shrunk from with horror." Observations on Mental Derangement 241. "To constitute what is called a *lucid interval*, absence of the disease itself, not of the particular delusion only, must be shown, and the party must freely and voluntarily, and without any design at the time of pretending sanity and freedom from delusion, be able to confess his delusion." Flood on Wills 388; Walkem on Wills 107, *et seq.*: 1 Redf. on Wills 107, *et seq.*; Wms. Ex'rs (6th Am. ed.) 34, *et seq.* "But although the law recognizes acts done during such intervals as valid, yet it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; and such proof is matter of extreme difficulty, for this, among other reasons, viz., that

[(*l*) But see Nichols *v.* Binns, 1 Sw. & Tr. 239.]

credit, or a belief which one cannot understand how any person in his senses should hold; and that mere eccentricity of habits or perversion

the patient is not unfrequently rational, to all outward appearance, without any real abatement of his malady. On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happened to see him when subject to them a strong opinion of his permanent incapacity. These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others." Wms. Ex'rs (6th Am. ed.) 34. In Att.-Gen. *v.* Parnther, 3 Bro. C. C. 444, Lord Thurlow said: "By a perfect interval I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit." In a case in New York it was said by Bradford, surrogate: "Among the most mysterious of the phenomena of the human mind, is the variation of the power and orderly action of the faculties, under different circumstances and conditions, and at different times; and especially mysterious is the oscillation from insanity to sanity, the rational power often fluctuating to and fro, until reason ultimately settles down firmly upon her throne, or falls, never again to resume her place in this life. Without speculating upon this interesting theme, it is sufficient to say that the law recognizes the fact established by experience, and does not hesitate to ratify the validity of a transaction performed in a lucid interval; though it is exacting in its demands, and scrutinizing in its judgment, of facts adduced to exhibit and demonstrate intelligent action at the time of the event under investigation. The principle is thus stated in the Institutes: '*Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur. Quibus non est permissum facere testamentum*' (Lib. 2, tit. 12, § 1); and it has been fully admitted in its broadest extent in the ecclesiastical courts. White *v.* Driver, 1 Phillim. R. 84; Chambers *v.* The Queen's Proctor, 2 Curteis 415. There can be no doubt that during an intermission of the disease the testamentary capacity is restored." Gombault *v.* Public Administrator, 4 Bradf. 226. It was remarked by Sir John Nicholl, in Brogden *v.* Brown, 2 Add. 445: "The case then set up in opposition to the will is confessedly one of *delirium* as contra-distinguished from fixed mental derangement, or permanent proper *insanity*. Now the two cases, however similar in some respects, are still distinguished each from the other in several particulars; and in no one particular more than in the greater comparative facility of proving a *lucid interval* in the one than in the other case. A principal reason of this is the following: In cases of permanent proper insanity the proof of a lucid interval is matter of *extreme* difficulty, as the court has often had occasion to observe, and for this among other reasons—namely, that the patient *so* affected is not unfrequently *rational* to all *outward* appearance without any *real* abatement of his malady, so that in truth and substance he is just as insane in his apparently rational as he is in his visible raving fits. But the *apparently* rational intervals of persons merely delirious for the most part are *really* such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of

of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity. (*m*)[12] General insanity must be distinguished

which to be ascertained by the *appearance* of the patient the patient is most commonly *really* sane. Hence as also from their greater presumed frequency in most cases of delirium the probabilities *a priori* in favor of a lucid interval are infinitely stronger in a case of delirium than in one of permanent proper insanity, and the difficulty of proving a lucid interval is less in the same exact proportion in the former than it is in the latter case." See also Cartwright *v.* Cartwright, 1 Phillim. 90; Cooke *v.* Cholmondely, 2 MacN. & G. 21; Sutton *v.* Sadler, 3 C. B. (N. S.) 90; Boyd *v.* Eby, 8 Watts 66; Lucas *v.* Parsons, 27 Ga. 593; Clark *v.* Fisher, 1 Paige 171; Rush *v.* Megee, 36 Ind. 69; Harden *v.* Hays, 9 Penna. St. 151; Wright *v.* Lewis, 5 Rich. 212; Chandler *v.* Barrett, 21 La. Ann. 58; Wood *v.* Sawyer, Phill. L. (N. C.) 251; Townshend *v.* Townshend, 7 Gill 10; Goble *v.* Grant, 2 Gr. Ch. (N. J.) 629; Halley *v.* Webster, 21 Me. 461. To establish a lucid interval, such restoration of the sound mind must be shown, as to enable the testator "soundly to judge of the act." Boyd *v.* Eby, *ubi supra;* Lucas *v.* Parsons, *ubi supra;* Clark *v.* Fisher, *ubi supra;* Jackson *v.* Van Dusen, 5 Johns. 144; Gombault *v.* Pub. Adm'r, 4 Bradf. 226. Although one under a commission of lunacy is presumptively incompetent to execute a valid will, yet, if he be restored to his reason, he may do so, and there must be the clearest proof that reason was actually restored. And, under such circumstances, there must be satisfactory proof that the will was made freely and without any influence designed to induce the testator to make an improper will. Lucas *v.* Parsons, *ubi supra;* In re Gangwere's Estate, 14 Penna. St. 417; Morrison *v.* Smith, 3 Bradf. 209. In doubtful cases, the reasonableness or not of the will, in its various provisions, is entitled to great weight. Clark *v.* Fisher, *ubi supra.* In the case of McAdam *v.* Walker, 1 Dow. 148, Lord Eldon, C., mentioned a case where a gentleman, who had been some time insane, and who had been confined, until the hour of his death, in a mad-house of the better sort, had made a will while so confined. The question was whether he was of sound mind at the time of making the will. It was a will of large contents, proportioning the different provisions with the most prudent and proper 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 had declared, previous to his malady, he intended to have done. It was held that he was of sound mind at the time of the execution of the will. In Chambers *v.* Queen's Proctor, 2 Curt. 415, the testator made his will on the 15th of the month, and killed himself on the 16th of the same month. It was proved that he had been affected by delusions on the 12th, 13th, and 14th of the same month. The will was particularly rational, and it was sustained on the ground that it had been made during a lucid interval. In pronouncing the decision of the court, Sir Herbert Jenner said: "What is the court to do in order to see whether the act of the deceased is a valid act? It must look

[(*m*) 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, Id. 608; Austen *v.* Graham, 8 Moo. P. C. C. 493.]

12. See Note D, *post* p. 99.

from partial insanity or monomania. In case of the former, a lucid interval, a real absence, at the time of making the will, of the disease

to the manner in which the act was done, to satisfy itself whether a lucid interval was established. It cannot be contended that the delusion was fixed and of long duration, and, if done during a lucid interval, the act will be valid, notwithstanding previous and subsequent insanity." Where actual (proper) insanity is proved to have once shown itself, it is necessary to prove *clearly*, either perfect recovery or, at least, a lucid interval at the time of the *factum*, in order to allow any *alleged* testamentary instrument to be pronounced for as a valid will. Ayrey *v.* Hill, 2 Add. 206; White *v.* Driver, 1 Phillim. 84; Halley *v.* Webster, 21 Me. 461. Sir John Nicholl says: "Whether where the excitement in some degree is proved to have actually subsisted at the time of the act done, it did or did not subsist in the *requisite* degree to vitiate the act done, must depend, in each case upon a due consideration of all the circumstances of the case itself in particular. The result will depend upon the deceased's state and condition *at the time* (to be collected principally from what passed at the time) of his giving instructions for and signing the instrument now propounded as and for his last will." Ayrey *v.* Hill, *ubi supra*. In Halley *v.* Webster, 21 Me. 461, 463, it was said by Whitman, C. J.: "No position can be better established than that, if a testator, a short time before making his will, be proved to have been of unsound mind, it throws the burthen of proof upon those who come to support the will to show the restoration of his sanity. * * * When a person is laboring under a typhus fever, which it would seem was the testator's disease, a suspension of the rational powers is often superinduced, of many days' duration. And if the proof were * * * that the testator had arrived to that stage in the fever, when such suspension had to a greater or less extent, taken place, so as to incapacitate him to make a will, those who would undertake to establish a will thereafter made, during his sickness, should be holden to prove, that he had, at the moment of making his will, recovered the use of his reason." But there are writers of repute who maintain that there is no such thing as a lucid interval —that what is commonly styled a lucid interval, is not a remission of the disease, but merely an absence of the symptoms. In support of this view, Dr. Hammond says: "A diseased brain will always produce a diseased mind. To assume that, because a patient, after a severe access of mania, extending perhaps over several days or months, gradually or even suddenly, becomes calm or apparently rational, he is therefore, for the time being, re-invested with all the God-like qualities which the healthy human mind possesses, is most illogical and unscientific. Would it not be strange if there were not these occasional remissions? The brain can endure a great deal of fatigue, but fancy how racked, how weary, how thoroughly exhausted it must be with the burning fancies, the rapid succession of ideas, the ravings which characterize the maniacal condition. There is no disposition to misinterpret the significance of remissions which occur in other diseases. No one thinks the epileptic is cured after he has had one fit and before the next; no one doubts that, unless the proper remedy be taken, the individual who has had a tertian ague will certainly have another paroxysm on the alternate day. The disease is still present, doing its work; but it does not manifest itself in the paroxysmal form. * * * * The law of periodicity prevails throughout the whole of our organism whether in health or disease. Nothing is continuous. After physical

itself, and not of its apparent delusions only, must be shown. (*n*)[13] In case of the latter, opinions have differed. In Waring *v.* Waring, (*o*) it was laid down by Lord Brougham, that it was incorrect to speak of partial insanity; that a mind unsound on one subject could not be called sound on any; and that unless a lucid interval (as explained above) could be shown, testamentary incapacity was the necessary consequence, although the subject on which the unsoundness was manifested might be quite unconnected with the testamentary disposition in question. It is not perfect sanity, however, but only a mind that comprehends the testamentary act that is required; [14] and in Banks *v.* Goodfellow, (*p*) Lord Brougham's doctrine, which it was observed was unnecessary to the decision of the cases in which it was stated, was rejected; and it was decided that monomania, which had not, and was not capable of having, any influence on the provisions

A disposing mind suffices.

labor we require repose; after mental exertion we must rest. All diseases have their stages of exacerbation and remission. Fevers decline in one period of the day and increase in violence at another. Even the victim of consumption has his alternations of comparative ease, during which he hopes for recovery, and which deceive not only himself, but the inexperienced friends who surround him. A case which is of striking application to the point under notice has recently come to my knowledge. A gentleman of this city became, during a period of great excitement, temporarily insane. After a not very long period of true mania, he was apparently restored to reason, and was about resuming his business when he conceived the idea of making his will. He sent for his lawyer and dictated clearly and fully all the provisions which he wished inserted in this document. His property was large, but he made his disposition of it in a manner that his legal friend thought rational, if not just. The will was signed, witnessed, and committed to the lawyer's hands for safe keeping. Soon afterward the gentleman had a relapse; he recovered however, and was finally pronounced cured. Two years afterward, meeting the lawyer in the street, he requested him to come to his house that evening, as he wished him to draw up his will. His friend asked him if he desired to cancel the will already made and which he had in his safe. 'I have never made a will,' replied the gentleman. 'Yes,' answered the lawyer; 'I drew one up for you more than two years ago; you signed it, it was witnessed, and it is now in my safe.' The gentleman was astonished. He had no recollection of the matter, and when the will was shown to him he expressed the utmost surprise and regret at some of the provisions which, as he said, were altogether different from those he would have made had he been of sane mind at the time. The will was destroyed and a new one executed, differing essentially from that which he had dictated during his so called lucid interval." Hammond Insanity in its Medico-Legal Relations 45, *et seq.*

[(*n*) Waring *v.* Waring, 6 Moo. P. C. C. 341, 12 Jur. 947; Smith *v.* Tebbitts, L. R., 1 P. & D. 398.]

13. See *ante* n. 11.

[(*o*) 6 Moo. P. C. C. 341, 12 Jur. 947.]

14. See Note D at the end of this chapter.

[(*p*) L. R., 5 Q. B. 549.]

of a will, did not destroy the capacity to make one; that the inquiry whether the monomania has or not had any such effect might be difficult, but was not impracticable; and that if, in the result, the court was convinced that it had, the conclusion must be against the will. The case of Greenwood is, on this point, ambiguous. It is thus stated by Lord Erskine] (*q*):—"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 favor of the will. [Further proceedings took place afterwards, and concluded in a compromise." But] in Dew *v.* Clarke, (*q*) 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 favor of some collateral relations, to the almost total exclusion of such only child; Sir J. Nicholl and the court of delegates, successively pronounced against the validity of the will, after the delivery of very able and elaborate judgments, which should be perused by all inquirers into this interesting subject. [And a like decision was made in the somewhat similar case of Boughton *v.* Knight.] (*r*)

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

(*q*) In White *v.* Wilson, 13 Ves. 89. Fowlis *v.* Davidson, 6 No. Cas. 461.
(*q*) 3 Add. 79, [5 Russ. 163; and see (*r*) L. R., 3 P. & D. 64.]

should not be allowed to make a will of personal [qu., or real?] estate. (*s*)

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;[15] while the contrary has been decided *with

Disability of coverture, whence arising;

(*s*) 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 appendices; Lord Thurlow's celebrated judgment in Att.-Gen. *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. & Sm. 620.]

15. The disability arising from coverture is clearly classed in the second division of disabilities made by Blackstone. 2 Black. Com. 497. By the civil law a married woman had the same power of disposal by will as that allowed to a *feme sole*. "The mental and moral capacity of the wife were never questioned, for she was allowed to perform many acts requiring ability, discretion and judgment, during her coverture. She could execute a power disposing of property of unlimited value according to her own discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying, and she could make a will of her personalty with her husband's consent. She could also make a will as executrix against his consent; and she had absolute power to act as a *feme sole* during the exile or transportation of her husband. Before her marriage she could fill a great variety of offices. The legal fiction was, that her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the *cestui que trust* or the mortgagor, the legal estate, which is the only estate the law recognizes, being in others." Per Lord Brougham, C., in Murray *v.* Barlee, 3 M. & K. 220. The assent given by the husband does not expressly operate to give testamentary capacity, but operates merely as a renunciation by him of his legal right to the administration of his wife's personalty. 2 Black. Com. 498. In some of the American states coverture is still recognized as a testamentary disability, but the tendency of our modern legislation is to remove all restrictions heretofore existing, either by the common or ecclesiastical law, upon married women as to the control and disposal of their separate property. In some of the states a married woman may dispose of her property by will as if she were a *feme sole*. This is the case in Ohio, Pennsylvania, California, Alabama, Arkansas, Dakota, Florida, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, Connecticut, Vermont, Rhode Island, New York, Georgia and Louisiana. See Allen *v.* Little, 5 Ohio 65; Johnson *v.* Sharp, 4 Coldw. (Tenn.) 45; Van Wert *v.* Benedict, 1 Bradf. 114; Dickinson *v.* Dickinson, 61 Penna. St. 401; Mosser *v.* Mosser's Ex'r, 32 Ala. 551. But in New Hampshire, Massachusetts and Rhode Island no mar-

respect to infancy, which alone of the other enumerated disabilities could admit of any question being raised on the subject: (*t*) as, of

ried woman can make a will to bar her husband's estate by curtesy. But in Massachusetts she may, if the husband give his written assent. Silsby *v.* Bullock, 10 Allen, 94; see also Burroughs *v.* Nutting, 105 Mass. 228. In New Jersey a married woman, above twenty-one years, may make a valid will the same as if she were *sole*, except so far as it may affect any rights of the husband in her property. Revision of N. J. 638, § 9; Beals *v.* Storm, 11 C. E. Gr. (N. J.) 372. She may leave all her property, both real and personal, to her husband. Richards *v.* Clark, 3 C. E. Gr. (N. J.) 327; affirmed 6 C. E. Gr. (N. J.) 361. But although she is living separate from her husband she cannot dispose of any interest of his in her property. Vreeland *v.* Ryno, 11 C. E. Gr. (N. J.) 160. But in Massachusetts the will of a married woman shall not be effectual to deprive the husband of more than one-half of her personal estate, unless he give his consent thereto in writing. Gen. Stat., ch. 108, § 9. And in Pennsylvania the same restrictions are imposed upon a wife as to devising her estate away from her husband that are placed upon the husband's devising his estate away from his wife. Laws of 1855, 430, § 1. But the act of 1855 neither expressly nor impliedly repealed section 9 of the act of 1848. Dickinson *v.* Dickinson, *ubi supra*. In Maryland it is provided that a married woman may make a will and give all her property to her husband or to any other person, with the consent of her husband subscribed to the will. Provided, she be examined by the witnesses as to her having made such will freely, without any fear, threats or compulsion of or from her husband, and that the will be made at least sixty days before her death. Code of Md., art. 93, § 308; Michael *v.* Baker, Ex'rx, 12 Md. 158; see also Buchanan *v.* Turner, 26 Md. 1; Schull *v.* Murray, 32 Md. 9. In Georgia a married woman cannot make a will, for want of perfect liberty, she being esteemed to be under control of her husband. But she may in the following cases: 1. Where an express power to will her separate estate is reserved or granted to her in the instrument creating the same or by a marriage contract. 2. Where having a separate estate absolute, or an estate in expectancy her husband consents. 3. Where her will is in execution of a power vested in her. 4. Whenever, on account of abandonment or divorce, or other cause, the law declares her to have the rights of a *feme sole*. Rev. Code Ga., § 2410. In Kansas a married woman may make a will, but neither a married man nor a married woman can bequeath away more than one-half of his or her estate, without the consent of the other in writing. Gen. Stat. Kansas, ch. 117, § 35. Bennett *v.* Hutchinson, 11 Kans. 398; Allen *v.* Hannum, 15 Id. 625; Barry *v.* Barry, Id. 587. In Colorado any married woman of eighteen may make a will of real or personal property, or if she be but seventeen she may of personal estate only; but she cannot bequeath more than one-half of her estate away from her husband without his consent in writing. Gen. Laws Col., § 1750. In Delaware, if a married woman be twenty-one or upwards, she may, with the written consent of her husband, given under his hand and seal, in the presence of two witnesses, dispose by will, but not so as to affect the rights of her husband by curtesy. But the husband and wife may, by ante-nuptial contract, executed in the presence of

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

course, any attempt to give a power of disposition to an idiot or lunatic would be abortive.

two witnesses, determine what rights each shall have in the other's property, both during marriage and after death, and may bar each other of all rights not so secured. Laws Del., vol. 14, ch. 550, § 4. In Kentucky, she may, by will, dispose of any estate secured to her separate use by deed or devise, or in execution of a written power to make a will. Gen. Stat. Ky. 1873, ch. 113, § 4. It seems that although she may dispose of her personal estate by consent of her husband, she has no power to dispose of any real estate, except in execution of a power. George *v.* Bussing, 15 B. Mon. 563. In Missouri and Oregon she may dispose of real estate by will, but not so as to bar curtesy. In Michigan, the consent of her husband must be endorsed on the will, as also in Nebraska, in which latter state such consent must be proved in the same manner as the will. But where the consent of the husband has been given to his wife's will, it has been held that he may revoke that consent at any time before the will is probated. Van Winkle *v.* Schoonmaker, 2 McCart. 384. If the will have been admitted to probate he cannot revoke his consent. Cutter *v.* Butler, 5 Fost. 343; George *v.* Bussing, *ubi supra;* Fisher *v.* Kimball, 17 Vt. 323. The statute of 1842, ch. 74, in Massachusetts enables a *feme covert* to dispose of her estate by will, with the assent of her husband endorsed thereon. Instruments executed in conformity to that statute will have the effect of other wills, and legatees and devisees will derive title immediately from the testatrix. Heath *v.* Withington, 6 Cush. 497. But that statute did not take away the power which a married woman before had to dispose of her property, with the assent of her husband, by appointment in the nature of a testamentary disposition. It has merely conferred an additional power. Ib. See as to this entire subject: 4 Kent 505, 506; 1 Redf. on Wills 22, *et seq.;* 2 Story Eq. Jur., §§ 1388, *et seq.;* Walkem on Wills 25, *et seq.;* Flood on Wills 367, *et seq.;* Wms. Ex'rs (6th Am. ed.) 76, *et seq.* It seems that since the statute of 1861 in Illinois, which makes *all* the property of a married woman her *separate* estate, she can dispose by will of all her property. In re Tuller, 79 Ill. 99. See as to the power of a *feme covert* in Georgia to make a will. Urquhart *v.* Oliver, 56 Ga. 344. The will of a married woman, made during the life of her husband, is not valid to pass her estate after his death, unless it be then republished. Osgood *v.* Breed, 12 Mass. 525. But in North Carolina, if an unmarried woman make a will, and then marry, and survive her husband, her will is good and effectual. Wood *v.* Bullock, 3 Hawks 298. And where the assent of the husband is required that assent must be to the particular will which is set up, as a general assent will not be effectual. Rex *v.* Bettesworth, 2 Str. 891. In Grimke *v.* Grimke, 1 Desaus. 366, it was held that the assent of the husband might be implied from the fact that the will was in his handwriting. See also Cutter *v.* Butler, 5 Fost. 343. If the wife execute a will under a power it is not essential that reference should be made to the power in the will. Heyer *v.* Burger, 1 Hoff. Ch. 1. A writing in the nature of a will, by a *feme covert*, under a power, is not a proper will, and the appointees take under the power coupled with the writing. Yet such a writing has the effect of a will to three intents: the words have the same liberal construction, it is ambulatory until the death of the testatrix, and the appointees can take only from the death of the testatrix. Southby *v.* Stonehouse, 2 Ves., Sr., 610. But it is also said such an instrument must have *all the qualities of a will.* Oke *v.* Heath, 1 Ves., Sr., 135. And

[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 and 35 Hen. VIII., c. 5, (which exception is preserved by the 1 Vict., c. 26, § 8,) she was, as we have seen, left subject to her pre-existing disabilities. 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 (*u*) to devise, and the legal estate must be obtained by conveyance from the heir. In the case of personal estate, the will of a married woman will be valid if made in pursuance of an agreement before marriage, or of an agreement made after marriage for consideration, (*x*) or if the husband assents to the particular will and survives her. (*y*) A married woman can also, in equity, dispose by will of the fee-simple of real estate, (*z*) and of the absolute interest in personal estate, (*a*) which belong to her

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

—but may as to uses;

—or as to equitable interests;

—or as to personalty by contract or with husband's assent;

—or property settled to separate use;

such a writing ought to be first propounded as a will in the spiritual court, and if no executor is appointed the court will grant administration to the husband, *cum testamento annexo*. Ross *v.* Ewer, 3 Atk. 156, 160. If a woman once married assumes to dispose of property by will which formerly belonged to her husband, and the contestants of the will raise no question in the probate court as to the continuance of the coverture, there will be no legal presumption of its continuance. Fatheree *v.* Lawrence, 33 Miss. 585. The will of a *feme covert* must be established in the court of probate before it can be made available as a will in a court of equity. But after probate it is for the court of equity to see that the instrument is of the kind by which a married woman can dispose of her property. The course in the court of probate is, where a married woman assumes the right to make a will, and the right is questioned, to pronounce for the will on proof of the *factum*, and leave it to the court of equity to determine whether she had such an interest or authority as she could dispose of or execute by will. Whitfield *v.* Hurst, 3 Ired. Eq. 242.

[(*u*) 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.

(*x*) 1 Roper Husb. & Wife 170.

(*y*) Willock *v.* Noble, L. R., 7 H. L. 580, 590, 597; Ex parte Fane, 16 Sim. 406; In re Reay, 4 Sw. & Tr. 215, 31 L. J., Prob. 154; In re Isaacs, 31 L. J., Prob. 158. The assent may be retracted at any time before probate, unless it has been given or confirmed after the wife's death. Maas *v.* Sheffield, 1 Rob. 364, 10 Jur. 417.

(*z*) Taylor *v.* Meads, 4 D., J. & S. 597; Pride *v.* Bubb, L. R., 7 Ch. 64. And the will defeats the husband's equitable right to curtesy. Cooper *v.* Macdonald, 7 Ch. D. 288. In Troutbeck *v.* Boughoy, L. R., 2 Eq. 534, the separate use was attached only to the annual rents.

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

for her separate use, (*b*) whether vested, or contingent on her surviving her husband; (*c*) 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. (*d*) And this separate trust of the principal attaches on all the produce or accumulations of such principal. (*e*) Savings out of an allowance made by a husband for the separate maintenance of his wife are in equity treated as her separate estate; (*f*) of which, therefore, she may dispose by will. But savings out of pin-money are said to belong to the husband; (*g*) 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.] [16]

—and its produce and accumulations.

Savings out of maintenance.

Pin-money.

(*b*) 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, as we have seen, would be insufficient if the husband died first. In re Smith, 1 Sw. & Tr. 125; 27 L. J., Prob. 39. A declaration of trust by the husband, in favor of his wife, for her separate use, may be either express (Baddeley *v.* Baddeley, 9 Ch. D. 113,) or implied by his acts, as where with his assent she carries on a separate business, and the profits and stock in trade are treated as her separate property. Haddon *v.* Fladgate, 1 Sw. & Tr. 125, 27 L. J., Prob. 39; Ashworth *v.* Outram, 5 Ch. D. 923. And see married women's property act, 1870. **Feme covert may revoke a will.**—Although a married woman may have no power to make a will, it seems that she may by "writing," under 1 Vict., c. 26, § 20, revoke one already made. Hawksley *v.* Barrow, L. R., 1 P. & D. 147, 152.

(*c*) Bishop *v.* Wall, 3 Ch. D. 394.

[(*d*) See Hall *v.* Waterhouse, 5 Giff. 64, as to realty; and cases in n. (*a*) as to personalty.

(*e*) 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; Scales *v.* Baker, 28 Beav. 91. But the wife's dealings with the produce may show an intention to put an end to the separate trust. Wright *v.* Wright, 2 J. & H. 647.

(*f*) Brooke *v.* Brooke, 25 Beav. 342; In re Tharp, 3 P. D. 76 (separate allowance to wife of lunatic). *Secus* at law, Messenger *v.* Clark, 5 Exch. 388.

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

16. There is probably no better or more thorough discussion of the subject of pin-money to be found anywhere than that contained in the case of Howard *v.* Digby, 8 Bligh (N. S.) 224, 259, 265. In delivering the opinion in this case the Lord Chancellor said: "It is wonderful, indeed, how little there is to be found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot even get a definition from the books, upon which you can rely; you cannot trace the line which divides it from separate property of the wife with any distinctness, or in a way

Wife of an exile may make a will,

A woman, whose husband has been banished for life by act of parliament, (*h*) may dispose by will of her real and personal estate; for, as he is civilly defunct, she is restored to the

on which you can depend. And as to authority, either of decisions, *dicta*, or text-writers, or *obiter dicta* of judges, there is nothing that furnishes a clear and steady light on the subject, the cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way, that when a text-writer quotes a case, Brodie *v.* Barry (2 Ves. & B. 36), for instance in support of a doctrine touching pin-money, you look at the book, and find it has nothing to do with pin-money, and does not support the proposition for which it is cited. * * * It is a very material fact in a case where authority is so little to be had that the general opinion of all those who give pin-money, either to their own wives or to the wives of their sons, upon marriage, should be entirely coincident with the view, to which the argument had led; namely, that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweler's account coming in. I mean not the jeweler's account for the jewels, because that is a very different question, but I mean for the repair and the wear and tear of trinkets, and for pocket-money, and things of that sort; I do not, of course, mean the carriage, and the house, and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum of money is settled at the marriage, which is to be set apart to the use of the wife, for the purpose of bearing those personal expenses. * * * It is meant for the wife's expenditure on her person—it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture, by the intercession and advice and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he might hold back her pin-money, if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent. But I am not bound here to do so, because, if, during her coverture, a claim were made by her (and this is one distinction between the claim of the wife and the claim of her personal representatives after death), the absurd and incredible state of things I have put, as the consequence of their argument, the case of her attiring herself in an unbecoming manner, never could happen, if the pin-money is only to be claimed by herself; for, in that case, the duke would of course say, 'If you do not dress as you ought to do, what occasion have you for pin money?' He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for that purpose. Now, the purpose is not the purpose of the wife alone; it is for the establishment; it is for the joint concern; it is for the maintenance of the common dignity; it is for the support of that family, whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendor of the joint establishment, consisting of the husband and wife, that part of the

(*h*) Countess of Portland *v.* Prodgers, 2 Vern. 104. [The report speaks only of a bequest of legacies.]

rights and privileges of discoverture. [This doctrine was held to be applicable to the case of a felon-convict transported for life, so as to enable his wife to dispose by will of personalty acquired by her after the conviction, (*i*) although the felon had received a conditional free pardon;] (*k*) and when a felon was transported for a definite term of years, his marital rights (and therefore it *should seem his wife's conjugal disabilities) were suspended for that period. (*l*)

—or wife of a felon-convict transported for life.

A will made during any personal disability, of course, is not [since the act 1 Vict., c. 26] rendered valid by the fact of the testator having outlived such disability, unless its removal were followed by some act of confirmation or adoption

Subsequent confirmation of will originally void.

whole expenditure is for the support of the wife herself. Then, does it not follow from thence, that the husband has a direct interest in the expenditure of the pin-money? He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes his station—that is the destination and the object of pin-money." It appears plainly from this that the pin-money is given not exclusively for the pleasure or position of the wife, but that the husband has at least some interest in the proper appropriation thereof. On the ground, therefore, that the pin-money is given for the express purpose of clothing the wife from year to year, in a manner becoming the station of the husband, the courts will not enforce the payment of arrears of pin-money beyond the current year. On the same ground it is held that the heirs of the wife can take no interest in the pin-money, and that they cannot enforce any demand therefor.

[(*i*) In re Martin, 2 Roberts. 405, 15 Jur. 686; In re Coward, 4 Sw. & Tr. 46, 34 L. J., Prob. 120. In the latter case, sentence of death had been recorded, so that the felon was attainted, and, being thus dead in the eye of the law, was incapable of claiming *jure mariti* (per Wood, V. C., Gough *v.* Davies, 2 K. & J. 627.) However, the court did not take this ground, but relied expressly on Ex parte Franks, 1 M. & Sc. 11, 7 Bing. 762, where the felon was transported for a term of years. See also Atlee *v.* Hook, 23 L. J., Ch. 776 (where a legacy bequeathed, after the conviction, to the wife of a felon transported for life, but, so far as appears, not attainted, was ordered to be paid to her); and per Romilly, M. R., In re Harrington's Trust, 29 Beav. 24. Attainder for felony is now abolished, and the *status* of a felon-convict regulated by 33 and 34 Vict., c. 23, as to which see *post*.

(*k*) Under 5 Geo. IV., c. 84, § 26, a convict was entitled to retain against the crown, and to recover in the courts of the United Kingdom, personalty acquired by him after receiving such a pardon. Gough *v.* Davies, 2 K. & J. 623. But see and consider In re Church's Will, 16 Jur. 517; Coombs *v.* Queen's Proctor, 2 Roberts. 547, 16 Jur. 820 (transportation for term of years), and see now the act referred to in the last preceding note.]

(*l*) Ex parte Franks, 1 M. & Sc. 11, 7 Bing. 762 [where it was held that the wife could be made bankrupt. But where the wife of a felon transported for years, had died intestate in the husband's lifetime, it was held that the crown, and not her next of kin, was entitled to her personal property acquired after the conviction. Coombs *v.* Queen's Proctor, 2 Roberts. 547, 16 Jur. 820.]

amounting in law to [re-execution. (*m*) Before the act] the delivery by a widow of an instrument executed during coverture into the custody of another, as the will of the depositor, was held to be a sufficient re-publication of a will of personal estate. (*n*)

Devises by aliens.

[At common law, a] devise of lands by an alien was at least voidable; (*o*) 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 remained 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; (*p*) and he might, of course, 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 vested his defeasible title in the devisee; (*q*) though, if he died intestate, the land escheated to the crown, or other lord, *pro defectu tenentis*, without any inquest of office, because an alien could have no heirs. (*r*)[17] [But by the naturalization act, 1870, (*s*)

(*m*) 1 Eq. Cas. Abb. 171, pl. 3; [Price *v.* Parker, 16 Sim. 198; Trimmell *v.* Fell, 16 Beav. 537; Willock *v.* Noble, L. R., 7 H. L. 580.]

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

(*o*) See Shep. Touch. 404.

(*p*) 4 Leon. 84.

(*q*) See Shep. Touch. 404.

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

17. Alien friends, or such whose countries are at peace with ours, may make wills to dispose of their personal estate, (but where they are incapable of holding real estate, they are equally so of devising it); but alien enemies, unless they have the privilege, express or implied, to reside in this country, are incapable of making any testamentary disposition of their property. 1 Redf. on Wills 8, *et seq.*; Wms. Ex'rs (6th Am. ed.) 15; 2 Kent 53, 54; 2 Sugden on Vendors (8th Am. ed.) 401, 402; Theobald on Wills 19. By statutes in many of the American states, the rights and privileges of aliens have been greatly enlarged, and in some of them, the ancient distinctions against aliens have been wholly removed. 2 Kent 69, *et seq.* But these provisions are strictly local, and will not extend beyond the boundaries of the enacting state. Therefore, an alien, who may have been admitted to privileges in one state, subsequently moving into another, can claim no greater privileges therein than those granted by the statute law of that state. Nor would the United States admit any foreigner, before he had been duly naturalized according to the act of congress, to any privileges other than those to which he is entitled by treaty, or the law of nations, or the statute law of the state in which he lives. In New York, aliens are made capable, by statute, of taking real estate by descent. Sutliff *v.* Forgey, 1 Cowen 89; Howard *v.* Moot, 64 N. Y. 262, 270. And a grant, by the legislature, of lands to an alien and his heirs, enables the heirs, although aliens, to inherit. Jackson *v.* Etz, 5 Cowen 314. This is also so in Massachusetts. Common-

[(*s*) 33 Vict. c. 14, § 2: not confined to alien friends, as 7 and 8 Vict., c. 66, § 3.]

"real and personal property of every description may be taken, acquired, held, *and disposed of* by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect (*t*) any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession *or expectancy in pursuance of any disposition made before the act, or in pursuance of any devolution by law on the death of any person dying before the act."]

Devises by traitors and felons; —realty.

Persons attainted of high treason [were formerly] incompetent to devise their lands since, by several old statutes, (*u*) the real estates of a traitor were, by the attainder, *ipso facto* vested in the crown. [18]

wealth *v.* Andre, 3 Pick. 224. But where the lands of an alien escheat, the state has no right to enter and take possession until office found. Jackson *v.* Adams, 7 Wend. 367. It is said by Chase, C. J.: "The court are of opinion, on the first point, that the title of Thomas McCreery, an alien friend, is good against everybody but the state, and that his right and possession could not be divested but by office found, or some act done by the state to acquire possession." McCreery *v.* Allender, 4 H. & McH. 409, 412. But see Slater *v.* Nason, 15 Pick. 345. But an alien may take by purchase and hold until office found. Mooers *v.* White, 6 Johns. Ch. 360, 366; Fox *v.* Southack, 12 Mass. 143; Montgomery *v.* Dorion, 7 N. H. 475. He may also convey. Mooers *v.* White, *ubi supra;* Montgomery *v.* Dorion, *ubi supra;* Marshall *v.* Conrad, 5 Call. 364. The treaty of 1794, between the United States and Great Britain, provided that subjects of either power could hold land within the territory of the other, and it was not annulled by a subsequent war between those powers. Fox *v.* Southack, *ubi supra;* Fiott *v.* Commonwealth, 12 Gratt. 564. But by Gen. Stats., ch. 90, § 38, in Massachusetts, aliens may take lands by descent, and no distinction is made between resident and non-resident aliens. Lumb *v.* Jenkins, 100 Mass. 527. But if lands be devised to trustees, in trust to sell the same, and pay the whole proceeds to an alien *cestui que trust*, it is, in equity, a bequest of personalty, and the alien may take and hold the proceeds, and can compel an execution of the trust, even as against the state. Craig *v.* Leslie, 3 Wheat. 563. See also Dawson *v.* Godfrey, 4 Cranch 321; Governeur's Heirs *v.* Robertson, 11 Wheat. 332; Rubeck *v.* Gardner, 7 Watts. 455; Scanlan *v.* Wright, 13 Pick. 523; Waugh *v.* Riley, 8 Metc. 290; People *v.* Conklin, 2 Hill (N. Y.) 67; Foss *v.* Crisp, 20 Pick. 121; Wilbur *v.* Tobey, 16 Pick. 177.

[(*t*) *I. e.*, shall not validate or invalidate, Sharp *v.* St. Sauveur, L. R., 7 Ch. 343.]

(*u*) See 4 Jarm. Conv. (2d ed.) 186.

18. 1 Redf. on Wills 118; 2 Kent 385, 386; Wms. Ex'rs (6th Am. ed.) 88; Flood on Wills 395; Walkem on Wills 50. In a recent case in England, where one properly executed her will and died, and the coroner's jury found a verdict of *felo de se*, it was held that such will was entitled to probate. In the goods of Bailey, 2 Sw. & Tr. 156.

The lands of all persons attainted for petit treason and felony, formerly escheated to the king or other feudal lord, (*x*) 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; (*y*) and such [until 1870 was] still the case as to persons not entitled to the benefit of the statute 54 Geo. III., c. 145, which provided, that no attainder for felony, except in cases of high treason, or of the crimes of petit treason (afterwards abolished by statute,) (*z*) or murder, or of abetting, procuring, or counseling 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."

There was some ground to contend, that the concluding words of this provision enabled persons convicted of, or rather attainted for, any other than the excepted offences, to alien their real estate by will, [and this ground was strengthened by the statutes, (*a*) which in all cases where a title had accrued to the crown by escheat for want of heirs, or by reason of any forfeiture, empowered the sovereign (notwithstanding the statute (*b*) which had 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 might have intended to make.

*[But the point is now of the less importance, since, by stat. 33 and 34 Vict., c. 23, attainder (which, and not the conviction, caused the disability) is thenceforth abolished, and express provisions (presently noticed) are made regarding the real estate both of traitors and felons.]

Wills of traitors and felons;

Treason and felony incapacitated persons from making a will of personal estate, which [if vested (either in possession or remainder,)] became forfeited to the crown on convic-

[(*x*) 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.]

(*y*) Shep. Touch. 404.

(*z*) 9 Geo. IV., c. 31, § 2.

[(*a*) 39 and 40 Geo. III., c. 88, § 12; 47 Geo. III., sess. 2, c. 24; 59 Geo. III., c. 94; 6 Geo. IV., c. 17.

(*b*) 1 Ann., st. 1, c. 7, § 5.]

tion; (c) and this incapacity extended to a *felo de se*, who was, however, capable of devising his real estate, as there was in such case no attainder. (d) In every case of felony in which sentence of death was not recorded, [that is to say, in which there was no attainder,] the prisoner's competency to devise or otherwise dispose of his real estate was not affected. (e)[19]

—personalty.

[But the law as to both real and personal property is now regulated by stat. 33 and 34 Vict., c. 23, which enacts (§ 1) that after the passing of it, "no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this act shall affect the law of forfeiture consequent on outlawry." The statute then, after defining (§ 6) "convict" to mean any person against whom sentence of death, or of penal servitude, shall have been pronounced or recorded upon any charge of treason or felony; and after providing (§ 7) that when any convict shall *die*, or become bankrupt, or shall have suffered his punishment, original or commuted, or have been pardoned, he shall thenceforth, as to the provisions thereinafter contained, cease to be subject to the act, enacts (§ 8) that no action or suit for the recovery of any property shall be brought by any convict during the time that he is subject to the act, and that every convict shall be incapable during that time of *alienating* or charging any property, or of making any

Attainder and forfeiture for treason or felony abolished.

[(c) 2 Black. Com. 499; In re Thompson's Trusts, 22 Beav. 506; In re Bateman's Trust, L. R., 15 Eq. 355. *Contra* as to goods which he has as executor of another, of which he may make a will, In re Bailey, 2 Sw. & Tr. 156, 31 L. J., Prob. 178. *Contra*, also, as to contingent interests, where the felony was not capital. Stokes *v.* Holden, 1 Keen 145; Barnett *v.* Blake, 2 Dr. & Sm. 117, 128; and as to personalty acquired by him after a conditional free pardon. Gough *v.* Davies, 2 K. & J. 623.

(d) Norris *v.* Chambres, 29 Beav. 258.

(e) Rex *v.* Willes, 3 B. & Ald. 510, 3 Inst. 55; Rex *v.* Bridger, 1 M. & Wel. 147; In re Harrop's Estate, 3 Drew. 726.]

19. In England it is held that outlaws also, though it be but for debt, are incapable of making a will as long as the outlawry continues; for their goods and chattels are forfeited during that time. But a man outlawed in a personal action may, it is said, in some cases, make executors; for he may have debts upon contract which are not forfeited to the king, and these executors may have a writ of error to reverse the outlawry. 2 Black. Com. 499; Shaw *v.* Cutteris, Cro. Eliz. 851; 4 Burn. E. L. 62; Wentw., ch. 1., p. 37, 14th ed. Before the statute 53 Geo. III., c. 127, there was some doubt whether an excommunicated person could make a will; but, by that statute, excommunication is not to be pronounced except in certain cases, and by § 3, in those cases, parties excommunicated shall incur no civil incapacity whatever. Swinb., pt. 2, § 22; Wentw., ch. 1, p. 38; 4 Burn. E. L. 62.

contract, save as thereinafter provided. Sect. 9 provides for the appointment of an administrator, in whom, upon his appointment, (§ 10) all the real and personal property (including *choses in action) to which the convict was at the time of his conviction, or shall afterwards, while subject to the act, become or be entitled, vests for all the convict's estate and interest. And the administrator has full power (§ 12) to let, sell, and mortgage the property, and thereout (§§ 13 to 17) to pay costs, debts, damages, &c., and to make allowances for the support of the convict and his family. Subject thereto, the administrator is (§ 18) to hold the property *in trust*, and may accumulate the income, *for the benefit of the convict* and his heirs, or legal personal representatives, or such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same is to *revest* in the convict on his ceasing to be subject to the act, or in his heirs or representatives, or such other persons. The convict is to be entitled as against the administrator to all property acquired by him while at large under license, and, during the same time, his disabilities under § 8 are suspended (§ 30).

Subject, therefore, to the temporary estate of the administrator, and to the charges imposed by the act, the real and personal property of a traitor or felon remains his own, and he may dispose of it by his will; for the prohibition against alienation during the time that he is subject to the act can have no application to his will, whensoever executed; a will being no alienation until the testator's death.]

Effect of the abolition.

The statute of 1 Vict., c. 26, has left all personal disabilities affecting the testamentary power as they stood under the pre-existing law, (*f*) with the exception of infancy, which formerly (we have seen) did not incapacitate persons of a certain age from bequeathing personal estate; whereas that statute (§ 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. II., c. 24; so that a person under age is now not com-

Effect of 1 Vict., c. 26, upon the disabilities of testators.

[(*f*) See as to coverture, Noble *v.* Willock, L R., 7 H. L. 580. But as to revocation by "writing," see Hawksley *v.* Barrow, L. R., 1 P. & D. 152.]

petent 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, (*g*) 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; (*h*) and as the law does not recognize fractions of a day, (*i*) the age would be attained at the first instant of the latter day.

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

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

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

NOTE A. "So also an idiot, *i. e.*, such a one as cannot number twenty, or tell what age he is, or the like, cannot make a testament, or dispose of his lands or goods; and albeit he do make a wise, reasonable, and sensible testament yet is the testament void. But such a one as is of a mean understanding only, that hath *grossum caput,* and is of the middle sort between a wise man and a fool is not prohibited to make a testament." Shep. Touch. 403. It being universally admitted that no idiot can make a valid will, the proper inquiry in this connection is who are considered idiots in the law. The description of an idiot, as given above, from Shep. Touch., is too restricted. The particulars there named are undoubtedly evidences which go to prove the imbecility or idiocy of the party, but we apprehend that no universal rule can be laid down by which it may be determined whether a man be an idiot or not, but that this question is evidently one of fact, and must be determined by the attendant circumstances of each particular case. It is hardly possible to give a definition of an idiot. Idiots are wholly incapacitated for the transaction of any business, and as a general thing are incapable of performing any labor whatever. They generally—nay, almost invariably—have an unmeaning expression of countenance, and are wholly incapable of improvement or advancement. What we find them by nature, that they ever remain, so far as knowledge or mental powers are concerned. It is, however, sometimes claimed that they have some degree of memory. Yet we hardly think that the vague recurrence to them of what may have happened in the past should be called memory. It is impossible for them at will to recall anything. They seem to be wholly without powers of perception or reflection. Dr. Ray, Med. Jur. Insan., § 54, says: "Idiocy is that condition of the

mind in which the reflective, and all or a part of the affective, powers, are either entirely wanting, or are manifested to the slightest possible extent. In reasoning power many idiots are below the brutes. Unable to compare two ideas together, nothing leads them to act but the faint impressions of the moment and these are often insufficient to induce them to gratify even their instinctive wants." In the case of persons so circumstanced there is no power to make any kind of a contract, and they are not held to be responsible for crime. In determining whether any person be an idiot or not, one very important point is whether the party was capable, unaided, of transacting any business, and whether he did so transact any business. On this point the remarks of Dr. Lushington, in Bannatyne *v.* Bannatyne, 14 Eng. L. & E. 581, are of great interest. He says: "Before entering upon this branch of the case, I must bear in mind what the nature of the case set up in opposition to the will is. I must repeat that it is not lunacy—it is not monomania—it is not any species of mental disorder, the symptoms of which it may, at periods, be difficult to detect; but the case presented is that of idiocy or imbecility, the characteristic of which is permanence, with little or no variation, though often, in the case of idiots, it does sometimes happen that there will be a greater degree of excitement demonstrated than at other periods. How is such a case to be met? I apprehend, to meet it, and to show that such a state of things did not exist at any given period, proofs of acts of business are most important evidence. Many acts of business could possibly be done by a lunatic, and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person. I shall look, therefore, in the first instance, to the acts of business. It is proved, by Mr. Falkner, that the deceased kept an account with Mess. Tuckwell, at Bath, for four years, from 1818 to 1821, and during all that period occasionally drew drafts and all those drafts were paid to himself over the counter. The first is dated 31st January, 1818; the last, May, 1820. According to the evidence, the deceased came himself to the counter, and there is no proof of any one accompanying him on such occasions; he asked for the sum he wanted; the clerk filled it in, he signed it, and took the money. Surely no idiot could have done this, for he must have exercised thought to go to the bank, memory and judgment as to the sum required; and moreover his conduct and demeanor could not at such times have been as described by the witnesses against the will, or from the glaring colors in which the imbecility is depicted, it must have been discovered, and the business never could have been transacted at all." S. C., p. 590. "I consider these transactions, then, of first-rate importance towards solving all the difficulties of this case; for here after the lapse of about thirty years, the court has the advantage of facts proved, with the dates duly affixed to them. I do not say that these facts alone utterly disprove that the testator was at the asylum at the beginning of 1819, but they go a long way towards it; and even if at some time thereabout the deceased was at the asylum, they do prove that the deceased did acts of business requiring what I think cannot be denied, some thought and some understanding. There is, I must say, not the least evidence to show, that in any one of these acts of business the deceased was assisted by any one person whatever—the presumption is the other way; and to put these acts upon the very lowest basis on which they can be placed, they do utterly disprove idiocy or imbecility. I will simply repeat, what I have already indeed said, that those who are afflicted with lunacy sometimes have the management of and can manage their pecuniary affairs—an idiot never. Now, the next branch of evidence is, in my opinion, almost equally instructive; it is the evidence of dealing with tradespeo-

ple." S. C., p. 591. "He gave orders himself, he paid his bills himself, he knew the value of money, and was careful to settle the price before the order—very particular, in joint accounts with his brothers, that he should not be charged beyond his fair proportion." Such a person may be of weak intellect, or even a lunatic, scarcely an idiot. Potts *v.* House, 6 Ga. 324, 336. In this case it is said that the term *non compos mentis* implies *a total want of mind.* And Lumpkin, J., in pronouncing the opinion of the court, said: "I subscribe, however, to the doctrine, that it is not every man of frantic appearance and behavior who is to be considered *non compos mentis*, either as it regards contracts, obligations or crimes; and that one may be addicted occasionally or habitually to the strangest peculiarities, and yet possess a testable capacity." The real question to be determined when the will propounded is contested on the ground that the testator was an idiot, is whether he was wholly devoid of mental powers. If any degree of intelligence were possessed by the testator the will could not be overthrown on the ground that he was *an idiot.* A mere *glimmer of reason,* it would seem, should be sufficient to sustain the will. A very remarkable case on this point is Stewart's Ex'r *v.* Lispenard, 26 Wend. 255, in which case the will of Alice Lispenard was sustained. The testatrix was incapable of taking care of herself, had a vacant expression of countenance and a silly laugh when addressed; she had an unnatural carriage to her body, dribbled at the mouth; she would cry like a child when the children refused to divide their candies with her; she could not be taught the Lord's Prayer nor to read, and when thirty-five years of age the extent to which it had been possible to educate her was to spell words of two syllables. Yet, notwithstanding all this, the Court of Appeals in New York established her will, disposing of a large property; the court holding that *imbecility* of mind in a testator will not avoid his last will and testament. However, this case has not been favorably received either by the bench or bar, and it was finally overruled in the case of Delafield *v.* Parish, 25 N. Y. 9. In Converse *v.* Converse, 21 Vt. 168, it is held that one, in order to execute a valid will, must have sufficient active memory to recall his family and his property, and be able to form a rational judgment in regard to the deserts of the one and the disposal of the other with reference to such deserts. See the remarks of Redfield, J., in that case as to the degree of mental capacity requisite to execute a valid will. See also Comstock *v.* Hadlyme, 8 Conn. 254; Moore *v.* Moore, 2 Bradf. 261; Kinne *v.* Kinne, 9 Conn. 102; Cordrey *v.* Cordrey, 1 Houst. 269; Harrison *v.* Rowan, 3 Wash. C. C. 580. Although the most common cases of idiocy are those where the party is so from his birth, yet this is not an essential quality of this affliction. In some cases those who have enjoyed reason absolutely lose it, and become beyond a doubt idiots. This may be the result of sudden shock unseating the intellect, but more commonly it is the result of insanity. The characteristics of the malady are not essentially different, whether it be natural or acquired.

NOTE B. "So also an old man that by reason of his great age is childish again, or so forgetful that he doth forget his own name cannot make a testament; for a testament made by such a one is void." Shep. Touch. 403. It is highly probable that the question of the disability of a testator to make a valid will has arisen no more frequently, nor been more thoroughly and learnedly considered, than in those cases arising from the failure, or supposed failure, of the mental powers from advancing years. *Senile dementia,* or the imbecility of mind from old age, is a most difficult subject with which to cope. No line of separation exists in nature, between the years in which a man's mental powers are held to be sound, and those when those powers are

shattered; no point is fixed beyond which to pass is to become incompetent on account of age. The failure of the powers of mind arises from a thousand circumstances and conditions in life. All do not start on this race with equal advantage. One of the first symptoms (if not invariably the first) of the approach of imbecility from age, is the loss of memory. Yet this is not in every case the same—some lose the memory gradually, and, when it is gone, their minds are wholly shattered; others lose it quickly, and yet, in other respects, are quite competent for the transaction of business, long after they may be said to be deprived of any valuable memory; still another class lose partially the memory. One man may be fairly taken to be in his second childhood at an age when another is in the prime of life as to mental vigor. It is not an unknown thing for the mental powers to sharpen in advanced years, and for one in whom we look for failure, to astonish us with his renewed vigor. Hence, it becomes essential that each testator's situation, circumstances, habits, life, and his relations to those who surround him, must be thoroughly investigated, before either court or jury can have any adequate conception as to his ability to make a valid testament, and that whether he be fifty or eighty, or older. It is impossible to lay down rules in one case, which can be binding in others. As in other cases involving capacity, the questions to be determined, in these cases, are whether the testator had sufficient memory to recall his property, and those upon whom his bounty should confer it, and sufficient mind to construct a will with a due understanding of the business then in hand, and in the manner in which he desired his possessions to be distributed. Harrison *v.* Rowan, 3 Wash. C. C. 580; Clark *v.* Fisher, 1 Paige 171; Daniel *v.* Daniel, 39 Penna. St. 191; Yoe *v.* McCord, 74 Ill. 33; Higgins *v.* Carlton, 28 Md. 115; Carpenter *v.* Calvert, 83 Ill. 62. The mere fact that the testator is very aged, cannot, of itself, be made use of to overthrow his will. "For a man may freely make his testament, how old soever he be; since it is not the integrity of the body, but of the mind, that is requisite in testaments." Swinb., pt. 2, § 5, pl. 1; Godolph., pt. 1, ch. 8, § 4; Thompson *v.* Kyner, 65 Penna. St. 368; Bird *v.* Bird, 2 Hagg. 142; Rutherford *v.* Morris, 77 Ill. 397; Higgins *v.* Carlton, *ubi supra;* Creely *v.* Ostrander, 3 Bradf. 107; Andress *v.* Weller, 2 Gr. Ch. (N. J.) 604; Crolius *v.* Stark, 64 Barb. 112. Nor that, being very aged, he has recently married a wife under twenty years of age. Thomas *v.* Stump, 62 Mo. 275. But if the testator be very aged, and of impaired sight and hearing, the court should be very careful that the will was not obtained by means of undue influence. Weir *v.* Fitzgerald, 2 Bradf. 42. In Collins *v.* Townley, 6 C. E. Gr. (N. J.) 353, the testatrix was ninety-eight years of age at the time she made the will, but, as no unsoundness or imbecility of mind was shown, of a kind that approached to a defect of testamentary capacity, the will was sustained. On the contrary, in a case where the testator was but about seventy years old, the will was held not to be his will. Harrel *v.* Harrel, 1 Duv. 203. In this case, the testator, at the time of the acknowledgment of the testamentary document, was confined to his bed by an inflammatory disease, which appeared very distressing, and made him both "drowsy" and "flighty," and of which he died, about two days after the attestation. It also appeared that he was largely, if not wholly, under the influence of a second wife, who was not the mother of any of his children, and who had constantly made solicitations, amounting to annoying importunities, that he would make the will, and that the provisions of the will were grossly unequal and inadequate, and that the testator had for years declared that he would make no will, as the law made the best will; and, not long before his death, he said that

he wished his property divided equally among his children, and that he would make no will. It is not to be doubted that, after the memory is impaired, the mind may still be sound. Most people, probably, as age advances, suffer from loss of memory long before they have reached that degree of senility which would incapacitate them from making a valid will. Lowder *v.* Lowder, 58 Ind. 538, 542. Though great age raises some doubt as to capacity, yet this will be only so far as to excite the vigilance of the court. Kindleside *v.* Harrison, 2 Phillim. 449. In Browne *v.* Molliston, 3 Whart. 129, Huston, J., said: "The presumption of competency is not destroyed by any extremity of age, though it may be weakened where the testator is very old and circumstances additional are proved; but taken alone it matters not that the testator was a hundred years old at the time of executing the will." "The law looks only to the competency of the understanding. The failure of memory is not sufficient to create the incapacity unless it be quite total or extends to the testator's immediate family or property." Kent, C., in Van Alst *v.* Hunter, 5 Johns. Ch. 148. In this case, the testator was between ninety and one hundred years old when he made his will. It was also remarked by the Chancellor, in this case, that the failure of memory might exist to a very great degree, and yet "the solid power of understanding" remain. In Sloan *v.* Maxwell, 2 Gr. Ch. (N. J.) 563, 581, it is said: "The advanced age of the testator, upwards of eighty years, was made on the argument a distinct point against the will, not indeed as rendering him legally incapable, so much as raising a presumption of incompetency. The power of making a valid will is not impaired by the access of old age, nor is it denied to him who has attained the utmost verge of human life, on that account alone. Three-score years and ten do not always or necessarily extinguish the light of intellect. It is then in some men more brilliant than it is in others at a much earlier age. The power of disposing of property is an inestimable privilege of the old. It frequently commands attention and respect when other motives have ceased to influence. How often without it would the hoary head be neglected, deserted and despised." In Den *v.* Johnson, 2 South. 454, it is said: "Sound signifies whole, unbroken, unimpaired, unshattered by disease or otherwise." If this were so, a will could never be made in the decline of life, but only in youth or early manhood. However, it cannot be that this unqualified exposition of the word "sound" was intended to be so broad, for the same learned judge who used it said, later in the same case: "It is true that every discomposure of the mind by these causes" (melancholy, grief, sorrow, misfortune, sickness or disease) "will not render one incapable of making a will: it must be such a discomposure, such a derangement, as deprives him of the rational faculties common to man." Though a testator be very aged, if he dictate his will, and it manifest intelligence and sound moral sentiment, and be not procured by duress or undue influence, it will be sustained. Watson *v.* Watson, 2 B. Mon. 74; Reed's Will, Id. 79; Harrison's Will, 1 Id. 351. See also Sloan *v.* Maxwell, *ubi supra;* Lowe *v.* Williamson, 1 Gr. Ch. (N. J.) 82; Stevens *v.* Van Cleve, 4 Wash. C. C. 262; Sechrest *v.* Edwards, 4 Metc. (Ky.) 163; Wintermute *v.* Wilson, 1 Stew. (N. J.) 437; Humphrey's Will, 11 C. E. Gr. (N. J.) 513; Thompson *v.* Kyner, 65 Penna. St. 368; Mowry *v.* Silber, 2 Bradf. 133; Higgins *v.* Carlton, 28 Md. 115. In Minor *v.* Thomas, 12 B. Mon. 106, the testator was upwards of ninety, and the subscribing witnesses testified that, in their opinion, he was *scarcely competent*, and it appeared that his mind was so impaired as to amount to incapacity to conceive, arrange, or dictate a will; the will was rejected. In Shropshire *v.* Reno, 5 J. J. Marsh. 91, the will was rejected, the testa-

tor being but little over seventy, and it being shown that he was not entirely superannuated, nor absolutely *stultus* or *fatuus*. But it appeared that he had not "a sound memory," nor sufficient mind, nor mind in a proper state, to dispose of his property with reason. As to what is to be considered a disposing memory, some light is afforded by the Marquis of Winchester's Case, 6 Co. 23, where we are informed: "It is not sufficient that the testator be of memory when he makes the will to answer familiar and usual questions, but he ought to have a disposing memory so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory which the law calls sane and perfect memory." To the same point, Kirkpatrick, C. J., said: "By these terms" (a sound and disposing mind and memory) "it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament; but if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory." Den *v.* Van Cleve, 2 South. 589, 660. See also Kinne *v.* Kinne, 9 Conn. 102; Moore *v.* Moore, 2 Bradf. 261; Cordrey *v.* Cordrey, 1 Houston 269; Duffield *v.* Morris, 2 Harr. (Del.) 375; Stackhouse *v.* Horton, 2 McCart. 202; Converse *v.* Converse, 21 Vt. 168; Thompson *v.* Kyner, 65 Penna. St. 368. In the case of Humphrey's Will, 11 C. E. Gr. (N. J.) 513, the testator was ninety-four years of age at the time of executing the codicil to his will, but it was shown that he retained, to a remarkable degree, his mental faculties and his characteristics of firmness, independence, and decision. It was held by the Ordinary, that he was possessed of testamentary capacity at the time of the execution of the codicil, and this decision was unanimously affirmed on appeal. S. C., 12 C. E. Gr. (N. J.) 567. The same degree of capacity is not requisite to the making of a valid will that is to the making of a contract, or the management of the ordinary business of life. Potts *v.* House, 6 Ga. 324; Harrison *v.* Rowan, 3 Wash. C. C. 580; Kinne *v.* Kinne, 9 Conn. 102; Converse *v.* Converse, 21 Vt. 168; Thompson *v.* Kyner, 65 Penna. St. 368. If insanity has not previously existed, or been supposed to exist, the inquiry as to mental capacity will be confined to the question whether the mental powers remain sufficiently strong fully to understand the act about to be done. But if insanity be shown to have formerly existed, the investigation, at once, will assume an entirely different character. Prinsep *v.* Dyce Sombre, 10 Moore P. C. 278; Banks *v.* Goodfellow, L. R., 5 Q. B. 549; 1 Redf. on Wills 94, *et seq.*; Flood on Wills 387; Walkem on Wills 117, *et seq.*; Wms. Ex'rs (6th Am. ed.) 54, *et seq.* The burden of proof that the mind of the testator was imbecile, is on the party impeaching the will. 2 Greenl. Ev., § 689. The attesting witnesses to a will are, by the law, placed around the testator as a guard to protect him from fraud, imposition, and undue influence, and to judge of his capacity. It especially devolves upon them, then, in the case of a will of a very aged person, to be fully persuaded of the possession, by him, of competent memory and mind for the transaction then being performed. It is, therefore, particularly desirable that the will of such a person should be attested by those who have been, for considerable time, acquainted with him, as *dementia* is often very decep-

tive to those who are not familiar with the party affected thereby. In Scribner *v.* Crane, 2 Paige 147, Walworth, C., speaking to this point, said: "No person is justified in putting his name as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument the witness in effect certifies to his knowledge of the mental capacity of the testator and that the will was executed by him freely and understandingly with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead or is out of the jurisdiction of the court." On the theory that one of the duties of the attesting witnesses to a will is to judge of the capacity of the testator, they are allowed to state the *opinion* formed by them, of the testator's capacity to execute a valid will at the time the will in question was executed, and the opinion of such a witness generally has great weight with both court and jury. Other witnesses that may be called on such a trial, are to state facts that tend to show the state of mind of the testator, but they will not be permitted to give their opinions, merely, of the mental capacity of the testator. 2 Greenl. Ev., § 691. See *post* note D; Harrison *v.* Rowan, 3 Wash. C. C. 580; Stevens *v.* Van Cleve, 4 Wash. C. C. 262; Rambler *v.* Tryon, 7 Serg. & R. 90; Roberts *v.* Trawick, 13 Ala. 68; Sloan *v.* Maxwell, 2 Gr. Ch. (N. J.) 563; Potts *v.* House, 6 Ga. 324; Logan *v.* McGinnis, 12 Penna. St. 27. In Roberts *v.* Trawick, *ubi supra*, it is held that, upon a question of sanity, opinions of capacity can only be given by those who are peculiarly qualified, from a long and intimate acquaintance, to detect any mental alienation.

NOTE C. "He that is overcome by drink, during the time of his drunkenness, is compared to a mad man, and therefore if he make his testament at that time it is void in law, which is to be understood when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case." Swinb., pt. 2, § 6. See Gore *v.* Gibson, 13 M. & W. 623; Shep. Touch. 403. Intoxication is temporary insanity, ceasing with the cause. Wheeler *v.* Alderson, 3 Hagg. 574. For an able exposition of the symptoms and immediate effects of a free indulgence in intoxicating drinks, see Ray Med. Jur. Insan. (5th ed.), §§ 543, 544. In cases of delirium arising from the use of intoxicating liquors, the paroxysms are generally of limited duration, and the fact that a person is addicted to habits of intoxication even to such a degree as to suffer from *mania a potu* cannot be held to invalidate his will, unless it be clearly shown that the will was made during a period when reason was actually dethroned from this cause. Nor will any presumption of incapacity be held from proof of the fact that the testator had at some time previous to the execution of the will been absolutely incapacitated for a testamentary act, or even for the making of a contract, or the performance of business. The rule here is entirely different from that in cases of mania or insanity, the rule being such that the *onus* is not placed upon the proponent of the will by the establishment of the previous existence of delirium, while in other cases of testamentary incapacity, the proof that the testator had been incompetent throws the burden of proof on the proponent to show that at the time of the *factum* of the will the testator was competent. The reason for this change in the rule is both evident and satisfactory. The duration of delirium from this cause is temporary, and will cease with the cause, if it is not prolonged or aggravated by a repetition of the exciting act,

and in ordinary cases when the exciting cause is removed and the force thereof is spent the person so affected is competent for all the ordinary duties of life. The prevailing rule both at law and in equity is, that the acts of such a party will not be held to be invalid unless it be proved that he was so deprived of his faculties as to be incapable of understandingly performing the act, or of giving a free consent, or was so far overcome by intoxication as to be practically under the control of other persons. See Flood on Wills 391, *et seq.*; Walkem on Wills 113, *et seq.* In the case of Wheeler *v.* Alderson, *ubi supra*, it was held that when no fixed and settled delusion is shown, and that the extravagant acts of the testatrix are accounted for by excitement arising from the excessive use of liquor, while at times the mind was sound, it must be proved, in order to avoid a will, that the deceased was so excited by liquor, or so conducted herself during the particular act as to be at that moment legally disqualified from giving effect to such act. In another case it appeared that the testator was an habitual drunkard who, when under the excitement of liquor, acted in all respects like a mad man, yet he was not otherwise deranged, or under any other circumstances insane. The will was sustained, as it was shown that at the time of the *factum* of the will the testator was not under the influence of liquor. Ayrey *v.* Hill, 2 Add. 206. In this case, speaking of the difference between such a state and one of actual insanity, Sir John Nicholl said: "Insanity will often be, though *latent*, so that a person may in effect be completely mad or insane, however on some subjects and in some parts of his conduct *apparently* rational. But the effects of drunkenness or ebriety only subsist whilst the cause, the excitement visibly lasts; there can scarcely be such a thing as *latent* ebriety; so that the case of a person in a state of *incapacity* from mere drunkenness or ebriety, and yet *capable* to all outward appearance, can hardly be supposed." See also Billinghurst *v.* Vickers, 1 Phillim. 187. In a leading American case on this subject it is held that testamentary capacity may be temporarily destroyed by drunkenness, and that if drunkenness be long-continued it may permanently destroy capacity by producing imbecility or insanity. Duffield *v.* Morris' Ex'r, 2 Harr. (Del.) 375. In delivering the opinion of the court in this case Harrington, J., said: "The probable cause of insanity often affords valuable aid in determining its character. Drunkenness itself is a species of insanity, and might invalidate a will made during the drunken fit; but long-continued habits of intemperance may gradually impair the mind and destroy the memory and other faculties so as to produce insanity of another kind. This is an important subject of inquiry in the present case. If Doctor Morris was insane to such an extent that he could not make a valid will, habitual intemperance was at least one of the causes of such insanity. The form of insanity usually produced by intemperance is *mania a potu* or *delirium tremens*, which is a raging and decided insanity that cannot be mistaken, temporary in its duration, and when off is followed not only by a lucid interval, but by permanent restoration to reason. Yet it is not improbable that drunkenness long-continued or much indulged in may produce on some minds and with some temperaments permanent derangement, fixed insanity. It has not been contended that Doctor Morris was the subject of *mania a potu*; but the attempt has been to show that from intemperance and other causes a permanent state of deranged intellect, a morbid delusion, came upon him which resulted in the taking his own life. This was the great question for the jury to try, whether Doctor Morris was the subject of such insane delusions, fancying things which did not exist and could not exist, and which no reasonable mind could believe to exist; did this delusion continue up to the time

of making his will without intermission at that time and to such an extent as to exclude thought, judgment and reflection; to deprive him of the power of rational conversation on the matter he was about and of that kind of knowledge that would enable him to apprehend in his own mind that he was making a will, and the objects and purposes of such an act? If he had this knowledge, memory and judgment, it is what the law means by a sound disposing mind and memory, which is sufficient to make the will valid whatever may have been the state of the testator's mind before or after." See also Gardner *v.* Gardner, 22 Wend. 526; Barrett *v.* Buxton, 2 Aiken 167; Peck *v.* Cary, 27 N. Y. 9; Nussear *v.* Arnold, 13 Serg. & R. 323; Julke *v.* Adam, 1 Redf. 454; McSorley *v.* McSorley, 2 Bradf. 188; Pierce *v.* Pierce (S. C. Mich., 1878), Am. Law Reg. (N. S.), Vol. 17, 744; Turner *v.* Cheeseman, 2 McCart. 243; Pancoast *v.* Graham, Id. 294. In the case of Cochran's Will, 1 Mon. 263, it is held, contrary to the general rule as to the burden of proof in this class of cases, that, where the testator was for some time prior to the execution of the will and until death in *general* in a state of derangement, produced by intemperance, but enjoying some intervals in which he was of disposing mind, it ought to appear, in order to establish the will, by undoubted proof, that the will was made in one of those intervals. Habitual drunkenness will not *per se* constitute incapacity to make a valid will. Thompson *v.* Kyner, 65 Penna. St. 368; Pierce *v.* Pierce (S. C. Mich., 1878), Am. Law Reg. (N. S.), Vol. 17, 744; Whitenack *v.* Stryker, 1 Gr. Ch. (N. J.) 8. The same principle applies in the matter of deeds or contracts obtained from a person while intoxicated or demented from the use of ardent spirits, though it is probable that a greater degree of capacity would be required to be proved in those cases than in that of a will. As illustrative of this principle as applied to contracts, &c., see Butler *v.* Mulvihill, 1 Bligh 137; M'Diarmid *v.* M'Diarmid, 3 Bligh (N. S.) 374; Freeman *v.* Staats, 4 Halst. Ch. 814; Warnock *v.* Campbell, 10 C. E. Gr. (N. J.) 485; Donelson *v.* Posey, 13 Ala. 752; Eaton *v.* Perry, 29 Mo. 96; Belcher *v.* Belcher, 10 Yerg. 121; Ritter's Appeal, 59 Penna. St. 9; Johnson *v.* Rockwell, 12 Ind. 76.

NOTE D. "So strong is this impediment of insanity of mind that if the testator make his testament after his *furor* has overtaken him, and while as yet it possesses his mind, although the *furor* after departing or ceasing the testator recover his former understanding yet does not the testament made during his former fit recover any force or strength thereby." Swinb., pt. 2, § 3, pl. 2; Godolph., pt. 1, ch. 8, § 2; Shep. Touch. 403. Madness, lunacy or insanity is by no means uniform in its manifestations. In some cases it is markedly evident, so as that it cannot be mistaken; in others it is subtle and cunning to a marvelous degree; cases are not at all uncommon where the insane person is perfectly successful in concealing the fact of his disease from his intimate associates, and even from his medical advisers. The malady is also various in its pathological qualities, and is properly to be treated of under certain subdivisions, according to their constituent elements. The medical writers are far from accord in their definitions or subdivisions of insanity. Dr. Ray says: "Madness is not indicated so much by any particular extravagance of thought or feeling as by a well marked change of character or departure from the ordinary habits of thinking, feeling and acting without any adequate external cause. To lay down, therefore, any particular definition of mania founded on symptoms, and to consider every person mad who may happen to come within the range of its application might induce the ridiculous consequence of making a large portion of mankind of unsound mind. * * * * When the sanity of an individual is in question instead of comparing him with a fancied standard of mental soundness, as

is too commonly the custom, his natural character should be diligently investigated in order to determine whether the apparent indication of madness is not merely the result of the ordinary and healthy constitution of the faculties. In a word he is to be compared with himself, not with others," Med. Jur. Insan. (5th ed.), § 133. Taylor says: "The main character of insanity in a legal view is said to be the existence of *delusion; i. e.*, that a person should believe something to exist which does not exist, and that he should act upon this belief." Taylor Med. Jur. 629. Dr. Guislain says: "Insanity is a morbid derangement of the mental faculties unattended by fever, and chronic in its character which deprives man of the power of thinking and acting freely as regards his happiness, preservation and responsibility." Léçons sur les Phren., T. 1, 45. Professor Gilman's definition is, "Insanity is a disease of the brain by which the freedom of the will is impaired." The Relations of the Medical to the Legal Profession 20. Dr. Hammond defines insanity to be "A general or partial derangement of one or more faculties of the mind, which whilst not abolishing consciousness prevents freedom of mind or of action." Insanity in its Medico-Legal Relations 9. Without consuming time and space with the various classifications which have been made of insanity, we present that of Esquirol, believing it to be as correct as any that has been given. His classification is: "1. MELANCHOLIA.—Perversion of the understanding in regard to one object or a small number of objects with the predominance of sadness or depression of mind. 2. MONOMANIA.—Perversion of understanding limited to a single object or small number of objects with predominance of mental excitement. 3. MANIA.—A condition in which the perversion of the understanding embraces all kinds of objects and is accompanied with mental excitement. 4. DEMENTIA.—A condition in which those affected are incapable of reasoning, from the fact that the organs of thought have lost their energy and the force necessary for performing their functions. 5. IMBECILITY OR IDIOCY.—A condition in which the organs have never been sufficiently well conformed to permit those affected to reason correctly." Insanity in its Medico-Legal Relations 10. The difficulty of establishing a criterion of insanity is that the cases of alleged insanity depend largely if not wholly upon the particular circumstances of each case. Did insanity always assume the same form, and were the degree of violence of the disease the same, this difficulty would disappear, and we might then settle upon an answer to the oft-repeated inquiry where eccentricity ceases and the disease develops into derangement. The case of Dew *v.* Clark, 3 Add. 79, is a justly celebrated case on this subject. In that case, speaking to this point, Sir John Nicholl said: "What is the true criterion of madness or insanity? Where is it that mere eccentricity or extravagance ends and that this begins? It may safely be assumed that madness subsists in every variety of shape and degree. It subsists in the maniac chained to his floor—it subsists in the patient afflicted with mental aberration on certain subjects, or on a certain subject only; and in respect of such never betraying itself in violence or outrage. The affliction is the same in both cases, in species; the difference is only in degree. The intermediate degrees between the highest and lowest grade of insanity are almost infinite. Patients afflicted with this terrible infirmity, in some minor degree, often conduct themselves rationally in all but *certain* respects; and this not in show or semblance only, but in truth and substance. Instances have occurred of patients in Bedlam employed as keepers, in some sort, of their fellow-madmen; they themselves being at the same time *essentially* insane. Few madmen are *so* mad as to be incapable of some degree of self-control; and the cunning which madmen are often found to exercise if bent upon carrying

some favorite point is a circumstance of the malady too well known to require any specific illustration. Instances, again, of the extraordinary power of at times concealing their infirmity, commonly inherent in madmen are familiar to most people. Still, however with all this among the vulgar some are for reckoning madmen those only who are frantic or violent, to some extent. Others again in the opposite extreme, are too apt to confound mere folly with frenzy—and to describe as odd or eccentric or in some such phrase patients who in better judgments are actually and *essentially* insane. What then is the true criterion of insanity? The true criterion—the true test—of the absence or presence of insanity, I take to be, the absence or presence of what, used in a *certain* sense of it, is comprisable in a single term, namely—*delusion.* Whenever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination; and whenever at the same time, having once so conceived, he is incapable of being, or at least, of being *permanently* reasoned out of their conception; such a patient is said to be under a *delusion* in a peculiar, *half-technical* sense of the term; and the absence or presence of delusion so understood, forms in my judgment the true and only test, or criterion of absent or present insanity. In short I look upon delusion, in this sense of it, and insanity to be almost if not altogether convertible terms; so that a patient under a delusion, so understood, on any subject or subjects in any degree is for that reason essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable and how like so ever to a real madman he may either speak or act, on some or on all subjects; still in the absence, I repeat, of anything in the nature of *delusion* so understood as above, the *supposed* lunatic is, in my judgment, not properly or essentially insane." So too it has been held in the United States. "The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe. A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects and not as to others." Forman's Will, 54 Barb. 274, 289. See also Seamen's Friends Soc. *v.* Hopper, 33 N. Y. 619; Stanton *v.* Wetherwax, 16 Barb. 259; Duffield *v.* Morris, 2 Harr. (Del.) 375; 2 Greenl. Ev., § 371, a; 1 Best Ev., §§ 147, 150. Harrington, J., in Duffield *v.* Morris, *ubi supra,* said, quoting from Shelford, "An *unsound* mind is marked by delusion; it mingles ideas of imagination with those of sensation, and mistakes one for the other. It is often accompanied by an apparent insensibility to or perversion of those feelings which belong to our nature. Insane delusion consists in the belief of facts which no rational person would have believed. It may sometimes exist on one or two particular subjects, though generally it is accompanied by eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may lead to confirm the existence of delusion and to establish its insane character." So too it is said by Cockburn, C. J., in the quite recent case of Banks *v.* Goodfellow, 5 L. R., Q. B. 549, 570, "It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away testamentary capacity, that where insane delusion has shown itself, it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered

form, would be little likely to have any influence on the disposition of the will. No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed and guided by a judge. In the case before us two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have had any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at law, and therefore would have taken the property without its being devised to her, was yet rational in this, that it was made in favor of a niece, who lived with him, and who was the object of his affection and regard. And we must take it on the finding of the jury that irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed. Under these circumstances we see no ground for holding the will to be invalid. If, indeed, it had been possible to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness, founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given in the course of this judgment, we are of opinion that a jury should be told, in such a case, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it." What, then, is a delusion? Many and various have been the answers given to this inquiry. Sir John Nicholl, in Dew *v.* Clark, 3 Add. 79, says: "A delusion is a belief of facts which no rational person would have believed." Lord Brougham defines it to be "a belief in things as realities which exist only in the imagination of the patient." Waring *v.* Waring, 6 Thornton's Notes 388. Both of these definitions are open to objection. The first because it reasons in a circle, the second because many things may be entertained in the imagination which are not delusions, and which the person himself is capable of distinguishing from delusions. It seems to us that the definition given by Dr. Ray is more exact than either of those

above given. He says: "Delusion is a belief in something impossible in the nature of things or the circumstances of the case." Ray's Med. Jur. (5th ed.), § 169. "There is a good deal which might be said in favor of making delusion the test of insanity, and it has been adopted by some writers as at least an alternative test. One of our modern and most able philosophical writers has made belief the very fundamental conception. He holds that knowing is not before it, and that knowledge without believing it to be knowledge would not be knowledge. With a very little ingenuity it might be shown that as insanity can only be manifested through mind, and as any change in the mental *status* must produce a change in the mental beliefs which accompany and are part of these conditions, that consequently all insanity was manifested in morbid beliefs, and that consequently delusion was a good test of insanity." Browne's Med. Jur. Insan., § 8. An error in fact, or a prejudice or suspicion, will not amount to an insane delusion. Clapp *v.* Fullerton, 34 N. Y. 190; Seamen's Friend Soc. *v.* Hopper, 33 N. Y. 619; Stackhouse *v.* Horton, 2 McCart. 202; Trumbull *v.* Gibbons, 2 Zab. 117; Hall *v.* Hall, 38 Ala. 131; Boardman *v.* Woodman, 47 N. H. 120, 138; Taylor *v.* Kelly, 31 Ala. 59. And where an aged testator was led, by a declaration of his wife, made in the delirium of disease, to believe that one of his daughters was illegitimate, this suspicion on his part was held not to amount to an insane delusion, so as to invalidate the will. Clapp *v.* Fullerton, *ubi supra.* And it is said by Green, C., in Stackhouse *v.* Horton, *ubi supra:* "For if there were actual ground for suspicion of an injury, though in fact not well founded and disbelieved by others, the misapprehension of the fact will not be considered mental delusion, and a will made by a party affected by such suspicion may be valid." But to the contrary see Bitner *v.* Bitner, 65 Penna. St. 347. See also Stanton *v.* Wetherwax, 16 Barb. 259; Jenckes *v.* Smithfield, 2 R. I. 255; Florey *v.* Florey, 24 Ala. 241; Townshend *v.* Townshend, 7 Gill 10; Kelly *v.* Miller, 39 Miss. 17. No expression is more common in connection with wills than "a sound and disposing mind." What, then, is "a sound and disposing mind?" It means a mind of natural capacity, and if it be greatly impaired by old age it is no longer "sound and disposing;" so, too, if it be broken down and enfeebled by sickness, or if it be overcome by morbid influences or unbalanced by delusions. Smith *v.* Tebbitt, 36 L. J., Prob. 97, 16 L. T. (N. S.) 841, 1 L. R., Prob. 398; Den *v.* Vancleve, 2 South. 589; Harrison *v.* Rowan, 3 Wash. C. C. 580; Stevens *v.* Vancleve, 4 Wash. C. C. 262. It was said by Appleton, C. J.: "Men may be sane who are neither sagacious nor successful, and who transact their business in an improper and improvident manner." Hovey *v.* Chase, 52 Me. 304, 315. The same inquiry may be pertinent as to the memory, and we may ask, who, then, is a person of "nonsane memory?" Littleton defines him to be "*qui non est compos mentis.*" Litt., § 405. And Coke, corroborating this, in his Commentaries, adds, "Many times, as here it appeareth, the Latin word explaineth the true sense, and (Littleton) calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legal." He proceeds to say, "*Non compos mentis* is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is *non compos mentis.* 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometimes his understanding and sometimes not, '*aliquando gaudel lucidis intervallis*' and therefore he is called '*non compos mentis*' so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken." Co. Litt. 246, b. The words "mind and memory," as generally

used in the statutes of the American states, and as used at common law, are and were convertible terms. It is said by Sutherland, J., "The use of the words mind and memory as convertible terms is not so unphilosophical as it might at first seem to be, for without memory there could be no mind, properly speaking. Without any memory, a person would be the mere recipient of a succession of present sensations, like the lowest type of animal life." Forman's Will, 54 Barb. 274, 286. "Moral insanity is a disorder of the feelings and propensities. Legal insanity is a disorder of the intellect. Dr. Prichard describes moral insanity as 'consisting in a morbid perversion of the feelings, affections and active powers, without any illusion or erroneous conviction impressed upon the understanding.' Moral insanity may, or may not, impair the intellect or intellectual faculties. Moral insanity not proceeding from, or accompanied with, insane illusion, the legal test of insanity, is insufficient to set aside a will." Sutherland, J., in Forman's Will, 54 Barb. 274, 291; Fulleck *v.* Allinson, 3 Hagg. 527; Boyd *v.* Eby, 8 Watts, 66, 72. Perversion of moral feeling does not constitute unsoundness of mind so as to render an act performed *per se* invalid. Frere *v.* Peacocke, 1 Roberts 442. Nor is moral debasement necessarily insanity. Mayo *v.* Jones, 78 N. C. 402. So too it is held that a will cannot be set aside on account of any moral obliquity or prejudice exhibited by the testator in the devises of the will, nor because the testator makes an unjust and unnatural disposition of his property. Den d. Trumbull *v.* Gibbons, 2 Zab. 117. Strong, violent and unjust prejudices, if not founded on *delusion*, do not show mental incapacity. Ibid. See also Carpenter *v.* Calvert, 83 Ill. 62; Higgins *v.* Carlton, 28 Md. 115. Nor can a will of one of sound mind be defeated by proving that at some former time his intentions were different, but where the testator was absent from home and made a will leaving all his property to a stranger, and evidence was given which showed that he was probably insane when he made the will, it is competent to show that testator lived amicably with his sisters, and some months before his death said that what property he had would be left to them. See also Norris *v.* Sheppard, 20 Penna. St. 475. See also Rutherford *v.* Morris, 77 Ill. 397. Sanity must be presumed till the contrary is shown. Groom *v.* Thomas, 2 Hagg. 433; Den d. Trumbull *v.* Gibbons, 2 Zab. 117; Jackson *v.* King, 4 Cowen 207; Banker *v.* Banker, 63 N. Y. 409; Baxter *v.* Abbott, 7 Gray 71; Rush *v.* Megee, 36 Ind. 69. But it seems not to be well agreed what this presumption is, whether a presumption of law, or fact, or mixed of law and fact; the point has been a vexed one, and extensively debated by the courts. It may not, therefore, be amiss to review at some length what has been said both in England and the United States as to this point. In England the principles adopted seem to be that it is not to be treated as a legal presumption, but not more than a mixed presumption of law and fact, or even, it may be, merely a presumption of fact, *i. e.*, the jury may infer sanity from the absence of evidence to prove that the testator was not of that sound mind and memory which is general to the bulk of mankind. If the will be produced to a jury and its execution be proved and no other evidence is offered, it would be correct for the jury to find for the will. And even though the contestant produce some evidence of incompetency the jury may find for the will if they do not consider the testimony sufficient to shake the ordinary presumption of sanity. Still the *onus probandi* is always on the party supporting the will, and he must prove to the satisfaction of the jury that it is the will of a competent testator; and if after the whole matter has been submitted, the evidence is not such as to satisfy them that the will was made by a sane testator, their verdict should not establish it as such. Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Wms. Ex'rs (6th Am.

ed.) 23, *et seq.*; Flood on Wills 385, *et seq.* While there is diversity in the decisions of the courts of the various states, and even in some of the decisions of the courts of the same state, it is by far the prevalent opinion in the courts of the various American states that the presumption of sanity is a presumption of law. It is certainly the custom, when a will is offered for probate, to ask of the subscribing witnesses their opinion as to the sanity of the testator at the time of the *factum* of the will. But it cannot be that this is because the law does not presume sanity. There is difference of opinion as to the reason for this course. It is suggested by an eminent American writer, that the reason of this course is in order to afford the contestant an opportunity to draw from the subscribing witnesses all the facts and circumstances attending the execution of the instrument, without making those witnesses his witnesses, and thus losing such advantage as he might gain by a cross-examination. Without attempting an exhaustive investigation of the rulings on this point, we will quote from some of the American cases touching this question. In Jackson *v.* Van Dusen, 5 Johns. 144, Van Ness, J., says: "In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility the proof of the fact lies upon him who alleges it and, until the contrary appears, sanity is to be presumed. This rule of law is recognized by all the elementary writers on the subject; and in all the adjudged cases which I have met with both in law and equity the court in their reasoning and opinions seem to take it for granted. Swinb., 3, 45; Bac. Abr., let. F, tit. "Idiots;" 1 Peake's Ev. 373; Lovelass on Wills, 15, 142; 6 Cruise's Dig. 14; 3 Atkyns 361, Tucker *v.* Phipps; 3 Br. Ch. Rep. 443, Attorney-General *v.* Parnther; 13 Ves., Jr., 87, White *v.* Wilson. This rule undoubtedly has its qualifications; one of which is that after a general derangement has been shown it is incumbent on the other side to show that the party who did the act was sane at the very time when it was performed. The defendant does not complain that the law was not so stated; nor is there any just ground for such complaint because in fact it was so laid down to the jury. But independently of authority the law ought to be so. Almost all mankind are possessed of at least a sufficient portion of reason to be able to manage the ordinary concerns of life. To say therefore that sanity is not to be presumed until the contrary is proved is to say that insanity or fatuity is the natural state of the human mind." In Sloan *v.* Maxwell, 2 Gr. Ch. (N. J.) 580, Ewing, C. J., said: "It is a fixed principle that whenever the formal execution of a will is duly proved he who wishes to impeach it on the ground of incompetency must support by proof the allegation he makes and thereby overcome the presumption which the law raises of the sanity of the testator." In Turner *v.* Cheeseman, 2 McCart. 243, Potts, P. J., said: "The general rules and principles adopted by the Ordinary in the case of Whitenack *v.* Stryker & Voorhees, 1 Green's Ch. R. 11, are of controlling authority in this court as far as they are applicable to this case. They were adopted after solemn argument and have not since been questioned as far as I am advised, in this state. In that case the Ordinary said: '1. The first principle is that the presumption of the law is in favor of capacity and he who insists on the contrary has the burden of proof except where insanity has been shown to exist at a time previous to the execution of the will; in that case the *onus* is shifted and the party offering the will is bound to show that it was executed at a lucid interval.'" So, too, in Browne *v.* Molliston, 3 Whart. 129, Huston, J., said: "That the decedent must be presumed to be competent to make a will until the contrary is proved." In Chandler *v.* Ferris, 1 Harr. (Del.) 454, Clayton, C. J., said: "After the formal proof of

the paper the executor might fold his arms until the caveators produced something to overthrow his case which is *prima facie* established by the production of the will and the inference of law in favor of sanity." To the same effect is Pettes *v.* Bingham, 10 N. H. 515. In this case, Parker, C. J., said: "It is probably usual in the probate courts upon proof of a will to inquire of the subscribing witnesses whether the testator was of a sound and disposing mind; but it seems to be well settled that every man is presumed to be sane until there is some evidence shown to rebut that presumption. 3 Stark. Ev. 1702; 6 Cruise Dig. 15; 13 Ves. 89, White *v.* Wilson; 3 Brown's Ch. 443, Attorney-General *v.* Parnther. But if insanity be proved and a lucid interval is alleged to have existed at the time of the execution of the will, then it is said the burden of proof attaches to the party alleging such lucid interval. 3 Brown 443. The burden of proof was on the applicants to show that the testator was not sane and the verdict finds substantially that nothing appeared in support of the plea." In a late case in the same state, Bell, C. J., said: "That every man is presumed to be sane is abundantly proved by the authorities. We think that although the subscribing witnesses if they can be produced must be examined in relation to the soundness of the testator's mind yet the party propounding a will for probate is under no general duty to offer any evidence of the testator's sanity, but may safely rely upon the presumption of the law that all men are sane until some evidence to the contrary is offered. It is therefore proper to say that the burden of proving the sanity of the testator and all other requirements of the law towards a valid will, is upon the party who asserts its validity. This burden remains upon him till the close of the trial though he need introduce no proof upon this point until something appears to the contrary." Perkins *v.* Perkins, 39 N. H. 163. In Brooks *v.* Barrett, 7 Pick. 94, 98, Parker, C. J., said: "The presumption of law is that all men are of sound mind and those who would defeat this presumption by a suggestion of insanity must prove the exception to the general rule." "The presumption of law is in favor of sanity." Duffield *v.* Morris' Ex'r, 2 Harr. (Del.) 375. In Banker *v.* Banker, 63 N. Y. 409, 414, Church, C. J., said: "The presumption of sanity always exists—that being the normal condition of man." In Hawkins *v.* Grimes, 13 B. Mon. 257, 270, Marshall, J., said: "If upon the whole evidence *pro* and *con*, it be doubtful whether the party be sane or not, then the presumption in favor of sanity may operate to decide the question otherwise in equi-poise. * * * If upon the whole case, they (the jury) should doubt upon the question of sanity, the instruction seems to indicate that the verdict should, on that ground, be against the will, because sanity was not proved by the party who was bound to prove it. Whereas in such a case as in a trial for homicide the presumption of law should resolve the doubt." "That the testator was of sound and disposing mind is presumed." Dean *v.* Dean, 27 Vt. 746. To the same effect is a recent case in North Carolina. In pronouncing the opinion of the court, Reade, J., said: "On the trial of an issue *devisavit vel non*, is the burden of proving the sanity of the testator on the propounder; or is the burden of proving his sanity on the caveator? is the first question. * * * We all know that sanity is the natural and usual condition of the mind, and therefore every man is presumed to be sane. Wood *v.* Sawyer, Phill. 251. Admitting that to be the general rule, it is insisted that an exception prevails in the probate of wills. Let us see if that is so in this state. * * * We would not be excused for citing authority or using argument to show that when a deed is to be proved, all that is necessary is to prove its formal execution. And if incapacity, fraud or other fault is alleged, it must be proved by him who

alleges it. There is, however, a difference in the *formal* probate of a deed for registration, and the *formal* probate of a will. A deed is proved by witnesses or acknowledged by the grantor for registration, for preservation and for notice, as a substitute for livery of seisin. But the formal proof of a will amounts to more than that. The judge of probate is authorized to take probate of a will in *common form* without notifying the persons interested; and to qualify an executor and grant letters testamentary and to settle and distribute the estate among creditors and devisees and legatees. He is supposed to act for all parties, and the proceeding is *in rem*. He is expected to make such general inquiries as will protect the interests of all persons interested, and as such persons would make, if they were present, and as will satisfy his own mind and conscience. And as a guide for him a formula of the oath of a subscribing witness is contained in the chapter on oaths, just as the form of an executor's oath is given. But the oath is not essential to the validity of the will, nor to its probate, either in common form or in solemn form. And the will may be proved although the witnesses be absent or dead, or where they swear directly the reverse of the prescribed oath. And at any rate the prescribed oath is intended exclusively for probates in common form, and is never used on the trial of an issue *devisavit vel non*. When the probate judge takes probate of a will in common form, when there are no parties present to look after their interests, and he has the interests of all in his hands, it is just and proper that he should satisfy himself, not only of the formal execution of the will but of the capacity of the testator, because the law attaches great solemnity to his action, and makes his record of probate conclusive as to all the world, until it shall be vacated by a competent tribunal. Bat. Rev., ch. 119, § 15. But when the parties interested come forward and make an issue, and go before a jury to try the validity of the will, it takes precisely the same form and is governed by the same rules as the trial of the validity of a deed or any other instrument. And its formal execution being proved by the propounder as required by the statute, *supra*, whatever is alleged by the caveator in derogation, he must prove. Most of the confusion and conflict of decisions upon the question has grown out of the fact that the distinction between probate in common form and the trial of an issue *devisavit vel non* before a jury has not been observed." Mayo *v.* Jones, 78 N. C. 402, 403. In Turner *v.* Cook, 36 Ind. 129, 137, it was said, by Downey, C. J.: "This ruling doubtless proceeds on the ground that sanity is presumed, and that, therefore, insanity must be shown by the party alleging it. There are many cases which make a distinction between wills and other instruments, such as deeds, etc., with reference to this rule, holding that as many wills are made by persons in sickness and in advanced age, the party propounding the will must show, in the first instance, that the testator was competent to make the will. Our statute with reference to the proof of wills before the clerk provides that if it shall appear from the proof taken, that the will was duly executed, the testator, at the time of executing the same, competent to devise his property, and not under coercion, such testimony shall be written down, etc. See 2 G. & H. 557, § 30. It is best, however, that we adhere to the rule established, and hold that in this case the burden of the issue, as to unsoundness of mind, was on the plaintiff." In Higgins *v.* Carlton, 28 Md. 115, 141, it is said, by Brent, J.: "The question as to the *onus probandi*, where the issue is *testamentary capacity*, has been a great deal discussed by both judges and text-writers, and has furnished an occasion for the display of much learning and ingenuity. The numerous decisions upon the subject, in this country, are by no means uniform, and many of them are in direct conflict, so that any attempt to reconcile them would be hopeless.

They all, however, agree upon the general proposition, that sanity is presumed by law. But, in some of the states, it is held, that this general presumption does not apply to last wills and testaments—they forming an exception to the rule—and that therefore a party propounding a will must not only prove execution, but must also offer positive proof of capacity. A different rule, however, is recognized in most of the American courts, and it is sustained by reason and the weight of authority. If the presumption of law is in favor of sanity, we can discover no satisfactory reason why it should not be applied to wills, as well as to any other instrument of writing. The argument drawn from the fact, that the statute requires the testator to be 'of sound and disposing mind,' if a good one, would apply with equal force to the other requirements of the statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the statute. Yet no court has ever required a party, propounding a will, to prove the age of the testator, until the question was raised upon proof by the contestants. Why the one should be permitted to rest undisturbed upon the doctrine of presumption, and not the other, to say the least, does not seem to be in accordance with sound reason. In Swinburne 44, pt. 2, § 3, it is said, 'every person is presumed to be of perfect mind and memory unless the contrary is proved. If it be asked wherefore, then, is that usual clause (of perfect mind and memory) so duly observed in every testament, if he that doth prefer the will be not charged with proof thereof? It may be answered that that which is notorious is to be alleged, not proved. And so this being accounted notorious (because where the contrary appeareth not, the law presumeth it) it need not be proved.' This doctrine is recognized to its full extent, and affirmed in the cases last above referred to; and the rule is distinctly laid down as a logical conclusion from the presumption in favor of sanity, that "the burthen of proof lies upon the person who asserts unsoundness of mind; unless a previous state of insanity has been established, in which case, the burthen is shifted to him who claims under the will." Robinson *v.* Hutchinson, 26 Vt. 38; Grabill *v.* Barr, 5 Penna. St. 441; Chandler *v.* Barrett, 21 La. Ann. 58; Cotton *v.* Ulmer, 45 Ala. 378; Panaud *v.* Jones, 1 Cal. 488; Dickie *v.* Carter, 42 Ill. 376; Mullins *v.* Cotrell, 41 Miss. 291; Ean *v.* Snyder, 46 Barb. 230; Ford *v.* Ford, 7 Humph. 92; Goble *v.* Grant, 2 Gr. Ch. (N. J.) 629; Guthrie *v.* Price, 23 Ark. 396; Terry *v.* Buffington, 11 Ga. 337; In the matter of Coffman, 12 Iowa 491; Copeland *v.* Copeland, 32 Ala. 512; Thompson *v.* Kyner, 65 Penna. St. 368. "So although this likewise rests in some degree on principles of public policy sanity is always presumed even when the accused is on his trial on a capital charge." Best Ev., § 332. "So although the law in general presumes against insanity, yet where the fact of insanity has been shown its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it." Id., § 405. See also 2 Greenl. Ev., § 689. But this rule does not apply to insanity which may have arisen from a violent disease. Hix *v.* Whittemore, 4 Metc. 545. On the other hand it is held that there is no presumption of law in favor of sanity. In Maine it is said that where a will is to be proved the law does not presume that the alleged testator was sane at the time as in the making of other instruments, but sanity is to be proved. Gerrish *v.* Nason, 22 Me. 438; Cilley *v.* Cilley, 34 Id. 162. In Michigan the position of the court appears to be quite anomalous on this point, for while it admits that there is a presumption in favor of sanity, and styles it a presumption of law, it denies to it the ordinary force of a presumption of law, and holds that the presumption must be established by a preponderance of proof. In Aikin *v.* Weckerly, 19 Mich. 482, 502,

Graves, J., said: "The inquiry out of which the question arose related to the sufficiency of the testator's understanding to make the will; and the result of that inquiry may have turned on the decision of the point presented. It is seen that the ground really occupied by proponent, is that the presumption of testamentary capacity supplies all the evidence on that subject which the law requires unless such counter proof is offered as will overcome this presumption, and that even in cases where a contestant introduces opposing evidence on the issue of testamentary ability, the law casts upon him the burden of showing incapacity by some amount of proof not less than a preponderance. This view necessarily assumes that without further proof than is supplied by this presumption the finding should be in favor of competency in all cases where the probate is unopposed, and in all contested cases where no evidence is given by contestant on the point of testamentary ability or where the opposing evidence submitted on that subject will no more than balance the presumption. This position is believed to be untenable. This court decided in Beaubien *v.* Cicotte, 8 Mich. 9, that the proponent of a testamentary paper for probate was required to aver the soundness of mind of the testator at the time of execution and that the burden of proving the fact rested upon him, but it was not found necessary to decide in that case upon the effect of the common law presumption of sanity as an item of testamentary capacity; or its aptitude as evidence under the requirement to prove the averment. The case of Taff *v.* Hosmer, 14 Mich. 309. however, not only affirms that proponent, before resting, is bound to make a *prima facie* case on the averment of soundness of mind, but is an authority that the necessity of making such a case on that point involves the production of some other evidence of testamentary capacity than is furnished by the legal presumption. It is true that this last proposition is not explicitly laid down in Taff *v.* Hosmer, but the opinion of my brother Cooley noticed the fact, that proponents in that case, before resting, had submitted evidence in aid of the presumption of law, and treated the course so pursued as agreeable to usage and correct in principle. In these testamentary cases, the burden of proving capacity is not merely cast in the first instance upon those averring it, but it abides with them during the trial. Undoubtedly the jury must consider and weigh the whole evidence bearing upon the point, whether presumptive or coming from one party or the other. But as those who propound the will for probate have the burden of proof, or in other words, are bound to establish their averments by a balance of proof in their favor, they will necessarily fail before the jury, unless on the whole evidence such balance is found. If it were otherwise, and the burden of proof was devolved on contestants, the parties asserting testamentary capacity would be entitled to a verdict, if the evidence should be equally balanced, and hence the parties really holding the affirmative would succeed, when in legal contemplation the matter would remain as though no evidence whatever had appeared. The question throughout the trial is whether the testator was of sound mind? And the whole evidence applicable to it belongs to the jury; but since proponents must aver testamentary capacity, and support such averment by a measure of evidence outweighing that opposed, they will fail if the whole evidence on the subject, presumptive and otherwise, supporting the averment is found to fall below this measure of proof." And it is remarked by Christiancy, J., in Kempsey *v.* McGinnis, 21 Mich. 123 as follows: "In this particular class of cases, and upon the question of mental soundness or unsoundness, after a *prima facie* case has been established by the proponents, the case, for all purposes connected with the order of proof upon that question, stands the same

as if the burden of proof throughout rested upon the contestants to show mental incapacity." In Williams *v.* Robinson, 42 Vt. 658, 664, Pierpoint, C. J., says: "I have thus far been considering the case upon the supposition that there is a legal implication that when a will is executed in due form the person executing it had the requisite capacity. If there is such a presumption, from what does it arise? Certainly it cannot arise from the fact that the great majority of mankind have sufficient capacity. The law will no more imply capacity from such a cause than it will imply that all men are white because a majority are, or that all men are dishonest because so many are. But it may be said that it is the duty of the persons called upon to act as witnesses to refuse to act and participate in the execution of a will, if they discover evidence of want of capacity, and that it is to be presumed they discharge their duty in this respect, and having acted as witnesses, the law will therefore presume the capacity of the testator. Does the law ever presume that the witnesses to a will have discharged their duty in respect to its execution when proof can be obtained? It is made the duty of the witnesses to a will, by statute, to see the testator sign the will, and to sign it themselves as witnesses in his presence, and in the presence of each other, and ordinarily there is attached to their attestation a certificate, over their signatures, that these statute requirements have been complied with. Yet the law makes no presumption in favor of the due execution of the instrument, but requires strict proof thereof. The object of this is to guard the testator against any fraud or imposition that may be practiced upon him in respect to his will. Why then should the law presume capacity, which is certainly the most important element in making a valid will, and the one best calculated to protect the testator against fraud and imposition? * * * If then we are to hold that there is this legal presumption in favor of the capacity of the testator, it must be strictly upon the force of authority. And although there are some respectable authorities that favor it, we think the weight of authority, especially in the more recent cases, is against it. Any attempt to reconcile the authorities would be useless labor. * * * I can see no good resulting from the presumption, but room for much evil. There is certainly no necessity for it, as proof on the subject is always accessible, and is presumed to be within the knowledge of the proponent's witnesses; then why not require him to prove it. It cannot have its origin in convenience, as in the case of other written instruments that are executed in the course of the ordinary daily business transactions between man and man that are open, and in which all parties participate, and which take effect upon their execution. But wills take effect only at the death of the testator. They are ordinarily executed in private, without the presence or knowledge of those who are affected by them, unless it be some one who is to be affected favorably; and in such case there is an additional reason for caution and requiring proof. * * * Upon the whole, we think the better rule is that which throws the burden on the proponent to prove the due execution of the will, and the capacity of the person executing it. Such rule is based upon sound reason, and tends to protect the rights of the testator and all persons that are to be affected by the provision of the instrument; imposes no unnecessary hardship, and ordinarily scarcely an inconvenience upon the proponent, and is well supported by authority." It seems to us, therefore, to be the prevailing doctrine in the American states, that the presumption of sanity is a presumption of law; surely by far the greater number of cases on this topic hold that it is so. We think, too, that this is in accordance with the reason of the matter. Why should the law refuse to accept as a presumption anything so common as the condition of

sanity? Reason is the common inheritance of mankind, and it seems to us that it should never be presumed that any one of the race has failed to obtain that inheritance, or having had it has become a mental bankrupt. But still further, why should it not be presumed as well in testamentary matters as in any other? Why say that, while a man still lives, it shall be presumed that he is sane, but that the moment he has passed away, and we are called upon to deal with his testamentary acts, it shall be presumed that he was not sane at the time of the *factum* of his will? No contract, obligation or undertaking of any man can be maintained if he was not sane at the time of the making of it, but, if that be the defence, it must be strictly pleaded and clearly proved, and no court would entertain any presumption, in such a case, that the defendant was insane. We can see no reason for erecting such a mark of separation between a will and all the other instruments executed by men. The doctrine contended for by those who oppose the presumption of law in favor of sanity would hold, that if a man executed a note and a will on the same day, the law would, in the case of the note, presume that he was sane, while, as far as his will was concerned, it would presume that he was insane, and call upon the proponent of the will to *prove* that he was sane, which is absurd. But if a person be under guardianship as *non compos mentis*, the presumption is that he is incapable of making a will. Hamilton *v.* Hamilton, 10 R. I. 538; Breed *v.* Pratt, 18 Pick. 115. But general derangement having been shown it is then incumbent on the one who insists that the act was valid to show sanity at the very time when it was performed. Jackson *v.* King, 4 Cowen 207; Clark *v.* Fisher, 1 Paige 171; Higgins *v.* Carlton, 28 Md. 115; Morrison *v.* Smith, 3 Bradf. 209; Harden *v.* Hays, 9 Penna. St. 151; Rush *v.* Megee, 36 Ind. 69; Halley *v.* Webster, 21 Me. 461. But there is no presumption of continuing insanity where the malady or delusion under which the testator labored was in its nature either accidental or temporary. Townshend *v.* Townshend, 7 Gill 10; Staples *v.* Wellington, 58 Me. 453; Aubert *v.* Aubert, 6 La. Ann. 104; McMasters *v.* Blair, 29 Penna. St. 298. When mental aberration is proved to have shown itself in the alleged testator, the degree of evidence necessary to substantiate any testamentary act depends greatly on the character of the act itself. If it purports to give effect only to *probable* intentions its validity may be established by comparatively slight evidence. But evidence very different in kind and much weightier in degree is requisite to the support of an act which purports to contain dispositions *contrary* to the testator's *probable* intentions, or savoring in any degree of folly or frenzy. Evans *v.* Knight, 1 Add. 229. In this case Sir John Nicholl said: "Evidence upon questions of capacity is almost always contradictory; the obvious grounds of conflicting evidence upon these questions are, that evidence of capacity is commonly evidence of opinion merely, that of the witnesses no two possibly have seen the party whose state is deposed to at precisely the same time and under precisely the same circumstances, and then each, again, of the several witnesses, however numerous, measures, possibly, testamentary capacity by his own particular standard." See also Williams *v.* Goude, 1 Hagg. 577; Groom *v.* Thomas, 2 Hagg. 433. On the question of the sanity of the testator, no particular *quantum* of evidence is necessary, in order to sustain the validity of the will; but the jury should determine the facts on the weight of the evidence. Rigg *v.* Wilton, 13 Ill. 15; Minard *v.* Minard, Brayt. 231; White *v.* Helmes, 1 McCord 430. If the subscribing witnesses to a will testify that the testator was insane, they may be contradicted by other evidence. Lowe *v.* Joliffe, 1 Wm. Black. 365. But subscribing witnesses ought not to be admitted to deny

their own attestation. "It is of terrible consequence that witnesses to wills should be tampered with, to deny their own attestation." Lord Mansfield, in Goodtitle *v.* Clayton, 4 Burr. 2224. It is held in New York, that the question of capacity, in the abstract, is, had the testator, at the time of the *factum*, a mind, or mind and memory, sufficiently sound to make a will; but, that, practically, in most cases, the question is, had the testator, at the time of the *factum*, a mind, or mind and memory, sufficiently sound to make *the* will in question. Forman's Will, 54 Barb. 274; Parish Will Case, 25 N. Y. 9; Hopper Will Case, 33 N. Y. 619; Lispenard Will Case, 26 Wend. 255; Clark *v.* Fisher, 1 Paige 171; Stanton *v.* Wetherwax, 16 Barb. 259; Thompson *v.* Thompson, 21 Barb. 107. This is also, probably, the real question in other states, in similar cases. See McClintock *v.* Curd, 32 Mo. 411. And it seems that if there be no evidence of insanity at the time of the *factum* of the will, the fact that the testator took his own life soon thereafter, will not invalidate the instrument, by raising the presumption of previous derangement. Burrows *v.* Burrows, 1 Hagg. 109; Duffield *v.* Morris, 2 Harr. (Del.) 375, 383; Brooks *v.* Barrett, 7 Pick. 94. In Brooks *v.* Barrett, *ubi supra*, the testator destroyed his own life shortly after he made his will. In regard to that point, Parker, C. J., said: "That species of insanity which is generally supposed to exist where the subject commits suicide may be there is no doubt and frequently is consistent with the exercise of usual discretion as to the management or disposition of property; indeed the power of reasoning on other subjects may be wholly unimpaired. The law does not consider the act of suicide as conclusive evidence of insanity; on the contrary it is held as a crime unless insanity is proved." It seems that it is competent to show, upon trials as to insanity, that the ancestral relatives of the party, whether in the direct or collateral line, were subject to insanity, or were actually insane. Baxter *v.* Abbott, 7 Gray 71. So, too, it is held that, to prove the sanity of a party at the time of the making of a contract, evidence may be given of the state of his mind *before, at,* and *after* such time. Grant *v.* Thompson, 4 Conn. 203. It has been held that, in order to set aside a will, it is not necessary that *derangement* of intellect should be proved. Imbecility of mind, short of actual insanity, will be sufficient for this purpose. A less degree of insanity than is necessary in order to acquit of crime, will be sufficient to avoid the will. McTaggart *v.* Thompson, 14 Penna. St. 149; Rambler *v.* Tryon, 7 Serg. & R. 90; Converse *v.* Converse, 21 Vt. 168. If a person have sufficient mental capacity to attend to his ordinary business, he is capable of making a valid will. Coleman *v.* Robertson, 17 Ala. 84; Horne *v.* Horne, 9 Ired. 99; Gleespin's Will, 11 C. E. Gr. (N. J.) 523; Lyons *v.* Van Riper, Id. 337; Thompson *v.* Kyner, 65 Penna. St. 368; Harvey *v.* Sullens, 46 Mo. 147; Higgins *v.* Carlton, 28 Md. 115; Bates *v.* Bates, 27 Ia. 110; Stancell *v.* Kenan, 33 Ga. 56; Aikin *v.* Weckerly, 19 Mich. 482; Trish *v.* Newell, 62 Ill. 196; Tobin *v.* Jenkins, 29 Ark. 151; Wood *v.* Wood, 4 Brews. 75; Bundy *v.* McKnight, 48 Ind. 502. And it seems that, though the testator had softening of the brain two years before he made his will, this will not, *per se*, alter this rule. Rutherford *v.* Morris, 77 Ill. 397; Holden *v.* Meadows, 31 Wis. 284. An unequal division of property, unnatural in its character, is not any evidence of insanity, and if the testator be free from any undue influence, and no actual insanity be shown, he may make such disposition of his property as partiality, pride, or caprice may dictate. Coleman *v.* Robertson, 17 Ala. 84; Den, ex d. Trumbull, *v.* Gibbons, 2 Zab. 117; Rutherford *v.* Morris, *ubi supra;* Higgins *v.* Carlton, *ubi supra;* Gamble *v.* Gamble, 39 Barb. 373. Although a person may understand and answer, rationally, questions put to him, yet he may not be capable of making a

will for all purposes. The rule of law is, that competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. Marsh *v.* Tyrrell, 2 Hagg. 84, 122. "And it is sufficient for the party which pleadeth the insanity of the testator's mind to prove that the testator was beside himself *before* the making of the testament, although he do not prove the testator's madness at the very time of making the testament; the reason is it being proved that the testator was once mad the law presumeth him to continue still in that case, unless the contrary be proved." Swinb., pt. 2, § 3. But if there is no disorder at the time of making the will, though the testator be greatly afflicted with distemper of mind, and the will is consistent with his intentions when he was of capacity the will must be sustained. Coghlan *v.* Coghlan, cited in 1 Phillim. 120. The fact that the testator bequeaths an article of property which he does not own is only a circumstance from which to infer his state of mind, and should never prevail as positive evidence showing incompetency. Marks *v.* Bryant, 4 Hen. & Munf. 91. Nor will the omission to mention one of the testator's children in the will, *per se* invalidate the will, on the ground of incapacity. Schneider *v.* Koester, 54 Mo. 500; Snow *v.* Benton, 28 Ill. 306. It appears that where a person is so influenced by religious impressions and apprehensions as that they produce extreme anxiety, and even hopeless despair, and are so overwhelming as to render him unconcerned and listless on all other subjects, it will not follow that his reason is impaired. Therefore it cannot be held that one so affected was incapable of making a rational and valid will. Weir's Will, 9 Dana 434. That a will was altogether written, and written well, by the testator himself, and that it made such dispositions and such *only* as were consistent with his affections and duties, is the best evidence that he possessed a disposing mind when he wrote it. Ib. An entire change of character and conduct is the best evidence of insanity. Lucas *v.* Parsons, 27 Ga. 593; Bitner *v.* Bitner, 65 Penna. St. 347. In a recent case A. left to trustees for his son T., who was semi-imbecile, one sixth of the residue of the estate of A., providing in his will that T. should have power to dispose of it by will to and among his brothers, sisters and niece and their descendants. T. made a will. On the question of his capacity to make that will it was urged that the will was to be regarded as the execution of a power conferred by the will of A. Runyon, Ordinary, said: "But surely it is not necessary to say that an idiot or lunatic cannot execute a power involving the exercise of discretion, even though it should appear that the donor knew at the time of the grant of the power that the donee was *non compos mentis*." Alexander's Will, 12 C. E. Gr. (N. J.) 463, 467. "If the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind. * * * Partial insanity renders a will null and void, if it can be proved or plainly inferred that the will is immediately founded in, or upon such partial insanity." Flood on Wills 389. Trumbull *v.* Gibbons, 2 Zab. 117; Townshend *v.* Townshend, 7 Gill 10; Seamen's Friend Soc. *v.* Hopper, 33 N. Y. 619; Potts *v.* House, 6 Ga. 324; Lucas *v.* Parsons, 27 Ga. 593; Denson *v.* Beazley, 34 Tex. 191. Upon this branch of this subject it was said by Cockburn, C. J., in Banks *v.* Goodfellow, L. R., 5 Q. B. 549, 560: "It is not given to man to fathom

the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired. But the question still remains, whether such partial unsoundness of the mind, if it leaves the affections, the moral sense, and the general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, should have the effect of taking away the testamentary capacity." And in Boyd *v.* Ehy, 8 Watts 66, 70, Sergeant, J., said: "The rule of law in regard to wills is that the memory which the law holds to be a sound memory is when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be collected from his words and actions and behavior at the time. If general lunacy be established it must be shown that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act. Incompetency then by reason of insanity is to be sought for in the words, actions and behavior at and about the time of the act in question. We have no other source to reason from. The internal structure and operation of the mind are inscrutable, and even a physical derangement of the brain (which is usually supposed to be its seat) is incapable of being ascertained. The *factum* itself is to be considered, whether such as a judicious rational mind would perform; and also, when a general derangement has once existed, it is incumbent on him who alleges restoration of mind to show that it took place so far as to enable the party to judge soundly of the act he is doing. What conclusion then are we to come to in a case where a person in the full possession of his faculties has made a will unexceptionable in its structure and dispositions, bequeathing various pecuniary legacies and then disposing of the residue of his estate to his nearest relations: and where that person, within the space of two or three months becomes lunatic, and in the paroxysms of his insanity and in connection with them imbibes the most violent antipathies against one of these relations, for whom formerly he entertained a high regard and affection; which antipathies are proved to be utterly without just cause or foundation and built upon imaginary grievances; and where this person be-

coming afterwards relieved from the symptoms of his derangement yet continues to cherish on all occasions these antipathies and perverted impressions and while under their influence, within nine months after the derangement, adds a codicil to his will, in which he revokes his residuary bequest and gives it all over to persons—strangers to him in blood, though otherwise having some claim upon his bounty? It appears to me that the only question in such a case is whether the person was of sound memory and discretion, considering the act done in all its bearings and judging of the soundness of mind of the supposed testator by his conduct and declarations at the time and as connected with his previous insanity and the degree of restoration of mind in the interval, and that if the erroneous and groundless impressions received during the time of his delirium still retain their hold (whether by some physical derangement of the brain or by some indelible stamp upon the thinking faculties) that person must be considered still under a delusion—the effect continues and it is only by effects we can judge of the existence of the exciting cause—and if he is under a delusion, though there be but a partial insanity, yet, if it be in relation to the act in question, it is well settled, it will invalidate contracts generally and will defeat a will which is the direct offspring of that partial insanity, both in courts of common law and in the ecclesiastical courts, although the testator in making it was sane in other respects on ordinary subjects." Stevens *v.* Vancleve, 4 Wash. C. C. 262, 267; Harrison *v.* Rowan, 3 Wash. C. C. 580, 585; Den *v.* Vancleve, 2 South. 589, 660; Kachline *v.* Clark, 4 Whart. 316; Tawney *v.* Long, 76 Penna. St. 106; Cordrey *v.* Cordrey, 1 Houst. 269; Horne *v.* Horne, 9 Ired. 99; Stancell *v.* Kenan, 33 Ga. 56; Hathorn *v.* King, 8 Mass. 371; Sloan *v.* Maxwell, 2 Gr. Ch. (N. J.) 563; Converse *v.* Converse, 21 Vt. 168. See also Jamison *v.* Jamison, 3 Houst. 108; Benoist *v.* Murrin, 58 Mo. 307; Spoonemore *v.* Cables, 66 Id. 579. The question has been much discussed as to the admissibility of the opinions of witnesses in matters of testamentary capacity. The authorities are very conflicting on this important subject. Therefore, we deem ourselves fortunate in being able to lay before the profession a thorough and exhaustive opinion on this subject by a very able judge, believing it to cover the ground fully. In a dissenting opinion in State *v.* Pike, 11 Am. Law Reg. (N. S.) 233, 241; 51 N. H. 105, Doe, J., making the most thorough examination of this subject that we find in this country, said: "Witnesses, not experts, called by the defendant, were not allowed to testify that, from their observations of his appearance and conduct before the alleged murder, they formed the opinion that he was insane. This testimony should have been received. In England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court any objection, question, or doubt in regard to it. But in Wright *v.* Tatham, 5 Cl. & Fin. 670, S. C., 4 Bing. N. C. 489, the question was involved in such a manner, and the number and strength of the judicial opinions were such, as to make that case an authority of the greatest weight in favor of the competency of the evidence. In addition to that case and the other English authorities cited in Boardman *v.* Woodman, 47 N. H. 144, are Lowe *v.* Jolliffe, 1 Wm. Black. 365; Attorney-General *v.* Parnther, 3 Br. C. C. 441, 442; King *v.* Arnold, 16 St. Tr. 695, 706, 707, 708, 710, 711, 712, 713, 715, 717, 719, 723, 724, 725, 726, 727, 728, 730, 732, 735, 736, 737, 738, 739, 742, 746, 747, 748, 750, 751, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763; King *v.* Ferrers, 19 St. Tr. 885, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933,

937, 938, 939, 940, 941, 952, 953; King *v.* Frith, 22 St. Tr. 307, 313, 314, 315, 317; King *v.* Hadfield, 27 St. Tr. 1281, 1299, 1301, 1304, 1305, 1330, 1331, 1332, 1337, 1347, 1350, 1353; King *v.* Bellingham, Annual Register 1812, part 2, pp. 304, 307; King *v.* Bowler, Ann. Reg. 1812, part 2, pp. 309, 310; King *v.* Offord, Ann. Reg. 1831, part 2, pp. 107, 108; Queen *v.* Oxford, 9 C. & P. 525, 317, 318; S. C., in Ann. Reg. 1840, part 2, pp. 249, 257, 259; S. C., in 1 Townsend Modern State Trials 102, 125, 132, 133, 134, 135; Queen *v.* Higginson, 1 C. & K. 129, 130; Queen *v.* McNaughten, Ann. Reg. 1843, part 2, pp. 345, 353, 354, 355, 356, 357; S. C., in 1 Townsend Mod. St. Tr. 314, 347, 348, 349, 384, 385, 387, 388, 389, 390, 391, 392; Queen *v.* Dove, J. F. Stephen Cr. Law 391, 394, 395, 396; Queen *v.* Mitchell, Ann. Reg. 1863, part 2, pp. 157, 159; Queen *v.* Townley, Ann. Reg. 1863, part 2, pp. 296, 302, 304; Queen *v.* Baker, Ann. Reg. 1867, part 2, pp. 217, 224. The number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised. The uniform rule in England, from the earliest times to the present, may be wrong; but on a common law subject like this, it is entitled to consideration. It should be set aside, and a new rule should be established if it can be clearly shown that all the authorities of the native land of the common law have been erroneous from the beginning, and in conflict with the principles of the common law, or that they are not applicable to our institutions or the circumstances of this country. But whoever asserts that such a condition exists, has the task of maintaining the assertion; and that task on this question has never been performed. In this country the authorities are almost equally unanimous in favor of the competency of the evidence: Lester *v.* Pittsford, 7 Vt. 158; Morse *v.* Crawford, 17 Id. 499; Clifford *v.* Richardson, 18 Id. 620, 627; Cram *v.* Cram, 33 Id. 15; Crane *v.* Northfield, Id. 124; Cavendish *v.* Troy, 41 Id. 99, 108; Grant *v.* Thompson, 4 Conn. 203; Kinne *v.* Kinne, 9 Id. 102; Dunham's Appeal, 27 Id. 192; Swift's Ev. 111; Stewart *v.* Lispenard, 26 Wend. 291, 308, 309; Culver *v.* Haslam, 7 Barb. 314; DeWitt *v.* Barley, 13 Id. 550; S. C., 9 N. Y. 371; S. C., 17 Id. 340; Delafield *v.* Parish, 25 Id. 37, 38; Clapp *v.* Fullerton, 34 Id. 190; Clark *v.* Sawyer, 3 Sandf. Ch. 357; Den *v.* Gibbons, 2 Zab. 117, 135, 136; Whitenack *v.* Stryker, 1 Green Ch. 8; Sloan *v.* Maxwell, 2 Id. 563, 583, 584, 586, 588, 592, 594, 599, 602; In the matter of Vanauken, 2 Stock. Ch. 192; Turner *v.* Cheesman, 15 N. J. Ch. 243; Garrison *v.* Garrison, Id. 266; Rambler *v.* Tyron, 7 S. & R. 90, 92; Irish *v.* Smith, 8 Id. 573, 576; Wogan *v.* Small, 11 Id. 141, 144; Grabill *v.* Barr, 5 Penna. St. 441, 443; Wilkinson *v.* Pearson, 23 Id. 117, 120; Bricker *v.* Lightner, 40 Id. 199; Duffield *v.* Morris, 2 Harring. (Del.) 375, 377, 385; Brooke *v.* Townsend, 7 Gill 1028; Stewart *v.* Redditt, 3 Md. 67, 78; Stewart *v.* Spedden, 5 Id. 433, 446; Dorsey *v.* Warfield, 7 Id. 65, 73; Weems *v.* Weems, 19 Id. 334, 345; Temple *v.* Taylor, 1 Hen. & Munf. 476, 478; Burton *v.* Scott, 3 Rand. 399, 403, 404, 405; Mercer *v.* Kelso, 4 Grat. 106, 118; Clary *v.* Clary, 2 Ired. 78; Hayward *v.* Hazard, 1 Bay 335, 340, 341, 342, 343, 344; Griffin *v.* Griffin, R. M. Charlt. 217, 218, 220, 221, 223; Potts *v.* House, 6 Ga. 324; Berry *v.* State, 10 Id. 510, 529; Walker *v.* Walker, 14 Id. 242, 151; Roberts *v.* Trawick, 13 Ala. 68, 84; Norris *v.* State, 16 Id. 776; Florey *v.* Florey, 24 Id. 241, 247; Powell *v.* State, 25 Id. 21; Stubbs *v.* Houston, 33 Id. 555, 564; In re Carmichael, 36 Id. 514, 522; Gibson *v.* Gibson, 9 Yerg. 329; Baldwin *v.* State, 12 Mo. 223; Farrel *v.* Brennan, 32 Id. 328; Kelly *v.* McGuire, 15 Ark. 555, 601; Abraham *v.* Wilkins, 17 Ark. 292, 322; State *v.* Gardner, Wright 392, 398; Clarke *v.* State, 12 Ohio 483, 490; Doe *v.* Reagan, 5 Blackf. 217; Roe *v.* Taylor, 45 Ill. 485; Pelamourges *v.* Clark, 9 Iowa 1, 11–19, 29; State *v.* Felter, 25 Id. 67; White *v.* Bailey, 10 Mich. 155, 161; Beaubien *v.* Cicotte, 12 Mich. 459, 495–508; Case of Lawrence,

tried in the District of Columbia, before Judge Cranch and two other judges, for shooting at President Jackson, 48 Niles Reg. 119; Hoge *v.* Fisher, Pet. C. C. 163, 165; Harrison *v.* Rowan, 3 Wash. C. C. 580, 582, 586. On the other side there are authorities in Maine, Massachusetts, and Texas which hold a contrary doctrine; but, on examination, they are found to occupy very feeble positions. So far as the history of the law, on this subject, has been brought to the notice of this court, the first time the competency of this evidence was doubted, was in the jury trial of a probate case at Cambridge, Mass., in 1807. The only account we have of that affair, is the report of Mr. Tyng, who says that the court permitted the subscribing witnesses to the will to give their opinions of the sanity of the testator, and that 'other witnesses were allowed to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment:' Pool *v.* Richardson, 3 Mass. 330. From the conspicuous and emphatic use of the word 'merely,' and from what occurred in subsequent Massachusetts cases, there is reason to suspect that the only point ruled in this case, was, that the witnesses were allowed to give their opinions when they stated the particular facts from which the state of the testator's mind was inferred by them, 'but not to testify merely their opinion or judgment.' They 'were allowed to testify to the appearance of the testator;' and they could not do that without giving their opinions. It was a ruling made hastily and probably instantaneously, without argument, during a trial before a jury, at a time when the hurry of clearing the crowded dockets of Massachusetts gave no opportunity for deliberation. If the court had been aware that this ruling overturned all the authorities and the uniform practice of England and America from the beginning of the common law to that day, it is not to be presumed that the ruling would have been made without a formal opinion reduced to writing by some member of the court, formally delivered and formally reported, giving some reason for the innovation. If they had been conscious of the novel and revolutionary character of the precedent, they would not have introduced it so summarily and inconsiderately. This was not the only mistake made at Nisi Prius. In the previous month, in the trial of another probate case, when the only issue was upon the sanity of a testator, and the formal execution of the will was therefore not in question, the court refused to allow two of the subscribing witnesses of the will to testify because the third witness was not produced: Chase *v.* Lincoln, 3 Mass. 236. Nor are these the only peculiarities in the precedents of that state. At the trial of another probate case, the physicians who attended the testatrix in her last sickness were asked whether, in their opinion, she was sane. Objection was made to the competency of any opinion. The court ruled that the attending physicians might give their opinions, but state the particular circumstances or symptoms from which they drew their conclusions: Hathorn *v.* King, 8 Mass. 371. And in Dickinson *v.* Barber, 9 Id. 225, it was held on that ground that certain depositions of physicians had been rightly excluded. In Commonwealth *v.* Rich, 14 Gray 335, 337, it was held, as matter of law, that a physician of thirty years' practice, who had testified that he had made the subject of mental disease a study, but not a special study, and had had the usual experience of practicing physicians on the subject, could not be questioned upon a hypothetical case stated in the usual manner. These cases show a peculiar and exceptional system of practice on these subjects, which has never prevailed in this state. In Buckminster *v.* Perry, 4 Mass. 593, 'Two or three witnesses were of opinion that the testator was much broken and very forgetful about the time the will was

made.' Instead of rejecting this evidence, the court charged the jury 'that the evidence given by the appellants to invalidate the will deserved but little consideration.' In Needham *v.* Ide, 5 Pick. 510, the jury were instructed that the '*mere opinions* of other witnesses' than those who subscribed the will, 'were not competent evidence, and were not entitled to *any weight*, further than they were supported by the facts and circumstances proved on the trial.' These witnesses gave their opinions, 'without being asked;' objection was not made to their opinions; their opinions were not rejected at the time they were given, nor absolutely excluded from the consideration of the jury by the charge of the court. But in Commonwealth *v.* Wilson, 1 Gray 337, 339; at Nisi Prius, in Hubble *v.* Bissell, 2 Allen 196, 200, by a *dictum;* and in Commonwealth *v.* Fairbanks, Id. 511, in a *per curiam* decision, it was held that the incompetency of the opinions of non-experts was not an open question in Massachusetts. The court merely refused to investigate the question. In this abrupt and unsatisfactory manner, without any consideration from first to last, has this exception become established in that state. Of the four judges reported as present at the October Term 1807, at Cambridge, we do not know who were present at the trial of Poole *v.* Richardson. The next year, at Cambridge, when Ch. J. Parsons charged the jury in Buckminster *v.* Perry, witnesses were allowed to testify that, in their opinion, 'the testator was much broken and very forgetful;' and this evidence was not excluded from the consideration of the jury. In Needham *v.* Ide no opinion of the court is reported; but the reporter says that the court overruled an objection taken to the instruction given to the jury that the mere opinions 'were not entitled to any weight further than they were supported by the facts and circumstances proved on the trial.' After that, at Nisi Prius, and in a *dictum*, and in a *per curiam* decision, the court held themselves concluded by their own precedents. The only judge in Massachusetts who appears to have deliberated on the subject, gave his judgment against the peculiar practice of that state. In Baxter *v.* Abbott, 7 Gray 71, 79, Judge Thomas says: 'All lawyers know how difficult it is to try issues of sanity with the restrictions as to matters of opinion already existing; how hard it is to make witnesses distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe and the impression which that conduct and those traits create, or the mental conclusion to which they lead the mind of the observer. If it were a new question I should be disposed to allow every witness to give his opinion subject to cross-examination, upon the reasons upon which it is based, his degree of intelligence and his means of observation.' The counties of Massachusetts which became the State of Maine thirteen years after the exception was introduced in Poole *v.* Richardson, did not abandon their practice on that point, as they did not abandon the general system of practice which had grown up with them while they were a part of Massachusetts. For thirteen years the exception had the same authority, and was administered by the same court in Essex and in York. As it was never examined in Massachusetts on the south, so it has never been examined in Massachusetts on the east: Ware *v.* Ware, 8 Greenlf. 42, 54, 55, 56; Wyman *v.* Gould, 47 Me. 159. It is equally regarded in both as an inherited peculiarity for which no one is responsible. Its position as an authority was not materially strengthened by the division of the state. In Gehrke *v.* State, 13 Texas 568, it was summarily held, without any citation of authority or consideration of principle, that it would have been improper to receive as evidence the vague, indefinite expression of a witness that the prisoner looked like or acted as an insane person. Thus stand the precedents of other jurisdictions at pres-

ent, so far as they have been brought to the notice of this court; Massachusetts, Maine, and Texas on one side, the rest on the other; and no attempt in either of the three states to justify their peculiar exception. If this amounts to a conflict among the authorities it must be regarded as inconsiderable. In many of the cases in which the opinions of ordinary witnesses have been received the question has been fully considered, and their competency established on solid ground. 'Testimony of opinion may be given where, from the general and indefinite nature of the inquiry, it is not susceptible of direct proof. Thus upon a question of insanity witnesses, not professional men, may be permitted to give their opinion in connection with the facts observed by them. But this evidence is always confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from the representation of others. Upon a question of insanity, for instance, witnesses who have observed the conduct of the patient, and been acquainted with his conversation, may testify to his acts and sayings, and give the result of their observation; but where mere opinion is required upon a given state of facts, that opinion is to be derived from professional men:' Lester *v.* Pittsford, 7 Vt. 158, 161. 'The law is well settled, and especially in this state, that a witness may give his opinion in evidence in connection with the facts upon which it is founded, and as derived from them, though he could not be allowed to give his opinion founded upon facts proved by other witnesses:' Morse *v.* Crawford, 17 Vt. 499, 502. 'Where mere opinion is required upon a given state of facts not connected with the personal observation of the witness, that opinion is to be received from professional men alone:' Cram *v.* Cram, 33 Vt. 15, 18. These extracts are a sufficient answer to the objection made against some of the authorities that they require the witness to state facts as well as opinion. The objection is as invalid as it would be if made against the admission of opinions as to physical health. A witness cannot testify that in his opinion the defendant was sick or well, without first showing that he had an opportunity of forming an opinion from facts observed by himself. If a witness, not an expert, is first asked whether, in his opinion, A. was sane or insane at a certain time, the witness would not be allowed to answer the question. It must first appear that his opinion is formed upon his own observations and not upon the testimony of other witnesses, or upon hearsay, or upon a hypothetical case. If his opinion is formed upon the testimony of other witnesses the jury have as good an opportunity as the witness to form an opinion; if it is formed upon hearsay it is mere indirect proof of hearsay; of a hypothetical case the jury can form an opinion as well as a non-expert witness. But if the opinion of the witness is formed upon his own observations he had a better opportunity to form an opinion than the jury can have from a description of the acts and words of the person whose sanity is in question; because such a description cannot generally convey any adequate idea of the signs of sanity or insanity as they appear to an observer. It is necessary as far as possible that the impression produced by the acts and words should be conveyed to the jury, and it cannot generally be conveyed by a mere description or recital of them; therefore the opinions of observers constitute one of the classes of testimony known in law as the best evidence; not the best because it happens to be the only available evidence in a particular case, but the best because it belongs to one of the best species of evidence usually available—the best in the nature of things—the best by reason of 'the general and indefinite nature of the inquiry, and the difficulty of producing direct proof of a mere mental condition:' Crane *v.* Northfield, 33 Vt. 124, 125. 'The best testimony the nature of the case admits of ought to

be adduced; and on the subject of insanity, in my judgment, it consists in the representation of facts, and of the impressions which they made:' Grant *v.* Thompson, 4 Conn. 203. 'The judgment which we form as to the mental condition of an acquaintance depends as much upon his looks and gestures, connected with his conversation and conduct, as upon the words and actions themselves, and yet it would be a hopeless task for the most gifted person to clothe in language all the minute particulars with their necessary accompaniments and qualifications which have led to the conclusion which he has formed:' Denio, J., in DeWitt *v.* Barley, 9 N. Y. 371, 389, 390. No mere description of the wrinkles of the face, of the tone of the voice, or the color of the hair, would be likely to convey any very accurate impression as to the precise age of the person described. The case of McKee *v.* Nelson, 4 Cow. 355, is an example belonging to the same class. That was an action for breach of promise of marriage, and a witness who knew the plaintiff, and had observed her conduct and deportment toward the defendant, was permitted to testify whether in her opinion the plaintiff was sincerely attached to him—a fact which it is plain could be proved in no other way. Trelawney *v.* Coleman, 2 Stark. 191, is another case of the same kind. There in an action for criminal conversation a witness who was acquainted with the parties was permitted to give her opinion as to the degree of affection entertained by the wife for her husband. * * * To me it seems a plain proposition that upon inquiries as to mental imbecility arising from age, it will be found impracticable in many cases to come to a satisfactory conclusion without receiving to some extent the opinions of witnesses. How is it possible to describe in words, that combination of minute appearances upon which a judgment in such cases is formed? The attempt to try such a question excluding all matter of opinion would, in most cases, I am persuaded, prove entirely futile. * * * A witness can scarcely convey any intelligible idea upon such a question without infusing into his testimony more or less of opinion. Mental imbecility is exhibited in part by attitude, by gesture, by the tones of the voice, and the expression of the eye and the face. Can these be described in language so as to convey to one not an eye-witness an adequate conception of their force? * * * It certainly strikes me that few questions can be suggested, about which it is possible to raise a doubt, which are more conclusively settled by authority, than that under consideration. * * * This court itself, since the former decision in this case, has, upon a question strictly analogous, unanimously established a different rule. I refer to the case of The People *v.* Eastwood, 14 N. Y. 562. Upon the trial of that case a witness was asked whether at the time of the homicide the prisoner was intoxicated? This question was objected to and excluded upon the ground that it called for the opinion of the witness. Exception was taken to this ruling, and upon that exception the case was brought to this court, where it was unanimously held that the evidence ought to have been received, and a new trial was granted for that among other reasons. The admissibility of the evidence was there placed upon the precise ground which has been assumed here, viz., that the appearances which indicate intoxication cannot be so perfectly described in words as to enable persons not eye-witnesses to judge with accuracy on the subject. The questions in that case and in this are in principle identical, and opinions cannot be held inadmissible in the present case without virtually overruling that of Eastwood: DeWitt *v.* Barley, 17 N. Y. 340, 344, 348, 350, 352. 'A witness may state facts, may give the look of the eye, and the action of the man, but unless he is permitted to express an opinion, he cannot convey to the mind distinctly the condition of the man that such

acts and looks portray.' In the matter of Vanauken, 2 Stock. Ch. 186, 192. How can a witness 'give the look of the eye,' without giving an opinion? 'The opinion of a witness as to the sanity of a person depends for its weight, on the capacity of the witness to judge, and his opportunity:' Burton *v.* Scott, 3 Rand. 399, 403. 'And so it is in regard to questions respecting the temper in which words have been spoken, or acts done. Were they said or done kindly or rudely—in good humor or in anger; in jest or in earnest? What answer can be given to these inquiries if the observer is not permitted to state his impression or belief? Must a *fac simile* be attempted so as to bring before the jury the very tone, look, gestures, and manner, and let them collect thereupon the disposition of the speaker or agent? * * * Unquestionably, before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons, that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than it has in fact enabled the observer to form a belief or judgment thereupon. So it is in the analogous case of handwriting. If a witness declares that he has seen the party write, whether it has been once only or a thousand times, this is enough to introduce the inquiry, whether he believes the paper produced to be the party's handwriting. His belief is evidence, the weight of which must depend upon a consideration of all the circumstances under which it was formed:' Clary *v.* Clary, 2 Ired. 78. Judge Redfield says of the decisions in Clary *v.* Clary, 'The learned judge shows with great ability and abundant success, in our judgment, that the rule here adopted, is the only one consistent with principle:' 1 Redfield on Wills 143, n. 16. 'A careful daily observer of a person feigning madness, would witness innumerable acts, motions and expressions of countenance, which, with the attending incidents and circumstances, would conclusively satisfy him of the fictitious character of the pretended malady, but which he could never communicate to a jury or scientific man, so as to give them a fair conception of their real importance. From poverty of language, these facts, should a witness attempt to detail them, would necessarily be mixed up with opinions general or partial, in spite of his best efforts to avoid it. There are things well known to all persons, which our language only enables us to express by words of comparison—such are the peculiar features of the face indicating an excitement of the passions, affections and emotions of the mind, as hope, fear, love, hatred, pleasure, pain, &c. Testimony affirming the existence or absence of either of these, is but a matter of opinion. So the statement of the fact that a man's whole conduct is natural, is but the opinion of the witness, formed by comparing the particular conduct spoken of, with the acts of the past life of the individual. It would hardly be claimed that such evidence should be excluded, yet it is equivalent to an opinion that the person is sane:' Clark *v.* State, 12 Ohio 483, 490. It must appear that 'the facts upon which it is based, have come under his own observation:' Doe *v.* Reagan, 5 Blackf. 217. The subject is fully considered in Beaubien *v.* Cicotte, 12 Mich. 459, 495–508, and other cases. Objection has been made to some of the cases in which it has been said that mere opinions were slight evidence. This has been said in some chancery cases, in which the judge passing upon fact as well as law, has expressed his opinion of the weight of certain testimony as a matter of fact within his power to decide. In other cases tried by jury, judges have expressed their opinions of the weight of this evidence as they were accustomed to express their opinions of the weight of other evidence. The practice, having been firmly fixed and

universal, has often been as visible in the decisions of the court as in summing up the evidence to the jury. It embraces all evidence alike, and has no bearing upon the competency of particular testimony, which is the point now before us. The practice is obsolete in this state, but it is settled by authority that, at common law, the judge may give the jury his opinion of the weight of any part or of the whole of the evidence—with this limitation, that he is not to give such opinion as imperative upon the jury—they are to understand that they are the judges of the facts: 2 Hale's Hist. Com. L. 147; King *v.* Fisher, 1 St. Tr. 395, 402; King *v.* Cullender et al., 6 St. Tr. 687, 700; King *v.* Keach, 6 St. Tr. 701, 706, 709; King *v.* Green et al., 7 St. Tr. 159, 214, 215, 216, 217, 218, 219; King *v.* Colledge, 8 St. Tr. 550, 713, 726; King *v.* Hardy, 24 St. Tr. 1362, 1363, 1383; Brembridge *v.* Osborne, 1 Stark. 374; Petty *v.* Anderson, 3 Bing. 170, 171, 172, 173; Solarte *v.* Melville, 7 B. & C. 430, 435; Davidson *v.* Stanley, 2 M. & G. 221; Calmady *v.* Rowe, 6 M., G. & S. 861, 893; Doe *v.* Strickland, 8 Id. 743; Pennell *v.* Dawson, 18 Com. B. 355, 370; S. C., 36 Eng. L. & Eq. 431, 440; Attorney-General *v.* Good, McClel. & Y. 286; Sutton *v.* Sadler, 3 Com. B. (N. S.) 87, 98, 101, 103; Queen *v.* Townley, Ann. Reg. 1863, part 2, pp. 306–309; Duberly *v.* Gunning, 4 T. R. 651, 652; Tyrwhitt *v.* Wynne, 3 B. & Ald. 556, 560, 561; Rex *v.* Burdett, 4 Id. 131, 167; 1 Am L. Rev. 59; Carver *v.* Jackson, 4 Pet. 1, 80; Garrard *v.* Reynolds, 4 How. (U. S.) 123; Harrison *v.* Rowan, 3 Wash. C. C. 580; Phillips *v.* Kingfield, 19 Me. 375; Cunningham *v.* Bachelder, 32 Id. 316; Nutting *v.* Herbert, 37 N. H. 346, 355; Buckminster *v.* Perry, 4 Mass. 593, 594; Commonwealth *v.* Child, 10 Pick. 252, 256; Curl *v.* Lowell, 19 Id. 25; Davis *v.* Jenney, 1 Metc. 221; Whiton *v.* O. C. I. Co., 2 Id. 1; Eddy *v.* Gray, 4 Allen 435; State *v.* Lynott, 5 R. I. 295; F. B. Church *v.* Rouse, 21 Conn. 160, 167; N. Y. F. I. Co. *v.* Walden, 12 Johns. 513; Garnder *v.* Picket, 19 Wend. 186; Lansing *v.* Russell, 13 Barb. 521; Hunt *v.* Bennett, 4 E. D. Smith 647; Bulkeley *v.* Ketellas, 4 Sandf. 450; Grove *v.* Donaldson, 15 Penna. St. 128; Oyster *v.* Longnecker, 16 Id. 269; Stoddard *v.* McIlwain, 7 Rich. 525; Still *v.* Glass, 1 Ga. 475. What was the New Hampshire rule as to the competency of the evidence, before the decision of Boardman *v.* Woodman? In May 1811, State *v.* Geo. Ryan was tried in Cheshire, before Livermore, Ch. J., and Steele, J. The attorney-general appeared for the state, and Chamberlain, Hubbard and Vose for the defendant. The defence was insanity. Of non-expert witnesses called by the state, one testified that at the trial before the magistrate the defendant 'wished an adjournment of his examination—appeared to argue his motion for it like a man of understanding and discretion;' another testified that he 'had no idea from what he saw of the defendant * * * that he was any way deranged—the prisoner then appeared to have the full use of his reason;' another testified that the defendant 'appeared to be perfectly in possession of his faculties * * * no appearance of derangement.' Of non-expert witnesses called by the defendant, one testified that the defendant conducted on one occasion 'like a man without sense;' another testified that on the morning of a certain day, the defendant 'was perfectly rational—in the afternoon, became wild;' another confirmed the last; another testified that the defendant 'appeared rational.' Non-expert witnesses gave their opinions freely without objection, and it is evident that the counsel and the court understood such evidence to be competent. Judge Livermore, in summing up the testimony, particularly named the witnesses, who, to use his own words, 'testify that in their opinion he had not the use of his reason:' Pamph. Report of State *v.* Ryan. In State *v.* Farmer, tried in 1821, before Richardson, Ch. J., and Woodbury and Green, JJ., a witness testified that the defendant had said he

would kill the deceased. On cross-examination he was asked if he thought the defendant in earnest, and he answered in the negative without objection. The charge of the court shows that it was understood that this evidence was competent: Pamph. Report of State *v.* Farmer. In October 1830, State *v.* Corey was tried in Cheshire, before Richardson, Ch. J., and Green and Harris, JJ. Handerson, Wilson and Chamberlain, the Solicitor, appeared for the state, and Woodbury, Hubbard and Joel Parker for the defendant. The trial was reported by Joel Parker. The defence was insanity. The first witness called for the defence was the defendant's brother, not an expert. He was asked if his father was sane. 'The solicitor objected to the question, and cited Poole et al. *v.* Richardson, 3 Mass. 330, and other authorities to show that the opinion of the witness could not be received in evidence.' What the 'other authorities' were, we know only from the fact that, at that time, there were no such authorities in the world outside of the original territory of the State of Massachusetts—the slight extension of the peculiar practice of Massachusetts beyond that territory, being a very recent affair. Notwithstanding the objection explicitly urged and supported by Massachusetts precedent, Corey's brother was allowed to testify, 'His father is crazy,' and his sister 'is wild as a hawk.' At least six other non-expert witnesses testified to their opinions that various relations of the defendant had been insane. One testified that the defendant was not insane at the time in question. One testified that the defendant looked and acted like a crazy person. The court asked one witness if the defendant, on a certain occasion, appeared rational; and received an affirmative answer. Many non-expert witnesses, on the part of the state, testified that they had known the defendant, and had never known of his being insane. One testified there 'was one time when he saw him *out*—cannot say whether he had been drinking or not.' Several testified that they had 'never known of his being deranged except from liquor.' We are informed by the reporter of the case that his report of the charge given to the jury by Judge Richardson, was submitted to, and revised by, Judge Richardson himself before publication. The charge shows that it was not doubted that the opinions were competent. Judge Richardson expressly said that the opinions formed the day before the homicide, by persons in a situation which enabled them to judge, were 'entitled to great weight.' Here was the first attempt made to introduce into this state the Massachusetts exception, which was then twenty-three years old. The total failure of the attempt; the citation, consideration, and rejection of the Massachusetts cases; the admission of the opinions; the question put to one of the witnesses by the court; and the declaration of Judge Richardson that the opinions formed the day before the homicide, were entitled to great weight, notwithstanding the Massachusetts authorities cited to show they were not admissible, render this a case of the very highest authority. To cite the Massachusetts cases as in conflict with State *v.* Corey, is, in this state, as unavailing as it would be to cite Gregg *v.* Wyman, 4 Cush. 332, as in conflict with Woodman *v.* Hubbard, 25 N. H. 67, 76, 77, where Gregg *v.* Wyman was held not to be law. The cases in Maine, as we have seen, cannot be regarded as anything else than Massachusetts authority. And thus all existing precedents which have been cited from other jurisdictions as in conflict with State *v.* Corey, are disposed of, except the Texas case. As no authority was cited and no ground stated for the decision of the latter case, we could not be expected to follow it, and to overthrow the overwhelming mass of English and American authorities including those of our own state, without some urgent reason for so doing. At the August Term 1832, in Rockingham, held by Judge Green and Judge Harris, the

case of Hamblett *v.* Hamblett was tried. The appellee 'offered in evidence the deposition of Mary Palmer in which she testified, among other things, that on the day of the execution of the will, she was at the house of the testator, and that 'his discourse was satisfactory to her.' To this part of the testimony, the appellant objected. The evidence was admitted, but the court, in their instructions to the jury, directed them not to rely upon any evidence of opinion as to the sanity or insanity of the testator, except what was derived from the testimony of the subscribing witnesses to the will." Questions raised at the trial were decided December 1833, when the court consisted of Richardson, Green, Parker, and Upham. Judge Parker, delivering the opinion of the court, said that the whole force and effect of some of the evidence relating to certain persons was, to show their opinions that the testator was sane. * * * It could be used only to show that they treated the will as valid and binding on them, and that the inference therefore was, that they were heretofore of opinion that the sanity of the testator could not be questioned. In this view, it would seem to stand upon the same ground, as the matter which forms another objection on the part of the appellant, which is to the admission of the testimony of Mary Palmer that she had a conversation with the testator on the day of the execution of the will, and that 'his discourse was satisfactory to her.' This is wholly immaterial unless it be as evidence of the opinion of the witness that the testator was sane. But, the case finds that the judge expressly directed the jury not to rely upon any evidence of opinion as to the sanity or insanity of the testator, except what was derived from the testimony of the subscribing witnesses to the will. On the supposition that this testimony of Mary Palmer to matter of opinion, or rather to matter from which her opinion of sanity is to be inferred, was incompetent—which is not conceded—if sufficiently connected with facts—the question arises whether this furnishes any ground for a new trial, the court having thus directed the jury.' After deciding that question, and holding that if the evidence had been incompetent, the exclusion of it after it had been received, would obviate the objection made to its admission, Judge Parker said, 'As to the direction of the judge, relative to evidence of opinion, it may be proper to remark that we do not intend to be understood as establishing this as the rule. The weight of authority seems to be in favor of admitting the opinions of others than the witnesses to the will, if connected with evidence of the facts upon which those opinions are founded: 3 Stark. Ev. 1707, in notes; Grante *v.* Thompson, 4 Conn. 203; *vide* also Hathorn *v.* King, 8 Mass. 371; Buckminster *v.* Perry, 4 Id. 594; Lowe *v.* Jolliffe, 2 W. Black. 365. It remains to be considered whenever the question shall directly arise whether this is not the most eligible and proper course in questions of this nature; but upon this matter it is not now necessary to make a decision:' Hamblett *v.* Hamblett, 6 N. H. 333, 336, 344, 349. This is a strong intimation that the doctrine of State *v.* Corey had not been, and was not likely to be, abandoned. In September 1834, State *v.* Prescott was tried in Merrimack, before Judge Richardson and Judge Parker. George Sullivan, attorney-general, and John Whiffle, solicitor, appeared for the state; Ichabod Bartlett and Charles H. Peaslee for the defendant. The defence was insanity. A large number of non-expert witnesses testified to their opinions of the sanity or the insanity of the defendant and some of his relatives; and no objection was made to the competency of the opinions. The case was sharply and strenuously contested on each side; it was tried according to the strict rules of law as then understood; the distinguished counsel on both sides insisted upon a rigid observance of those rules;

they waived no objection that occurred to them; nothing was yielded to courtesy, convenience, or humanity; in no case tried in this state, since that time, has there been a greater display of zeal, acuteness, and power on the part of counsel. It is reasonably certain that if it had been supposed to be doubtful whether the opinions of non-experts were admissible, objections would have been made to them. Those opinions were argued by the counsel, and considered by the court and jury as evidence; and there is no reason to suspect that any one engaged in the trial thought they were not evidence. In addition to these precedents, we know, upon the most authentic information, that, down to the time when Judge Parker left the bench in 1848, he did not understand that the early New Hampshire practice with which he had been familiar in State *v.* Corey, and State *v.* Prescott, and of which he had expressed his approval in Hamblett *v.* Hamblett, had been abolished, and the contrary Massachusetts practice established in its place. After the delivery and publication of his opinion in Hamblett *v.* Hamblett, it is not probable that he would assent to a silent reversal of the doctrine of State *v.* Corey, or allow it to be reversed without some reason for or against the innovation, being put on record. This brings us down to a recent period. Whatever uncertainty there is, has arisen since Judge Parker presided in this court. In 1848, when he retired from the bench and removed from the state, the decision in Texas had not been made, but the Massachusetts exception had been disapproved in Hamblett *v.* Hamblett, and rejected in State *v.* Ryan, State *v.* Corey, and State *v.* Prescott. Down to 1848 there is no doubt that the doctrine of Poole *v.* Richardson was not the law of this state. This is a matter as to which we have dates. The doctrine of Poole *v.* Richardson was not brought from England with the body of the common law; it was a ruling first made in this country in the present century; it had not gained a foothold in this state twenty-one years ago, and was never recognized in our decisions until 1865. After Judge Parker left the state, and before the trial of Boardman *v.* Woodman, the question of sanity was tried in a few cases, and so far as any practice can be said to have grown up in those few cases in those seventeen years, it grew into conformity to the Massachusetts exception. So far as it amounted to anything, it was a silent, unauthentic growth, and it is very easily explained. No judge remained on the bench who had participated in the decision of Hamblett *v.* Hamblett, or in the trial of the early cases. The significant observations of Judge Parker, in Hamblett *v.* Hamblett, were not kept prominently before the profession by any head-note or digest. They were enveloped in a case of eighteen pages, and in a part of it not likely to be often if ever read; they were entirely overlooked or forgotten. The pamphlet reports of State *v.* Ryan, State *v.* Corey, and State *v.* Prescott, were scarce, seldom if ever read and substantially unknown; and the surviving counsel who had been engaged in those trials were no longer on active duty at our bar, and had no occasion to remonstrate against the change of our practice. The Massachusetts exception prevailed in the territory adjoining us on the south and east. The Massachusetts reports were used more than any others except our own. The legal treatises referring to this subject, in most common use among us, were written or edited by Massachusetts men who were not aware that the doctrine of Poole *v.* Richardson was a peculiarity of their state, and who stated the Massachusetts exception to be the common law, as they erroneously supposed it was. Greenleaf on Evidence and Massachusetts editions of Jarman on Wills exercised a potent influence in the introduction of that great mistake: 1 Greenlf. Ev., § 440; 1 Jarman on Wills, 77, Mass. ed. In the second and subsequent Massachusetts edi-

tions of Jarman, the third chapter of the first volume of the English edition was omitted, and a new chapter by the Massachusetts editor was inserted in its place. In the text of this new chapter the editor gives the peculiar local rule of Poole *v.* Richardson, as if it were common law. It was stated in the advertisement to the second edition that the editor had added this new chapter to the original text; but the authorship of this chapter was very likely to escape observation in the use generally made of the book. There was one peculiarity in our practice which opened the way for the introduction of the Massachusetts exception. In 1826, when the court consisted of Richardson, Green, and Harris, the case of Rochester *v.* Chester, 3 N. H. 349, was decided, in which Judge Richardson, being an inhabitant of Chester, did not sit. It was there held that witnesses could not testify their opinions of the value of land. The decision of Green, J., and Harris, J., was reported. In Peterboro' *v.* Jaffrey, 6 N. H. 462, in which case Judge Parker did not sit, the exception introduced in Rochester *v.* Chester was followed; it was then necessarily applied to sleds and all other property, and it continued in force (Low *v.* Railroad, 45 N. H. 370, 383,) until its excessive inconvenience in practice could no longer be endured, and it was rescinded by the legislature: Gen. Stat., ch. 209, § 24. After Judge Bell came to the bench, the court were never unanimous against restoring the common law rule which admitted opinions of the value of property, but, in accordance with the general usage, no dissent was publicly expressed. The exception introduced by Judge Green and Judge Harris in Rochester *v.* Chester was peculiar to this state; it seems never to have prevailed anywhere else in the whole world: 1 Redfield on Wills 137, 3 c; Crane *v.* Northfield, 33 Vt. 126; Clark *v.* Baird, 9 N. Y. 183; DeWitt *v.* Barley, 17 Id. 342, 343; Kellogg *v.* Krauser, 14 S. & R. 137, 142; Laney *v.* Bradford, 4 Rich. 1; Beaubien *v.* Cicotte, 12 Mich. 507. Not only was it a local peculiarity, it was a troublesome and mischievous one. Unless the jury could have a view of the property in question they could not, generally have satisfactory evidence of its value, and if they could have a view of it, their information would generally have been greatly increased by the opinions of persons familiar with the property and with the circumstances affecting its value. It was unjust; it often resulted in excessive, often insufficient damages. It was expensive and annoying; the parties were compelled to summon a greater number of witnesses than would have been necessary if their opinions could have been taken, and the process of obtaining from them such testimony as they were allowed to give, and excluding their opinions, was difficult and tedious. It was inconsistent with itself. Before the decision of Low *v.* Railroad, in 1864, witnesses were allowed to testify that other similar property had been actually sold for a certain price: Hackett *v.* B., C. and M. Railroad, 35 N. H. 390, 392, 398; their statement of the similarity of property involved their opinion, as was suggested by Judge Wilcox, in Whipple *v.* Walpole, 10 N. H. 131, and by Judge Parker in Beard *v.* Kirk, 11 Id. 401. The witness who was not permitted to say that he thought a certain horse was worth more or less than a thousand dollars, was permitted to give his opinion of the age, size, weight, form, speed, strength, endurance, health, appetite, docility, timidity, and general disposition of the horse. He was permitted to give his opinion on these points, because his statement of facts without opinion was not the best evidence; and for the same reason the common law allows him to give his opinion of the value. The great legal objection to Rochester *v.* Chester is, that it was a violation of the elementary rule of law which allows the best evidence to be given of which the case in its nature is susceptible. Opinions are the best evidence 'where lan-

guage is not adapted to convey those circumstances on which the judgment must be formed:' Clark *v.* Baird, 9 N. Y. 183, 196. Opinions are the best evidence when 'from the nature of the subject to be investigated it cannot be so described in language as to enable persons not eye witnesses to form an accurate judgment in regard to it. * * * No description of a sled could enable a jury to judge as accurately of its value as one who had an opportunity of examining it. Two sleds may be made of the same materials and of the same dimensions, and the value of one be three times that of the other; as two horses may have legs of the same length, heads of the same size, and hair of the same color, and yet be widely different in value:' DeWitt *v.* Barley, 17 N. Y. 342, 343. Opinions, like other testimony, are competent in the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea of the force, meaning and inherent evidence of the things described. Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay, or on evidence from which the jury can form an opinion as well as the witness. A rule that opinions are or are not evidence must necessarily be in conflict with the rule which admits the best evidence. A constant observer of the trial of cases examining the testimony for the purpose of ascertaining how many opinions are received and how many rejected, will find ten of the former as often as he finds one of the latter; and if he is very critical he will find the ratio much greater than that. Opinions are constantly given. A case can hardly be tried without them. Their number is so vast and their use so habitual that they are not noticed as opinions distinguished from other evidence. 'It has been said that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact, since judgment must be given *secundem allegata et probata;* and a man cannot be indicted for perjury who falsely swears as to his persuasion or belief. As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is *correct;* as where a man believes a fact to be true merely because he has *heard* it said to be so; but with respect to persuasion or belief, as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons and of handwriting it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury. With regard to the second objection it has been decided that a man who falsely swears that he thinks or believes, may be indicted for perjury:' 1 Stark. Ev. 153. The cases of identity of persons and things and of handwriting having been named in the English books, as illustrations of the competency of opinions, those cases were supposed to be peculiar exceptions to the general rule, whereas they are mere instances of the application of the general rule which admits the best evidence. This general, natural, fundamental, comprehensive, and chief rule of evidence was gradually ignored, and special and artificial rules were substituted; or if there was not an absolute substitution, there was such a removal of emphasis from the general rule to the special ones that the former lost the overshadowing influence and control which belong to it. Entire systems of law, theology, medicine, and philosophy are easily changed by a transfer of emphasis from one point to another. To say the least, the emphasis which belongs to the general rule admitting the best evidence was gradually taken from it and placed upon the fact that there are some opinions which, not being the best evidence, are not evidence;

and this fact was gradually transformed into a so-called general rule that opinions are not evidence, and this artificial rule was treated as a rule of law. The objection to this supposed rule against opinions is, that it has usurped the place of the supreme rule admitting the best evidence; that it is a mere statement of the supposed fact that opinions are not admitted under the rule of the best evidence, and that as a statement of that kind it is not true. The local peculiarity of Rochester *v.* Chester tended strongly to build up and give unlimited emphasis to the supposed rule against opinions. If a farmer could not give his opinion of the value of his neighbor's farm, horse, or sled, of a ton of hay or bushel of potatoes, there was a difficulty in showing on what ground he could give his opinion of his neighbor's sanity. The legislature restored the common law in reference to opinions of value; the court ought to restore the common law in reference to opinions of sanity. The anomaly of our present practice is easily traced to its source. The innovation and error of Poole *v.* Richardson crept into this state surreptitiously between 1848 and 1865, after it had been kept out more than forty years, and after the formal attempt to introduce it in State *v.* Corey had signally failed. Being open to all, and more than all, the objections made against Rochester *v.* Chester, and having lost its sole support when that innovation and error was swept away, it should be allowed to disappear. When the fact that some opinions are not the best evidence had been magnified and turned into the so-called general rule of law that opinions are not evidence, and the rule admitting the best evidence was supplanted by it, it was thought necessary to find a special precedent for every opinion before it could be admitted. The judgments of Westminster Hall were searched to find a decision that an opinion as to value of property was competent; and to find another decision that an opinion as to sanity was competent. No such decisions could be found. None had ever been made because such opinions had always been received as unquestionably competent. The reason of the failure to find the decisions was not understood here. The failure was taken as conclusive proof that in England the opinions were not admitted. When an American mistake of this magnitude is discovered it is fit to be corrected at once. To return to the true principle is not to change the law, but to cease violating the law; or, putting it in a milder form, to allow that which is the law *de facto* to yield to that which is the law *de jure*. In criminal cases, it is often a question how nearly a footprint in earth or snow corresponded to the form of a shoe of the prisoner. A witness who has seen the footprint and the shoe is allowed to give his opinion on the subject, because a mere description of forms would not be the best evidence. If a plaster cast of the track, or the original impression itself preserved by freezing, could be produced, this evidence of its form would be more satisfactory than any verbal description. So it is when an impression has been made upon the mind of a witness by the appearance and conduct of the prisoner, indicating sanity or insanity; that impression is the best evidence the witness can give on the subject. His description of the appearance and conduct is, in fact, but indirect and imperfect evidence of the impression; when he gives the original impression itself, it is as if a footprint were brought into court. In 1795, Sir A. G. Kinloch was tried for the murder of his brother, Sir Francis Kinloch: 25 St. Tr. 891, 985. Sir Francis, in making an attempt to seize and confine the defendant, had been killed by him. The defence was insanity. In the argument of Mr. Hope for the defendant, the weight of opinions of insanity was presented in this manner: 'And now, gentlemen, in the face of all this evidence, in opposition to the opinion of every friend who saw him, in

opposition to the advice of every professional person consulted on the occasion; in opposition to the impression of the family; to the attempt of Sir Francis: you, sitting here, wanting the strong evidence which they had, his eyes, his looks, his gestures, his tones, his whole demeanor; you, sitting here, I say, are desired presumptuously to determine that all, all were mistaken; that the prisoner was not mad, and coercion not necessary; and this you are desired to do;—why? Because he killed his brother! Wonderful conclusion! If anything was wanting to confirm the evidence arising from the opinion of the family, that fatal event puts it beyond doubt. If it could be doubted whether Sir Francis too thought him totally deranged; I answer, he has sealed his opinion with his blood. They had been taking precautions all night against danger and mischief from the prisoner; and when the dreaded mischief happens, it is given you as a proof that their precautions were unnecessary; admirable logic! That they apprehended danger is clear.—Why? They have told you because they thought him mad; the mischief happens; and that which they dreaded as the natural consequence of his madness, you are to take as a proof of the soundness of his understanding.' If the evidence thus argued by Mr. Hope was inadmissible, the court should not have allowed him to make that argument. But if a prosecuting officer should object to such an argument being made, was there ever a court that would sustain the objection? A non-expert may testify that, in his opinion, the plaintiff was sincerely attached to the defendant (McKee *v.* Nelson, 4 Cow. 355, cited as law in Robertson *v.* Stark, 15 N. H. 114); that the plaintiff 'seemed satisfied' with a business arrangement proposed to him by the witness (Bradley *v.* S. F. M. Co., 30 N. H. 487, 491); that the witness thought a horse 'was not then sound, * * * his feet appeared to have a disease of long standing' (Willis *v.* Quimby, 31 N. H. 485, 487); that a horse 'appeared to be well, and free from disease, that he traveled well, ate well, breathed freely;' that 'running him round the yard he showed distress in his breathing;' that he thought he 'never saw any indication of the horse being diseased' (Spear *v.* Richardson, 34 N. H. 428, 429, 430, 431); that there were, at a certain place, 'some hard excavations, but nothing approaching the nature of hard pan' (Currier *v.* B. & M. R. R., 34 N. H. 498, 501, 508); that a lady's health, in the opinion of the witness, 'had not been near so good since' a certain time 'as before,' 'that she had a very severe fit of sickness in the fall of 1861, and that she recovered very slowly after she began to mend,' that the witness 'considered her very sick;' that the defendant, in carrying a barrel of flour at one time, and a barrel of sugar at another, 'seemed to carry them easily;' 'that he should call the defendant a very active man;' 'that he had a scuffle with' the defendant, in which the defendant 'was too much for him' (State *v.* Knapp, 45 N. H. 148, 149, 154); that the witness 'did not see any appearance of fright' in a horse at the time of an accident, that the horse 'did not appear to be frightened in the least, before he went off the bank or afterwards,' that 'he appeared to be rather a sulky-dispositioned horse to use' (Whittier *v.* Franklin, 46 N. H. 23); that a carriage not seen by the witness, appeared, from the sound, to start from a certain point (State *v.* Shinborn, 46 N. H. 497, 501); that the plaintiff 'seemed to suffer, and seemed weak and debilitated,' that 'she did not seem to be excited, frightened,' that 'she was lamer in the morning' than the day before (Taylor *v.* R. R., 48 N. H. 304, 306, 309); and, since the restoration of the common law, opinions of the value of property are admitted here as well as everywhere else. If opinions of physical condition are competent, opinions of mental condition must be competent. The difficulty of proving physical health or disease, without opin-

ion, makes opinion a legal grade of best evidence; the difficulty of proving mental health or disease, without opinion, is still greater, and makes opinion more palpably a class of best evidence. Lord Hale recognized the similarity of insanity and intoxication, and treated of both under the head of 'idiocy, madness, and lunacy.' After describing '*dementia naturalis*,' and '*dementia accidentalis*,' he says, 'The third sort of *dementia* is that which is *dementia affectata*, namely *drunkenness*. This vice doth deprive men of the use of reason, and puts many men into a perfect but temporary phrensy; * * * such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses:' 1 Hale P. C. 32. In this case, it is unanimously decided that witnesses, not experts, were properly allowed to testify that, at times the defendant did appear, and at times did not appear, to be under the influence of intoxicating liquor. Admitting opinions of the influence of alcohol, and rejecting opinions of insanity, is arbitrary. It was not so in Judge Richardson's day. In State *v.* Corey, one witness testified that there was one time when he saw the defendant '*out*—cannot say whether he had been drinking or not;' and several testified that they had 'never known of his being deranged except from liquor.' Exclude opinions of the influence of alcohol, and, in many cases, it would be a trying task for the jury to guess, upon the evidence, whether the defendant was intoxicated or insane. The appearances and conduct which gave to one witness an impression that this defendant was intoxicated, may have given to others the impression that he was insane; and when a man is on trial for his life, the state is not entitled to a monopoly of the opinions. Under the exception of Poole *v.* Richardson, counsel who have introduced evidence tending to show insanity, have, in most if not in all cases, been painfully aware of the fact that their client's cause suffered unjustly from the suppression of an important class of the best evidence. The exclusion of opinions is practically a one-sided exclusion. A witness for the state is allowed to say that the defendant appeared natural or as usual; that is a clear opinion; and it is understood and taken by the counsel, court, and jury as a full and explicit opinion that the defendant was sane. If the witness should testify in terms, that, in his opinion, the defendant was sane, the effect of his testimony would not be altered in the slightest degree. On the other side, a witness is allowed to say that the defendant did not appear natural, or did appear peculiarly or strangely; that also is a clear opinion; and if it were necessarily understood and taken as a full and explicit opinion that the defendant was insane, there would be no injustice, and the exception excluding opinions would be totally abolished. If 'unnatural,' by its peculiar use in this connection, should, in evidence, come to be synonymous with 'insane,' as 'natural' is understood to be synonymous with 'sane,' the legal question now under consideration would dwindle to a point of literary taste. But the effect of the opinion that the defendant did not appear natural, or did appear peculiarly or strangely, falls far short of the effect of an opinion that he appeared to be insane; and the state has this great and unfair advantage over the accused. If he has feigned insanity for the purpose of escaping punishment, a mere narration by the witnesses of their observations of him would probably appear like very strong evidence of insanity; whereas this evidence might be properly and truthfully rebutted by their opinions; they might have observed evidence of simulation which they could not describe. And thus the modern, eccentric, Nisi Prius ruling supposed by Mr. Tyng to have been made in Poole *v.* Richardson, and unfortunately published by him, operates unavoidably to oppress and endanger the accused, who, by reason of insanity, are innocent; and to encourage crime by shielding the guilty

who feign insanity. Objectionable as the new dogma is in all the details of its practical operation, it is also, in a purely legal view, a violation of the elementary principle which admits the best evidence." * *

NOTE E. The subjects of fraud and undue influence may be considered most advantageously at one and the same time. For, while they are not in all particulars identical, they are so closely allied that it would be difficult, and not wholly profitable, to treat of the one and not of the other. Fraud is generally, if not always, accomplished in the matter of the execution of a testament in such a manner as that it will constitute an undue influence on the mind of the testator. But, on the other hand, undue influence may often be exercised to that extent that it will invalidate a will, and at the same time be wholly free from fraud. "To invalidate a will on the ground of *fraud* and *undue influence*, it must be shown that they were practiced with respect to the will itself, or so contemporaneously with the will, or connected with it, as by almost presumption to affect it. Other frauds committed against a testator are only evidence to raise a strong suspicion against any act done under the superintendence, or by the interference, of those committing them." Jones *v.* Goodrich, 5 Moo. P. C. 16. "Fraud is no less detestable in law than open force. Wherefore when the testator is circumvented by fraud the testament is of no more force than if he were constrained by fear. With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a will made under fear, it is left to the discretion of the judge, comparing the deceit to the capacity or understanding of the person deceived, to discover whether it be such as may overthrow the testament or not. If a part of a will has been obtained by fraud, probate, it should seem, ought to be refused as to that part and granted as to the rest." Wms. Ex'rs (6th Am. ed.) 63. "The modes of fraud are infinite; and it has been said that courts of equity have very wisely never laid down as a general proposition what shall constitute fraud or any general rule beyond which they will not go upon the ground of fraud lest other means of avoiding the equity of the courts may be found. It is usually and accurately divided however into two large classes, actual fraud and constructive fraud." Flood on Wills 396. Mr. Justice Story says: "Fraud in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another or by which an undue and unconscientious advantage is taken of another." Story's Eq. Jur., § 187. Another distinguished writer says: "By fraud is meant all surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one." Domat 1, 18, 3. Fraud cannot be presumed, but the circumstances may render fraud so probable that the court will require stronger proof than in cases where all natural presumptions are in favor of the disposition and free will of the testator. Jones *v.* Goodrich, *ubi supra*. Circumvention by means of fraud, will be considered in the same light as constraint by force, and will have the same effect in setting aside a will as such constraint has. Miller *v.* Miller, 3 Serg. & R. 267. "If the testator be compelled by violence, or urged by threatenings, to make his testament, the testament being made by just fear, is ineffectual. Likewise if he be circumvented by fraud, the testament loseth its force; for albeit honest and modest intercession or request is not prohibited, yet these fraudulent and malicious means, whereby men are secretly induced to make their testaments, are no less detestable than open force." 1 Swinb. 22. "So if by over importunement. As if a man make his will in his sickness, by the over importuning of his wife, to the end he may be quiet; this shall be said to be a will made by constraint; and

shall not be a good will." Style 427, Constable *v.* Tufnell, 4 Hagg. 465. In the case of Hall *v.* Hall, 37 L. J. P. 40, the general law as to undue influence is very clearly stated in the following language: "To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion — appeals to the affections, or ties of kindred—to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist—moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these if carried to a degree in which the free play of the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's." To constitute undue influence, some act or acts must have been done to cause the testator to dispose of his property contrary to his desire. Leverett's Heirs *v.* Carlisle, 19 Ala. 80; Forney *v.* Ferrell, 4 W. Va. 729. Mere passion or prejudice, or the effect of peculiar religious views, will not be sufficient. Newton *v.* Carbery, 5 Cranch C. C. 632. What degree of influence will vitiate a will, will depend upon the capacity in other respects of the testator. What would be an undue influence on one man would be no influence at all on another. A man of strong will, whose mind is in its wonted vigor, could not be shown to have been influenced by what might be such influence as to wholly invalidate the will of one whose mind had been weakened by sickness, dissipation or age. But as well in the case of the sick, dissipated, or aged, as in that of one in health and vigor, in the case of him whose intellect is weak, as of him whose mind is strong, that influence which will be sufficient to invalidate a will must be such as, in some degree, or to some extent, to deprive the party affected thereby of his free agency and to make the will not the product of his own untrammeled thought. Comstock *v.* Hadlyme, 8 Conn. 254; Shailer *v.* Bumstead, 99 Mass. 112; Harrel *v.* Harrel, 1 Duv. 203; Chandler *v.* Ferris, 1 Harr. (Del.) 454; Leverett's Heirs *v.* Carlisle, 19 Ala. 80; Denton *v.* Franklin, 9 B. Mon. 28; Rollwagen *v.* Rollwagen, 63 N. Y. 504; Lynch *v.* Clements, 9 C. E. Gr. (N. J.) 431; Breed *v.* Pratt, 18 Pick. 115; Thompson *v.* Kyner, 65 Penna. St. 368; Pool *v.* Pool, 35 Ala. 12; Davis *v.* Calvert, 5 Gill & J. 269; Marshall *v.* Flinn, 4 Jones (N. C.) L. 199; O'Neall *v.* Farr, 1 Rich. 80; Rogers *v.* Diamond, 13 Ark. 474; McDaniel *v.* Crosby, 19 Ark. 533; Wright *v.* Howe, 7 Jones (N. C.) L. 412. In Potts *v.* House, 6 Ga. 324, Lumpkin, J., says: "On this subject as on that with regard to capacity no precise and distinct line can be drawn. Suffice it to say that the influence exercised must be an unlawful importunity on account of the manner or motive of its exertion and by reason of which the testator's mind was so embarrassed and restrained in its operation that he was not master of his own opinions in respect to the disposition of his estate. * * * The only inquiry for courts is, Was the testator, from the infirmity of age or other cause, constrained to act against his will, to do that which he was unable to refuse, by importunity or threats or any other way by which one person acquires dominion and control over another? If so the validity of the will may be impeached; and it is wholly immaterial from what quarter this undue influence which destroys free agency comes." To the same point Sir John Nicholl said: "I may perhaps prelimi-

narily observe that importunity in its correct legal acceptation must be in such degree as to take away from the testator free agency—it must be such importunity as he is too weak to resist—such as will render the act no longer the act of the deceased—not the free act of a capable testator, in order to invalidate the instrument. Kindleside *v.* Harrison, 2 Phillim. 449, 551. The influence to vitiate an act must be such as to amount to force and coercion destroying free agency, and there must be proof that the act was obtained by this coercion. Williams *v.* Goude, 1 Hagg. 577, 581. Gardiner *v.* Gardiner, 34 N. Y. 155; Gaither *v.* Gaither, 20 Ga. 709. To be within the meaning of the rule of law it must be an influence amounting to coercion or fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose. Boyse *v.* Rossborough, 6 H. L. Cas. 2. In order to set aside the will of a person of sound mind it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which cannot be presumed, but must be shown, and in connection with the will and not with other things. Ib. See also Brick *v.* Brick, 66 N. Y. 144; Eckert *v.* Flowry, 43 Penna. St. 46; McIntire *v.* McConn, 28 Iowa 480; Barnes *v.* Barnes, 66 Me. 286; Turner *v.* Cheesman, 2 McCart. 243; Taylor *v.* Kelly, 31 Ala. 59; Marshall *v.* Flinn, 4 Jones (N. C.) L. 199; Wampler *v.* Wampler, 9 Md. 540; O'Neall *v.* Farr, 1 Rich. 80; Morris *v.* Stokes, 21 Ga. 552; McDaniel *v.* Crosby, 19 Ark. 533; Moore *v.* Blauvelt, 2 McCart. 367; Gardner *v.* Gardner, 22 Wend. 526; Sutton *v.* Sutton, 5 Harr. (Del.) 459; Stackhouse *v.* Horton, 2 McCart. 202; Wightman *v.* Stoddard, 3 Bradf. 393; Roe *v.* Taylor, 45 Ill. 485; Harvey *v.* Sullens, 46 Mo. 147; Children's Aid Society *v.* Loveridge, 70 N. Y. 387; Seguine *v.* Seguine, 3 Keyes 663; Rutherford *v.* Morris, 77 Ill. 397; Higgins *v.* Carlton, 28 Md. 115; Hoge's Estate, 2 Brews. 450; Leeper *v.* Taylor, 49 Ala. 221; Rabb *v.* Graham, 43 Ind. 1. In Boyse *v.* Rossborough, 6 H. L. Cas. 2, 47, this subject received thorough consideration, and Lord Cranworth observed: "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish. * * In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be

allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may perhaps be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is however extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud. One point, however, is beyond dispute, and that is that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." His lordship then proceeds to comment upon the facts in evidence in the case, after which he says: "But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. * * The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that at and near the time when the will sought to be impeached was executed the alleged testator was, in other important transactions, so under the influence of the persons benefitted by the will that as to them he was not a free agent but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised." In Stackhouse *v.* Horton, 2 McCart. 202, 231, it is said: "Such influence, if any was exerted, must amount to fraud. Nothing less can vitiate the instrument." See also Simmerman *v.* Songer, 29 Gratt. 9. In Shailer *v.* Bumstead, 99 Mass. 112, 121, commenting upon this subject, Colt, J., said: "To establish the charge of fraud and undue influence, two points must be sustained: first, the fact of the deception practised, or the influence exercised; and next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator; and under the last includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence,

which constitutes the necessary counterpart and complement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained. It is said to be doubtful whether the existence and exercise of undue influence does not necessarily presuppose weakness of mind, and whether the acts of one who was in all respects sound can be set aside on that ground in the absence of proof of fraud or imposition. And it is certain that, however ingenious the fraud or coercive the influence may be, it is of no consequence, if there was intelligence enough to detect and strength enough to resist them. The inquiry is of course directed to the condition at the date of the execution of the will; but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury. They must be satisfied, by a comparison of the will, in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as he then was, that such a will could not be the result of the free and uncontrolled action of such a man so operated upon, before they can by their verdict invalidate it. As before stated, the previous conduct and declarations are admissible; and so, by the weight of authority and upon principle, are subsequent declarations, when they denote the mental fact to be proved. For, by common observation and experience, the existence of many forms of mental development, especially that of weakness in those faculties which are an essential part of the mind itself, when once proved, imply that the infirmity must have existed for some considerable time. The inference is quite as conclusive that such condition must have had a gradual and progressive development, requiring antecedent lapse of time, as that it will continue, when once proved, for any considerable period thereafter. The decay and loss of vigor which often accompanies old age furnishes the most common illustration of this. It is difficult to say that declarations offered to establish mental facts of this description are of equal weight, whether occurring before or after the act in question. But, if they are equally significant and no more remote in point of time, they are equally competent, and may be quite as influential with the jury. The difficulty in the admission of these subsequent statements of the testator has been, that, while competent for the purpose above indicated, they are not, by the better reason and the most authoritative decisions, admissible to establish the fact of fraud and undue influence as one of the constituent elements of the issue. When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve. The declaration is not to be wholly rejected, however, if admissible on other grounds; and it must be left to the judge carefully to point out how far it is to be rejected or received as evidence by the jury. Ordinarily we should expect more or less evidence of the prior existence of those peculiarities which the subsequent declarations give evidence of; and in the reported cases this will generally be found to be so. It is not necessary to decide whether, in the entire absence of such evidence, subsequent

declarations would ever be competent. Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question. The doctrines thus stated are maintained by the current of English and American authority." Provis *v.* Reed, 5 Bing. 435; Marston *v.* Roe, 8 Ad. & El. 14; Constable *v.* Tufnell, 4 Hagg. 465; Jackson *v.* Kniffen, 2 Johns. 31; Waterman *v.* Whitney, 11 N. Y. 157; Comstock *v.* Hadlyme, 8 Conn. 254; Boylan *v.* Meeker, 4 Dutch. 274; Reel *v.* Reel, 1 Hawks (N. C.) 248; Howell *v.* Barden, 3 Dev. (N. C.) 442; Moritz *v.* Brough, 16 Serg. & R. 402; McTaggart *v.* Thompson, 14 Penna. St. 149; Cawthorn *v.* Haynes, 24 Mo. 236; Robinson *v.* Hutchinson, 26 Vermont 47; St. Leger's Appeal, 34 Conn. 434; Breed *v.* Pratt, 18 Pick. 115; Patterson *v.* Patterson, 6 Serg. & R. 55; Nussear *v.* Arnold, 13 Serg. & R. 323; Creely *v.* Ostrander, 3 Bradf. 107; Potts *v.* House, 6 Ga. 324; Reynolds *v.* Root, 62 Barb. 250; Thompson *v.* Kyner, 65 Penna. St. 368; McKeone *v.* Barnes, 108 Mass. 344; Gardiner *v.* Gardiner, 34 N. Y. 155; Glover *v.* Hayden, 4 Cush. 580; Lowe *v.* Williamson, 1 Gr. Ch. (N. J.) 82. See also Coffin *v.* Coffin, 23 N. Y. 9; Coleman *v.* Robertson, 17 Ala. 84; Wampler *v.* Wampler, 9 Md. 540; Hall *v.* Hall, 38 Ala. 131; Thornton *v.* Thornton, 39 Vt. 122; Woodward *v.* James, 3 Strobh. 552; Floyd *v.* Floyd, 3 Strobh. 44; Brown *v.* Moore, 6 Yerg. (Tenn.) 272; Harris *v.* Betson, 1 Stew. (N. J.) 211; Rutherford *v.* Morris, 77 Ill. 397; McKinley *v.* Lamb, 56 Barb. 284; Lawrence *v.* Steel, 66 N. C. 584; Lee *v.* Lee, 71 N. C. 139; Bundy *v.* McKnight, 48 Ind. 502. In the case of Chandler *v.* Ferris, 1 Harr. (Del.) 454, 464, Clayton, C. J., said: "If the jury were satisfied from the evidence that the testator was capable of exercising thought and judgment and reflection; if he knew what he was about and had memory and judgment his will could not be invalidated on the ground of insanity. Neither could it be set aside on the ground of undue influence unless such influence amounted to a degree of constraint such as the testator was too weak to resist: such as deprived him of his free agency and prevented him from doing as he pleased with his property. Neither advice, nor arguments, nor persuasion would vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion." It is not possible to define or describe, with exactness, what influence amounts to undue influence, in the sense of the law; this can only be done in general and approximate terms. In each case, the decision must be arrived at by the application of these general principles, with good sense, to the special facts and surroundings of the case. Lynch *v.* Clements, 9 C. E. Gr. (N. J.) 431; Moore *v.* Blauvelt, 2 McCart. 367. General ill-treatment of a wife by her husband, is not a sufficient ground for impeaching her will in his favor. McMahon *v.* Ryan, 20 Penna. St. 329. Undue influence must be *proved* in each case. It is not a *presumption*, but a *conclusion*. Humphrey's Will, 11 C. E. Gr. (N. J.) 513; Carroll *v.* Norton, 3 Bradf. 291; Stackhouse *v.* Horton, 2 McCart. 202; McKeone *v.* Barnes, 108 Mass. 344; Higgins *v.* Carlton, 28 Md. 115. Yet it need not be proved directly, but may be, and most frequently is, proved circumstantially. Reynolds *v.* Root, 62 Barb. 250; Titlow *v.* Titlow, 54 Penna. St. 216; Jackman's Will, 26 Wisc. 104. Although mere weakness of intellect does not prove undue influence, yet it may be that, in that feeble state, the testator more readily and easily becomes the victim of the improper influences of unprincipled and designing persons who see fit to practice upon him. Reynolds

v. Root, 62 Barb. 250. So a strong circumstance to show undue influence would be the exclusion, by the testator, of a daughter with whom he had had no difficulty, and who was in need of his aid. Ib. But neither moral nor physical constraint is to be inferred from mental weakness alone. Eckert *v.* Flowry, 43 Penna. St. 46. If the testator act upon the suggestion of others, this will not invalidate the will, if there be no evidence of improper dealing or undue influence. Creely *v.* Ostrander, 3 Bradf. 107; Chandler *v.* Ferris, 1 Harr. (Del.) 454. T., a semi-imbecile, who had once been in an asylum, made his will giving various small legacies to relatives and giving the residue to his sister M.; his sister E. was excluded from all benefit in the estate. Before the time of making the will, M. had repeatedly told T. that E. intended to send him to the asylum, and would do it, in order that she might obtain control of his property. It was held that the will in favor of M. was procured by undue influence. Alexander's Will, 12 C. E. Gr. (N. J.) 463. In a case where A. gave $10,000 to S., who was a priest of the Roman Catholic church, to which A. belonged, A. during his last illness confessed to S., and S. acted as attorney for A. in the matter of his will, Butler, J., said: "The rule that undue influence in respect to a legacy is to be presumed, when the relation of attorney and client subsists between the testator and the legatee, and the will is drawn by the latter, is well established, and was recognized in the charge of the court. * * * The presumption is one of *fact*—a badge of fraud, (for undue influence is a species of fraud,)—and, like other presumptions of fact, may be rebutted by any evidence which tends to show, and satisfies the jury, that in the particular case it is untrue. It is not that the *mere relation* necessarily induces or exerts an undue influence, (for all legacies by clients to their attorneys are not presumptively induced by undue influence,) but because drawing the will presents an opportunity and a temptation, which, together with the personal friendship and confidence and influence of the relation, justify suspicion and the requirement from the legatee of satisfactory evidence that the opportunity was not embraced and the influence was not exerted." St. Leger's Appeal, 34 Conn. 434, 450. This presumption exists, and therefore the burden of proof is upon the party sustaining the will to show clearly and fully that the making and execution of the will was free from impropriety and unfairness and the jury should be satisfied that the relation had no improper influence over the mind of the testator and did not induce him to make a different disposition from what he otherwise would have done. Ibid. Wilson *v.* Moran, 3 Bradf. 172; Wright *v.* Howe, 7 Jones (N. C.) Eq. 412. So too as to the relation of guardian and ward; if a will be made beneficial to the guardian by the ward it is incumbent upon those who would establish the will to show beyond reasonable doubt that the testator had such freedom of will and action as are requisite to render a will legally valid. Breed *v.* Pratt, 18 Pick. 115; Meek *v.* Perry, 36 Miss. 190; Garvin's Adm'r *v.* Williams, 44 Mo. 465; Gaither *v.* Gaither, 20 Ga. 721; Taylor *v.* Taylor, 8 How. 183; De Montmorency *v.* Devereux, 7 Cl. & Fin. 188; Wells *v.* Middleton, 1 Cox 125; Fish *v.* Miller, 1 Hoff. Ch. 273. In the case of Garvin's Adm'r *v.* Williams, 44 Mo. 465, 469, in commenting upon this subject, it is said by Wagner, J.: "There is no subject in the whole range of equity jurisprudence where its salutary principles have been more often invoked than in those cases where donations have been obtained by persons standing in some confidential, fiduciary, or other relation toward the donor, and where they may have exercised dominion over him. Transactions of this kind taking place between attorney and client, spiritual adviser and advisee, trustee and *cestui que trust*, parent and child, guardian and ward, are watched by courts with the most scrutinizing jeal-

ousy, and generally held to be presumptively void." And further, speaking as to the relations existing between guardians and wards, the same learned judge says: "And here it must be observed that the rule is applied not exclusively while the relation actually exists, but for such period of time thereafter as may be sufficient to insure complete emancipation on the part of the ward, and afford him an independent and unbiased opportunity to investigate for himself and see that everything is correct. Chancellor Walworth said, in one case, that it was not the practice of the court to discharge the guardian absolutely, and to order his bond to be given up immediately upon the infant's arriving at age, although he had settled with the guardian; that the ward, notwithstanding such settlement, was entitled to a reasonable time, after he became of age, to investigate the accounts of the guardian, and to surcharge and falsify the same if, upon such investigation, he found anything wrong. (In re Van Horn, 7 Paige 46; Willard's Eq. 182.)" In further discussing the subject, he continues: "It would be indeed strange and remarkable if any distinction were made, and the doctrine did not apply to wills; that the law should watch with such extreme jealousy, and throw every safeguard around the living, and deny it to those who were just ready to sink into the grave on account of disease; that, on grounds of public utility, men of health should be protected because by reason of certain confidence they were placed in a situation where they were liable to be imposed on, yet when they were placed in the same relation, emaciated by sickness, and bereft to a great extent of their intellectual capacity, they should fall a prey to cupidity and avarice. When advantage is taken of persons living and they have been deprived of their rights by undue influence, their wrongs may be made known, and a remedy is easily afforded; but where a will is procured from a person stricken with disease from which he never recovers, who is to disclose the injustice which has been perpetrated, and unfold the means which led to its execution? It is true that while the testator is living, his will is ambulatory, and may be altered or revoked; but this principle is of no consequence when he is induced to make and publish it in view of impending death, when no opportunity or reconsideration is open to him." In Meek *v.* Perry, 36 Miss. 190, David McKinnie died, leaving two daughters, Mary and Louisa. Michael McKinnie, their uncle, qualified as their guardian. Five months after Louisa had arrived at age, being in low health, she made her will, giving all her property to her uncle, the guardian, and disinheriting her sister, and died four days afterward. The Supreme Court of Mississippi set the will aside, and said that in transactions between guardian and ward, the law, upon a principle of public policy, and to protect the ward against the efforts of overweening confidence and self-delusion, and the infirmities of a hasty, precipitate judgment, presumed the existence of undue influence on the part of the guardian, and therefore such dealings were *prima facie* void, and would be so held unless the guardian showed, by the clearest proof, that he dealt with the ward exactly like a stranger, taking no advantage of his influence over him or his superior knowledge in relation to the subject matter of the transaction, and that the ward's act was the result of his own volition and upon the fullest deliberation. In the case of Huguenin *v.* Baseley, 14 Ves. 299, the Chancellor reviews the cases, and places his decision on the ground of public utility; and in Wood *v.* Downes, 18 Ves. 127, the same doctrine is reiterated. Since those decisions were rendered there are many cases reported in the English books, some of which might seem to qualify or mitigate the stringent and inflexible rule laid down by the early Chancellors; but an examination will show that where gifts or donations have been upheld between parties where confidential

relations existed, it has been under special and peculiar circumstances, and where an entire absence of undue influence was apparent. In connection with evidence of a conspiracy between the father and mother of the testator, and in connection with the evidence of fraud and imposition on the testator's wife, it is competent to show that the estate came by the wife, that it was valuable, and that she had been practiced upon, to induce her to consent that it should be changed from real to personal estate, to give the testator a disposing power over it. Patterson *v.* Patterson, 6 Serg. & R. 55. The influence must be a present coercive power operating upon the mind of the testator at or about the time of the *factum* of the will. Although threats have been made or even actual violence has been practiced upon or toward the testator, and that, too, avowedly for the purpose of influencing the making of the will, yet if the testamentary act itself be far removed from the time of such threats or violence it will not be possible to set aside the will on that account. Eckert *v.* Flowry, 43 Penna. St. 46; Chandler *v.* Ferris, 1 Harr. (Del.) 454; Thompson *v.* Kyner, 65 Penna. St. 368; McMahon *v.* Ryan, 20 Penna. St. 329; Gardiner *v.* Gardiner, 34 N. Y. 155; Sechrest *v.* Edwards, 4 Metc. (Ky.) 163; Marshall *v.* Flinn, 4 Jones L. 199; Monroe *v.* Barclay, 17 Ohio St. 302; Higgins *v.* Carlton, 28 Md. 115; Tyson *v.* Tyson, 37 Md. 567; Rabb *v.* Graham, 43 Ind. 1. But see to the contrary, Taylor *v.* Wilburn, 20 Mo. 306. The fact that the will in question displays an entire change from former testamentary intentions is strong evidence of undue influence in its procurement. Tyler *v.* Gardiner, 35 N. Y. 559. And drafts of previous wills made by direction of the testator, though not executed, are evidence to be considered, and will throw "very considerable light" on the question of the testator's intentions. Thornton *v.* Thornton, 39 Vt. 122. The unnatural character of the will is always to be considered as calculated to show either incapacity or undue influence; yet, of itself, it is probably never sufficient ground for the presumption that the will was procured by undue influence. Kevil *v.* Kevil, 2 Bush. 614; Carpenter *v.* Calvert, 83 Ill. 62; Higgins *v.* Carlton, 28 Md. 115. Nor is it proper, by instructions or otherwise, in such a case, to invite the jury to an investigation of the question whether the will is a just will and a proper disposition of the testator's estate. Carpenter *v.* Calvert, *ubi supra*. On the other hand all influence is not undue influence. The procuring a will to be made unless by foul means is nothing against its validity. A man may, by fair argument and persuasion, or even by flattery, induce another to make a will, and even to make it in his favor. Miller *v.* Miller, 3 Serg. & R. 267; Harrison's Will, 1 B. Mon. 351; McIntire *v.* McConn, 28 Iowa 480; Sechrest *v.* Edwards, 4 Metc. (Ky.) 163; Small *v.* Small, 4 Greenl. 220; Jackman's Will, 26 Wisc. 104; Chandler *v.* Ferris, 1 Harr. (Del.) 454; Lowe *v.* Williamson, 1 Gr. Ch. (N. J.) 82; Roe *v.* Taylor, 45 Ill. 485; Rogers *v.* Diamond, 13 Ark. 474; McDaniel *v.* Crosby, 19 Ark. 533; Sutton *v.* Sutton, 5 Harr. (Del.) 459; Newhouse *v.* Godwin, 17 Barb. 236; Gilreath *v.* Gilreath, 4 Jones (N. C.) Eq. 142; Lide *v.* Lide, 2 Brev. 403; Pingree *v.* Jones, 80 Ill. 177; Davis *v.* Calvert, 5 Gill & J. 269; Yoe *v.* McCord, 74 Ill. 33; Hoge's Estate, 2 Brews. 450; Tawney *v.* Long, 76 Penna. St. 106; Rabb *v.* Graham, 43 Ind. 1. The fact that the provisions of the will were changed by the testator in accordance with the solicitations of, and in order to gratify, his wife, will not *per se* prove undue influence. Rankin *v.* Rankin, 61 Mo. 295. In the case of Stulz *v.* Schaeffle, 18 Ehg. Law & Eq. 576, the will was obtained from one J. S. by the importunity of his wife, and the will was sustained, the court holding that such an influence exercised by the wife was not an undue influence. Lumpkin, J., said: "With respect to a will alleged to have

been obtained by undue influence, I would remark, that it is not unlawful for a person, by honest intercession and persuasion, to procure a will in favor of himself or another; neither is it to induce the testator, by fair and flattering speeches; for though persuasion may be employed to induce the dispositions in a will, this does not amount to influence in the legal sense. If a wife, by her virtues, has gained such an ascendency over her husband and so rivalled his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity or undue advantage taken of the testator by his wife, though it should be proved that she possessed a powerful influence over his mind and conduct in the general concerns of life." Potts *v.* House, 6 Ga. 324; Small *v.* Small, 4 Greenl. 220; Jackman's Will, 26 Wisc. 104. An influence worthily exerted for the benefit of *others* ought not to condemn the will. Harrison's Will, 1 B. Mon. 351. Unless it be an *interested influence* it cannot be considered that it is an undue influence. Ib. Kindness and attention do not of themselves constitute undue influence so as to invalidate a will. Gleespin's Will, 11 C. E. Gr. (N. J.) 523; Den d. Trumbull *v.* Gibbons, 2 Zab. 117; Roe *v.* Taylor, 45 Ill. 485; Rogers *v.* Diamond, 13 Ark. 474; Rutherford *v.* Morris, 77 Ill. 397; Allmon *v.* Pigg, 82 Ill. 149; Higgins *v.* Carlton, 28 Md. 115. In a well-considered case in Michigan touching this question Campbell, J., said: "In all cases of this kind it has been customary, as the reports show, to allow a wide range of inquiry into the family relations, and the terms upon which they have lived. It would be impossible to obtain a clear idea concerning motives and probabilities without it. These cases, as before intimated, are determined generally upon circumstantial evidence; and it must be received upon all points tending to throw light upon the various family relations. The same remark will apply to the negative evidence that no complaint was made by Beaubien of any importunity from his natural heirs. Although of no great force alone, it had a tendency, if true, to show that her charges made to him about their rapacity did not meet with any response in his feelings, and also that he had not been driven to disinherit them by any importunities of theirs. It was not irrelevant, and was admissible as throwing some light, however faint, upon these domestic affairs." Again he said: "It is true, of course, that making one will does not, of itself, render it at all unlikely that another will may be substituted; but previous preferences and plans may have a plain bearing upon an issue where the question arises whether the testator has understandingly, and of his own free will, changed his settled views." Beaubien *v.* Cicotte, 12 Mich. 459, 488. In this same case it was also held that it was competent on an issue as to undue influence to give evidence that the testator regretted that he had married, that he had not control at home, that he stood in fear of his wife, and that to avoid trouble at home he was obliged to submit to his wife's demands. Beaubien *v.* Cicotte, *ubi supra*. So it is held in New York that the question whether the will is such as would be expected from the disposition and affections of the testator and also from his declarations about it, should be carefully considered. Allen *v.* Public Adm'r, 1 Bradf. 378. And it is said by Church, C. J., "A testator has, of course, a right to change radically and arbitrarily, the manner of disposing of his property, and, in the absence of fraud, courts will sustain his action in this respect; but when, according to the ordinary motives which operate upon men, we find an unnatural change made in a sick man's will, and one apparently contrary to his previous fixed and determined purpose, it is the duty of

courts to scrutinize closely the circumstances, with a view of ascertaining whether the act was free, voluntary and intelligent." McLaughlin *v.* McDevitt, 63 N. Y. 213, 217. In Children's Aid Society *v.* Loveridge, 70 N. Y. 387, 394, Miller, J., said: "The position of the contestants is that the execution of the will was procured by the exercise of undue influence on the part of those who were the beneficiaries, and who, at the very time of the making of the same, were possessed of her confidence and surrounded her. In order to avoid a will, upon any such ground, it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear. Gratitude, love, esteem or friendship which induces another to make testamentary dispositions of property cannot ordinarily be considered as arising from undue influence, and all these motives are allowed to have full scope, without in any way affecting the validity of the act. So, also, lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation." Influence arising from gratitude, affection or esteem will not be held to be undue influence. Gardiner *v.* Gardiner, 34 N. Y. 155; Jackman's Will, 26 Wis. 104; Tyler *v.* Gardiner, 35 N. Y. 559; Glover *v.* Hayden, 4 Cush. 580; Rutherford *v.* Morris, 77 Ill. 397. But such influence may be carried so far as to invalidate the will. Davis *v.* Calvert, 5 Gill & J. 269. And though the influence acquired by kind offices be exercised over a testator above eighty years of age, whose bodily faculties are impaired, and who without good reason entertains feelings of hostility toward his family, the will cannot on that account be invalidated. Lowe *v.* Williamson, 1 Gr. Ch. (N. J.) 82. But although this is so as to parties whose influence arises from the ordinary social relations of life, it cannot be allowed as to an influence arising from any unlawful relations. Dean *v.* Negley, 41 Penna. St. 312. See also Rudy *v.* Ulrich, 69 Penna. St. 177; Kessinger *v.* Kessinger, 37 Ind. 341; Monroe *v.* Barclay, 17 Ohio St. 302. There is also a difference to be noted between the influence exerted by a wife upon the testator and that exerted upon him by a woman who is living with him in adulterous relations. Nussear *v.* Arnold, 13 Serg. & R. 323; Farr *v.* Thompson, Cheves 37; Denton *v.* Franklin, 9 B. Mon. 28; Dean *v.* Negley, *ubi supra.* However, when a testator lives with a woman to whom he is not legally married, and leaves to her and her children a large portion of his estate, this will not create any *presumption* that the will was executed under improper influence. Main *v.* Ryder, 84 Penna. St. 217. But this unlawful relation ought to be considered in determining the question of undue influence. However, the question is one of fact for the jury. Ib. The mere fact that the will is in favor of a woman—a mulatto—who had great power over the testator, and with whom he had lived in an adulterous manner, is not sufficient to set aside a will legally executed. Farr *v.* Thompson, Cheves 37. But the will of an aged man in Kentucky executed under very similar circumstances, was set aside. Denton *v.* Franklin, 9 B. Mon. 28. Proof

that the principal legatee has had unlawful sexual intercourse with the testâtrix will not constitute sufficient ground to set aside the will. Roe *v.* Taylor, 45 Ill. 485. Nor that the testator had lived in adulterous relations with the mother of the principal legatee. Rudy *v.* Ulrich, 69 Penna. St. 177. The burden of showing that a will was procured by means of undue influence is on the party alleging it. Tyler *v.* Gardiner, 35 N. Y. 559; Small *v.* Small, 4 Greenl. 220; Glover *v.* Hayden, 4 Cush. 580; Baldwin *v.* Parker, 99 Mass. 79; Taylor *v.* Wilburn, 20 Mo. 306; Davis *v.* Davis, 123 Mass. 590; Higgins *v.* Carlton, 28 Md. 115. If no evidence be offered of any influence exerted upon the testator at or about the time of making the will, nor of any fraud, misrepresentation or constraint, it is error to submit to the jury the question whether any undue influence had been exerted. Eckert *v.* Flowry, 43 Penna. St. 46. An influence may often be obtained through practicing on the religious beliefs or fears of a party. The courts are very jealous of an influence exerted through this channel. A grant of an annuity obtained by a person having "*a spiritual ascendency*" over a woman who was under a state of religious delusion, was set aside upon principles of public policy. Norton *v.* Relly, 2 Eden 286. In the matter of undue influence evidence is not admissible to show that one of the devisees had *intimated* that he had procured the will to be made, and that it was read to him, and that he had given reasons why a brother and a sister got so small portions. Miller *v.* Miller, 3 Serg. & R. 267. But statements made by the sole legatee, known to him to be false, as to the execution and contents of the will, are competent for the contestant. Fairchild *v.* Bascomb, 35 Vt. 398. So also are declarations, by a legatee accused of undue influence, made four years before the execution of the will, to the effect that the testator was of unsound mind. Robinson *v.* Hutchinson, 31 Vt. 443. If one legacy in a will be procured by fraud or undue influence, this will not invalidate the will beyond that particular legacy; it must stand as to all other legacies; but if the fraud or undue influence affects the entire will, it cannot be sustained. Florey *v.* Florey, 24 Ala. 241; Baker's Will, 2 Redf. 179; In re Welsh, 1 Redf. 238. So, too, the fraudulent alteration of one legacy will not otherwise invalidate the will. Smith *v.* Fenner, 1 Gall. C. C. 170. The procurement, by undue influence, of the revocation of an existing valid will, will not be sustained by the law, and if a testator be induced by fear or threats, or affection, or any other cause unduly exercised, being enfeebled in body and mind, to destroy his will, provided, however, the influence of such motives be sufficient to take away his free agency and to make the act not an act of his own free will, such destruction of his will will not amount to a revocation, but the will so destroyed still remains in full force. Batton *v.* Watson, 13 Ga. 63. If, after the execution of the will, the testator declared that he was induced to make it by undue influence, such declaration is not admissible to prove that fact. Robinson *v.* Hutchinson, 26 Vt. 38; Richardson *v.* Richardson, 35 Vt. 238. But declarations of this character, made by the testator about the time of the *factum*, either just before or just after, which tend to show the state of the testator's mind at that time, are competent evidence to prove undue influence. Robinson *v.* Hutchinson, *ubi supra*. On the question of undue influence, as well as of mental capacity, it is permitted the contestants to show that the testator had brothers and sisters, known to him to be poor, and for whom he cherished affection, for whom he made no provision; also that testator knew that the sole legatee was intemperate. Fairchild *v.* Bascomb, 35 Vt. 398. But a will obtained by undue influence may not always be set aside on that account. The court will consider all the circumstances, as the time that may have elapsed between the execution of the will

and the death of the testator, and subsequent acts that he may have done in direct or constructive ratification of the will, any declaration that he may have subsequently made to the effect that although unduly influenced at the time of the making of the will he had since become satisfied with it and wished it to stand. For where the will has been a long time in existence, in the control of the testator, undestroyed, uncanceled or unrevoked, the court may be justified in inferring that he had thereby ratified the will, and certainly any man may, by direct declarations or well-authenticated acts, adopt freely, and with full intent to ratify it, a will which may have been procured in this way. Small *v.* Small, 4 Greenl. 220; Shailer *v.* Bumstead, 99 Mass. 112. In this latter case Colt, J., said: "A will made when fraud or compulsion is used may nevertheless be shown to be the free act of the party, by proof of statements in which the will and its provisions are approved, made when relieved of any improper influence or coercion. It is always open to inquiry whether undue influence in any case operated to produce the will; and, as the will is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to operate, is evidence that it was fairly executed; to meet which, to some extent at least, statements of dissatisfaction with or want of knowledge of its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation." 99 Mass. 125. It seems that a court of equity will not entertain a bill to set aside a will on account of fraud and imposition. Story Eq. Jur., §§ 1446, 1449, a; Lyne *v.* Guardian, 1 Mo. 410; Blue *v.* Patterson, 1 Dev. & B. (N. C.) Eq. 457. In a recent case on this subject it was said by Bradley, J.: "Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts) the most satisfactory ground of its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give free and adequate relief." In re Broderick's Will, 21 Wall. 503, 509. By statute in England, it is provided that no will of any petty officer, seaman, non-commissioned officer of marines, or marine, shall be deemed good and valid in law, to any intent or purpose, which shall be contained, printed or written, in the same instrument, paper, or parchment, with a power of attorney. 1 Wm. IV., c. 20; 28 and 29 Vict., c. 72, § 4. These

statutes, and earlier ones on the same subject, of which these take the place, have been enacted, owing to the advantage often taken of sea-faring men on account of the pressure of their necessities; and it is the policy of the English law, particularly, to guard the testamentary acts of this class of persons, owing to the facility with which they are taken advantage of. But it is not the intent of this law to set aside every will where there is an existing debt between the mariner and his agent; but, in such case, there must be the best of proof that the will was not made merely as a security for the debt. On this point, see Moore *v.* Stevens, 3 Phill. 190, note (*a*); Zacharias *v.* Collis, 3 Phill. 176, 202; Hay *v.* Mullo, 2 Cas. temp. Lee 273; Deardsley *v.* Fleming, 2 Cas. temp. Lee 98; Ramsay *v.* Calcot, 2 Cas. temp. Lee 322; Master *v.* Stone, 2 Cas. temp. Lee 339. The influence which would avoid gifts *inter vivos*, is not, of necessity, sufficient to invalidate a will. Therefore, although the natural influence arising from the relation of parent and child, husband and wife, attorney and client, confessor and penitent, or guardian and ward, exerted by those who possess it, to obtain a benefit for themselves, in the matter of a gift *inter vivos*, will be held to be an undue influence, such influence may be exerted in obtaining a legacy, provided the testator thoroughly understands what he is doing, and is a free agent. Parfitt *v.* Lawless, 41 L. J. P. 68; 27 L. T. (N. S.) 215. But the party benefited must show, affirmatively, that the other party could have formed a free and unfettered judgment in the matter. S. C., L. R., 2 P. & D. 462. A deed obtained from a father by his children, will not be sanctioned by a court of equity, if it appear to have been procured by an abuse of confidence reposed in his children by the grantor, who, in order to procure it, took advantage of his age, weakness, and partiality for them, the consideration being also inadequate. Whelan *v.* Whelan, 3 Cowen 537. A deed obtained by fraud and undue influence, is void, and it will be set aside in equity, not only as to the one who practiced the fraud or exerted the influence, but as to any person who may have acquired an interest under it, though he may be entirely innocent. Ib. A person falsely supposing his estate to be in danger, conveys it to his children, who, knowing that it is not in danger, neglect to inform the grantor; this neglect is a sufficient ground for avoiding the deed. Ib. But a child may, by fair argument, obtain a deed in his favor from his parent. Gilreath *v.* Gilreath, 4 Jones (N. C.) Eq. 142.

*CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.[1]

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 him-

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

1. Before proceeding with the inquiry as to what may be devised or bequeathed, it may be advantageous to endeavor to form a distinct idea of what is a devise, and what is a legacy, and how they differ from each other, and also what is a bequest. An old writer says: "A devise or legacy is where a man in his testament doth give anything to another; the first of these terms is properly applied to the gift of lands, and the last to the gift of goods or chattels; and therefore a devise strictly is said to be where a man in his testament doth give his lands to another after his decease; and a legacy is said to be where a man in his testament doth give any chattel to another to have after the death of the testator." Shep. Touch. 400. "A legacy is said to be bequeathed and the gift of a legacy is called a bequest." Flood on Wills 1. Frequently, however, the term bequest is taken to be the general expression, including the specific terms devise and legacy; it is therefore used by many, if not most writers, indiscriminately in speaking of both devises and legacies, and as applying equally well to both real and personal estate. The party taking is denominated respectively devisee or legatee, as he is the recipient under the will of land or personalty. The great drawback upon the use of the word bequest is that it has no corresponding word to denote the party taking, as in the case of the terms devise and legacy. Godolphin says that "a legacy is some particular thing or things given or left by a testator in his testament wherein an executor is appointed, to be paid or performed by his executor or by an intestate in a codicil or last will wherein no executor is appointed to be paid or performed by an administrator." Godolph., pt. 3, ch. 1, § 1. Although a legacy is generally understood to refer strictly to personalty yet its meaning may be extended to property not technically within its import, in order to carry out the intention of the testator. If, then, it appear evidently to a court of construction that the language of the will fairly justifies a wider interpretation than would ordinarily be allowed, legacy may so be extended as to include lands. Lord Mansfield said in Brady *v.* Cubitt, 1 Doug. 31, 39, "The word legacy in its ordinary signification is applied to money, but it may signify a devise of land and may here comprehend the devise

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

self both these characters.[2] 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

Joint estates not devisable.

which the testator calls a gift." "The word legacy, however," says Lord Denman, "must be admitted to have a direct reference to personalty, and not to a devise of land." But by reference to several cases his lordship then shows that where the true and ordinary significance of the word is not observed, the meaning to be given to the word must be decided by the intention of the testator. It is also said that whether the word "bequeath" means the same as "devise," when made use of in a will, must be determined by the connection in which it is found. Dow *v.* Dow, 36 Me. 211. An annuity is a legacy charged on the whole estate, not specifically devised. Trent *v.* Trent, Gilmer 174.

2. By the old Roman Law of the Twelve Tables a testator was permitted to leave all his property by way of legacies. But subsequently, by what was called the *Lex Falcidia*, a Roman testator could not bequeath more than three-quarters of his property in legacies, so that to the heirs, whether one or more, there remained, in any event, one-quarter of the entire property, which was called the Falcidian portion. Just. 2, 22, *De Lege Falcidia*. The progress of the English law has been in a directly opposite course from that of the Roman law, for while in early times the English testator had not the power to bequeath all his personalty as he might have elected, the legislation of England has constantly enlarged the powers of testators in this behalf, until now the law of England permits a testator to dispose of all his effects by will in such manner as he may desire. "With us in England the power of bequeathing is co-eval with the first rudiments of law; for we have no traces or memorials of any time when it did not exist. But we are not to imagine that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal. * * * The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabile parte bonorum* was given to recover them. This continued to be the law of the land at the time of *Magna Charta* * * * and Sir Henry Finch lays it down expressly in the reign of Charles I. to be the general law of the land." 2 Black. Com. 491. By statute, 1 Vict., c. 26, § 3, it is enacted "that it shall be lawful for every person to devise, bequeath or dispose of by his will executed in manner hereinafter required all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed or disposed of would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act

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. VIII., 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

had not been made, or notwithstanding that the same in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real, or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." The right to dispose of property by will is as broad and comprehensive as the right of disposition while living. Ross *v.* Duncan, Freem. Ch. (Miss.) 587. A testator may bequeath a life estate in personal property to one, and limit a remainder therein to another. Hetfield *v.* Fowler, 60 Ill. 45. In one case the testator bequeathed his personal property, but made no devise of his real estate. His real estate was sufficient to pay all debts of the testator. It was held that the legatee of the personal property took that property discharged from the payment of debts. McCullom *v.* Chidester, 63 Ill. 477. If a testator bequeath all his interest in certain, described estate, such bequest will operate as an assignment of his interest as lessee in that estate. Martin *v.* Tobin, 123 Mass. 85. In Louisiana it is held that if a person enters into a second marriage, children of the first marriage surviving, he cannot give to his intended spouse more than one-fifth of the estate in usufruct. Williams *v.* Hardy, 15 La. Ann. 286. And in Illinois, every devise of real estate is fraudulent and void as against existing creditors of the devisor. Ryan *v.* Jones, 15 Ill. 1. See also Heuser *v.* Harris, 42 Ill. 425; Rhoads *v.* Rhoads, 43 Ill. 239; Carmichael *v.* Reed, 45 Ill. 108; Barry *v.* Barry, 15 Kans. 587.

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

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

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*tion; it is enough that he had acquired a devisable interest in the estate at the time of his decease. (*d*)[3]

(*d*) As to the devise of trust estates.—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.

3. Trustees, by appointment and acceptance of office, become joint tenants. Eaton *v.* Smith, 2 Beav. 236. But one trustee is not liable, in the absence of collusion, for the default of his co-trustee. Brice *v.* Stokes, 2 L. C. Eq. 899; 4 Kent 513. Property held in joint tenancy by the testator will survive to the other joint tenants, and therefore cannot be given by will; thus, for instance, if property be transferred by the testator into the joint names of himself and his wife, there being nothing to rebut the presumption of advancement, such property cannot be given by will, whether by specific gift or in any other manner. Dummer *v.* Pitcher, 2 My. & K. 262; Coates *v.* Stevens, 1 Y. & C. Ex. 66; Grosvener *v.* Durston, 25 Beav. 97.

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.

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.[4] This doctrine, in regard to real estate, was recog-

Executory interests, when devisable.

4. 4 Kent 284. Blackstone says: "But *contingencies* and mere *possibilities*, though they may be released, or devised by will or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest." 2 Com. 290. To which Mr. Chitty adds the following: "It is now well established, as a general rule, that possibilities (not meaning thereby *mere hopes* of succession, Carleton *v.* Leighton, 3 Meriv. 671; Jones *v.* Roe, 3 T. R. 93, 96;) are devisable: for a disposition of equitable interests in land, though not good at law, may be sustained in equity. (Perry *v.* Phelips, 1 Ves., Jr., 254; Scawen *v.* Blunt, 7 Ves. 300; Moor *v.* Hawkins, 2 Eden 343.) But the generality of the doctrine that *every* equitable interest is devisable, requires at least one exception;—the devisee of a copyhold must be considered as having an equitable interest therein; but it has been decided, that he cannot devise the same before he has been admitted. (Wainwright *v.* Elwell, 1 Mad. 627.) So, under a devise to two persons, or to the survivor of them and the estate to be disposed of by the survivor, by will, as he should think fit, it was held, that the devisees took as tenants in common for life, with a contingent remainder in fee to the survivor; but that such contingent remainder was not devisable by a will made by one of the tenants in common in the lifetime of both. (Doe *v.* Tomkinson, 2 Mau. & Sel. 170.)" 2 Black. Com. 290, note 7. "Mr. Ritso remarks that, independently of thus confounding contingencies and mere possibilities, as if they were *in pari ratione*,—which they certainly are not,—there is here a great mistake; first in describing mere possibilities to be such as may be released or devised by will, &c.; and, secondly, in supposing devisable possibilities to be incapable of being assigned to a stranger. For, in the first place, there is this wide difference between contingencies (which import a present interest of which the future enjoyment is contingent) and mere possibilities, (which import no such present interest,) namely, that the former may be released in certain cases, and are generally descendible and devisable, but not so the latter. Suppose, for instance, lands are limited (by executory devise) to A. in fee, but if A. should die before the age of twenty-one, then to C. in fee: this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a *present interest*, although the enjoyment of it is future and contingent. But where there is no such present interest as the hope of succession which the heir has from his ancestor in general, this, being but a *mere* or *naked* possibility, cannot be released or devised, &c. Fearne 366. Secondly, contingencies or possibilities which may be released or devised, &c., are also assignable in equity, upon the same principle; for an assignment operates by way of agreement or contract, which the court considers as the engagement of the one to transfer and make good a right and interest to the other. As where A., possessed of a term of 1000 years, devised it to B.

nized in 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 father's lifetime. *The Court of K. B. 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. Buller, J., 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 Doe *v.* Tomkinson, (*g*)

for 50 years, *if she should so long live*, and after her decease to C., and died; and afterwards C. assigned to D.; now, this was a good assignment, although the assignment of a possibility to a stranger. The same point was determined, in the case of Theobald *v.* Duffay in the house of lords, March, 1729—30 Ritso, Introd. 48." 2 Black. Com. (Sharswood's ed.) 290, note 5. Upon this subject it is said, by Chancellor Kent, 4 Kent 261: "All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and devisable and assignable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be either devised, or descend, at the common law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens." Lawrence *v.* Bayard, 7 Paige 70; Varrick *v.* Edwards, 1 Hoff. Ch. 382, 395–405; Munsell *v.* Lewis, 4 Hill (N. Y.) 635; Fortescue *v.* Satterthwaite, 1 Ired. L. 566; Jackson *v.* Waldron, 13 Wend. 178. In the last foregoing case, it was, after a full and learned discussion, decided that a *mere naked possibility* cannot be assigned, or released, or devised, or pass by descent, and can only be extinguished by estoppel. On the other hand, if the possibility *be coupled with an interest*, it may be released, devised or assigned, like any other future estate in remainder. See also 2 Kent 475, n.; 1 Redf. on Wills 387. Where land is devised to the widow for life, to be sold at her death and the proceeds to be equally divided among the testator's children, the interest of the children living at his death can be, by them, devised. Allen *v.* Allen, 2 Tenn. Ch. 28.

(*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.]

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

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 K. B. 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 *contingency, 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. [5]

[(*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 re-publishing 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. In Sug. Pow., p. 269, 8th ed., the decision in Doe *v.* Tomkinson is 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. And see McAdam *v.* Logan, 3 B. C. C. 310, and Mr. Eden's note; Fearne C. R. 370, But see per Lord Westbury, Thomas *v.* Jones, 1 D., J. & S. 78, 79.]

5. In England, prior to the recent wills act, (1 Vict., c. 26,) a will was regarded by the law in the nature of a conveyance, and it was accordingly a well-established rule of law in England, that no person could dispose of any real estate, by will, in which he had not, at the time of the execution of the will, a legal or equitable

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

estate. It was also necessary that such estate should remain in the testator at the time of his decease. Under this rule, after-acquired real estate could not pass by the will. But now, by virtue of the wills act, 1838, (1 Vict., c. 26, § 3,) rights of entry, and all contingent, executory, and future interests in any real or personal estate, are also devisable. All contingent possible interests are devisable because there is an interest. 4 Kent 510; Nutter *v.* Russell, 3 Metc. (Ky.) 163. Where real estate was devised on condition, and the devise was forfeited, by neglect to comply with the condition, it was held that this interest could be devised and passed to the residuary devisees, there being an interest in the testator not specifically devised, depending on the performance or non-performance of the condition. Hayden *v.* Stoughton, 5 Pick. 528. A contingent interest is such an estate as may be transmitted by devise. Austin *v.* Cambridgeport, 21 Pick. 215; Brigham *v.* Shattuck, 10 Pick. 306. See also Emery *v.* Judge of Probate, 7 N. H. 142; Greene *v.* Dennis, 6 Conn. 293. In New Jersey, a possibility coupled with an interest is devisable by will and transmissible by descent. Den *v.* Manners, Spencer 142. A devise of rents, issues, and profits of land is, in effect, a devise of the land. Ib.; Silknitter's Appeal, 45 Penna. St. 365; Drusadow *v.* Wilde, 63 Id. 170; Earl *v.* Rowe, 35 Me. 414; Reed *v.* Reed, 9 Mass. 372; France's Estate, 75 Penna. St. 220. So, too, an unlimited bequest of the interest, or produce of a fund, will amount to a bequest of the fund itself. Garret *v.* Rex, 6 Watts 14; Van Rensselaer *v.* Dunkin, 24 Penna. St. 252; Craft *v.* Snook, 2 Beas. 121; Mason *v.* Trustees Tuckerton Church, 12 C. E. Gr. (N. J.) 47; Earl *v.* Grim, 1 Johns. Ch. 494. But it is not so if it appears, from the context of the will, that the interest only was intended for the legatee. Parker *v.* Moore, 10 C. E. Gr. (N. J.) 228; Dorr *v.* Wainwright, 13 Pick. 328; Giddings *v.* Seward, 16 N. Y. 365; Saunderson *v.* Stearns, 6 Mass. 37; Hall *v.* Cushing, 9 Pick. 395; Claggett *v.* Hardy, 3 N. H. 148. See also Parker's Appeal, 61 Penna. St. 478. If the income of an estate be bequeathed to the wife of the testator "to raise the children," and after they are raised, to the children and the wife, the children will be considered as "raised," when the youngest has attained twenty-one years, and from that time they will be entitled to share in the income. Shoemaker *v.* Stobaugh, 59 Ind. 598. A license to live on certain premises may be devised. Calhoun *v.* Jester, 11 Penna. St. 474. So too an easement may be devised. Hart *v.* Hill, 1 Whart. 124. A possibility of reverter is not devisable. Per Harper, J., in Deas *v.* Horry, 2 Hill, (S. C.) Ch. 244, 248. The reversion expectant on the determination of an estate tail is a vested interest, and may be devised. Steel *v.* Cook, 1 Metc. 281. So also may the interest over of a devisee in an executory devise. Kean *v.* Roe, 2 Harr. (Del.) 103. See also Eby *v.* Eby, 5 Penna. St. 461; Nicholson *v.* Bettle, 57 Penna. St. 384. It appears that if a devise be made subject to a condition which is contrary to public policy, the condition is void, and the devisee will take the estate clear of all conditions. Conrad *v.* Long, 33 Mich. 78. A power to sell lands may be devised. Wright *v.* Trustees Meth. Ep. Ch., 1 Hoff. Ch. 202. See also 1 Redf. on Wills 392; 4 Kent 261, *et seq.*

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."

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*)[6] As to rights of action.

And the same doctrine was applicable to rights of entry. This point was much discussed in 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 Cave *v.* Holford, (*l*) of Lord Eldon, in Att.-Gen. *v.* Vigor, (*m*) and of the Court of K. B., in 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 appears to be more consistent with principle than the contrary position advanced in the early case of Bunter *v.* Coke. (*p*) Rights of entry.

*[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 right to recover possession of the land from a mere adverse possessor, or a person holding over after the determination of his lawful

(*i*) Baker *v.* Hacking, Cro. Car. 387, 405; see also Doe d. Cooper *v.* Finch, 1 Nev. & M. 130, [4 B. & Ad. 283.]

6. If land to which a testator is entitled under a parol contract of sale be devised, the right to sue for a breach of such contract does not, by such devise of the land, vest in the devisee, but it goes to the executor of the testator. Irwin *v.* Hamilton, 6 Serg. & R. 208. See also McCullom *v.* Chidester, 63 Ill. 477; Swift *v.* Lee, 65 Ill. 336.

(*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.]

(*p*) Salk. 237.

title, for in such cases the freehold was in the testator, and of course might have been devised by him.] (*q*)[7]

All such questions, however, are precluded as to wills made since the year 1837 by the statute 1 Vict., which has expressly extended the testamentary power to "all rights of entry for conditions broken and other rights of entry." (*r*) [And as to rights of action, the question cannot recur since the statute 3 and 4 Will. IV., c. 27, § 36, abolishing real actions, on which alone it is conceived the question could have arisen.

Where a conveyance has been executed under circumstances which would give the grantor a right in equity to have it set aside and reconveyance decreed, such right is clearly devisable. (*s*)

Conversely, possession without title confers a devisable interest which may be defended and recovered by the devisee against all but the true owner. (*t*)[8]

Possession *de facto*.

Personal property limited by settlement merely to the executors or

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

7. A conveyance of land obtained by fraud or imposition, although duly acknowledged and recorded, does not work such disseisin as to disable the grantor to afterwards devise the same lands. Smithwick *v.* Jordan, 15 Mass. 113. See also Poor *v.* Robinson, 10 Mass. 131; Hyer *v.* Shobe, 2 Munf. 200. In New York a devise would be good, notwithstanding an actual disseisin, the power being given to dispose by will of any property right or interest in real estate, whether vested or not. Varick *v.* Jackson, 2 Wend. 166. A mere adverse possession does not affect the validity of a devise. Such interest would pass by descent under the statute. It would be bound by a judgment against the ancestor and, after *sci. fa.*, might be sold under execution against the heir. Ib.; S. C., 7 Cowen 238. Where a devise was made to two sons in fee, with clause that if either die without issue the survivor should take his part, and if both die without issue then over, it was held that under the statute of New York nothing passed by this last limitation over. Waring *v.* Jackson, 1 Peters 570. See also Doe *v.* Thompson, 5 Cowen 374. In Maryland an equitable interest in land is transmissible by will. Carrol *v.* Norwood, 4 Harr. & McH. 287. A right of entry is devisable under the statute of Virginia. Watts *v.* Cole, 2 Leigh 653, 664. It is so even by a person entitled as *special occupant*, though he never was in actual possession, and another person held the land with an adverse claim at the time of the devise. Hyer *v.* Shobe, *ubi supra*. It seems to be a well-established doctrine now, in most, if not all, of the American states, that the true test of a devisable interest is that it is every interest in land that is descendible. 4 Kent 513. But in England, it would appear, the test is a possibility coupled with an interest.

[(*r*) The devise must be by apt words: "real estate of which I may die seised" has been held not to pass land of which, though entitled thereto, the testator was not seised. Leach *v.* Jay, 9 Ch. D. 42.

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

(*t*) Asher *v.* Whitlock, L. R., 1 Q. B. 1.]

8. Smith *v.* Bryan, 12 Ired. 11.

administrators of the settlor may be disposed of by his will, since he himself takes absolutely under such a limitation. (*u*)

Chose in action.

In Bishop *v.* Curtis, (*v*) 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.] [9]

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. VIII., which shows that *it did not (as commonly supposed) arise from the mode of penning those statutes, but resulted from principles common to both species of devises.

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

(*v*) 21 L. J., Q. B. 391.]

9. All property in action depends entirely upon contracts, express or implied, which are the only regular means of acquiring choses in action; these are in fact things which are *in potentia* rather than *in esse*, though the owners may have as absolute a property in, and be as well entitled to, such things in action as to things in possession. 2 Black. Com. 398. In the case referred to in the text, Lord Campbell, C. J., said: "The wills act, 1838, never was intended to have any operation to make anything bequeathable as personal estate which might not have been previously bequeathed. It only provides a mode for executing wills; and with respect to real estate, a clause is introduced making things devisable which before were not so, such as rights of entry, which may now pass by will. But there is nothing to indicate an intention of enabling a party to bequeath a *chose in action* so as to pass the right of suit" to the legatee. The executor, as the representative of the testator, stands in his place, and without doubt is the proper person to sue, although the right to sue, as a *right*, is unquestionably a bequeathable interest. Gresley *v.* Mousley, 4 DeG. & J. 78. The executor or administrator of a deceased person stands in the exact position of the deceased in all matters of contract; therefore, if there should be due to the deceased any debts of record, or on specialty or other contract, bonds, bills or notes, these may all be enforced by the executor or administrator in the same manner as they might have been by the deceased himself. "Thus if money be payable to B without naming his executor, yet his executor or administrator shall have an action for it. So if money be payable to A or his assigns, his executor shall take it for he is an assignee in law." Wms. Ex'rs (6th Am. ed.) 866. An executor or administrator is an assignee in *law*, because the rights and property of a deceased person devolve upon him by the law. When these are transferred by express conveyance or assignment, then the person receiving them is an assignee in *deed* or *fact*. Toller Ex'rs 166. A party may devise all his interest in a pending suit. Swift *v.* Lee, 65 Ill. 336.

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 seised 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*)[10]

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

10. In an early case in Virginia the question was, Can a man devise lands which he should afterwards acquire? The court were of opinion that he might, the statute providing that the testator may dispose by will of lands he then hath or *may have* at the time of his death. Turpin *v.* Turpin, 1 Wash. (Va.) 75. This decision turns upon the wording of the Virginia statute. But at common law after-acquired real estate would not pass by will. Milnes *v.* Slater, 8 Ves. 295; Perry *v.* Phelips, 1 Ves. 251; McKinnon *v.* Thompson, 3 Johns. Ch. 307; Livingston *v.* Newkirk, Id. 312; Kemp *v.* McPherson, 7 Harr. & J. 320; Hays *v.* Jackson, 6 Mass. 149; Ballard *v.* Carter, 5 Pick. 112; George *v.* Green, 13 N. H. 521; Minuse *v.* Cox, 5 Johns. Ch. 441; Brewster *v.* McCall, 15 Conn. 274; Thompson *v.* Scott, 1 McCord Eq. 32; Meador *v.* Sorsby, 2 Ala. 712; Carter *v.* Thomas, 4 Greenl. 341; Girard *v.* Philadelphia, 4 Rawle 323; Foster *v.* Craige, 3 Ired. L. 536; Watson *v.* Child, 9 Rich. Eq. 129; Ross *v.* Ross, 12 B. Mon. 437; Johnson *v.* Hunly, 1 Tayl. (N. C.) 305; Douglass *v.* Sherman, 2 Paige 358; Raines *v.* Barker, 13 Gratt. 128. A change was made in England in this respect by the wills act, 1 Vict., c. 26, § 3; for the provisions of which section see *ante* note 2, p. 146. A similar change has been made in most of the American states, so that at this time the general doctrine in the United States is that a will will pass after-acquired real estate. Yet this cannot be the case except where it has been made possible by statute. In New York, Virginia, Maine, Massachusetts, New Hampshire, Connecticut, Vermont, Pennsylvania, Maryland, Indiana, Illinois, Ohio, Kentucky, North Carolina, Alabama, California, Colorado, Delaware, Georgia, Iowa, Kansas, Missouri, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, West Virginia and Wisconsin, this is provided for by statute. The provision of the statute in New Jersey is that it shall apply only to the wills of persons who die after July 4th, 1850. And it has been decided that the Maryland statute applies only to wills taking effect after June 1st, 1850. Carroll *v.* Carroll, 16 How. 275. But in many of the states the question has been much discussed as to whether the statute applies only to wills made after the passage of the act or to all wills that shall take effect after its passage. In some cases it has been held that it applies to any will where the death of the testator is after the enactment of the statute. Condict *v.* King, 2 Beas. 375; Van Tilburgh *v.* Hollinshead, 1 McCart. 36, n.; Hamilton *v.* Flinn, 21 Tex. 713; Meserve *v.* Meserve, 63 Me. 518; Smith *v.* Jones, 4 Ohio 115; Alexander *v.* Worthington, 5 Md. 471; Magruder *v.* Carroll, 4 Md. 335, Wilson *v.* Wilson, 6 Md. 487; De Peyster *v.* Clendining, 8 Paige 295; Loveren *v.* Lamprey, 22 N. H. 434; Winchester *v.* Forster, 3 Cush. 366; Cushing

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

v. Aylwin, 12 Metc. 169. In other cases it has been held to the contrary. Roberts *v.* Elliot, 3 Mon. 395; Parker *v.* Bogardus, 5 N. Y. 309; Ellison *v.* Miller, 11 Barb. 332; Green *v.* Dikeman, 18 Barb. 535; Brewster *v.* McCall, 15 Conn. 274, 289; Mullock *v.* Souder, 5 Watts & S. 198; Gable *v.* Daub, 40 Penna. St. 217; Gibbon *v.* Gibbon, 40 Ga. 562; Battle *v.* Speight, 9 Ired. L. 288. See also Alexander *v.* Waller, 6 Bush 330, 341; Warner *v.* Swearingen, 6 Dana 195; Henderson *v.* Ryan, 27 Tex. 670; Willis *v.* Watson, 4 Scam. 64; Peters *v.* Spillman, 18 Ill. 370; Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590; Means *v.* Evans, 4 Desaus. 242. If it be required by the statute that the intention of the testator to pass after-acquired real estate appear, it becomes highly proper to ascertain what expressions will indicate such intention. The words "all the residue" have been held sufficient. Fluke *v.* Fluke, 1 C. E. Gr. (N. J.) 478; so, too, the words "whole estate." Flournoy *v.* Flournoy, 1 Bush 523. So also the words, "all my real and personal property." Liggat *v.* Hart, 23 Mo. 127. And "all my estate." Winchester *v.* Forster, 3 Cush. 366. The words "such estate as it hath pleased God to bless me with" have been held insufficient. Dennis *v.* Warder, 3 B. Mon. 173. So, too, the words, in the appointing of executors, "for the full and final settlement of my estate whether real or personal." Lynes *v.* Townsend, 33 N. Y. 558; and "all the rest and residue of my estate." Youngs *v.* Youngs, 45 N. Y. 254; Havens *v.* Havens, 1 Sandf. Ch. 324. And it seems that the statute will not apply to cases where particular pieces of property are devised, and there is a residuary clause. Bowen *v.* Johnson, 6 Ind. 110. And it has been said that the presumption is that the testator means to confine his bequests to land to which he is then entitled. By Washington, J., in Smith *v.* Edrington, 8 Cranch 66. This rule of law in regard to real estate has never been extended to personal property, but it has long been well settled that such estate will pass under a will, though it be acquired after the execution of the will, and that, too, under general expressions, it being requisite only that the expressions used be such as to make it the evident intention of the testator to bequeath such after-acquired personalty. Haven *v.* Foster, 14 Pick. 534, 539; Brimmer *v.* Sohier, 1 Cush. 118, 133; Winchester *v.* Forster, 3 Cush. 366, 369; Warner *v.* Swearingen, 6 Dana 195, 199; Walton *v.* Walton, 7 J. J. Marsh. 58; Marshall *v.* Porter, 10 B. Mon. 1; Allen *v.* Harrison, 3 Call. 289; Smith *v.* Edrington, 8 Cranch 66; Henderson *v.* Ryan, 27 Tex. 670, 674. See also Walkem on Wills 266.

will, for the heir-at-law to whom the equitable inheritance descended.(y)[11] 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 re-publishing 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 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

Effect of uncompleted contract.

(y) Strode *v.* Lady Falkland, 3 Ch. Rep. 187. [In Yardley *v.* Holland, L. R., 20 Eq. 428, a mortgagee in fee devised "all hereditaments whereof he was seised as mortgagee" (without any specific description of the mortgaged estate), and afterwards purchased the equity of redemption: this was ademption, and the devise failed both at law and in equity.]

11. As the law stood in England prior to the recent wills act, it was held to be necessary, in order to dispose of an estate by will, that the party devising should have the ownership of the land at the time of making the will, and that there should be a continuance of the same interest till the time of the death of the testator, it was impossible to make a valid devise of a given piece of land which was held by one species of title at the time of the *factum* of the will and by another species of title at the time of the death of the testator. This same principle prevailed in the United States until changed by statute, and must still prevail in any state (if such there be) where the old rule of law is in force. It was accordingly held in Massachusetts, in 1827, that where a person who, by his will, devised a mortgage, subsequently to the execution of the will took an absolute title in the same premises and canceled the mortgage as a part of the consideration (paying the mortgagor the difference in money), the will would not operate to pass the estate in the land. Ballard *v.* Carter, 5 Pick. 112. But the law having been altered in Massachusetts, so that any right or interest in lands acquired by the testator subsequently to the making of the will, shall pass thereby in like manner as if possessed by him at the time of making the will, such will would now pass a title obtained by conveyance in satisfaction of the mortgage or by foreclosure. And this is the present state of the law in most, if not all, of the American states.

(z) Greenhill *v.* Greenhill, Pre. Ch. 320, [2 Vern. 679, Gilb. Eq. R. 77;] Green *v.* Smith, 1 Atk. 572; Gibson *v.* Lord Montfort, 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.*]

(b) Duckle *v.* Baines, 8 Sim. 525.

a revocation of the devise of the equitable interest.[12] The removal of this incapacity, therefore, is not the least of the advantages conferred by the statute 1 Vict., c. 26, 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;[13] for upon this fact would depend the question, (which has lost none of its importance,) 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 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.

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 Whittaker *v.*

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

12. If a mortgagee foreclose after publication of his will, this will convert the mortgage from personal into real estate, which will descend to the heirs unencumbered by any bequest in the will not charged on real estate. Smith *v.* Edson, 5 Conn. 531; Brigham *v.* Winchester, 1 Metc. 390.

13. Where A enters into articles of agreement to purchase certain property, and actually takes possession of it under the agreement, but dies before any deed is made to him for it, the heirs of A cannot be compelled, in a court of law, to receive a deed for the property, or complete the purchase and pay the purchase money. Cooper *v.* Vanderbelt, 2 Halst. 121. See also Miller's Adm'r *v.* Miller, 10 C. E. Gr. (N. J.) 354; Reddish *v.* Miller's Adm'r, 12 C. E. Gr. (N. J.) 514. Consult N. J. Rev. Stats. 638, § 1. But if the executor complete the contract by paying for the property, the land will pass by a devise of all the testator's real estate. Williams *v.* Hassell, 73 N. C. 174.

(*c*) 3 Atk. 1.

(*d*) 7 Ves. 341.

Whittaker, (*e*) where W., 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 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 canceled 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, being of opinion that the acts of the executors could not affect the rights of the parties; and relying, also, 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 favored. 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. [14]

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

(*e*) 4 B. C. C. 30.

14. "If the purchaser of a real estate dies, without having paid the purchase-money, his heir at law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator. And if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him. So if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty so far as it goes. And it has been decided that if by reason of the complication of the testator's affairs the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit. But if a title cannot be made, or there was not a perfect contract, or the court should think the contract ought not to be exe-

Such is the doctrine 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 the decision was founded on the general principle, and not on the particular terms of the contract. In adverting to Whittaker *v.* Whittaker, which was urged as an authority for the plaintiff, Lord Eldon 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 W. in equity belonged to the devisees of his real estate. The vendor objected he was not to be held to the contract forever, and the embarrassment of W.'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

Effect of uncompleted contract.

cuted, in all these cases there is no conversion of real estate into personal, in consideration of the court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends. And therefore, if the vendor dies, the estate will go to the heir-at-law of the vendor in the same manner as if no contract had been entered into; and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him. The court cannot speculate on what the deceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor a right to call upon his heir." Wms. Ex'rs (6th Am. ed.) 1861. The same question must be determined whether it be the purchase or the sale that is to be enforced, *i. e.*, was the ancestor himself bound? 1 Sugden on Vendors (8th Am. ed.) 293, 294. Where an estate directed to be bought, yet not actually contracted for, is not or cannot be purchased, the money must be laid out in other lands for the benefit of the devisee. If a testator intend that the devisee of the estate contracted for should have another equally valuable estate in case the title to the one under contract fails, that should be made clearly to appear in the will. See also Sugden on Vendors (8th Am. ed.) 409. See *ante* n. 12. If a person have a contract for a conveyance of lands, he has a devisable interest therein, and a devisee of such interest may transmit it to another by will. Malin *v.* Malin, 1 Wend. 625.

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

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 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 color for that; Green *v.* Smith, (*h*) indeed, seems to state a doctrine quite inconsistent." He 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

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 he alluded to such evidence of intention as would have amounted to an acceptance of the title. Nothing short of *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

What evidence of intention by devisor to accept title necessary.

[(*g*) See acc. Curre *v.* Bowyer, 5 Beav. 6, n.; Hudson *v.* Cook, L. R., 13 Eq. 417; Ingle *v.* Richards, 28 Beav. 365; Haynes *v.* Haynes, 1 Dr. & Sm. 451, 452; Lysaght *v.* Edwards, 2 Ch. D. 516.]

(*h*) 1 Atk. 572.

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

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 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 property, *would belong to the personal representatives; (*l*) 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

Cases where there is an option to purchase.

(*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.

[(*l*) See *post* ch. VII., § 3, *ad fin.*]

held by Lord Eldon, in Townley *v.* Bedwell, (*m*) on the authority of a previous decision of Lord Kenyon, (*n*) (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. [15]

[There is at least equal reason for holding that conversion has taken place in cases where, at the testator's death, the contract, though unilateral, is unconditional and complete without a further act by one of the parties. But, whether contract or option, the vendor's will may show an intention inconsistent with the notion of conversion. In Knollys *v.* Shepherd (*o*) (a case of contract,) a specific devise to the testator's "dear wife" of the estate "which he had lately contracted to sell," was held not to show such an intention, but to give the wife only the legal estate, the purchase-money passing by the residuary bequest. But in the case of an option, a will made or re-published after the date of the contract, and specifically devising the property in strict settlement, has been held to take the case out of the rule in Townley *v.* Bedwell; and, upon the option being exercised after the testator's death, to carry the purchase-money to the devisees. (*p*)

(*m*) 14 Ves. 591. [See also Collingwood *v.* Row, 26 L. J., Ch. 649, 3 Jur. (N. S.) 785.]

(*n*) 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.]

15. "When an estate is contracted to be sold, it is in equity considered as converted into personalty from the time of the contract and this notional conversion takes place although the election to purchase rests merely with the purchaser." 1 Sug. on Vend. (8th Am. ed.) 287. It seems to have been held that where, in an ordinary contract, to be completed by a certain future day, "all rents and other profits to accrue in the meantime," were to belong to the vendor, his heirs, executors, and administrators, and the vendor died before that day, the intermediate rents belonged to the heir, as it was clearly evident that the estate was to be kept as realty up to the time when it should be actually converted into personal estate. Lawes *v.* Bennett, 1 Cox 167; Ripley *v.* Waterworth, 7 Ves. 425; In re Crofton, 1 Ir. Eq. R. 204; Pegg *v.* Wisden, 16 Beav. 239.

[(*o*) 1 J. & W. 499, cit., affirmed in D. P., Sug. Law of Prop. 223. As to whether a general devise includes an estate which the testator has contracted to sell, see *post* ch. XXI., § 2.

(*p*) Drant *v.* Vause, 1 Y. & C. C. C. 580; Emuss *v.* Smith, 2 De G. & S. 722. Neither a specific devise executed before (Weeding *v.* Weeding, 1 J. & H. 42,) nor a general devise executed after the contract (Goold *v.* Teague, 5 Jur. (N. S.) 116,) is sufficient for the purpose. The rule applies only as between the real and personal representatives of the vendor, and will not be extended. See Edwards *v.* West, 7 Ch. D. 858.]

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. VIII. (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) the testator till his death, 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)

Devises of copyhold.

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.[16] By the statute 55 Geo. III., 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)[17] But this statute supplied formal surrenders only, and therefore did not dispense with a

Will of a copyholder in joint tenancy a severance.

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

Only dispenses with formal surrenders.

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

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

(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 (1 De G. & S. 75), it was held by K. Bruce, V. C., that a surrender by one joint tenant to the use of the will of a stranger whose will did not come into operation until after the death of the surrenderor produced a severance; but on appeal (3 D., M. & G. 202) this was doubted by Lord Cranworth, Parke, B., and Cresswell, J., seeing that the right by survivorship had actually accrued.]

16. Lacey *v.* Hill, 19 Eq. 346.

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

17. Doe d. Clark *v.* Ludlam, 7 Bing. 275. "The effect of section 3, of the wills act, is only to dispense with the necessity for a surrender, and not to convey the estate into the devisee without admission. The estate, therefore, remains in the customary heir till admittance." Theobald on Wills 72. Garland *v.* Mead, L. R., 6 Q. B. 441.

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 sur*render 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*)

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*)[18]

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*)[19] A devise of copyholds, therefore, however comprehensive in its

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

[(*z*) Wardell *v.* Wardell, 3 B. C. C. 117; Pike *v.* White, Id. 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.

(*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.]

18. Before the statute 55 Geo. III., equitable estates of copyholds, which could not be surrendered, could be devised by words of direct reference. Allen *v.* Poulton, 1 Ves., Sr., 121. But they would not pass by a general devise of lands; now, however, the evidence of intention to pass copyholds, inferred from a surrender, being unnecessary, they would pass under a general devise. Lord Cranworth in Torrey *v.* Brown, 5 H. L. 555, 574.

[(*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, Id. 435, n.

19. But, by the 24th section of the wills act, every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if executed immediately before the death of the testator, *unless a contrary intention shall appear by the will.*

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*)

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*) [Freeholds held of the manor coming to the lord by act or operation of law, as by escheat or descent, also passed by a previously executed devise of the manor; but not if he acquired them by purchase, for when so acquired they do not become parcel of the manor.] (*j*) 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 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*)

After-acquired copyholds pass as part of a manor.

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 Smith *v.* Triggs; (*m*) but which case, rightly understood, seems not to have warranted any such doctrine. It was

Devise by devisee or surrenderee of copyholds before admittance void.

[(*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.

[(*j*) Delacherois *v.* Delacherois, 11 H. L. Cas. 62.

(*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.

Devise by an unadmitted heir held to be good.

frequently cited, however, as an authority on this point, (*n*) but as such it has been completely overruled by Right d. Taylor *v.* Banks, (*o*) the facts of which were as follows:—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, § 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 on a mistaken view of Smith *v.* Triggs. The point was again agitated, and received a similar determination in [King *v.* Turner (*x*)] and Doe d. Perry *v.* Wilson. (*y*)

Devises by unadmitted devisee or surrenderee under wills act.

The act 1 Vict., c. 26, § 3, 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. III., c. 192, which only *supplied* a surrender,

(*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.

[(*x*) 1 My. & K. 456.]

(*y*) 5 Ad. & Ell. 321; [and see Doe d. Winder *v.* Lawes, 7 Ad. & Ell. 195.

and makes the will itself, without any surrender, confer a right to admittance, (*z*) notwithstanding that the testator has not surrendered to the use of his will, or notwithstanding that the copyholds, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, 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. 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. But in Lacey *v.* Hill, (*a*) it was held that the new act does not merely dispense with the surrender and the custom, but gives the devise the same effect as if there actually had been both; and that consequently a *general devise of the testator's "real estate," without more, bars his widow of her freebench. Reading the act, Sir G. Jessel, M. R., said, "That means that a testator is to have the same power of devising copyhold estate, as if he had done all the things there mentioned; as if there had been a surrender, or as if there had been a custom, and so forth. It breaks in upon the customary law of copyholds for the purpose of giving an unlimited power of devise. I am of opinion that *the same* effect is to be given to a devise of copyholds under the new law, as under the law as it stood before the wills act, and consequently the widow is not entitled to freebench." It is to be presumed that in this case the custom gave freebench of lands of which the copyholder was seised at his death, and not, as is the custom in some manors, (*b*) of those of which he was seised at any time during the coverture; since, in the latter case, notwithstanding a custom to surrender to the use of the will, neither a devise nor an actual surrender by the husband would under the previous law have barred the freebench.]

Lacey *v.* Hill. Devise of copyholds bars freebench.

(*z*) This view was adopted by the court in Garland *v.* Mead, L. R., 6 Q. B. 441. Admittance is still necessary to vest the estate.

(*a*) L. R., 19 Eq. 346. The contrary must have been assumed in Thompson *v.* Burra, L. R., 16 Eq. 592. It was needless there to argue that the widow must elect between her freebench and the benefits given her by the will if the freebench was defeated by the devise. It need scarcely be observed that a devise by one joint tenant will not work a severance, since the power of devising under the act is given only where the property if not devised would go to the customary heir.

[(*b*) Riddell *v.* Jenner, 10 Bing. 29 (Manor of Cheltenham.)

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. (*c*)

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; [20] and, therefore, even under the old law, it was quite unnecessary, as regarded the testator's com-

Bequests of chattel interests in lands.

(*c*) The form of admittance of a devisee of copyholds is now somewhat simplified by stat. 4 and 5 Vict., c. 35, §§ 88, 89, 90.]

20. "The general rule is that chattels real shall go to the executor or administrator, and not to the heir. Chattels real are such as concern or savor of the realty; or in other words, they are chattel interests issuing out of, or annexed to real estates. Thus, while the military tenures subsisted, wardship in chivalry was accounted such an interest, and accrued to the executor or administrator, and not to the heir; because it was in respect of a tenure of land, or other hereditament, and was for years, viz., during the minority, or till marriage had." Wms. Ex'rs (6th Am. ed.) 746; Co. Lit. 118 b; 2 Black. Com. 386; Godolph., pt. 2, ch. 13, § 2; Went. Off. Ex. 126, (14th ed.); Shep. Touch. 468. "All leases and terms of lands, tenements and hereditaments, of a chattel quality, are chattels real, and will go to the executor or administrator; but he has no interest in the freehold terms or leases. The general rule for distinguishing these two kinds is, that all interests for a shorter period than a life, or more properly speaking, all interests for a *definite* space of time, measured by years, months, or days are deemed chattel interests; in other words, testamentary, and of the nature, for the purpose of succession, of other chattels or personal property. Thus, not only on a term of one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays £10, &c., or until the grantee be promoted to a benefice, or for any like *uncertain* time; in all these cases the lessee has an estate of freehold in judgment of law; while a lease for ten thousand years is not a freehold, but chattel interest. If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors or administrators. If a lessee for years of a

petency 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

carve of land grants to another a rent out of the said carve for the life of the grantee, that is a good charge during the term, if the grantee so long live; but in such a case the grantee hath but a chattel. A. made a lease to B. for life by indenture, in which was a proviso that if the lessee died before the end of sixty years then next ensuing, his executor should have and enjoy, as in the right and title of the lessee, for term of so many of the years as amounted to the whole number of sixty, so that the commencement of the said sixty shall be accounted from the date of the said indenture. The lessee made two executors and died. One of them entered into the land. And the opinion of the court was, that no lease for years was made by this proviso in the lease, nor by remainder in his executor; because nothing of the said term was limited to the lessee for life as remainder to him and his executors." Gravenor *v.* Parker, Anders. 19; Wms. Ex'rs (6th Am. ed.) 749, *et seq.* "Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs but his executors. So if a lease for years be made to a bishop, parson or other *sole* corporation and his successors, yet it will go to the executors of the lessee; because a term for years being a chattel, the law allows none but personal representatives to succeed thereto, nor can this mode of succession be altered by any limitation of the party. Again it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. Therefore, where a term for years is devised to one and the heirs of his body, or to the heirs male of his body, the term, at the death of the devisee, shall go to the executor and not to the heir. So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives. In a modern case the testator devised his real estate to A. for life, without impeachment &c. with remainder to trustees to procure contingent remainders, with remainder to the heirs of the body of A. By codicil, reciting the after-purchase of a leasehold estate, he devised the same to the trustees named in his will, 'for such estate and estates and in such manner and form' as his real estates were given by will. It was held that A. taking an estate tail in the real estates under the will, was nevertheless entitled to the absolute interest in the leasehold bequeathed by the codicil. Brouncker *v.* Bagot, 1 Meriv. 271. With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitation to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor. * * However if there appears any other circumstance or clause in the will, to show the intention that these words should be words of purchase, and not words of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase to the exclusion of his executor. The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal

part of his property at his decease; (*d*) 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.

hereditaments, such as leases for years of commons, tithes, fairs, markets, profits of leets, corodies for years, and the like. In the case of a tenancy from year to year as long as both parties please, since the death either of the lessor or lessee does not determine it, the interest of the tenant is transmissible to his executor or administrator. Therefore due notice to quit must be given to the latter before the lessor or his representative can recover in ejectment; and the executor or administrator of the lessee may maintain ejectment; and it was held no objection that the demise in the declaration was stated to be for seven years. So where W. H., being a tenant from year to year to Lady H. died, leaving his widow in possession and J. H. some time afterwards took out administration to the deceased, but the widow continued in possession, paying rent to Lady H. with the knowledge of J. H., who never objected to such payment or made any demand of rent, it was held, that there was no evidence of a determination of the tenancy from year to year by operation of law, and that the administrator was entitled to recover possession from the widow." Doe *v.* Wood, 14 M. & W. 682; Wms. Ex'rs (6th Am. ed.) 750, *et seq.* "If a lease be made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none. It may be advisable here to remark that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets shall be applied, and the legatee has no right to enter without the executor's special assent. If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it be with nothing; for the executorship or administratorship is entire, and must be renounced *in toto*, or not at all. Generally speaking, the courts of equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate. There is, however, a particular sort of term, usually called a 'Term attendant upon the inheritance,' the beneficial interest in which is regarded in equity in a peculiar way; and considered as completely consolidated with the freehold and inheritance, so as to follow the fee in all the various modifications and charges to which it may be subjected by the acts of law or of the owner. The consequence is that this interest is not looked upon in equity as a chattel; it is not assets in the hands of the executor or administrator, nor was it formerly liable to the simple contract debts of the deceased, but is, together with the fee, real assets." Wms. Ex'rs (6th Am. ed.) 754. "When a term for years is created for a particular purpose, as for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created is satisfied, the termor is considered in equity as a trustee for the owner of the inheritance; and though at law the term is deemed a term in gross in such trustee, yet in equity it follows the fee, and is looked upon as completely consolidated with it. Hence it is not regarded as per-

(*d*) See Wind *v.* Jekyl, 1 P. W. 575; see also James *v.* Dean, 11 Ves. 388.

Freeholds *pur autre vie* require a distinct consideration in connection 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. II., c. 3, § 12), the act of Henry VIII. being (according to the prevalent and probably the better opinion) confined to estates of inheritance in fee simple. (*e*)[21]

Freeholds *pur autre vie.*

sonal assets in the hands of the executor of the person entitled to the fee, but as real assets which go to his heir. Yet this must not be understood of every term which attends the inheritance; for where a termor purchases the freehold and inheritance, and takes a conveyance thereof in the name of a trustee, although the term in himself will be attendant on his equitable fee-simple, yet, at his death, it will be assets in the hands of his personal representatives. But by stat. 8 and 9 Vict., c. 112, after December 31st, 1845, all terms attendant on the inheritance shall determine, unless for protection, in certain cases, against incumbrances." Wms. Ex'rs (6th Am. ed.) 1779.

(*e*) Anon., Cart. 211.

21. Anciently, an estate *pur autre vie*—*i. e.*, a lease for the life of another—not limited to a man and his heirs, would, at the death of the owner, have belonged to no one. Therefore, he who first obtained the possession of it upon the death of the owner might have held it during the life of the *cestui qui vie*. The person so obtaining and holding it was called the "general occupant." "This seems to have been recurring to first principles and calling in the law of nature to ascertain the property of the land when left without a legal owner." 2 Black. Com. 258. However, a civilized community could not long tolerate so primitive a state of things, and therefore it was enacted by the statute of frauds, (29 Car. II., c. 3, § 12,) which was explained by 14 Geo. III., c. 20, that an estate *pur autre vie*, not limited to the owner and his heirs, might be disposed of by will; or, if the owner died intestate, that it should go to his administrator as personalty. If the estate were limited to the owner and his heirs, then the heir—"the special occupant"—should hold the estate, and it would, in that case, be assets by descent in his hands. "It may be remarked that an estate granted *pur autre vie* to a man and the heirs of his body is called a *quasi* entail and as regards its descent is like any other estate tail. The heir to an estate tail, or, as he is called, the special heir, is not mentioned in the wills act, 1838, so it is assumed that *quasi* entails, if the entail be not barred, are not devisable and are not subject to debts. As to whether an executor may be special occupant of an incorporeal hereditament, see Sugden on Powers 193, note." Flood on Wills 134, note (*c*). See Sugden on Powers (4th ed.) 98, note; also a note of Morley & Coote to their edition of Wat-

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

kins on Conveyancing 69; also Low *v.* Burrow, 3 P. Wms. 264 note (*D*), and the observations of Tindal, C. J., in Bearpark *v.* Hutchinson, 7 Bing. 187. "In Northen *v.* Carnegie, 4 Drew. 587, Kindersley, V. C., expressed a clear opinion, that though where the property is incorporeal, there cannot be a general occupant, there was nothing to prevent special occupancy, and the learned judge proceeded to say, that he should have no hesitation in coming to the conclusion that an executor may be a special occupant of an incorporeal hereditament. In the case before his Honor, there was a limitation of an incorporeal hereditament to A. his heirs and assigns for lives, and A. conveyed it to trustees, their executors and administrators, upon contingencies which never happened; and it was held that he had parted with his whole estate *at law*, but with a resulting beneficial interest in him, insomuch as he had limited on the contingencies." Wms. Ex'rs (6th Am. ed.) 755, note (*c*). "A question has arisen, viz., to whom the estate *pur autre vie* would go if limited to a man, *his heirs, executors and administrators;* and it was argued in favor of creditors generally, that the administrator was entitled; but the court decided for the heir. (Atkinson *v.* Baker, 4 T. R. 229. This was the case of a deed. But the same had been held in the case of a will. Carpenter *v.* Dunsmore, 3 El. & Bl. 918.) In another case, (Doe *v.* Steele, 4 Q. B. 663,) where a tenant in fee conveyed lands to 'H. *her heirs* and assigns *to hold* to H. *and her assigns* during the life of G.,' it was held that, after H.'s death, G., who was her heir, was entitled to hold for his life as special occupant, and that the land did not pass to H.'s executors by the words in the *habendum* 'to H. and her assigns,' but that these words must be disregarded, as being repugnant to the words in the premises. A question has been raised upon the construction of this statute, (29 Car. II., c. 3, § 12,) whether, if a *rent* be limited to a man, his executors and administrators, *pur autre vie*, and the grantee die, living *cestui que vie*, and without having disposed of it in his lifetime, it is not determined, notwithstanding the statute; on the ground that it was intended to apply to those estates only in which executors or administrators, if named, might take as special occupants, and consequently not to incorporeal hereditaments. (Northen *v.* Carnegie, *ubi supra.*) The better opinion seems to be that the statute nevertheless gives the estate to the executors or administrators; (Kendal *v.* Micfield, Barnard Ch. Cas. 46; Jenison *v.* Lexington, 1 P. Wms. 555;) but to avoid the doubt, it has been usual to limit the rent to the grantee, his executors and assigns, for a certain number of years, determinable on the death of the *cestui que vie.* In Bearpark *v.* Hutchinson, *ubi supra*, it was held by the Court of Common Pleas, after taking time to consider, that where a rent charge was granted to a man during the life of another, without further words, and the grantee died during the life of the *cestui que vie*, the right to the rent-charge vested in the personal representative. And Tindal, C. J., in delivering the judgment of the court, observed, with respect to the objection that the statute is limited to such estates as were capable, before the statute, of occupancy, that 'special occupant of rent' was a legal phrase, in common use and possessing a known meaning, before the statute, as descriptive, not of the person who should enter and occupy, but who should receive or take rent; and that therefore the sounder construction of the second branch of the

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

statute was to make it include the grantee of rent, since such estates were held in common parlance to be the subject of special occupancy. If the executor should die intestate, it may be doubted whether the estate would, under this statute, go to his administrator, or to the administrator *de bonis non.* (Oldham *v.* Pickering, Carth. 376.) Under the above statute the owner of an estate *pur autre vie* may devise it to several in succession, so as to designate who shall occupy till *cestui que vie* dies, and to leave no interval or chasm. But a question may arise as to what shall become of the estate, if it be only partially devised, *i. e.*, if it be devised for a period which expires before the estate *pur autre vie* ends. In Doe *v.* Robinson, (8 B. & C. 296,) the Court of K. B. decided that the residue, whereof there is no devise, belongs to the representatives of the devisor. There the tenant of lands which had been granted 'to him and his heirs' *pur autre vie,* devised them to A B, without saying more, and A B died living *cestui que vie.* And it was held that the heir of the devisor was entitled as special occupant. In that case the court held that the words used were not sufficient to pass the whole interest. If the devise had been of the whole term itself, or of the whole interest of the devisor to A B, without more, the representative of A B would have been entitled, notwithstanding no words of limitation were used in the devise. It should seem that in the case of a will made after the year 1837, the whole interest would pass to the devisee under the words of the bequest used in Doe *v.* Robinson, by reason of the statute 1 Vict., c. 26, § 28. And it has been doubted whether the words used in Doe *v.* Robinson were not sufficient, even before the act, to pass the whole term; and the authority of that decision has been questioned. Whether the real or the personal representative would have been the person to take is a point on which the authorities appear to be conflicting. In Doe *v.* Lewis, (9 M. & W. 662,) where the estate had been devised to the grantee, his heirs and assigns, for lives, and he devised the premises, during the residue of the lease, to W. J. L. *and his assigns,* who died intestate, it was held by the barons of the exchequer that the estate did not go to the heir of W. J. L., but to his personal representative; for that the devise by the original grantee defeated the title of his own heir as special occupant, and his devisee, W. J. L., took the estate to hold to him and his assigns for the residue of the term; and on the death of W. J. L., as there was no devise of the estate, nor special occupant thereof, it passed to the executors or administrators of W. J. L. ('the party that had the estate thereof') within the express words of the statute of frauds. But in Wall *v.* Byrne, (2 Jones & Lat. 118,) where a lessee of lands which had been demised to him, his heirs and assigns, *pur autre vie,* devised all his real freehold and personal property to his wife and children, share and share alike; and one of the children, who survived the testator, died intestate; it was held by Sugden, Lord Chancellor of Ireland, that the heir-at-law of such child, and not his personal representative, was entitled to his share of the estate *pur autre vie.* And the learned judge said that if ever a point was closed by decision it was this: that where a man had an estate *pur autre vie* limited to him and his heirs, and devises that estate by words, which, without words of limitation, would pass the *quasi* inheritance, and the devisee dies intestate, the persons to take are the heirs, and not the personal representative of the devisee; that the point

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

was so decided in Ireland many years since (Blake *v.* Jones d. Blake, 1 Hud. & Bro. 227, note), and that decision had been followed in England (Phillpotts *v.* James, 3 Dougl. 425), and many opinions had been given upon it; and he must, therefore, decline to hear the question argued. His lordship distinguished the case of Doe *v.* Lewis, on the ground that there the devise was to a man and his *assigns*, which, it was held, did not mean *heirs;* whereas in the case before him the devise was in general terms, and in words which were sufficient to pass the entire interest of the testator under the lease to his devisees; and that both law and good sense required that the devisee should take the same interest which he himself had. This distinction, however, does not appear to reconcile the two decisions satisfactorily, nor to afford any answer to the reasoning on which the Court of Exchequer proceeded. By stat. 1 Vict., c. 26, § 3, (which, however, does not extend to any will made before January 1st, 1838,) estates *pur autre vie* may be disposed of by will, executed as required by that act, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether the same shall be a corporeal or incorporeal hereditament." Wms. Ex'rs (6th Am. ed.) 756, *et seq.* "It must be remarked that this statute does not declare to whom the residue or surplus, which shall remain in the hands of the executors or administrators, shall belong, in case the estate goes to them under the statute. And in the case of Oldham *v.* Pickering, (Carth. 376,) it was determined, that such residue was *not* distributable amongst the next of kin; for, notwithstanding the alteration by the statute, the estate remained freehold. This gave occasion to the passing of the stat. 14 Geo. II., c. 20, § 9, which, after reciting the statute of Car. II., and that doubts had arisen, where no devise was made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong, enacts, 'that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed, in the same manner as the personal estate of the testator or intestate.' Neither of these statutes, however, provides expressly for the case of a tenant *pur autre vie* dying intestate as to that estate, but having made a valid will of his personalty; or, in other words, the statutes omit to state whether the surplus shall in such case, go according to the personal estate disposed of by the will, or as undisposed-of personal estate. Nor is any provision made by these statutes for the surplus which may be in the hands of an executor or administrator as special occupant. Both these points were fully considered by Lord Eldon, in the case of Ripley *v.* Waterworth, (7 Ves. 425.) There, lands had been limited to a man, his executors, administrators, and assigns *pur autre vie:* he died, having published his will (not attested according to the statute of frauds), and appointed an executor, and made a residuary bequest of his personal estate. There were four distinct claimants, the heir-at-law, the residuary legatee, and the next of kin; and a claim was made by the executor for his own benefit. For the heir-at-law it was urged, that it was real estate, viz., a descendible freehold; that it would not pass by an unattested will, and an executor could not, at common law, take a special occu-

will might not have been attested in the manner required by the statute in question. (*f*) By the 1 Vict., c. 26, § 3, [the previous enactments respecting estates *pur autre vie* were repealed, and] the testamentary

pant; and, therefore, the heir-at-law was entitled. For the residuary legatees and next of kin, it was urged that an executor might, at common law, take an estate *pur autre vie*, as special occupant; and that even prior to the statute of frauds, it was assets in his hands; and that it would be strange if (the statute providing, that where there is no special occupant, it shall go to the executor,) it should not go to the executor, where it is expressly given to him; and that the executor would, as special occupant, take it as personal estate chargeable with debts, and subject to application as personal estate, after debts paid. The Lord Chancellor was of opinion that it could, in no event, go to the heir; that it did not belong to the executor; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate, by a will sufficient to pass personal estate, and, therefore, he must be considered as holding it for the residuary legatee. With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st day of January, 1838, the statute 1 Vict., c. 26, after repealing the above-mentioned statutes of Car. II. and Geo. II. and enacting by section 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by section 6, that, 'if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same will be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. In the case last cited, Lord Eldon observed, with respect to the claim of the executor for his own benefit, that he doubted whether an executor or administrator ever takes anything as such which he will not be bound to apply as personal estate of the testator or intestate: And in Milner *v.* Harewood, 18 Ves. 273, his lordship recurring to his decision in Ripley *v.* Waterworth, said, 'I have determined, and I see no reason to dissent from it, that, where the executor is the special occupant, taking as executor, he must hold that as all other property taken by an executor, and therefore distributable in this court.' From this principle it seems to be a necessary deduction, that whenever personal estate is limited to executors or administrators as purchasers, they will take for the benefit of the persons entitled to the personal estate." Wms. Ex'rs (6th Am. ed.) 1776, *et seq.* An estate *pur autre vie* is now personal assets, yet it may be devised under the term lands. Wright *v.* Trustees Meth. Ep. Ch., 1 Hoff. Ch. 202.

(*f*) Ripley *v.* Waterworth, 7 Ves. 425; [in connection with which case, see Bearpark *v.* Hutchinson, 7 Bing. 178, 4 M. & Pay. 848, as to rents *pur autre vie*.

power is expressly extended to such estates, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; [and by § 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 cus-*tomary 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: (*g*) 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. IV., c. 40, § 2, constituted him a trustee.] (*h*)

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,] (*i*) 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, (*k*) Lord

[(*g*) Reynolds *v.* Wright, 25 Beav. 100, 2 D., F. & J. 590.

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

(*i*) 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.]

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

Kenyon inclined to think that the devise was good; but his lordship's *dictum* stands opposed to that of Lord Redesdale, in Campbell *v.* Sandys; (*l*) and to [the opinion of the Court of B. R. in Ireland, in Hopkins *v.* Ramage, (*m*) who thought that a *quasi* tenant in tail could not *by will exclude the title of the issue or remaindermen,] and such was evidently the impression of Sir T. Plumer in Blake *v.* Luxton (*n*) [and of Sir E. Sugden in Allen *v.* Allen.] (*o*) The statute 1 Vict. does not in terms dispose of this debatable point, but has, it should seem, done so in effect, by the language of the general enabling clause, § 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.*

(*l*) 1 Sch. & Lef. 294.

[(*m*) 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.]

(*n*) Coop. 185.

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

*CHAPTER V.

WHO MAY BE DEVISEES OR LEGATEES. (a)

Corporations can take by devise, but cannot hold without license.

The statute of 34 Hen. VIII., 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.[1] The statute 1 Vict., c. 26, contains no such

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

1. By the statute of New York a valid devise to a corporation is prohibited unless the corporation be expressly authorized to take by devise. 4 Kent 507. But religious corporations formed under the general statute can take by will to an amount not exceeding the limit provided in § 4 of the statute. Williams *v.* Williams, 8 N. Y. 525, 530. But a testator cannot give to two or more corporations in the aggregate more than he could give to a single object, viz., one-half his estate. Chamberlain *v.* Chamberlain, 43 N. Y. 424. But it appears that, in Virginia, if a bequest of its own stock be made to a corporation such bequest is valid. Rivanna Nav. Co. *v.* Dawsons, 3 Gratt. 19. The United States is not a person within the meaning of the New York statute of wills, and not being a corporation authorized by the New York statute to take by will, a devise to it is void. In the matter of Fox, 52 N. Y. 530. On this point it was said, by Andrews, J.: "The English statute of wills became a part of the law of this state upon the adoption of the constitution of 1777. It was substantially re-enacted by statutes passed in 1787 and in 1813. (1 Greenl. Laws, 387; 1 R. L., 364.) And at the revision in 1830 the language was changed so as to provide that a testator may devise his lands 'to every person capable by law of holding real estate, but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise.' (2 Rev. Stat. 57, § 3.) The validity of the devise to the United States in the will in question is to be tested by this statute. It is a settled principle of the common law, that the *lex rei sitæ* governs in respect to modes of transfer of real property and the capacity to make and receive them, and the validity of devises of lands is regulated and controlled by the local law; and the law of any other jurisdiction or sovereignty upon the subject, in opposition to the law of the place, is nugatory. There can be no pretence that the states have surrendered to the general government control over this subject. No such claim has been asserted; and jurisdiction over testamentary dispositions of lands within a state by the general government is in no

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

way an essential or appropriate incident to the power to take lands for public uses. It was held in White *v.* Howard, (46 N. Y. 144,) that corporations, referred to in our statute of wills, are those created by and existing under the laws of this state; and a devise to a foreign corporation, of lands in this state, was held to be void, although the corporation was authorized by its charter to take by devise. It must be maintained, therefore, to sustain the devise in question, that the United States is a person, within the purview of the statute. The word person, when used in a statute, will, unless the meaning is restricted by the context, be deemed to include corporations. They are artificial persons; bodies politic, possessing some of the attributes of natural persons, and are subject to many of the obligations and duties imposed by law upon individuals. In the present statute of wills it was used in this comprehensive sense; otherwise, the prohibition against devises to corporations, not authorized by their charters or by statute to take by devise would have been unnecessary. * * * In construing a statute, words are to be taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended. The word person does not in its ordinary or legal signification, embrace a state or government; and there is no ground to justify such an extension of its meaning in construing the statute relating to devises. The gift, in the will in question, to the United States cannot be sustained as a devise of land, for the reason that the testamentary capacity given by the statute extends only to devises to natural persons, and such corporations as are authorized by the law of the state to take by devise." In the matter of Fox, 52 N. Y. 530, 534. But the cities of Baltimore and New Orleans, being corporations created by law, are capable of taking a legacy for purposes not foreign to the objects for which they were created. McDonogh *v.* Murdoch, 15 How. 367. And in Pennsylvania eleemosynary corporations of other states may take, by devise, land in Pennsylvania, although the statutes of wills of their own states prohibit them from so taking land in those states. Thompson *v.* Swoope, 24 Penna. St. 474. A bequest to a foreign corporation is valid in Massachusetts, Burbank *v.* Whitney, 24 Pick. 146; and in Michigan. Estate of Ticknor, 13 Mich. 44. In Voorhees *v.* Voorhees, 2 Halst. Ch. 511, the devise was to a society for the spread of the gospel. It was organized and known by the name given it in the will at the date of the will, and prior to the death of the testator it was incorporated under such name. The devise was held good. It appears that in Pennsylvania such a devise would be good, although the society was not incorporated until after the death of the testator. Zimmerman *v.* Anders, 6 Watts & Serg. 218. See also Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. 133; Banks *v.* Phelan, 4 Barb. 80; Bartlet *v.* King, 12 Mass. 536; Burr *v.* Smith, 7 Vt. 241; Zeisweiss *v.* James, 63 Penna. St. 465. Under the constitution and laws of Vermont a voluntary association or society for religious purposes may receive and hold a legacy. Smith *v.* Nelson, 18 Vt. 511. And if a bequest be made to such a society with the provision that the interest thereof be annually paid to their minister forever, it will be held to be a bequest to the society. Ib. In Ohio an unincorporated society is capable of receiving a bequest of personalty not amounting to a trust. American Tract

and determined by the application of the general principles of law. [Now, according to those principles, corporations have capacity to take lands, though, without a sufficient license in that behalf, they cannot retain them. (*b*) Their incapacity to *take* land by devise was a consequence of the exception in the statute of Henry; and since the act 1 Vict., c. 26, has repealed that statute without reviving the prohibition, they are now as capable of taking by devise as natural persons. But, as in cases of acquisition by other means, a proper license is needed to enable them to hold.] The disability of corporations to *hold* real property was created by various statutes (*c*) before 34 Hen. VIII., which appear to have been founded on the principle, that, by allowing lands to become vested in objects endued with perpetuity of duration,

Society *v.* Atwater, 30 Ohio St. 77. So, too, in Michigan. Estate of Ticknor, 13 Mich. 44. But in New York a devise to an unincorporated charitable association is void, and is not made valid by the incorporation of such association after the death of the testator. White *v.* Howard, 46 N. Y. 144. So, too, an after-amendment of its charter will not give vitality to a devise to a corporation not authorized to take by will at the time of the death of the testator. Ib. Nor the subsequent incorporation of an unincorporated association. Owens *v.* Missionary Soc. M. E. Ch., 14 N. Y. 380. See also Murphy *v.* Dallam, 1 Bland 529; State *v.* Warren, 28 Md. 338; White *v.* Hale, 2 Coldw. (Tenn.) 77. And the same rule applies when the devise is to a city for a charitable object. Boyce *v.* St. Louis, 29 Barb. 650. It is held in New York that the existence of a corporation organized under the laws of another state will be recognized by the courts of New York, and that it may take property under the will of a citizen of New York, provided that under the law of its organization it can take by bequest. Chamberlain *v.* Chamberlain, 43 N. Y. 424, 432. In Michigan it is held that a school district may lawfully accept a bequest of a fund to be invested for the purpose of purchasing and keeping up a district library. Maynard *v.* Woodard, 36 Mich. 423. So, too, a town may take a bequest for the erection of a high school. Hatheway *v.* Sackett, 32 Mich. 97. And such school district has power legally to administer such a trust. Maynard *v.* Woodard, *ubi supra*. So, too, in Indiana a devise may be made to the board of county commissioners for the benefit of the orphan poor and other destitute persons in such county. Board of Comms. *v.* Rogers, 55 Ind. 297; Craig *v.* Secrist, 54 Ind. 419. And the county board is competent to administer the trust. Board of Comms. *v.* Rogers, *ubi supra*. But a bequest to an unincorporated society in Indiana, the income to be expended in educating young men of certain religious beliefs for the ministry, is void at law. McCord *v.* Ochiltree, 8 Blackf. 15. So a devise to certain trustees, for the use of deserving poor widows residing within certain limits, is a valid devise, and the trustees take for the uses named. De Bruler *v.* Ferguson, 54 Ind. 549. See also McCartee *v.* Orphan Asylum, 9 Cowen 437.

[(*b*) Co. Lit. 2 b. See the *stat. de Religiosis* and other acts cited in the margin there.]

(*c*) *Magna Charta*, c. 36; 9 Hen. III., c. 36; 7 Edw. I., c. 1; [13 Edw. I., c. 32 et c. 33;] 34 Edw. I., st. 3; 18 Edw. III., st. 3, c. 3; 15 Rich. II., c. 5; 23 Hen. VIII., c. 10.

the lords were deprived of escheats, and other feudal profits. Hence, the necessity of obtaining the king's license, he being the ultimate lord of every fee in the kingdom; but this license only remitted his own rights, and did not pre*vent the right of forfeiture accruing to intermediate lords. Doubts having arisen, however, at the Revolution, how far such license was valid, (*d*) as being an exercise of the dispensing power formerly claimed by the crown (but which, it is pretty evident, it was not, but merely a waiver of its own right of forfeiture), the statute 7 and 8 Will. III., c. 37, was passed, which provides that the crown for the future, at its own discretion, may grant licenses to alien or take in mortmain, of whomsoever the tenements shall be holden. At this day, therefore, the license from the crown protects against forfeiture to any intermediate lord.

Devises to corporations in trust.

But where [before 1 Vict., c. 26] real estate was devised upon trust to a corporation not empowered to take lands [by devise, although] the devise was, of course, void at law [under the statute of Henry, yet] the estate descended to the heir *charged with the trust* (supposing that it was not illegal, under stat. 9 Geo. II., c. 36, as being in favor 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. (*e*) [And since the stat. 1 Vict., c. 26, the trust would equally be upheld; the only difference being that the corporation trustee is now capable (unless incapacitated by the stat. 9 Geo. II.) of taking by devise, though not, without license, of holding.] [2]

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

(*e*) Sonley *v.* Clockmakers' Company, 1 B. C. C. 81; [Incorporated Society *v.* Richards, 1 D. & War. 258 (where, the lands being in Ireland, the charitable trust was valid.) The statute 43 Eliz., c. 4, did not, as sometimes supposed, render devises to charitable corporations valid at law. In Flood's case (Hob. 136, 1 Eq. Cas. Ab. 95, pl. 6,) it was expressly "agreed that the devise was void in law," though the charitable use was upheld in equity. Benet College *v.* Bishop of London, 2 W. Bl. 1182, holding such a devise good at law, "rests on no solid foundation;" see per Lord St. Leonards, 1 D. & War. 305.]

2. Even a regular corporation aggregate cannot be seized of land in trust, for any purpose foreign to its institution. Jackson *v.* Hartwell, 8 Johns. 422. See also Jackson *v.* Cory, 8 Johns. 385; Hornbeck *v.* Westbrook, 9 Johns. 73; North Hempstead *v.* Hempstead, 2 Wend. 109; In the matter of Howe, 1 Paige 214; Sutton *v.* Cole, 3 Pick. 232. But it may take as a trustee, if the object be consistent with the purposes of the corporation. Trustees of Phillips Academy *v.* King, 12 Mass. 546. But if the legacy be given in trust for an authorized use, and also for a use which is foreign to those which the corporation can execute, the whole trust is void. Andrew *v.* N. Y. Bible and Prayer Book. Soc., 4 Sandf. 156. But if the devise be to a corporation, partly for its own use and partly for the use of others,

It should be observed, however, that devises to some corporations are authorized by act of parliament. For instance, the stat. 43 Geo. III., c. 107, enables persons to devise lands to the Governors of Queen Anne's Bounty; and the stat. 43 Geo. III., c. 108, authorizes, under certain limitations, the devise to any persons or bodies politic or corporate of land not exceeding five acres, 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 favor of many other charity *corporations. (*f*) And although generally devises for charitable uses are forbidden by the act of 9 Geo. II., c. 36, yet the 4th section of that statute, which excepts out of its operation gifts to the Colleges in the two English universities, and the Colleges of Eton, Winchester, and Westminster, [leaves devises to those corporations to be dealt with by the general law as settled by the stat. 1 Vict. [3]

the right of the corporation to take and hold for its own use, carries with it, as a necessary incident, the power to execute the part of the trust which relates to others. In the matter of Howe, *ubi supra*. But it is also a well-settled doctrine, under the statute of Elizabeth for charitable uses, that an appropriation or dedication of property for such uses, will be upheld, although there were no specific grantee or trustee. In all such cases arising under wills, the executor or heir, as the case may be, becomes the trustee of those for whose use the donation or appropriation is intended, and may be compelled, by a court of equity, to execute the trust. Beatty *v.* Kurtz, 2 Peters 566, 583; Pawlet *v.* Clark, 9 Cranch 292, 331. This rule applies where the devise is to an incorporated society. Bartlett *v.* Nye, 4 Metc. 378; Burbank *v.* Whitney, 24 Pick. 146. And it was said by Walworth, C., in Potter *v.* Chapin, 6 Paige, 639, 649, 650: "Although some doubt was thrown upon the question of charitable donations, for the benefit of a community or body not incorporated so as to be capable of taking and conveying the legal title to property, by the decision of the Supreme Court of the United States in the case of the Baptist Association *v.* Hart's Executors, 4 Wheat. 1, I believe it is generally admitted that the decision in that case was wrong. And it may now be considered as an established principle of American law, that the Court of Chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, provided the sum is consistent with local laws and public policy, where the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor."

(*f*) *Vide* Church Building act, 9 Geo. IV., c. 42, and other statutes stated *post* ch. IX., and in Shelford on Charitable Uses.

3. As to devises for charitable uses, see *post* ch. IX.

The incapacity of alienage has been removed, as we have already seen, by the naturalization act, 1870. (*g*) But the act not being retrospective, and giving no protection to rights acquired by an alien before it was passed, (*h*) it is still necessary to consider the old law.] Alienage could not, strictly speaking, be ranked among the incapacities to *take* real estate by devise, as the property remained in the alien till office found, when it devolved to the crown. (*i*)[4] On this principle, where lands were devised to an

Devises to aliens.

[(*g*) 33 Vict., c. 14, § 2, stated *ante* p. 41.

(*h*) Sharp *v.* St. Sauveur, L. R., 7 Ch. 351.]

(*i*) Duplessis *v.* Attorney-General, 1 B. P. C., Toml. 415.

4. Though aliens may take lands by purchase, neither they nor a purchaser under them could, prior to recent statutes, hold as against the state. The People *v.* Conklin, 2 Hill (N. Y.) 67; Vaux *v.* Nesbit, 1 McCord Ch. 352. But their title would be good as against anyone except the state. McCreery *v.* Allender, 4 Har. & McH. 409. But the statute, in New York, (2 Rev. Stat. 57, § 4,) which provides that every devise of real property to a person who, at the time of the testator's death, shall be an alien, not authorized by statute to hold real estate, shall be void, does not apply to an alien devisee, born after the death of the testator. Wadsworth *v.* Wadsworth, 12 N. Y. 376; affirmed, 16 Barb. 601. An alien may take by purchase, and hold until office found. Mooers *v.* White, 6 Johns. Ch. 360, 366; Montgomery *v.* Dorion, 7 N. H. 475; Marshall *v.* Conrad, 5 Call. 364; Fox *v.* Southack, 12 Mass. 143; McCreery *v.* Allender, 4 Har. & McH. 409, 412; Scanlan *v.* Wright, 13 Pick. 523; Foss *v.* Crisp, 20 Pick. 121; Jackson *v.* Beach, 1 Johns. Cas. 399. And also by devise. Sutliff *v.* Forgey, 1 Cowen 89; Vaux *v.* Nesbit, *ubi supra;* Fox *v.* Southack, *ubi supra;* People *v.* Conklin, *ubi supra;* Fairfax *v.* Hunter, 7 Cranch 603; Stephen *v.* Swann, 9 Leigh 404; Mick *v.* Mick, 10 Wend. 379; Marshall *v.* Conrad, *ubi supra;* McIlvaine *v.* Coxe, 2 Cranch 280; S. C., 4 Cranch 209. And children, born in this country, of an alien who purchased real estate while he was an alien enemy, before January 22d, 1817, and continued to hold after that period, and after he became an alien friend, may inherit his estate by force of section 2, act of 1817, concerning aliens, and his widow, may have dower therein. Yeo *v.* Mercereau, 3 Harr. (N. J.) 387. But the act of 1846, in New Jersey, which authorizes aliens to purchase lands and hold the same to them and their heirs, does not remove the disability of alienage from persons who, without it, would have been their heirs. Colgan *v.* McKeon, 4 Zab. 566. And an alien with rights secured by treaty, and thereby competent to hold real estate, is competent to maintain an action for its recovery. Martin *v.* Brown, 2 Halst. 305; Bradstreet *v.* Supervisors of Oneida Co., 13 Wend. 546. So, too, if he holds under a special law of the state. Bonaparte *v.* Camden and Amboy R. R. Co., Bald. C. C. 205. But as to personal estate, an alien could always take by bequest. Craig *v.* Leslie, 3 Wheat. 563; Anstice *v.* Brown, 6 Paige 448; Polk *v.* Ralston, 2 Humph. 537. And in equity, lands directed to be sold and converted into money are considered as money. Craig *v.* Leslie, *ubi supra;* Anstice *v.* Brown, *ubi supra.* See also 2 Kent 53, 54, 69, *et seq.;* Wms. Ex'rs (6th Am. ed.) 15; 2 Sugden on Vendors (8th Am. ed.) 401, 402; Theobald on Wills 19; *ante* chap. III., note 16. A rebel devisee has the legal capacity to take under the de-

alien and another concurrently as joint tenants, the entirety did not vest in the latter (as would have been the effect if the devise to the alien had been absolutely void), but in both jointly; and if the crown did not during the joint lives seize the alien's undivided moiety (as it might do after office found,) (*j*) then, on the decease of the alien, leaving his co-devisee surviving, such moiety devolved 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, have overreached the title of the surviving joint tenant to the alien's moiety. (*k*) If, however, the alien survived his co-devisee, he did 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 gave an estate to one whom it did not permit to retain it; (*l*) but though the principle is unquestionable, perhaps, this application of it may be fairly excepted to, as the survivor seems to have been *in* by the original gift.

A trust of freehold or copyhold lands declared in favor of an alien went to the crown;

[Where a trust in lands for life or any greater estate was created in favor of an alien by will or otherwise, it was *doubted whether as "the chancery could not compel one to execute a trust for an alien," (*m*) the crown could get the benefit of it. The doubt, however, had no better foundation with regard to a trust estate than with regard to a legal estate; for an alien could never sue in a real or mixed action, (*n*) 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. (*o*) And where a trust declared in favor of an outlaw or person attainted was forfeited; although he could not sue for it, yet the crown, claiming through him, could. Accordingly the question was finally decided in favor of the crown. (*p*) The crown took, not for any reason arising

vise, and is entitled to hold the property so devised, subject to the approval of the testator's government. Hoskins *v.* Gentry, 2 Duv. 285.

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

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

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

[*68]

[(*m*) Per Rolle, J., Rex *v.* Holland, Sty. 20. But see per Hatherly, C. L. R., 7 Ch. 354.

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

(*o*) *Ante* p. 67.

(*p*) Barrow *v.* Wadkin, 24 Beav. 1; Sharp *v.* St. Sauveur, L. R., 7 Ch. 343: overruling Rittson *v.* Stordy, 3 Sm. & Gif. 230.

out of the doctrine of tenures, (*q*) but by its prerogative on grounds of public policy, (*r*) a title which extended, *a fortiori*, to the trust of chattel interests in land, (*s*) except such as an *alien might himself hold. (*t*) But] the proceeds of real estate, which was impressed with a trust for conversion, could be given to an alien, [and the crown had no claim,] this not being a trust conferring on the alien an interest in land, but merely a right to have the land converted into money; and the policy of the law in regard to mortmain, (which had been much pressed in argument as analogous in principle,) depending upon considerations

—also the trust of chattels real.

—but not the proceeds of real estate directed to be sold.

(*q*) Escheat or forfeiture. Forfeiture there was 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 favor 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 was never acted upon. As to Lord Loughborough's often-cited *dictum*, that "the crown comes under no head of equity," Walker *v.* Denne, 2 Ves., Jr., 179, see per Romilly, M. R., 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 *cestui 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 favor 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.* Attorney-General, 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.

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

(*s*) 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 Id. 381; Reynolds *v.* Wright 25 Beav. 100, 2 D., F. & J. 590; 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.

(*t*) Co. Litt. 2 b, and *infra*.]

entirely different. (*u*) "It was argued," said Lord Cottenham, "that 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."

Naturalization and denization,

The disabilities of alienage might be removed partially by a grant of letters of denization from the crown, or wholly by an act of parliament investing the alien with the rights and privileges of a British subject. [Such acts, in favor of the particular individual, were superseded by the act 7 and 8 Vict., c. 66, (now repealed), which (§ 6) empowered the secretary of state to grant certificates of naturalization, having the same effect as the ordinary acts of naturalization; and enacted (§ 5), that every alien friend might, by *grant*, lease, assignment, *bequest, representation, or otherwise*, take and hold any lands or tenements for the purpose of residence, occupation, or trade, for any term not exceeding twenty-one years, as if he were a natural-born subject.]

—were not retrospective,

An act of naturalization was 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.; (*x*) [and the act 7 and 8 Vict. is in equivalent terms. But]

—but denization was.

letters of denization expressly authorize the denizen to hold lands theretofore granted, (*y*) and he may even hold such *as devolve to him by act of law, except, of course, that [formerly he could] not claim by descent from or through his father, if an alien. (*z*)

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.

(*u*) Du Hourmelin *v.* Sheldon, 1 Beav. 79, [4 My. & Cr. 525; and see Master *v.* De Croismar, 11 Beav. 184.]

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

(*y*) Foudrin *v.* Gowdey, 3 My. & K. 383.

(*z*) Sir M. Hale in Collingwood *v.* Pace, 1 Vent. 417. Otherwise, if the father was a denizen at the son's birth.

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.[5] In applying this principle it was long a

Period of credibility.

5. In most, if not all, of the American states, the matter of devises to attesting witnesses has been regulated by statute. In some it is provided that such a devise shall be absolutely void. This is so in New Jersey, (N. J. Revision 1244, § 4,) Rhode Island, (Gen. Stats., ch. 171, § 15,) Oregon, (Deady's Stats., ch. 64, § 20,) New York, (Rev. Stats., pt. 2, ch. 6, art. 3, § 48,) North Carolina, (Bat. Rev., ch. 119, § 10,) Ohio, (Rev. Stats., ch. 123, § 11,) South Carolina, (Stats. 1873, ch. 86, § 5,) Indiana, (Rev. 1876, pt. 4, ch. 3, § 29,) and Georgia, (Code 1873, § 2417.) In others it is enacted that such devise shall be void as to such witness, unless there be the statutory number of attesting witnesses in addition to him. This is so in Massachusetts, (Gen. Stats., ch. 92, § 10,) Michigan, (Compl. Laws 1871, ch. 154, § 7,) Missouri, (Wagner's Rev., ch. 145, § 36,) Minnesota, (Stats. at Large 1873, ch. 35, § 7,) New Hampshire, (Gen. Laws 1878, ch. 193, § 8,) Nebraska, (Gen. Stats. 1873, ch. 17, § 130,) Virginia, (Code 1873, ch. 118, § 19,) Vermont, (Stats., ch. 49, § 11,) Wisconsin, (Stats. 1871, tit. XVIII., ch. 97, § 8,) Kentucky, (Gen. Stats. 1877, ch. 113, § 15,) Kansas, (Gen. Stats. 1877, ch. 117, § 11,) Iowa, (Code 1873, tit. XVI., ch. 2, § 2327,) Illinois, (Hurd's Rev. Stats. 1877, ch. 148, § 8,) Dakota, (Civil Code 1877, § 717,) Connecticut, (Rev. 1875, tit. XVIII., ch. 11, pt. 1, art. 1, § 3,) Colorado, (Gen. Laws 1877, ch. 103, § 5,) California, (Civil Code 1876, § 6282,) West Virginia, (Code 1868, ch. 77, § 18,) and Arkansas, (Rev. Stats. 1874, §§ 5804, 5806.) But in Michigan it is provided that if such witness would have been entitled to any share of the estate of the testator in case the will was not established, then so much of the share as would have descended to such witness, or would have been distributed to him, as will not exceed the devise or bequest made to him in the will, shall be saved to him. (Compl. Laws 1871, ch. 154, § 8.) And a similar provision is also made in Missouri, (Wagner's Rev., ch. 145, § 38,) Minnesota, (Stats. at Large 1873, ch. 35, § 8,) South Carolina, (Stats. 1873, ch. 86, § 5,) Ohio, (Rev. Stats., ch. 123, § 11,) Nebraska, (Gen. Stats. 1873, ch. 17, § 131,) Indiana, (Rev. 1876, pt. 4, ch. 3, § 29,) Iowa, (Code 1873, tit. XVI., ch. 2, § 2328,) Kansas, (Gen. Stats. 1877, ch. 117, § 11,) Kentucky, (Gen. Stats. 1877, ch. 113, § 15,) Illinois, (Hurd's Rev. Stats. 1877, ch. 148, § 8,) Dakota, (Civil Code 1877, § 718,) Colorado, (Gen. Laws 1877, ch. 103, § 5,) California, (Civil Code 1876, § 6283,) Arkansas, (Rev. Stats. 1874, § 5805,) West Virginia, (Code 1868, ch. 77, § 18,) and Virginia, (Code 1873, ch. 118, § 19.) But in Vermont, if such witness be the heir-at-law of the testator, such devise is not void (Stats., ch. 49, § 11); so, too, in Connecticut (Rev. 1875, tit. XVIII., ch. 11, pt. 1, art. 1, § 3); Fortune *v.* Buck, 23 Conn. 1. In Missouri the question as to the competency of a witness who is both devisee and heir-at-law, depends on whether he will take more or less by the will than by intestacy. Graham *v.* O'Fallon, 4 Mo. 601. See also Jackson *v.* Denniston, 4 Johns. 311; Rucker *v.* Lambdin, 12 Sm. & M. 230; Ackless *v.* Seekright, Breese 76; Cannon *v.* Setzler, 6 Rich. 471; Croft *v.* Croft, 4 Gratt. 103; Moore *v.* McWilliams, 3 Rich. Eq. 10; Snelgrove *v.* Snelgrove, 4 Desaus. 274; Starr *v.* Starr, 2 Root 303.

question, whether the witness could be 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 Doe d. Hindson *v.* Hersey, (*a*) made an able and energetic protest. "A will," he said, "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.] [6]

The doctrine contended for by this distinguished judge seems eventually to have prevailed, (*b*) 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. II.,

(*a*) 4 Burn's Eccl. Law 27.

6. As to this question, see Deakins *v.* Hollis, 7 Gill & J. 311; Kerns *v.* Soxman, 16 Serg. & R. 315; Cook *v.* Grant, Id. 198; Search's Appeal, 13 Penna. St. 108; Weems *v.* Weems, 19 Md. 334; Allison *v.* Allison, 4 Hawks 141. See also *post* chap. VI., note 23.

(*b*) Brograve *v.* Winder, 2 Ves., Jr., 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.

c. 6, (c) was passed, which, after reciting the 29 Car. II., c. 3, § 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 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 (§ 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.

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

—and witnesses competent.

Creditors whose debts are charged, good witnesses.

On the statute it was decided: 1st. That it extended exclusively to persons beneficially interested, and not to a devisee or executor in trust. (*d*) 2ndly. That it applied only where the witness took a direct interest under the will, and not where his interest *arose consequentially. Thus in Hatfield *v.* Thorp, (*e*) where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, and would *jure uxoris* have claimed an interest in the devised lands, it was held that the devise was not within the statute, (*f*) and, consequently, that the attestation was insuffi-

Points decided on the statute.

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

(*d*) 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, 1 Mad. 144. See also Goss *v.* Tracey, 1 P. W. 290; Goodtitle *v.* Welford, Doug. 139.

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

[(*f*) The court certified, on a case from chancery, that "the will was not duly attested *so as to pass any estate to*" the wife; referring to no statute, and not expressly denying that the rest of the will was valid. Of course, it could only have been valid (if at all) by virtue of the statute Geo. II.; upon which the argument would be that the words "person to whom any estate should be thereby given," occurring in the former part of the clause, meant "taking any estate in consequence of the devise," and that the words "such devise shall, so far as concerns such person attesting," occurring in the latter part of the clause, meant "so far as it creates an interest in such person." Such an interest, and even a gift to the wife for her

cient. 3rdly. That the act did not apply to wills of [copyholds (*g*) or of] personal estate, (*h*) for as such wills did not require an attestation at all, there was no ground for invalidating the gift to the witness; but that in regard to wills of freehold lands, 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. (*i*)

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 re-publication, if she had not been a witness to the codicil.] (*k*)

Stat. 1 Vict., c. 26.

By the act 1 Vict., c. 26, the legislature has adopted the principle, and extended the operation, of the enactments in the statute 25 Geo. II., 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

separate use, would have disqualified the husband as a witness under 29 Car. II. (Holdfast *v.* Dowsing, 2 Str. 1253); and it might have seemed not unreasonable to suppose that the act Geo. II. was intended to include such a case. But there is no trace of such an argument in the case, and the form of the certificate was probably determined without reference to it, and simply by the form of the question proposed, which it precisely follows.

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

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

(*i*) Doe *v.* Mills, 1 Mood. & Rob. 288.

[(*k*) Denne *v.* Wood, 4 L. J. (O. S.) 57, V. C. Leach.]

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. 7

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 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. 8

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.

Points decided on 1 Vict., c. 26, § 15.

[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: (*l*) 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. (*m*) Each witness attests only the instrument to which

7. Sullivan *v.* Sullivan, 106 Mass. 474; Huie *v.* McConnell, 2 Jones L. 455, 457; Winslow *v.* Kimball, 25 Me. 493.

8. Orndorff *v.* Hummer, 12 B. Mon. 619; McDonough *v.* Loughlin, 20 Barb. 238; Burritt *v.* Silliman, 13 N. Y. 93; Murphy *v.* Murphy, 24 Mo. 526; Dorsey *v.* Warfield, 7 Md. 65; Snyder *v.* Bull, 17 Penna. St. 54; Sawyer *v.* Dozier, 5 Ired. L. 97; Comstock *v.* Hadlyme, 8 Conn. 254; Overton *v.* Overton, 4 Dev. & Bat. 197; Wyman *v.* Symmes, 10 Allen 153; Sears *v.* Dillingham, 12 Mass. 358; Jones *v.* Larrabee, 47 Me. 474; Richardson *v.* Richardson, 35 Vt. 238; Vansant *v.* Boileau, 1 Binn. 444; Gunter *v.* Gunter, 3 Jones L. 441; Morton *v.* Ingram, 11 Ired. 368; Tucker *v.* Tucker, 5 Ired. L. 161; Coalter *v.* Bryan, 1 Gratt. 18; Nohle *v.* Burnett, 10 Rich. 505; Henderson *v.* Kenner, 1 Rich. 474. See also *post* chap. VI., note 23.

[(*l*) Gurney *v.* Gurney, 3 Drew. 208; Tempest *v.* Tempest, 2 K. & J. 642, 7 D., M. & G. 470; in conformity with the rule respecting real estate before the act, see p. 72.

[(*m*) Gurney *v.* Gurney, *sup.*

he puts his name. Again, where a will attested by a legatee is republished by a codicil attested by other witnesses, the gift to the legatee is made good. (*n*) But where by will a legacy was bequeathed in a contingency which failed, and by a codicil attested by the legatee, the legacy was made absolute, the legatee was held disqualified to take the absolute legacy. (*o*) And, following the rule regarding wills of real estate under the pre-existing law, a witness is held to be disqualified to take as legatee although he is a supernumerary. (*p*) But the court of probate receives evidence *quo animo* the supernumerary signed; and if it appear that he did not sign as a witness, his signature will be omitted from the probate.] (*q*)

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, (*r*) regard is evidently had to the statute of 1 Will. IV., 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 statute 1 Vict. 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*

(*n*) Anderson *v.* Anderson, L. R., 13 Eq. 381.

(*o*) Gaskin *v.* Rogers, L. R., 2 Eq. 284.

(*p*) Wigan *v.* Rowland, 11 Hare 157; Randfield *v.* Randfield, 32 L. J., Ch. 668.

(*q*) In re Sharman, L. R., 1 P. & D. 661. Its presence in the probate would appear to be conclusive of its character in the case of personalty. In a case where the superfluous name was struck through in the original, probate issued in *fac simile*, leaving it for the court of construction to determine the effect, In re Raine, 34 L. J., Prob. 125: as to which see Gann *v.* Gregory, 3 D., M. & G. 777, stated above, p. 27. But since the judicature act, 1873, it should seem the probate division ought itself to determine the question. As to real estate the probate will be equally conclusive if the proper parties have been cited under the court of probate act, 1857; see also Randfield *v.* Randfield, 30 L. J., Ch. 179, n.

(*r*) A gift to the witness as trustee of course is not invalidated, Cresswell *v.* Cresswell, L. R., 6 Eq. 69.

by descent and not by purchase; and it was held, that neither the imposition of a pecuniary charge, (*s*) nor even the engrafting on the devise to the heir an executory devise, (*t*) had the effect of interrupting the descent.[9] 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. (*u*)

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; (*x*) 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. (*y*) Of course a devise to one of several co-heirs or co-heiresses made the devisee a purchaser; (*z*) [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.] (*a*) Devises to testator's heir.

Whether the doctrine in question extended to testamentary appointments was a point of some nicety, and occasioned much discussion, (*b*) into which, however, it is not now proposed to enter, as questions of

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

(*t*) 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.]

9. Ellis *v.* Page, 7 Cush. 161; Whitney *v.* Whitney, 14 Mass. 88; Sedgwick *v.* Minot, 6 Allen 171. It was said by Wilde, J.: "But on examining the books, it appears clearly that the devise to the heirs cannot be supported. * * * For whether they should take a remainder or reversion, they would have an absolute fee, after the termination of the mesne estates; and the title by descent is, in estimation of law, the worthier title." Whitney *v.* Whitney, 14 Mass. 88, 90.

[(*u*) That in cases of marshaling, the heir, under an express devise to him, had the rights of a devisee. See Biederman *v.* Seymour, 3 Beav. 368; *a fortiori*, since the stat. 3 and 4 Will. IV., c. 106, § 3; see Strickland *v.* Strickland, 10 Sim. 374.]

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

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

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

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

(*b*) 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.

this nature cannot arise under any will, future or recent; the statute of 3 and 4 Will. IV., c. 106, § 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. (c)

Stat. 3 and 4 Will. IV., c. 106, § 3, making heir-devisee a purchaser.

*[Infants (including infants *en ventre sa mère*), (d)[10] *femes coverte* and insane persons are not incapacitated from taking by devise or bequest though they cannot manifest their acceptance; for acceptance will be presumed unless it 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.] (e)

Infant, *f. c.* or lunatic, may take by devise.

(c) The negative words seem to exclude the claim of a devisee-heir of copyholds (which are expressly included in the act) to disclaim the devise and take as heir, Bickley *v.* Bickley, L. R., 4 Eq. 216.

(d) Burdett *v.* Hopegood, 1 P. W. 486; Mogg *v.* Mogg, 1 Mer. 654.]

10. A devise to an unborn illegitimate child, where the mother is described, is valid. Pratt *v.* Flamer, 5 Harr. & J. 10.

[(e) Lit., § 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. II., 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. [1]

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

1. With the exception of nuncupative wills, to be noticed hereafter, the provisions of the statute of frauds in regard to the making of wills prevail throughout the American states. While no formality need be used by the testator in the expression of his will, one requisite is to be rigidly enforced, and that is, that the will be in writing, or its equivalent. The use of a printed blank will be sustained. But the will must be either written or partially written and partially printed, signed by the testator, or in his presence by some one authorized by the testator to sign for him, and it must be attested by the statutory number of attesting witnesses. While the law requires that the will be in writing, it is silent as to the material to be used in the writing, or that upon which the will is to be written. Yet these matters will have some weight with the court in the determination of the question whether the writing was merely deliberative and in contemplation of the making of the will or the final testamentary act of the deceased. However, while the general provisions of the statute of frauds have been maintained in regard to the formalities requisite to the execution of a valid will, these provisions vary in minor points in the various states. In New Jersey there are four requisites to a valid will: 1. That it be in writing. 2. That it be signed by the testator. 3. That such signature shall be made by the testator, or

[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 details

—is illustrated by decisions on 1 Vict., c. 26.

the making thereof acknowledged by him in the presence of two witnesses. 4. That it shall be declared to be his last will in the presence of two witnesses. In re McElwaine's will, 3 C. E. Gr. (N. J.) 499. In the act of 1814 in New Jersey it was provided that the will should be "published;" in the act of 1851 the word "declared" was substituted for the word "published." But no argument is to be drawn from this substitution. Whatever would amount to a publication would answer the requirement that it should be declared to be the testator's will. Mundy *v.* Mundy, 2 McCart. 290. In Massachusetts, the statute provides that no will, except as in the statute excepted, shall be effectual to pass any real or personal estate, nor to charge or in any way affect the same unless it is in writing and signed by the testator or by some person in his presence, by his express direction, and attested and subscribed in his presence by three or more competent witnesses. The exceptions to this statute are wills made in conformity to the law at the time of their execution; wills made out of Massachusetts, if in accordance with the law of the place where executed, and nuncupative wills made by soldiers in actual military service or mariners at sea. This statute also provides that if witnesses are competent at the time of the attesting of the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved. Mass. Gen. Stats., ch. 92, §§ 6, 7, 8, 9. The statute of Michigan is apparently a copy of the Massachusetts statute, except as to the number of witnesses, two only being required, instead of three as in Massachusetts. Compl. Laws Mich. 1871, 1372, § 5. The provisions of the statute in New York are that the will shall be subscribed by the testator at the end thereof, in the presence of each of the attesting witnesses, or that the testator shall acknowledge his signature to the will as a will to each of the attesting witnesses, that at the same time he shall declare the instrument to be his last will and testament, that the attesting witnesses shall sign their names also at the end of the will, that there shall be at least two such witnesses, and that they shall be requested by the testator to sign as attesting witnesses. N. Y. Rev. Stats., vol. 2, p. 63, §§ 40, 41. It is held in Illinois that the indispensable requisites to the validity of a will under the statute of that state are, that it must be signed by the testator, or by some one in his presence and by his direction and be attested in his presence by two or more witnesses. Rigg *v.* Wilton, 13 Ill. 15. And but two of the subscribing witnesses, under the Illinois statute of 1787, are required to prove the will; therefore, where the will was attested by three witnesses, one of whom was a devisee, the will was held to be valid. Ackless *v.* Seekright, Breese 76; 4 Kent 514 and note (*d*); 2 Black. Com. 376; Wms. Ex'rs (6th Am. ed.) 90, *et seq.*; Walkem on Wills 158, *et seq.*; 1 Redf. on Wills 164, *et seq.*; Flood on Wills 313, *et seq.* In the majority of the American states two attesting witnesses are required to the will. This is the case in Alabama, Arkansas, California, Colorado, Dakota, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin. Three witnesses are requisite in Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Mississippi, New

remain unaltered, so that the cases decided under the later statute bearing upon the interpretation of the words "signature," "presence," "direction," "other persons," "attested," "subscribed," which are com-

Mexico, South Carolina and Vermont. In New Hampshire three witnesses are necessary and it is also essential that the will be sealed. We believe that this is the only state which now requires that there be a seal to a will, though in many of the states a seal is made use of in the execution of a will. In Pennsylvania the provision is somewhat peculiar: no subscribing witnesses are required to the will itself, but when the instrument is offered for probate its execution must be proved by at least two witnesses. But in case the names of witnesses be subscribed to the will it is not essential that the witnesses who prove the will be those who signed it. Rhorer *v.* Stehman, 1 Watts 442, 463; Hight *v.* Wilson, 1 Dallas 94; Arndt *v.* Arndt, 1 Serg. & R. 256. In Louisiana the statutory provisions are very peculiar, and not at all in accord with those of any other of the American states. By the statute of that state wills are divided into three classes, nuncupative or open testaments, mystic or sealed testaments, and holographics. C. C. La., § 1574. Nuncupative wills may be executed by public act, or under private signature; if by public act, they must be dictated to a notary public in presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place; if by private signature, they must be made in the presence of five resident witnesses or seven non-resident witnesses, or the testator may produce before such witnesses a will already made and declare it to be his last will. C. C. La., §§ 1578, 1581. Mystic or closed wills must be signed by the testator himself, whether written by him or by another; they must then be sealed, and delivered so sealed to a notary public and seven witnesses; the testator must then declare in their presence that such paper contains his last will. The notary shall then draw up a superscription on the envelope, and that shall be signed by the notary and witnesses. If any one of the witnesses does not know how to sign, express mention shall be made thereof, but in all cases, at least two witnesses must sign. C. C. La., §§ 1584, 1587. In Mississippi one witness is sufficient as to a will of personalty, and such a will may be admitted to probate on proof by one witness, and that, too, though there may be other witnesses to the will whose proof is not taken. Kirk *v.* The State, 13 Sm. & M. 406. So, too, in Tennessee, if there be no contest as to the validity of the will. Rogers *v.* Winton, 2 Humph. 178. So in Massachusetts, when there is no contest, it is not necessary to call all the witnesses to prove the will for probate, but probate may be granted on proof by one witness. Mass. Gen. Stats., ch. 92, § 20. So, also, by statute, in Vermont. Gen. Stats. Vt., ch. 49, § 18. So, too, in Connecticut. Field's Appeal, 36 Conn. 277. It is also so held in Rhode Island. Sprague *v.* Luther, 8 R. I. 252. As to requisite witnesses to the valid execution of a will, see Doe *v.* Pattison, 2 Blackf. 355. It is held in Michigan that, at common law, it not being essential to the validity of a will that it should be attested by witnesses; therefore a will of personal property, executed abroad, by a person who died there, but whose domicil was at the time in Michigan, was valid, though unattested by three witnesses. High Appl't, 2 Doug. 515. See also Parker *v.* Brown, 6 Gratt. 554. But when the statute requires three witnesses in order to make the will valid to pass real estate, the execution of the will in the presence of two witnesses, and the subsequent execution of a codicil thereto in the presence of two witnesses, one of whom was not one of the

mon to both enactments, bear equally upon the interpretation of the same words in the statute 29 Car. II., c. 3; and thus (since the execution of bequests of personal estate is now assimilated to that of devises

witnesses to the original will, will not be a witnessing of the will and codicil by three witnesses so as to pass real estate. Dunlap *v.* Dunlap, 4 Desaus. 305. Though the statute of Virginia requires at least two witnesses to the will, it may be proved by one of them if he prove the attestation of the other. Lamberts *v.* Cooper's Executor, 29 Gratt. 61. In Missouri it is not essential to the validity of the will that the testator should actually sign in the presence of the attesting witnesses. Nor must the witnesses sign in the presence of each other, though each must sign in the presence of the testator. Cravens *v.* Faulconer, 28 Mo. 19. Nor in Vermont. Adams *v.* Field, 21 Vt. 256; Roberts *v.* Welsh, 46 Vt. 164. Nor in Virginia. Rosser *v.* Franklin, 6 Gratt. 1; Parramore *v.* Taylor, 11 Gratt. 220. But in Arkansas they need not sign in the presence of the testator, either actually or constructively. Abraham *v.* Wilkins, 17 Ark. 292; Rogers *v.* Diamond, 13 Ark. 474, 487. So, too, in Alabama, as to personalty. Ex parte Henry, 24 Ala. 638. In Connecticut the witnesses to a will need not sign in the presence of each other. Gaylor's Appeal, 43 Conn. 82. So, too, in Illinois. Flinn *v.* Owen, 58 Ill. 111. And in Alabama. Hoffman *v.* Hoffman, 26 Ala. 535. In Vermont it is not essential that the witnesses actually see each other sign. If they were so situated that they might have seen each other sign, that is sufficient. Blanchard *v.* Blanchard, 32 Vt. 62. The statement in the attestation clause to the will, that the witnesses signed their names to the will in the presence of the testator, throws the *onus* of proving that they did not so sign upon the party opposing the will. Tappen *v.* Davidson, 12 C. E. Gr. (N. J.) 459. And in Georgia the subscribing witnesses may be permitted to testify that they subscribed to the will in the presence of the testator, whether the attestation clause so states or not. Lucas *v.* Parsons, 24 Ga. 640. By statute, in some of the states, no witnesses are necessary, if the will be a holograph. And the will must, as a general rule, in such case, be in the handwriting of the testator, and must be found among his valuable papers, or be produced by some reliable person with whom it was deposited by the testator for its preservation. Such wills are provided for in Arkansas, Kentucky, Tennessee, Virginia, North Carolina, Mississippi and Louisiana. It appears that the placing of a holograph will in a trunk left for safe keeping with a friend, and containing the greater portion of the valuable papers of the testator, as well as some part of his money, is sufficient to satisfy the requirements of the North Carolina statute on the point of deposit. Hill *v.* Bell, Phill. (N. C.) L. 122. The fact that the will has the signature of one subscribing witness does not prevent it from being proved as a holograph. Harrison *v.* Burgess, 1 Hawks 384; Brown *v.* Beaver, 3 Jones L. 516. Nor that it has appended an attestation clause, unexecuted by any witness. Hill *v.* Bell, *ubi supra*. The formalities necessary to give validity to a holographic will in Louisiana, are that the will must be written, dated and signed by the testator himself. Succession of G. Ehrenberg, 21 La. Ann. 280. If not *entirely* written by the testator the will is null. Williams *v.* Hardy, 15 La. Ann. 286. But it may be written in pencil. Philbrick *v.* Spangler, 15 La. Ann. 46. And if a holographic will bearing a particular date be found among the valuable papers of the decedent, it is presumed that it was deposited there by him at the time of its date. Sawyer *v.* Sawyer, 7 Jones L. 134. In Ten-

of real estate,) the construction of the older statute, although never within the sphere of the ecclesiastical courts, is nevertheless illustrated by many of their decisions on the statute of Victoria.]

The first inquiry suggested by the statute 29 Car. II., is, what amounts to a "signing" by the testator? It has been decided that a mark is sufficient, and that, notwithstanding the testator is *able to write, (*b*) [and though his name does not appear

Mark, a sufficient signing.

nessee such a will must be entirely in the handwriting of the testator, and must be deposited as above mentioned, and the handwriting must be proved to be that of the testator by at least three witnesses, the object being that the writing be so well known as to prevent any deceit. Tate *v.* Tate, 11 Humph. 465. But in Kentucky the statute does not require such a will to be in the *handwriting* of the decedent, but to be written by him; therefore, a will will be good if written by the testator, though it be written in a disguised hand. Hannah *v.* Peake, 2 Mon. 133. See also Crutcher *v.* Crutcher, 11 Humph. 377; Marr *v.* Marr, 2 Head 303; Hocker *v.* Hocker, 4 Gratt. 277; Anderson *v.* Pryor, 10 Sm. & M. 620. Such a will, made in Virginia, will pass lands in Ohio. Bailey *v.* Bailey, 8 Ohio 239. See 4 Kent 519; Wms. Ex'rs (6th Am. ed.) 92, note b[1]; Flood on Wills 156, 313. The sufficiency of the execution and attestation of the will must be determined by the law of the domicil of the testator at the time of death, although such will was made and attested elsewhere. Patterson *v.* Ransom, 55 Ind. 402. The law as it was at the time the will was executed and attested, must control in the determination of the question of the legality of the execution. Price *v.* Brown, 1 Bradf. 291. The writing of a will with pencil has been sustained. Myers *v.* Vanderbelt, 84 Penna. St. 510; In re Dyer, 1 Hagg. 219. However, it is a strong indication that the will was not a final act if it be written in pencil, but merely a deliberative one; this indication may, truly, be overcome by clear proof that the will, thus written, was intended by the testator as his final testamentary act. It was said on this point by Lord Brougham, in Bateman *v.* Pennington, 3 Moo. P. C. 223, 227: "All the cases show that the signing in pencil affords a *prima facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." See Waller *v.* Waller, 1 Gratt. 454. A seal is not requisite to the execution of a will. Avery *v.* Pixley, 4 Mass. 460; Hight *v.* Wilson, 1 Dallas 94; Doe *v.* Pattison, 2 Blackf. 355; Williams' Lessee *v.* Burnet, Wright (Ohio) 53. By the statute of 1805 a seal was essential to a will intended to pass real estate, in Ohio, but the act of 1824 repealed that provision. Williams' Lessee *v.* Burnet, *ubi supra.* See 1 Greenl. Ev., § 272; 2 Id., § 677; 1 Redfield on Wills 165, *et seq.* And it appears that a will may be made by two persons as a joint will; such a will, however, will in effect be two distinct wills, of which separate probates will be granted. In the goods of Stracey, Deane & Sw. 6; Ex parte Day, 1 Bradf. 476; Gould *v.* Mansfield, 103 Mass. 408; Schumaker *v.* Schmidt, 44 Ala. 454; Bynum *v.* Bynum, 11 Ired. L. 632; Lewis *v.* Scofield, 26 Conn. 452; Walker *v.* Walker, 14 Ohio St. 157. But by statute in Louisiana a testament cannot be made by the same act by two or more persons, either for the benefit of a third person or under the title of a mutual or reciprocal disposition. C. C. La., § 1572.

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

on the face of the will. (*c*) A mark being sufficient, of course the initials of the testator's name would also suffice; (*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*) and that the testator was also wrongly named in the body of the will, (*g*) or that his hand was guided in making the mark. (*h*)[2] But where two sisters made mutual wills in favor of each other, the words *mutatis mutandis* being precisely the same, and by mistake each

Wrong name.

Wrong will.

[(*c*) In re Bryce, 2 Curt. 325.

(*d*) In re Savory, 15 Jur. 1042.

(*e*) In re Redding, 2 Rob. 339, 14 Jur. 1052; In re Glover, 11 Jur. 1022, 5 No. Cas. 553; and see the corresponding cases as to signature of a witness, *post* p. *82.

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

(*g*) In re Dowse, 31 L. J., Prob. 172.

(*h*) Wilson *v.* Beddard, 12 Sim. 28.]

2. Higgins *v.* Carlton, 28 Md. 115; Smith *v.* Dolby, 4 Harring. 350; Pool *v.* Buffum, 3 Oregon 438; Chaffee *v.* Baptist M. C., 10 Paige 85; Upchurch *v.* Upchurch, 16 B. Mon. 102, 113; Cozzens' Will, 61 Penna. St. 196; Ray *v.* Hill, 3 Strobh. 297; Succession of Carroll, 28 La. Ann. 388; Flannery's Will, 24 Penna. St. 502; Asay *v.* Hoover, 5 Penna. St. 21; Jackson *v.* Van Dusen, 5 Johns. 144; Butler *v.* Benson, 1 Barb. 526; Nickerson *v.* Buck, 12 Cush. 332; Sprague *v.* Luther, 8 R. I. 252. Flood on Wills 313, 321; Walkem on Wills 178; 1 Redf. on Wills 203, 206 and notes; 4 Kent 513, 516; Wms. Ex'rs (6th Am. ed.) 102. But an act validating the execution of wills by means of marks is not retroactive, and will not sustain the will of one who died before the enactment. Shinkle *v.* Crock, 17 Penna. St. 159; Davies *v.* Morris, 17 Penna. St. 205; Burford *v.* Burford, 29 Penna. St. 221. And in Pennsylvania the substitution of any other mode of execution than the signing by the testator, must be on account of sickness or infirmity, and must be at the request of the testator, and such execution, whether by a mark, or the writing of the name by another, must be proved by the oath of two witnesses, and so, too, must the request. Greenough *v.* Greenough, 11 Penna. St. 489; Grabill *v.* Barr, 5 Penna. St. 441; Asay *v.* Hoover, *ubi supra*. Although it is held, probably without exception, that one who is thereto authorized by the testator may sign for him, which shall constitute a valid execution of the will, and also that a testator may execute the will by making his mark, yet it has been held that, although the name of the testator be written to the will at his request and in his presence, but with the intention that he should execute it himself by a mark, the execution will not be valid if the testator fail to affix his mark. Main *v.* Ryder, 84 Penna. St. 217. In Missouri, if the testator execute his will by making his mark, this must be the only signature. St. Louis Hospital *v.* Williams, 19 Mo. 609. If, in addition to the mark, the name of the testator be written at his request by some other person, the will is void unless such person signs his own name as an attesting witness, and states that he signed the testator's name at his request as required by statute. Ib.; St. Louis Hospital *v.* Wegman, 21 Mo. 17; Northcutt *v.* Northcutt, 20 Mo. 266; McGee *v.* Porter, 14 Mo. 611. The same course must be pursued where a person signs for a testator, though the testator makes no mark. Simpson *v.* Simpson, 27 Mo. 288; Will of Cornelius, 14 Ark. 675.

signed the will of the other, both signatures were held invalid, neither sister 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

And this requirement of the Missouri statute is mandatory, not directory. McGee *v.* Porter, *ubi supra.* But in Virginia, if the testator's name be signed for him by another, the adding of a mark is a work of supererogation. Rosser *v.* Franklin, 6 Gratt. 1. The fact that a wrong name is set to the testator's mark will not avoid the will. Long *v.* Zook, 13 Penna. St. 400. But it is as essential that the testator be conscious at the time his mark is set to the will as it is that a testator be conscious when he signs the will. Dunlop *v.* Dunlop, 10 Watts 153; and if he be unconscious at such time, the will cannot be maintained, though he afterwards ratify his mark, unless there be a re-execution. Ib. But in New Jersey it is said that it is not sufficient that the signature be made by another, though at the request and in the presence of the testatator; the signing required by the statute must be some signature, making some mark or *signum* upon the paper, so as to identify and give efficacy to it by some act, and not by words merely. In re McElwaine's will, 3 C. E. Gr. (N. J.) 499. If the testator be paralyzed, or otherwise so enfeebled as to be unable to sign his name, and another guide his hand in the signing, this will be held to be the testator's own act, although such assistance was rendered without any request from the testator. Vandruff *v.* Rinehart, 29 Penna. St. 232; Cozzens' Will, *ubi supra.* In a well-considered case, where it was objected to the execution that the testator's hand was guided by another, and that that was not sufficient under the statute, it was said by Washington, J.: "But is it to be believed that, when all persons, except those of unsound mind and memory, are permitted to dispose of their property by will, the legislature could have intended to deny this privilege to those who from accident, disease, or want of education could not write? If such be the construction of the law, it would be insufficient for the testator to make his mark, since that would not amount to subscribing his name. The fact is, that at the time the act of assembly was passed, the statute of frauds and perjuries, 29 Car. I., was in force in this state, and was not repealed by the act. And although at a much later period all the statutes of England were repealed, still the above statute had become incorporated with, and formed a part of the land laws of this state, so far as it respected last wills and testaments; and has always, as I understand from Judge Pennington, been considered as furnishing the rule as to the execution of wills. If so, this will was executed in strict conformity with the statute; since the submission of the testator (who, in relation to this part of the case, is to be considered as fully cognizant of what he was doing) to have his hand directed, so as to write his name, was at least equivalent to an express direction to another to sign his name. For it cannot be denied that, under the statute, the direction to subscribe the name of the testator may be given to him by signs, as well as by words. But be the law upon this subject as it may, this will, in the opinion of the court, was, upon strictly legal principles, signed by the testator, his hand being *with his own consent* guided by another, and the will afterwards acknowledged by him. Under these circumstances, the act of Pharis was, in point of law, the act of the testator." Stevens *v.* Van Cleve, 4 Wash. C. C. 262. See also Van Hanswyck *v.* Wiese, 44 Barb. 494. It has been held, in England, that where a person, in the presence of and at the request of the testator, stamped the will with an instrument on which the testator's

void; (*i*) and even if the gift had been to a third person, evidence would have been admitted to show that the paper, though executed by the testatrix with due formality, was not in fact her will, (*j*) 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.] [3]

Sealing, insufficient.

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 Parker, C. B., and his coadjutors in Smith *v.* Evans, (*l*) (though the C. B. on another occasion, (*m*) erroneously supposed it to have been decided the other way,) down to Lord Eldon in Wright *v.* Wakeford. (*n*)

Signature by another for testator.

[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 imma-

usual signature was engraved, for the purpose of stamping it on letters and other documents requiring the signature of the testator, intending such act to take the place of the signing by the testator, the will was well executed. Jenkins *v.* Gaisford, 3 Sw. & Tr. 93. And the party who signs for the testator may sign his own name first, and that of the testator after; thus, "A B for C D, at his request," is a good signing of the will. Vernon *v.* Kirk, 30 Penna. St. 218. See also Robins *v.* Coryell, 27 Barb. 556; Abraham *v.* Wilkins, 17 Ark. 292. But such signature must be at the request of the testator, and in many of the American states it must appear from the attestation clause that such request was made; but this need not appear if the party signing be a volunteer, unauthorized to sign for the purpose of execution. Pool *v.* Buffum, 3 Oregon 438. By statute in Louisiana, if the will is not signed by the testator he must declare that he does not know how, or is not able, to sign, and express mention must be made of his declaration, and of the cause that hinders him from signing. C. C. La., § 1579.

[(*i*) Anon., 14 Jur. 402; In re Hunt, L. R., 3 P. & D. 250.

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

3. The signing of a will, to be a sufficient signing, must be such as upon its face, and from the frame of the instrument, appears to have been intended to give it authenticity as a will. It must be evident that the name written was regarded as and intended for a signature, and that the instrument was complete without further signing. And this must appear from the paper itself. Waller *v.* Waller, 1 Gratt. 454.

(*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., Jr., 12.

(*n*) 17 Ves. 458.

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

terial *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 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*)[4] And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been.] (*r*)

One signature, of course, is sufficient, though the will be contained in several sheets of paper; and [it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death; (*s*) and that any apparent alteration in their order and paging was made before execution. (*t*) The signature may also be on a piece of paper stuck or tied on at the end of the will, and containing nothing but the signature and attestation; (*u*) but in such case the fact of the piece of paper having been so attached before execution must be proved.] (*x*) Where

One signature of several sheets sufficient

[(*p*) In re Clark, 2 Curt. 329.

(*q*) In re Blair, 6 No. Cas. 528.]

4. But if the testator frequently request another person to sign the will for him, and that person refuses on account of misapprehension of the law, such refusal, with continued exertion at each opportunity to have the will signed, is not a compliance with the law. Stricker *v.* Groves, 5 Whart. 386. In regard to requisites by statute, where wills are signed by another for the testator, in many of the states, see *ante* note 2; and see also Will of Cornelius, 14 Ark. 675; McGee *v.* Porter, 14 Mo. 611; Northcutt *v.* Northcutt, 20 Mo. 266; Simpson *v.* Simpson, 27 Mo. 288; Vernon *v.* Kirk, 30 Penna. St. 218; Pool *v.* Buffum, 3 Oregon 438; Abraham *v.* Wilkins, 17 Ark. 292; Will of Jenkins, 43 Wis. 610. See also Flood on Wills 330; Wms. Ex'rs (6th Am. ed.) 108; 1 Redf. on Wills 204, *et seq.* In Armstrong *v.* Armstrong, 29 Ala. 538, 541, it is said, by Rice, C. J.: "It is not essential that the testator should write his own name. The British statute, as well as our own, allows a will to be signed for him by another, and his name, when written by another, for him, in his presence, and by his direction will have the same effect as if it had been written by himself. Although his name is not written by himself, nor subscribed to the will; yet if it be written in the beginning of the will by another, in his presence, and under his direction; and if it be acknowledged by him to the attesting witnesses, at the time he calls upon them to subscribe it, it will be as effectual as if with his own pen he had written it."

[(*r*) Jenkyns *v.* Gaisford, 32 L. J., Prob. 122.

(*s*) Marsh *v.* Marsh, 1 Sw. & Tr. 528, 30 L. J., Prob. 77. And see Bond *v.* Seawell, 3 Burr. 1775.

(*t*) Rees *v.* Rees, L. R., 3 P. & D. 84: agreeing with the presumption regarding other alterations, *post* ch. VII., § 2, *ad fin.*

(*u*) Cooke *v.* Lambert, 32 L. J., Prob. 93; In re Horsford, L. R., 3 P. & D. 211.

(*x*) In re West, 32 L. J., Prob. 182.]

the *testimonium* at the end referred to the preceding sides of the sheet of letter paper as being subscribed by the testator, the fact of those sides not being so 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. (*y*)[5] It was immaterial, under the statute of frauds, in what part of the will the testator's name was written; 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. (*z*) 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, (*a*) 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.[6]

As to position of name.

It will be observed that the testator is merely required by the statute of Car. II., to "sign;" but it was formerly considered that, independently of this enactment, publication was necessary

Publication, whether requisite.

(*y*) Winsor *v.* Pratt, 5 J. B. Moo. 484, 2 Br. & B. 650.

5. Martin *v.* Hamlin, 4 Strobh. 188; Wikoff's Appeal, 15 Penna. St. 281; Ela *v.* Edwards, 16 Gray 91; Tonnele *v.* Hall, 4 Comst. 140; Gilman *v.* Gilman, 1 Redf. 354; Walkem on Wills 179; 1 Redf. on Wills 208.

(*z*) Lemayne *v.* Stanley, 3 Lev. 1, Freem. 538, 1 Eq. Cas. 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. The rule is different under 15 and 16 Vict., c. 24, *post.*]

(*a*) 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; Sweetland *v.* Sweetland, 4 Sw. & Tr. 9, 34 L. J., Prob. 42; and cases cited *post.*

6. See Cohen's Will, 1 Tuck. 286; Waller *v.* Waller, 1 Gratt. 454; Allen *v.* Everett, 12 B. Mon. 379; Gilman *v.* Gilman, 1 Redf. 354; Roy *v.* Roy, 16 Gratt. 418; Armstrong *v.* Armstrong, 29 Ala. 538; Lewis *v.* Lewis, 13 Barb. 17; Glancy *v.* Glancy, 17 Ohio St. 134; Ginder *v.* Farnum, 10 Penna. St. 98; Butler *v.* Benson, 1 Barb. 526; Stricker *v.* Groves, 5 Whart. 386; Hays *v.* Harden, 6 Penna. St. 409; Adams *v.* Field, 21 Vt. 256; Sarah Miles' Will, 4 Dana 1. If a paper be folded up and endorsed by the testator, as his, "R.'s Will," this will not be a sufficient signing. Roy *v.* Roy, *ubi supra.* See Wms. Ex'rs (6th Am. ed.) 104; Flood on Wills 321; 1 Redf. on Wills 210.

to complete the testamentary act. Lord Hardwicke, in particular, in Ross *v.* Ewer, (*b*) strenuously insisted on the necessity of a will of freehold lands being published. On the other hand, in Moodie *v.* Reid, (*c*) Gibbs, C. J., 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. VIII. and Car. II.; and subsequent judges have virtually adopted the latter opinion, 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. [7]

(*b*) 3 Atk. 156.

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

7. This is not so held in the American states, at least not universally, though the doctrine varies in the different states. Where the witnesses, at the time of signing, could not see what the paper was, and the testator did not, in any manner, inform them what it was, it was held that the will was not well executed. Lewis *v.* Lewis, 13 Barb. 17. And where the witnesses were asked to witness a deed, it was held not to be a sufficient publication. Swett *v.* Boardman, 1 Mass. 258. Publication is not valid unless there be some *communication* to the witnesses that the instrument is a will. Remsen *v.* Brinckerhoff, 26 Wend. 325; Rutherford *v.* Rutherford, 1 Denio 33; Compton *v.* Mitton, 7 Halst. 70; Swett *v.* Boardman, 1 Mass. 258; Hunt *v.* Mootrie, 3 Bradf. 322; Tunison *v.* Tunison, 4 Bradf. 138; Buntin *v.* Johnson, 28 La. Ann. 796. But the mere want of recollection on the part of the witnesses, that such communication was made, will not defeat the will, where the attestation clause contains a declaration that the will was published. Brinckerhoff *v.* Remsen, *ubi supra;* Ela *v.* Edwards, 16 Gray 91, 99. When the witnesses do not remember the execution and attestation of the will, the fact that they signed in the presence of the testator, may be established by circumstantial evidence. Pate's Adm'r, *v.* Joe, 3 J. J. Marsh. 116. See also Transue *v.* Brown, 31 Penn. St. 92; Lawyer *v.* Smith, 8 Mich. 411; Sutton *v.* Sutton, 5 Harr. (Del.) 459. And the declaration of a witness that it was never his custom to attest an instrument without hearing it acknowledged, is evidence to go to the jury as to execution. Pate's Adm'r, *v.* Joe, *ubi supra;* Hughes *v.* Hughes, 31 Ala. 519; Lawyer *v.* Smith, *ubi supra.* There must be, in some of the states, an actual publication, and such publication must be some act that will intimate to the witnesses that the instrument is the will of the testator, and it must be some declaration or expression different and distinct from a request to sign as a witness. This is so in New York. Heyer *v.* Berger, 1 Hoff. Ch. 1; Torry *v.* Bowen, 15 Barb. 304; Lewis *v.* Lewis, 13 Barb. 17; Newhouse *v.* Godwin, 17 Barb. 236; Abbey *v.* Christy, 49 Barb. 276; Gilbert *v.* Knox, 52 N. Y. 125; Harris' Will, 1 Tuck. 293; Harder's Will, 1 Tuck. 426. See also Auburn Theo. Sem. *v.* Calhoun, 62 Barb. 381; McKinley *v.* Lamb, 64 Barb. 199. And in New Jersey, Compton *v.* Mitton, 7 Halst. 70; Combs *v.* Jolly, 2 Green Ch. 625; Mickle *v.* Matlack, 2 Harr. (N. J.) 87; Morehouse *v.* Cotheal, 1 Zab. 480. Also in North Carolina. And in Arkansas, Rogers *v.* Diamond, 13 Ark. 474. But the publication need not be made in

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

the words of the statute. Ib. But, in Louisiana, a declaration that the instrument contains the last intentions of the testator, is a sufficient compliance with the code. Succession of Morales, 16 La. Ann. 267. See also Buntin *v.* Johnson, 28 La. Ann. 796. As to publication of a will in New York, it was said by Comstock, C. J., in Coffin *v.* Coffin, 23 N. Y. 9: "The statute requires that the testator, when he subscribes a will, or acknowledges its execution to the witnesses, shall declare the instrument to be his last will and testament. But this declaration need not be in any particular form. Any communication of the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement. In the case before us, according to the evidence of the two attesting witnesses, one of them asked the testator if he wished him to sign or witness the paper as his will; to which the testator answered in the affirmative. As both the witnesses were present, this was a good publication as to both of them, if good as to either. We think it was sufficient, because it was in substance a communication that the paper was the will of the testator. There can be no doubt that such a declaration can be made in answer to a question, or even by a sign. It is only required that it be understandingly made." Brinckerhoff *v.* Remsen, 8 Paige 488; S. C., 26 Wend. 325; Lewis *v.* Lewis, 11 N. Y. 220; Vaughan *v.* Burford, 3 Bradf. 78. So, too, in Lewis *v.* Lewis, *ubi supra*, it was said by Allen, J.: "To satisfy the statute, the testator must in some manner communicate to the attesting witnesses, at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his last will and testament, by some assertion or clear assent in words or signs; and the declaration must be unequivocal. The policy and object of the statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere, and from other sources, learned that the document which they are called to attest is a will, or that they suspect, or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and, at the time of his execution, which includes publication, designs to give effect to it as his will." Hunt *v.* Mootrie, 3 Bradf. 322; Nipper *v.* Groesbeck, 22 Barb. 670. And where formal publication is necessary, it is essential, in an action under the will, that publication be averred in the pleadings. Upon this point it was remarked by Green, C. J.: "In this state, the same statute and the same clause of the statute, which requires the will to be *in writing*, requires also that it should be signed and published in the presence of three subscribing witnesses. If it be necessary to aver in pleading the existence of the one requisite, it must be equally essential to aver the existence of the other. Both authority and precedent concur in this conclusion, that it is essential in good pleading to aver the will of real estate to be in writing and I am of opinion that it is equally essential to aver that the will was signed and published by the testator, in the presence of three sub-

would suffice, but that it might be made before each witness separately, and need not take place in the simultaneous presence of

scribing witnesses." Morehouse *v.* Cotheal, 1 Zab. 480, 488. However, in Delaware, formal execution is a sufficient publication. Smith *v.* Dolby, 4 Harring. 350. This seems also to be the rule in Vermont. See Dean *v.* Dean, 27 Vt. 746. In this case Isham, J., says: "In relation to the publication of the will, it is to be observed that attesting the will by the witnesses is an attestation of its publication. A formal publication is not necessary. Writing and signing the will is a sufficient publication; indeed any act of the testator by which he designates that he means to give effect to the paper as his will, is a publication of the will itself." And in Maine, Massachusetts, Kentucky, Illinois, Indiana, South Carolina and Virginia, it is only requisite that it be evident that the testator knew that the instrument was his will and intended to execute it, and that it should be attested as his will. Cilley *v.* Cilley, 34 Me. 162; Osborn *v.* Cook, 11 Cush. 532; Swett *v.* Boardman, 1 Mass. 258; Dewey *v.* Dewey, 1 Metc. 349; Hogan *v.* Grosvenor, 10 Metc. 54; Verdier *v.* Verdier, 8 Rich. 135; Black *v.* Ellis, 3 Hill (S. C.) 68; Beane *v.* Yerby, 12 Gratt. 239; Ray *v.* Walton, 2 A. K. Marsh. 71; Dickie *v.* Carter, 42 Ill. 376; Brown *v.* McAlister, 34 Ind. 375. And in Georgia the acknowledgment of his signature by the testator is a sufficient publication. Webb *v.* Fleming, 30 Ga. 808. But in Pennsylvania it need not even be declared to be a will, the declaration by the testator that it is his *act and deed*, being sufficient. Loy *v.* Kennedy, 1 Watts & S. 396. But the will must be complete when it is published and attested. Chisholm's Heirs *v.* Ben, 7 B. Mon. 408; Vernam *v.* Spencer, 3 Bradf. 16; Jones *v.* Jones, 3 Metc. (Ky.) 266; Barnes *v.* Syester, 14 Md. 507; Waller *v.* Waller, 1 Gratt. 454. The reading over of the attestation clause to the witnesses, and the assent, thereupon, of the testator to the question whether that is his last will and testament, is a sufficient publication. Whitbeck *v.* Patterson, 10 Barb. 608; Thompson *v.* Stevens, 62 N. Y. 634; Coffin *v.* Coffin, 23 N. Y. 9; Higgins *v.* Carlton, 28 Md. 115. But this is not sufficient in Louisiana. McCaleb *v.* Douglass, 16 La. Ann. 327. In New York the statute does not require any particular form of words to be used, either in acknowledgment, publication or the request to the witnesses to sign as attesting witnesses. Nelson *v.* McGiffert, 3 Barb. Ch. 158; Thompson *v.* Stevens, 62 N. Y. 634; Moore *v.* Moore, 2 Bradf. 261; Brown *v.* De Selding, 4 Sandf. 10; Remsen *v.* Brinckerhoff, 26 Wend. 324; Whitbeck *v.* Patterson, 10 Barb. 608; Campbell *v.* Logan, 2 Bradf. 90; Gombault *v.* Pub. Adm'r, 4 Bradf. 226; Carle *v.* Underhill, 3 Bradf. 101; Gilman *v.* Gilman, 1 Redf. 354. And a substantial compliance with the statutory formula is sufficient; thus, where a testator said, placing his finger on the seal to his will, after execution, "I *acknowledge* this to be my last will and testament," it was held to be a sufficient compliance with the statute, its requirement being that testator "*declare*" the instrument to be his will. Seguine *v.* Seguine, 2 Barb. 385; Upchurch *v.* Upchurch, 16 B. Mon. 102; Thompson *v.* Stevens, *ubi supra;* Mundy *v.* Mundy, 2 McCart. 290; Chaffee *v.* Baptist Mis. Con., 10 Paige 85; Gilbert *v.* Knox, 52 N. Y. 125. So, too, in Ohio, the acknowledgment to the witnesses need not be in any specified manner, or with any set form of words; but the fact may be communicated by signs, motions, conduct or attending circumstances. Raudebaugh *v.* Shelley, 6 Ohio St. 307. And this is also held in some other states. Cilley *v.* Cilley, 34 Me. 162. See also Sarah Miles' Will, 4 Dana 1. It is not sufficient, however,

all.[8] The point, though doubted in some of the early cases, (*d*) was decided by Sir J. Jekyl, M. R., in Smith *v.* Codron, (*e*) where A signed and

that the testator sign the will at one time, and publish it at another. The law contemplates both as done at one time. Yet it makes no difference, whether the publication be first and the signature afterwards, or *vice versa*, if they are both parts of the same transaction. Doe *v.* Roe, 2 Barb. 200; Seguine *v.* Seguine, Id. 385; Sechrest *v.* Edwards, 4 Metc. (Ky.) 163; Swift *v.* Wiley, 1 B. Mon. 114; Mickle *v.* Matlack, 2 Harr. (N. J.) 86; Parramore *v.* Taylor, 11 Gratt. 220; Beane *v.* Yerby, 12 Gratt. 239; Green *v.* Crain, 12 Gratt. 252; Vaughan *v.* Burford, 3 Bradf. 78. If a party seek to establish a will, he takes upon himself the *onus* of proving the concurrence of all the acts necessary to its validity. He must show that it was subscribed at *the end* thereof, by the testator, or some one thereto requested by the testator, in his presence, in the presence of the witnesses, declared by the testator to be his last will and testament, and that each witness signed his name in the presence of the testator. The proof of one of these requisites cannot be enlarged, by implication, to be proof of all. Lewis *v.* Lewis, *ubi supra*. See also Tappen *v.* Davidson, 12 C. E. Gr. (N. J.) 459; In re Kellum, 52 N. Y. 517. And if one witness testify expressly to the fulfillment of every ceremony required by the statute it is sufficient. Compton *v.* Mitton, 7 Halst. 70; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Baker *v.* Dobyns, 4 Dana 220. See also Welch *v.* Welch, 2 Mon. 83; Carrico *v.* Neal, 1 Dana 162. But it has been held that where a witness testifies that he did not see the testator sign, nor hear him acknowledge the will, the party calling him may call other witnesses to contradict him. Thompson *v.* Thompson, 2 W. L. M. 84. See Wms. Ex'rs (6th Am. ed.) 110, 119, note (*q*); 1 Redf. on Wills 214–220, 284, 285, note 19; Flood on Wills 314; Walkem on Wills 185.

8. Under the act of 1814, in New Jersey, it was necessary that the witnesses should be present at the time of the *factum* of the will, and should actually see the testator sign. But the act of 1851, in that state, changed this, and, by virtue of that act, the acknowledgment of his signature to the will by the testator, in the presence of the witnesses, is sufficient. Compton *v.* Mitton, 7 Halst. 70; Mickle *v.* Matlack, 2 Harr. 86; Combs *v.* Jolly, 2 Green Ch. 625; Mundy *v.* Mundy, 2 McCart. 290; Will of Alpaugh, 8 C. E. Gr. 507; Bailey *v.* Styles, 1 Gr. Ch. 220. So, too, in Massachusetts, the witnesses need not see the testator sign, but if the signature be acknowledged by the testator to be his, that will be sufficient, and that, too, whether he actually signed the will, or it was signed by another at his request. Hall *v.* Hall, 17 Pick. 373; Dewey *v.* Dewey, 1 Metc. 349; Hogan *v.* Grosvenor, 10 Metc. 56; Tilden *v.* Tilden, 13 Gray 110; Ela *v.* Edwards, 16 Gray 91; Nickerson *v.* Buck, 12 Cush. 332; Chase *v.* Kittredge, 11 Allen 49. In Dewey *v.* Dewey, *ubi supra*, it is said by Dewey, J.: "It is not required that the testator should sign his name to the will in the presence of the attesting witnesses. The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient. * * * So a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to

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

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

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 after*wards, told him that the paper he had subscribed was his will: this was held to be a good exe-

authorize their attestation to it, and to make it a good will." So it is largely, if not universally, held in the various American states, that the acknowledgment of his signature to the witnesses by the testator, is a sufficient compliance with the statute. Dudleys *v.* Dudleys, 3 Leigh 436; Rosser *v.* Franklin, 6 Gratt. 1; Cochran's Will, 3 Bibb 491; Denton *v.* Franklin, 9 B. Mon. 28; Adams *v.* Field, 21 Vt. 256; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Lewis *v.* Lewis, 13 Barb. 17; Baskin *v.* Baskin, 36 N. Y. 416; Peck *v.* Cary, 27 N. Y. 9; Tarrant *v.* Ware, 25 N. Y. 425, n.; Coffin *v.* Coffin, 23 N. Y. 9; Dickie *v.* Carter, 42 Ill. 376; Allison *v.* Allison, 46 Ill. 61; Reed *v.* Watson, 27 Ind. 443; Brown *v.* McAllister, 34 Ind. 375; Turner *v.* Cook, 36 Ind. 129; Tucker *v.* Oxner, 12 Rich. L. 141; Beane *v.* Yerby, 12 Gratt. 239; Green *v.* Crain, 12 Gratt. 252; Higgins *v.* Carlton, 28 Md. 115; Swift *v.* Wiley, 1 B. Mon. 114; Loy *v.* Kennedy, 1 Watts & S. 396; Rogers *v.* Diamond, 13 Ark. 474; Abraham *v.* Wilkins, 17 Ark. 292; Thompson *v.* Davitte, 59 Ga. 472; Upchurch *v.* Upchurch, 16 B. Mon. 102. But if the signature of the testator be hidden from the witnesses, a mere publication of the will in their presence cannot be deemed an acknowledgment. Baskin *v.* Baskin, 36 N. Y. 416. But where three witnesses are required by statute, and one of them signed without seeing the signature of the testator, it has been held that the will was not well attested, although the testator acknowledged that he had signed it. Tucker *v.* Oxner, 12 Rich. L. 141. Nor can a will be attested unless signed by the testator, or by some one by him authorized. Reed *v.* Watson, 27 Ind. 443. But in Pennsylvania the witnesses may sign first. Miller *v.* McNeill, 35 Penna. St. 217. And in New Jersey the validity of the will is not affected by the fact that one of the witnesses signed before the testator. Mundy *v.* Mundy, 2 McCart. 290, 294. So, too, in Connecticut it is held that it makes no difference in what order the testator and witnesses sign, provided it be all part of one transaction. O'Brien *v.* Galagher, 25 Conn. 229. But it appears to be a sufficient acknowledgment when, in the hearing of the testator and the witnesses, the attestation clause was read, which clause recited that the testator executed the instrument as his will, and thereupon the testator handed a pen to the witnesses, and saw them sign as such, although the testator uttered not a word. Clear and explicit acts should be regarded rather than mere form. Allison *v.* Allison, 46 Ill. 61. The rule in this regard is *non quod dictum, sed quod factum est, inspicitur*. Higgins *v.* Carlton, 28 Md. 115; Osborn *v.* Cook, 11 Cush. 532, 536. If no proof of acknowledgment is produced, the allegation in the attestation clause may be taken as true, and proof that the will was acknowledged. Will of Alpaugh, 8 C. E. Gr. (N. J.) 507. Unless there be affirmative evidence to disprove the statement in the attestation clause. Allaire *v.* Allaire, 8 Vr. 312, affirmed, 10 Vr. 113; Barnes *v.* Barnes, 66 Me. 286. So, too, if the attestation clause shows that the will was signed and declared in the presence of the witnesses, it will be presumed that both witnesses were present at the same time. Kirkpatrick's Will, 7 C. E. Gr. (N. J.) 463. See Wms. Ex'rs (6th Am. ed.) 113, 117, note (*n*).

cution, and the doctrine was confirmed in a series of subsequent decisions. (*f*)

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 Ellis *v.* Smith (*g*) by Lord Hardwicke, with the assistance of Sir J. Strange, M. R., Willes, C. J., and Parker, C. B. 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.

What amounted to an acknowledgment.

The next question was, what constituted a sufficient acknowledgment before the witnesses. In Gryle *v.* Gryle, (*h*) 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 in Ellis *v.* Smith, (*i*) 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 judges who decided that case in favor of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration. [9]

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

(*g*) 1 Ves., Jr., 11.

(*h*) 2 Atk. 176.

(*i*) 1 Ves., Jr., 11.

9. In Ela *v.* Edwards, 16 Gray 91, the testatrix passed to the first witness a package of papers, with the request that she sign as a witness, at the same time showing the witness where to sign; to the last witness, she said that she wished her to witness a document, that she had been making a little disposition of her effects, and would like to have the witness sign it as a witness, and then the testatrix put her finger on the line where the witness was to sign. It was held that this was a sufficient acknowledgment of the will, within the Massachusetts statute. It has also been held that the expression, by the testator, "I wish you to witness this," is sufficient. Tilden *v.* Tilden, 13 Gray 110. See also Dewey *v.* Dewey, 1 Metc. 349; Hall *v.* Hall, 17 Pick. 373; Osborn *v.* Cook, 11 Cush. 532; Nickerson *v.* Buck, 12 Cush. 332; Raudebaugh *v.* Shelley, 6 Ohio St. 307; Dunlop *v.* Dunlop, 10 Watts 153; Hoffman *v.* Hoffman, 26 Ala. 535; Maupin *v.* Wools, 1 Duv. 223. Where a testatrix was asked by the scrivener, if "that was her signature for the purpose?" and if "that was her last will and testament?" to which she replied, either by saying "Yes," or by nodding

Witnesses need not be apprised of the nature of instrument.

Later adjudications 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. (*k*) "When we find," said Tindal, C. J., in 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." [10]

What a sufficient signature by the witnesses;

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; (*l*) 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.[11]

—a mark;

[The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the

—initials;

her head affirmatively, the acknowledgment was held to be sufficient. Hutchings *v.* Cochrane, 2 Bradf. 295. See also Jauncey *v.* Thorne, 2 Barb. Ch. 40; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Baskin *v.* Baskin, 36 N. Y. 416; Butler *v.* Benson, 1 Barb. 526; Adams *v.* Field, 21 Vt. 256; Beane *v.* Yerby, 12 Gratt. 239; Denton *v.* Franklin, 9 B. Mon. 28; Reed *v.* Watson, 27 Ind. 443; Rucker *v.* Lambdin, 12 Sm. & M. 230; Rogers *v.* Diamond, 13 Ark. 474; Allison *v.* Allison, 46 Ill. 61; Will of Alpaugh, 8 C. E. Gr. (N. J.) 507.

(*k*) 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. & M. 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.]

10. But it is held in Vermont that it is not a legal attestation where the witness is not acquainted with the nature of the paper, nor why he attested it. Roberts *v.* Welch, 46 Vt. 164. But it is sufficient if the testator declares it to be "his will, or his instrument." Ib.

(*l*) Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, Id. 504; [In re Amiss, 2 Rob. 116, 7 No. Cas. 274; In re Ashmore, 3 Curt. 756.

11. Compton *v.* Mitton, 7 Halst. 70; Collins *v.* Nicols, 1 Har. & J. 399; Jesse *v.* Parker, 6 Gratt. 57; Chase *v.* Kittredge, 11 Allen 49; Campbell *v.* Logan, 2 Bradf. 90; Jackson *v.* Van Dusen, 5 Johns. 144; Adams *v.* Chaplin, 1 Hill (S. C.) Eq. 265; Meehan *v.* Rourke, 2 Bradf. 385; Chaffee *v.* Baptist Mis. Con., 10 Paige 85; Prigden *v.* Prigden, 13 Ired. 259; Ford *v.* Ford, 7 Humph. 92; Jackson *v.* Jackson, 39 N. Y. 153; 2 Greenl. Ev., § 677; 1 Redf. on Wills 228. Where the attestation is by

execution; (*m*) but not if they are placed in the margin opposite to, and apparently for the purpose only of identifying alterations. (*n*)[12] A witness need not sign his own name, if the name actually subscribed be intended to represent his name: (*o*) or if he write a description (without any name) intended to identify him as a witness. (*p*) But if

—wrong name;

a wrong name be signed with the intention of making it appear that the will was attested by the person to whom

a mark, the validity of such an attestation does not depend upon the fact of the witness making his mark, or doing some manual act in connection with the signature, but upon the signing of the name of the witness by his authority. Jesse *v.* Parker, 6 Gratt. 57. In Campbell *v.* Logan, 2 Bradf. 90, 97, it is said by Bradford, surrogate: "Our statute differs from the English act, in requiring each of the witnesses '*to sign his name* as a witness at the end of the will,' while the latter only prescribes that the witnesses shall 'attest' and 'subscribe' the will. The will, by our act, is simply required to be 'subscribed' by the testator; but each of the witnesses must '*sign his name.*' For the witness merely to put his mark, is not a signature of his *name;* and where witnesses attest by mark, their names are generally written by other persons, without the marksman taking any part in the act. In such cases, a question may very well arise, whether that mode of execution is sufficient." But it is also said, by the same learned surrogate: "Where another person writes the name of the witness and then the witness acknowledges the signature—puts his mark to it, his *signum*—he literally *signs;* and what he signs is his name—*i. e.*, he signs his name—while a mark alone would not be sufficient. I think the requisition of the statute sufficiently complied with, by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the legislature, in having the name of the witness, and excluding wills attested only by marks; and does not shut out the attestation of wills by illiterate persons, when a penman can be found to record the transaction." Meehan *v.* Rourke, 2 Bradf. 385, 392. But declarations made by a witness to a will, who is since deceased, are not competent evidence to prove his signature. Collins *v.* Nicols, *ubi supra.* And if the witnesses are all dead, there must be proof of their signatures; or, if they set their marks to the will, there must be proof that such marks were made by them. Ib.

(*m*) In re Christian, 2 Rob. 110, 7 No. Cas. 265.

(*n*) In re Martin, 6 No. Cas. 694, 1 Rob. 712; In re Cunningham, 1 Searle & S. 132, 29 L. J., Ch. 71. See the former case mentioned again p. *85.

12. Jackson *v.* Van Dusen, 5 Johns. 144; Adams *v.* Chaplin, 1 Hill (S. C.) Ch. 265.

(*o*) In re Olliver, 2 Spinks 57.

(*p*) In re Sperling, 33 L. J., Prob. 25. Whatever is written, it must be with the intention that it shall represent the writer's name, or otherwise identify him. In re Eynon, L. R., 3 P. & D. 93; In re Maddock, Id. 169.

that name belongs, instead of the actual witness, the subscription is insufficient. (*q*) Putting their seals to the will is not sufficient. (*r*) If the witness cannot write, his hand may be guided by another person, (*s*) or another person may write the witness' name while the witness holds the top of the pen; (*t*)[13] in fact, there seems to be no distinction in these respects 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 required to be made 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. (*u*)

—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; (*x*) 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 decided that the will was not properly re-executed. (*y*) So where a witness to a

Must be an act apparent on the paper.

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

(*r*) In re Byrd, 3 Curt. 117, 1 No. Cas. 490.

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

(*t*) In re Lewis, 31 L. J., Prob. 153. But *prima facie* not so if the witness can write. In re Kilcher, 6 No. Cas. 15.

13. It is said by Gray, J.: "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a literal compliance with statute, but not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation, without affirmative evidence that it was so made." Chase *v.* Kittredge, 11 Allen 49, 59; Ex parte Leroy, 3 Bradf. 227; Horton *v.* Johnson, 18 Ga. 396. See also Montgomery *v.* Perkins, 2 Metc. (Ky.) 448. And the witness' name may be written by another at his request. Upchurch *v.* Upchurch, 16 B. Mon. 102; Jesse *v.* Parker, 6 Gratt. 57. And if the name of the witness be subscribed to the paper, not as a witness, but for some other purpose, and afterwards the testator requests him to become a witness, he may adopt such prior signature. Pollock *v.* Glassell, 2 Gratt. 439.

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

(*x*) Playne *v.* Scriven, 1 Rob. 772, 7 No. Cas. 122, 13 Jur. 712; In re Cunningham, 1 Searle & S. 132, 29 L. J., Prob. 71; In re Maddock, L. R., 3 P. & D. 169.

(*y*) In re Trevanion, 2 Rob. 311.

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, it was held by Sir C. Cresswell that the will was not duly re-executed. (*z*) In 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' signature. They were nothing more than acknowledgments of the former signatures. The signature must be such as is descriptive of the witness, whether by a mark, or by initials, or by his full name, (*a*) or by a description without name; (*b*) a view which necessarily denies efficacy as a signature to the writing of the date.

—and descriptive of the witness.

The signature of the witnesses may be placed in any part of the will; for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the fourth side; (*c*) 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. (*d*) 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.] (*e*)[14]

Position of witness' signature.

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

Applicability of attestation to several distinct parts of a will;

(*z*) Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433, 8 H. L. Cas. 160.

(*a*) Per Lord Chelmsford, 8 H. L. Cas. 171.

(*b*) In re Sperling, 33 L. J., Prob. 25.

(*c*) In re Chamney, 1 Rob. 757, 7 No. Cas. 70; In re Braddock, 1 P. D. 433.

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

(*e*) In re Jones, 1 No. Cas. 396.]

14. But in Kentucky, it has been expressly held that the witnesses must sign at the end of the will. Soward *v.* Soward, 1 Duv. 132. And so, too, in New York, it is necessary that the signatures of the witnesses should be at the end of the will. Coffin *v.* Coffin, 23 N. Y. 9; Peck *v.* Cary, 27 N. Y. 9; Butler *v.* Benson, 1 Barb. 526. However, this is not so in Mississippi, but the witnesses may sign on any part of the instrument. Murray *v.* Murphy, 39 Miss. 214.

complete in itself independently of the latter. (*f*) 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; [15] and which fact it seems would be presumed, unless the contrary were distinctly proved, (*g*) as would also that of the attestation being intended to apply to the whole. 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: [16] [and would fail altogether where the memorandum does not follow the whole. Thus where will and codicil were on different sheets found pinned together, an attestation clause written on the back of the will was not held to be applicable to the codicil without proof that it was so intended, and that the sheets were pinned together at the time of subscription. (*h*) So where there is an evident intention that each paper or sheet shall be separately attested; as, where a testator signed five sheets, and the witnesses subscribed the first four, and the fifth sheet contained an attestation clause 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; (*i*) 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.] (*k*)

—to several testamentary papers;

—to will and codicil.

It was held under the devising clause of the statute of frauds, that if a testator made a will attested by two witnesses, and afterwards made a codicil also 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

(*f*) Carlton *v.* Griffin, 1 Burr. 549.

15. And the several sheets composing such a will, need not be physically united. Wikoff's Appeal, 15 Penna. St. 281.

(*g*) Bond *v.* Seawell, 3 Burr. 1775.

16. A codicil properly attested, may set up a will to which it is not attached. It is a part of the will, and makes the will speak from the date of the codicil, unless there be an evident intention that it should not so operate. Harvey *v.* Chouteau, 14 Mo. 587; Mooers *v.* White, 6 Johns. Ch. 360; Wikoff's Appeal, 15 Penna. St. 281; Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590.

[(*h*) In re Braddock, 1 P. D. 433.

(*i*) Ewens *v.* Franklin, 1 Deane 7, 1 Jur. (N. S.) 1220; In re Dilkes, L. R, 3 P. & D. 164; Phipps *v.* Hale, Id. 166.

(*k*) In re Taylor, 2 Rob. 411; and see per Lord Campbell, 24 L. J., Q. B. 175; In re Pearse, L. R., 1 P. & D. 382.]

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. (*l*) If, however, evidence were adduced of such actual intention, the attestation to the codicil would apply to both. (*m*)

[And in every case the court must be satisfied that the names were written *animo attestandi;* and their position may for this purpose be material: where, for instance, on one page the will was written, signed by the testator and subscribed by one witness, and on the next page a memorandum or inventory of property was written, to which three names were subscribed, it was held that these names could not be deemed to have been so placed *animo attestandi:* (*n*) though it would not necessarily follow that a person did not sign as a witness because he also intended his signature to serve another purpose, *e. g.*, his acceptance of the executorship. (*o*)

Animus attestandi.

Where an executed will was altered, and the witnesses put their initials in the margin opposite the alterations, it was held that the will was not properly re-executed. (*q*) But this decision seems questionable, for the initials were intended to represent the signatures, and it was proved (extrinsic evidence being admissible on this question) (*r*) that they were written with the intent to attest the will.]

No particular form of words was essential to constitute an attestation. (*s*)[17] It was not requisite that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, though such

What constituted a sufficient attestation.

(*l*) Lea *v.* Libb, Carth. 35, 3 Salk. 395.

(*m*) Bond *v.* Seawell, 3 Burr. 1775. [But now the witnesses must be present at the same time.

(*n*) In re Wilson, L. R., 1 P. & D. 269. See also Dunn *v.* Dunn, Id. 277.

(*o*) Griffiths *v.* Griffiths, L. R., 2 P. & D. 300.

(*q*) In re Martin, 6 No. Cas. 694.

(*r*) Ib.; Dunn *v.* Dunn, L. R., 1 P. & D. 277.

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

17. Nelson *v.* McGiffert, 3 Barb. Ch. 158; Seguine *v.* Seguine, 2 Barb. 385; Fatheree *v.* Lawrence, 33 Miss. 585; Leaycraft *v.* Simmons, 3 Bradf. 35; Frye's Will, 2 R. I. 88; Jackson *v.* Jackson, 39 N. Y. 153; Osborn *v.* Cook, 11 Cush. 532; Chase *v.* Kittredge, 11 Allen 49. But it is not sufficient that the witnesses subscribe their names to the will: they must attest the signing or acknowledgment of the will by the testator. Griffith *v.* Griffith, 5 B. Mon. 511. If the attestation clause be entirely omitted, this will not invalidate the will. Fry's Will, 2 R. I. 88; Ela *v.* Edwards, 16 Gray 91. In Leaycraft *v.* Simmons, *ubi supra*, it was said by Bradford, surrogate: "The statute does not require an attestation clause. The question is whether all the proper ceremonies were performed. If they were and the witnesses prove it, the requisitions of the law are answered. The omission to recite at the end of the will

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. (*t*) Where the death [or absence] of the witnesses prevents the obtaining

Due execution when presumed.

any or all of the prescribed forms, cannot affect the validity of the instrument, because the recital is not required." And in another case in New York it was said by Walworth, C.: "An attestation clause, showing upon its face that all the forms required by the statute have been complied with, is not absolutely necessary to the validity of a will, as the witness will be permitted to prove that the forms were in fact all complied with, although the attestation clause is silent on the subject. Indeed it has been decided that a formality of this kind, not noticed in the attestation clause, may even be presumed from circumstances, after the witnesses to the will are dead. * * * The statute does not require an attestation clause showing that the proper legal formalities were complied with; and although upon the face of the instrument those formalities are stated to have taken place, the fact may be disproved by the witnesses. But prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with; not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time they cannot recollect what did take place, but also for the purpose of showing that the person who prepared the will knew what the requisite formalities were, and therefore gave the proper information to the testator, or saw that they were complied with if he was present. To impress the more strongly upon the memory of the witnesses the important fact that all the legal forms requisite to a due execution of the will were complied with, at the time when they subscribed their names as witnesses to such execution, the safer course is to read over the whole of the attestation clause, in the presence and hearing of the witnesses, and of the testator. And where the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, especially if he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading in his presence should be stated in the attestation clause. Or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things, however, are matters of precaution and prudence, to prevent any well founded doubt upon matters of fact; and where they are neglected it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity is satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents. The legislature, however, has seen proper to prescribe certain legal requisites to the due execution of a will; all of which must be substantially complied with or the will is void in law. And the *onus* of satisfying the court that these were complied with lies upon the party seeking to establish the will. But the fact of such

(*t*) 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.]

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: (u) [and since the passing of the act 1 Vict.

Even against evidence of the witnesses.

probate has been granted of a will where both the witnesses deposed that the requirements of the act had not been complied with, the court being satisfied by the circumstances that the evidence was mistaken; (x) 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. (y) But where there was nothing but a formal attestation clause on one side, and the adverse testimony of both witnesses on the other, probate was refused. (z) And in no case will the presumption of compliance with the statutory requirements be made unless the will appears on the face of it to have been duly executed. If the will is lost, due execution must be proved, (a) and the

compliance may be proved by other evidence, or inferred from circumstances, where the subscribing witnesses are dead, or absent, or otherwise incapacitated to give testimony; or where from lapse of time, or otherwise, they are unable to recollect whether the requisite formalities were observed at the time when they witnessed the execution of the instrument." Chaffee *v.* Baptist Mis. Con., 10 Paige 85, 89.

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

(x) Leach *v.* Bates, 6 No. Cas. 699. *A fortiori*, where the adverse evidence of one witness is opposed by the affidavit of the other, deceased, witness. Wright *v.* Rogers, L. R., 1 P. & D. 678.

(y) Baylis *v.* Sayer, 3 No. Cas. 22; see also Gove *v.* Gawen, 3 Curt. 151; Blake *v.* Knight, Id. 547; Pennant *v.* Kingscote, Id. 642; In re Hare, Id. 54; Cooper *v.* Bockett, Id. 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; In re Noyes, Id. 284; Burgoyne *v.* Showler, 1 Rob. 5; Thomson *v.* Hull, 16 Jur. 1144, 2 Rob. 426; In 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; In re Helgate, 1 Sw. & Tr. 261, 5 Jur. (N. S.) 251, 29 L. J., Prob. 161; Lloyd *v.* Roberts, 12 Moo. P. C. C. 158; In re Thomas, 1 Sw. & Tr. 255, 28 L. J., Prob. 33; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J., Prob. 31; Cregreen *v.* Willoughby, 6 Jur. (N. S.) 590; In re Huckvale, L. R., 1 P. & D. 375; Smith *v.* Smith, Id. 143 (where witness saw testatrix writing, but did not see her signature.)

(z) Croft *v.* Croft, 4 Sw. & Tr. 10, 34 L. J., Prob. 44.

(a) As in In re Gardner, 27 L. J., Prob. 55; Eckersley *v.* Platt, L. R., 1 P. & D. 281. The contents of the will and its existence at the testator's death must also be proved. *Post* Chap. VII., § 2.

testator's written declarations of the fact are insufficient, though accompanied by a document referred to by him as a copy of his will, and representing the will as duly executed. (*b*) The presumption of due execution 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. (*c*)

"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.[18] Thus, if a testator, after having signed and published his will, and before the witnesses subscribed their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient. (*d*)

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. (*e*) 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 Shires *v.* Glasscock, (*f*) 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

(*b*) In re Ripley, 1 Sw. & Tr. 68.

(*c*) In re Lee, 4 Jur. (N. S.) 790.]

18. Watson *v.* Pipes, 32 Miss. 451; Hill *v.* Barge, 12 Ala. 687; 1 Greenl. Ev., § 272; 4 Kent 515, 516; 2 Greenl. Ev., § 678; 1 Redf. on Wills 244. It has been repeatedly decided that it is the province and duty of the subscribing witnesses to a will not only to attest the corporal act of the execution of the will, but also the sanity of the testator at the time of the *factum*. Withinton *v.* Withinton, 7 Mo. 589; Heyward *v.* Hazard, 1 Bay. (S. C.) 335; Field's Appeal, 36 Conn. 277, 279; Whitenack *v.* Stryker, 1 Gr. Ch. (N. J.) 9.

(*d*) Right *v.* Price, Doug. 241.

(*e*) See Longford *v.* Eyre, 1 P. W. 740.

(*f*) 2 Salk. 688, cit. Carth. 81.

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 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. [19]

Sufficient if the testator *might* have seen.

So, in Davy *v.* Smith, (*g*) where the testator lay in bed in one room,

19. Reynolds *v.* Reynolds, 1 Speers 253; Russell *v.* Falls, 3 Harr. & McHen. 457; Edelen *v.* Hardey, 7 Harr. & J. 61; Boldry *v.* Parris, 2 Cush. 433; Graham *v.* Graham, 10 Ired. L. 219; Hill *v.* Barge, 12 Ala. 687; Wright *v.* Lewis, 5 Rich. 212; Ray *v.* Hill, 3 Strobh. 297; Lamb *v.* Girtman, 33 Ga. 289; Robinson *v.* King, 6 Ga. 539; Howard's Will, 5 Mon. 199; Rucker *v.* Lambdin, 12 Sm. & M. 230; Watson *v.* Pipes, 32 Miss. 451. The requirement that the witnesses sign "in presence of the testator" means that they must not withdraw from the continued observation of his senses, although the testator himself may refrain from using such senses. Reynolds *v.* Reynolds, *ubi supra;* Bynum *v.* Bynum, 11 Ired. L. 632; Ambre *v.* Weishaar, 74 Ill. 109. But although the witnesses attest the will in the same room with the testator, and he see them, yet if he can see their backs only, this is not a good attestation. Graham *v.* Graham, *ubi supra.* But see, *contra*, Nock *v.* Nock, 10 Gratt. 106. It appears that under the recent statute in New York the witnesses need not sign in the presence of the testator. Lyon *v.* Smith, 11 Barb. 124. In this case it was said by Shankland, J.: "The formalities necessary to the due execution of a will depend wholly upon statutory regulations, and as the present statute does not require the attestation to be in the presence of the testator, I am of opinion it is no longer necessary." See also Jackson *v.* Christman, 4 Wend. 277; Ruddon *v.* McDonald, 1 Bradf. 352. So, too, in Arkansas, under the statute of 1839, it was not essential to the validity of the will that the attesting witnesses should subscribe in the presence or within the view of the testator. Will of Cornelius, 14 Ark. 675. In a case in Virginia, the testator executed his will, and then requested certain persons to attest it; for convenience they took it to another room, out of the view of the testator, and there signed their names as witnesses, and immediately returned to the testator, with the paper, and one of them, in the presence of the others, with the paper open in his hand, said to the testator, "Here is your will, witnessed," at the same time pointing to the names of the witnesses, which were on the same page with and close to the name of the testator; the testator took the paper, folded it up, and spoke of it as his will; it was held that the recognition of the attestation, by the witnesses, to the testator, was a substantial subscribing of the names as witnesses in his presence. Sturdivant *v.* Birchett, 10 Gratt. 67. But in Maryland and Massachusetts a will so attested is held to be, *prima facie*, illegally executed. Edelen *v.* Hardey, 7 Harr. & J. 61; Boldry *v.* Parris, 2 Cush. 433. So, too, in Georgia. Lamb *v.* Girtman, 33 Ga. 289. See Wms. Ex'rs (6th Am. ed.) 123; 1 Redf. on Wills 245.

(*g*) 3 Salk. 395.

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. (*g*)

Testator and witnesses need not be in same house.

It is not even necessary that the testator should be in the same house with the witnesses; for, in Casson *v.* Dade, (*h*) 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.

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

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, (*i*) 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.

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 Doe d. Wright *v.* Manifold, (*k*) 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

[(*g*) Newton *v.* Clarke, 2 Curt. 320.]

(*h*) 1 B. C. C. 99, Dick. 586.

(*i*) Carth. 79, Comb. 156, 1 Show. 89, Cas. temp. Holt, 222; [and see In re Colman, 3 Curt. 118; In re Ellis, 2 Curt. 395; In re Newman, 1 Curt. 914.]

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

which he was, the attestation was decided not to be good.[20] Lord Ellenborough said:—"In favor 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; (*l*) and where the testator is blind, it has been decided that the position of the witnesses must be such,

20. The general rule is, that attestation in the same room with the testator, is *prima facie* good, but attestation in a different room is *prima facie* bad. Yet this presumption must always yield to *positive* proof, and the attestation being out of the room, if proved that the testator could have seen, it will be good; but attestation within the room proved to have been beyond the scope of the testator's vision, will be bad. Neil *v.* Neil, 1 Leigh 6; Ambre *v.* Weishaar, 74 Ill. 109; Howard's Will, 5 Mon. 199. In Lamh *v.* Girtman, 33 Ga. 289, the testator being very feeble, sent for J. S. to write his will, and for S. S. and Z. B. to witness it. The will was written according to the testator's instructions, and signed by him, whereupon he withdrew to his bedroom, to lie down on the bed. The will was then attested, but none of the witnesses saw the testator at the time, nor could any of them tell what position he occupied while the will was being attested. If the testator had been upon the bed, in the usual position, he could not have seen the attestation, but had he lain with his head to the foot of the bed, he could have seen the attestation, as he also might have done from several other positions in his bed-room. The court was requested to charge that if the testator "might have seen" the attestation, it is sufficient; that "it is not necessary that he should actually have seen the attestation." The court refused to give this charge, but said: "If the attestation be in the same room this is the law; otherwise it is not." It was held that the court erred in not charging as requested, there being evidence to authorize the request. Russel *v.* Falls, 3 Harr. & McHen. 457; Orndorff *v.* Hummer, 12 B. Mon. 619; Brooks *v.* Duffell, 23 Ga. 441; Reed *v.* Roberts, 26 Ga. 294; Jones *v.* Tuck, 3 Jones L. 202; Watson *v.* Pipes, 32 Miss. 451; Moore *v.* Moore, 8 Grátt. 307; Nock *v.* Nock, 10 Gratt. 106; Graham *v.* Graham, 10 Ired. L. 219; Sprague *v.* Luther, 8 R. I. 252; Robinson *v.* King, 6 Ga. 539. As to what may be a constructive signing in the presence of the testator, see Sturdivant *v.* Birchett, 10 Gratt. 67. In Russell *v.* Falls, 3 Harr. & McHen. 457, 472, it was said: "The statute makes the subscribing in the presence or view essential. I am not bound to assign a reason why it ought to be so. It is a positive regulation, and cannot be dispensed with any more than signing by the testator, or that the will must be written. The testator must be in such a position that he *may* see. But if change of position is necessary to see it is void."

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

that the testator, if he had had his eyesight, might have been able to see them sign.] (*m*)[21]

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. (*n*)

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. (*o*)[22]

Credibility of witnesses.

The statute of Car. II., 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.[23] The disqualifi-

(*m*) In re Piercy, 1 Rob. 278, 4 No. Cas. 250.]

21. Ray *v.* Hill, 3 Strobh. 297; Reynolds *v.* Reynolds, 1 Speers 253; Wampler *v.* Wampler, 9 Md. 540; Weir *v.* Fitzgerald, 2 Bradf. 42, 68; Lewis *v.* Lewis, 6 Serg. & R. 489. In Reynolds *v.* Reynolds, 1 Speers 253, 256, it was said by Richardson, J.: "I would not say that it is absolutely impossible (although so considered by great writers) that even a blind and deaf and dumb man can make a will. But whenever such a case occurs, the three requisites of all wills must appear; that the testator signed the will, or expressly directed it to be signed for him; that three witnesses attested it in writing; and that the testator had been sensible that they signed their names in his presence." If the testator be blind, it is not essential to a due attestation of his will, that it should be read over to him in the presence of the witnesses. Weir *v.* Fitzgerald, 2 Bradf. 42; Harrison *v.* Rowan, 3 Wash. C. C. 580; Wampler *v.* Wampler, 9 Md. 540; Martin *v.* Mitchell, 28 Ga. 382; Clifton *v.* Murray, 7 Ga. 564. See also Davis *v.* Rogers, 1 Houst. 44; Guthrie *v.* Price, 23 Ark. 396.

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

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

22. Edelen *v.* Hardey, 7 Harr. & J. 61; Reynolds *v.* Reynolds, 1 Speers 253.

23. By "credible witness," is meant *competent* witness, and he must be competent at the time of the attestation. Hawes *v.* Humphrey, 9 Pick. 350; Amory *v.* Fellowes, 5 Mass. 219; Workman *v.* Dominick, 3 Strobh. 589; Patten *v.* Tallman, 27 Me. 17; Haven *v.* Hilliard, 23 Pick. 10; Rucker *v.* Lambdin, 12 Sm. & M. 230; Hall *v.* Hall, 18 Ga. 40; Morton *v.* Ingram, 11 Ired. 368; Taylor *v.* Taylor, 1 Rich. 531; Higgins *v.* Carlton, 28 Md. 115; Nixon *v.* Armstrong, 38 Tex. 296. And it is sufficient if the witness was competent at the time of the *factum* of the will, although he may have become incompetent afterwards. Amory *v.* Fellowes, *ubi supra;* Sears *v.* Dillingham, 12 Mass. 358; Higgins *v.* Carlton, *ubi supra.* In that case, the will may be proved by the other witness or witnesses. Sears *v.* Dillingham, *ubi supra;* Deakins *v.* Hollis, 7 Gill & J. 311. But an interested witness is not competent to prove that he was not interested when the facts which he is to prove occurred. This must be made to appear by other testimony. Gill's Will, 2 Dana 447.

cation arising from interest has been noticed in a former chapter. (*p*) With respect to crime, it will be sufficient to refer the reader to the

And if a witness be incompetent, because entitled to a beneficial interest, he may become competent by assignment of the interest to which he would otherwise be entitled. Deakins *v.* Hollis, 7 Gill & J. 311; Kerns *v.* Soxman, 16 Serg. & R. 315; Cook *v.* Grant, Id. 198; Search's Appeal, 13 Penna. St. 108. But see Hans *v.* Palmer, 21 Penna. St. 296, where it is held that he cannot by assignment, but that he may by a release. Also by release, in Maryland. Shaffer *v.* Corbett, 3 Harr. & McH. 513; Weems *v.* Weems, 19 Md. 334. And in Texas. Nixon *v.* Armstrong, 38 Tex. 296. But it is otherwise in North Carolina. Allison *v.* Allison, 4 Hawks 141. But the devise of a power to sell land, to an executor, or a devise of the land to him in trust to sell, does not give him such an interest in the land as to disqualify him from being an attesting witness to the will. Tucker *v.* Tucker, 5 Ired. L. 161. And in Alabama, if a legatee be a witness to the will, he is made competent to prove the will, by statute, but his legacy is thereby forfeited. Perkins *v.* Windham, 4 Ala. 634. But an executor is an incompetent witness, nor can he become a competent witness by renunciation of his executorship. Gilbert *v.* Gilbert, 22 Ala. 529. So, too, in Delaware. Davis *v.* Rogers, 1 Houst. 44. But the wife of an executor is not, on that account, an incompetent witness to a will. Hawley *v.* Brown, 1 Root 494. But if the executor have no interest, he may be a witness; so, also, a mere trustee may be. Comstock *v.* Hadlyme, 8 Conn. 254, 262; Den *v.* Allen, 1 Penn. 35; Dorsey *v.* Warfield, 7 Md. 65; Malloy *v.* McNair, 4 Jones L. 297; Peralta *v.* Castro, 6 Cal. 354; Snyder *v.* Bull, 17 Penna. St. 54. And if an executor die before trial, he will be held to be a competent witness, and his handwriting may be proved. Harleston *v.* Corbett, 12 Rich. 604. But the giving of a lease of personal property belonging to the estate, by the executor, to one who is a subscribing witness to the will, does not give him such an interest as to make him incompetent as a witness. Seguine *v.* Seguine, 2 Barb. 385. And if a party who is not an attesting witness was named as executor, but renounced his executorship, he will thereby become a competent witness to prove the will. Filson *v.* Filson, 3 Strobh. 288. But in New Hampshire it is held that the appointment of a person to be executor of a will does not give him such an interest as to render either him or his wife incompetent as a witness. Stewart *v.* Harriman, 56 N. H. 25. And in Pennsylvania, it is said that an executor, being plaintiff in a feigned issue to determine the validity of a will, is not a competent witness, because he is liable for costs. Vansant *v.* Boileau, 1 Binn. 444. But under the act of 1869 an executor, being also a devisee, is a competent witness. Bowen *v.* Goranflo, 73 Penna. St. 357; Frew *v.* Clarke, 80 Penna. St. 170. But for the rule in North Carolina, see Sawyer *v.* Dozier, 5 Ired. L. 97. But in Maine it is held that where the validity of the will is contested, a person named therein as executor may be a witness. Millay *v.* Wiley, 46 Me. 230; Jones *v.* Larrabee, 47 Me. 474. And in many cases it has been held that an executor as such is not an incompetent witness to the will. Wyman *v.* Symmes, 10 Allen 153; Murphy *v.* Murphy, 24 Mo. 526; Henderson *v.* Kenner, 1 Rich. 474; Overton *v.* Overton, 4 Dev. & Bat. 197; Noble *v.* Burnett, 10 Rich. 505; Richardson *v.* Richardson, 35 Vt. 238; Meyer *v.* Fogg, 7 Fla. 292; Rucker *v.* Lambdin, 12 Sm. &

(*p*) *Vide ante* p. *70.

numerous and valuable treatises on evidence, which are in the hands of the profession.

M. 230; Kelly *v.* Miller, 39 Miss. 17; Orndorff *v.* Hummer, 12 B. Mon. 619; Estep *v.* Morris, 38 Md. 417; McDaniel's Will, 2 J. J. Marsh. 331. Nor does the fact that he is entitled to commissions for his services give him such an interest as to disqualify him. Meyer *v.* Fogg, *ubi supra;* McDonough *v.* Loughlin, 20 Barb. 238. In this case Strong, J., said: "The tendency of modern legislation is to relax the rules of exclusion, and I yield to the spirit of the age, where those rules were merely technical, or had no substantial foundation." But prior to the adoption of the Revised Code (1856) in North Carolina, an executor could not be a witness in favor of the will, even by renouncing and releasing his interest. Gunter *v.* Gunter, 3 Jones L. 441. And this restriction extended to the wife of such executor. Huie *v.* McConnell, 2 Jones L. 455. But if the executor renounce his executorship, the wife is competent. Daniel *v.* Proctor, 1 Dev. L. 428. But if an executor receive, under the will, other and greater interest than commissions, this will disqualify him as a witness in Kentucky. Orndorff *v.* Hummer, 12 B. Mon. 619. Where the witnesses are all inhabitants of a town, and taxed there, and a legacy is given to that town by the will, it has been held that they are "credible witnesses within the meaning of the statute." Eustis *v.* Parker, 1 N. H. 273. So, too, in Connecticut. Cornwell *v.* Isham, 1 Day 35, 41, note (*j*). But see *contra*, Starr *v.* Starr, 2 Root 303. A witness competent at the time of the *factum* is not rendered incompetent because at the time of the proof of the will he is a judge of probate for that county. Patten *v.* Tallman, *ubi supra;* McLean *v.* Barnard, 1 Root 462; Starr *v.* Starr, 2 Root 332. A devisee is not a competent witness. Snelgrove *v.* Snelgrove, 4 Desaus. 274; Starr *v.* Starr, 2 Root 303. But where the witness is incompetent on account of being a devisee, a properly attested codicil will so far operate as a republication of the will, as to enable the devisee witness of the original will to take under it. Mooers *v.* White, 6 Johns. Ch. 360. And where the statute provides that a legacy given to a subscribing witness shall be void, the witness is competent. Rucker *v.* Lambdin, 12 Sm. & M. 230. But, in Massachusetts, a wife is not a competent witness to a will if her husband be a devisee under the will. Sullivan *v.* Sullivan, 106 Mass. 474. This appears a strange ruling when we read the provision of the Massachusetts statute, where it is said that "all beneficial devises, legacies and gifts made or given in any will to a subscribing witness thereto shall be wholly void unless there are three other competent witnesses to the devise." Gen. Stat. Mass., ch. 92, § 10. But, in Maine, the wife is a competent witness, and the devise is void. Winslow *v.* Kimball, 25 Me. 493. In this case, Whitman, C. J., says: "The unity of husband and wife in legal contemplation is such that if either be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void within the intent of the statute." It is so held in Jackson *v.* Woods, 1 Johns. Cas. 163; Jackson *v.* Durland, 2 Id. 314. In the case of a nuncupative will, in Maryland, where one of the witnesses was the wife of one of the legatees, that legatee released all his interest to certain relatives of the deceased, who refused to accept the release, it was held a good release, and that the wife became a competent witness. Brayfield *v.* Brayfield, 3 Harr. & J. 208. See 1 Redf. on Wills 253, *et seq.;* Wms. Ex'rs (6th Am. ed.) 92, 113, and notes.

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.][24] As where a person by his will devises all the

24. A map of lots, attached to the will, after the signature and attestation clause, may be incorporated into the will. Tonnele *v.* Hall, 4 Comst. 140. See also Johnson *v.* Clarkson, 3 Rich. Eq. 305; Thompson *v.* Quimby, 2 Bradf. 449; Pollock *v.* Glassell, 2 Gratt. 439; Chambers *v.* McDaniel, 6 Ired. L. 226; Jackson *v.* Babcock, 12 Johns. 389; Fesler *v.* Simpson, 58 Ind. 83; Loring *v.* Sumner, 23 Pick. 98; Wikoff's Appeal, 15 Penna. St. 281; Harvy *v.* Chouteau, 14 Mo. 587; Crosby *v.* Mason, 32 Conn. 482; 1 Redf. on Wills, 261, *et seq.;* Wms. Ex'rs (6th Am. ed.) 130, *et seq.* On this subject, Judge Redfield says: "This 'incorporation' of the paper referred to into the will, so makes it a part of the instrument, that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by force of the reference and the consequent incorporation." 1 Redf. on Wills 263, 264. In Thompson *v.* Quimby, 2 Bradf. 449, 458, it was remarked by Bradford, surrogate: "It appears that the schedule referred to in the will, was not attached to the instrument at the time of the execution, or subsequently. Something was said concerning it when the decedent was about signing the will, and the idea was advanced that it might be annexed afterwards; but the proceeding was not interrupted, and he called on the witnesses to attest, and declared the instrument to be his will, notwithstanding the schedule was not ready. I cannot perceive that it would have made any difference whether the schedule was attached to the will or not. In either case, unless executed and attested as a will, it could have no testamentary character. Reference may be made in a will to another document, for the purpose of description, but there can be no valid testamentary dispositions unless contained in the will; and the testator cannot in his will reserve the power of giving, or declare that he does give, by an instrument not formally executed according to the provisions of the statute. The schedule it was proposed to attach to the will, as well as the clause in the will referring to it, would consequently have been void, even had the schedule been annexed." However, this is not the view taken of this matter in the majority of the cases, and we understand it to have been overruled in the case of Tonnele *v.* Hall, *ubi supra*, by the Court of Appeals in New York; and that the prevalent doctrine both in England and America, at this time is, that an existing document, distinctly referred to in the will, may, by such reference, be incorporated into, and become a part of the will, although there be no act of execution or attestation, so far as such document referred to is concerned. But in Thayer *v.* Wellington, 9 Allen 283, the testator gave a sum of money to a person, in trust, to appropriate in such manner as the testator might, by any instrument in writing, direct and appoint; and an appointment was made on a separate paper, signed by the testator, but not attested according to the statute, declaring the appropriation and naming the beneficiary. It was held that this did not create a valid bequest in favor of such beneficiary. And to the same effect, see Wood *v.* Sawyer, Phill. (N. C.) L. 251. But it has been decided in Kentucky, that a codicil duly executed and attached,

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; (*q*) and it would, it is conceived, 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 Dillon *v.* Harris, (*r*) 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.

Incorporation of unattested document.

[Questions similar to that raised in the last case have since the act 1 Vict., c. 26, frequently come before the probate court. Three things are necessary: first, that the will should refer to some document as then in existence; (*s*) secondly, proof that the document propounded for probate was, in fact, written before the will was made; and, thirdly, proof of the identity of such document with that referred to in the will. As to the first point, a clause which "ratifies and confirms a deed, dated, &c., and made between, &c.," answers this requirement and incorporates the deed. (*t*) But there should be no ambiguity.

or referring to a paper which, before, was never duly signed, published, and attested as a will, will have the effect of giving operation to the whole as one will. Beall *v.* Cunningham, 3 B. Mon. 390.

(*q*) See Habergham *v.* Vincent, 2 Ves., Jr., 204; also, Molineux *v.* Molineux, Cro. Jac. 144.

(*r*) 4 Bligh (N. S.) 329.

[(*s*) Van Straubenzee *v.* Monck, 3 Sw. & Tr. 6, 32 L. J., Prob. 21; In re Sunderland, L. R., 1 P. & D. 198; In re Pascall, Id. 606.

(*t*) Sheldon *v.* Sheldon, 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877; Bizzey *v.* Flight, 3 Ch. D. 269. But see In re Hubbard,

A reference to a document as "made or to be made" gives strong ground for concluding that the document had not already been made. (*u*) So a reference to persons or things "hereinafter named," (*x*) or to "the annexed schedule," (*y*) is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the *witnesses, although it be proved that, in fact, such writings were in existence before the will was executed; much less if the evidence on this last point is hesitating. (*z*) But although the document was written after the execution of the will, it may be incorporated if the testator afterwards executes a codicil, for the codicil republishes the will, and makes the will speak from the date of the codicil. (*a*) The will must be so worded that, so speaking, it shall refer to the document as then existing. (*b*)

With regard to the evidence necessary to prove that the document propounded for probate was in existence at the date of the will, and that it is the same as that which is referred to therein; if the reference is distinct, *e. g.*, to date, heading, and other particulars, and if the document propounded agrees in these particulars with the description contained in the will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed. (c) Where the reference is less distinct, yet if it be in terms sufficiently definite to render it capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.

Thus, in Allen *v.* Maddock, (*d*) an unexecuted will was held to have

L. R., 1 P. & D. 53, and *qu.*; but, as the deed referred to was valid *per se*, its rejection from the probate seems to have been immaterial.

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

(*x*) In re Watkins, L. R., 1 P. & D. 19; In re Brewis, 33 L, J., Prob. 124; In re Dallow, L. R., 1 P. & D. 189.

(*y*) Singleton *v.* Tomlinson, 3 App. Cas. 413, 414, per Lord Cairns. Moreover, the schedule was not annexed but endorsed (being on the fourth side of a sheet of paper on which the will was written), a discrepancy pointed out by Lord Blackburn, Id. 425. But as to this see In re Ash, 1 Deane 14, 2 Jur. (N. S.) 526.

[(*z*) *Ante* note (*y*).

(*a*) In re Hunt, 2 Rob. 622; In re Truro, L. R., 1 P. & D. 201.

(*b*) L. R., 1 P. & D. 204.

(*c*) Swete *v.* Pidsley, 6 No. Cas. 190.

(*d*) 11 Moore, P. C. C. 427. See also In re Countess of Durham, 3 Curt. 57, 1 No. Cas. 365, 6 Jur. 176; In re Pewtner, 4 No. Cas. 479; In re Darby, Id. 427, 10 Jur. 164; Jorden *v.* Jorden, 2 No. Cas.

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 I shall direct by my will to be indorsed hereon," and the testator afterwards made a will, which, though not indorsed on 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. (*e*) The evidence in the latter case was certainly slight. *It is a circumstance frequently relied on that the document proposed for probate was shown to some person before execution of the will, as the paper therein referred to. (*e*)

Probate of incorporated documents.

Although an incorporated document is entitled to probate—*i. e.*, to be set out at length therein—there is no necessity for so proving it in order to bring it within the cognizance of the court of construction; for if it is not proved, the court will look at the original document. Thus, in Bizzey *v.* Flight, (*f*) where A made a voluntary settlement which, as to certain bank shares and mortgages, was incomplete, so that the shares still belonged to A at her death, and she by will "confirmed the settlement, dated," &c.: the settlement was not proved. Sir C. Hall, V. C., said: "If a will confirms an instrument which is sufficiently identified, and probate passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate." He held that the effect was as if the testatrix had declared "that the shares specified in the settlement should be held on the following trusts," and had then set out the trusts. So in Quihampton *v.* Going, (*g*) where a testator referred to

—not necessary to give jurisdiction to the court of construction.

388; In re Dickens, 3 Curt. 60, 1 No. Cas. 398; In re Almosnino, 1 Sw. & Tr. 508, 29 L. J., Prob. 46; In re Willesford, 3 Curt. 77, 1 No. Cas. 404; In re Bacon, 3 No. Cas. 644; In re Mercer, L. R., 2 P. & D. 91; In re Greves, 1 Sw. & Tr. 250, 28 L. J., Prob. 18 (where the evidence of identity failed); but see In re Edwards, 6 No. Cas. 369; Collier *v.* Langebear, 1 No. Cas. 306; In re Sotheron, 2 Curt. 831, 1 No. Cas. 73, would not now be followed.

(*e*) Wood *v.* Goodlake, 4 Monthly Law Mag. 155, 1 No. Cas. 144. Compare In re Pascall, L. R., 1 P. & D. 606; In re Gill, L. R., 2 P. & D. 6.

(*e*) In re Smartt, 4 No. Cas. 38; In re Bacon, 3 No. Cas. 644.

(*f*) 3 Ch. D. 269. The trusts that were invalid under the settlement being incorporated in and made part of the will, assumed the testamentary character in all respects, and became subject to ademption, &c.

(*g*) W. N. 1876, p. 209. See also Singleton *v.* Tomlinson, 3 App. Cas. 404, where probate had been *refused:* but this was not relied on.

certain entries he had made in his ledger, as explaining his will, Sir G. Jessel, M. R., held that the ledger was incorporated with the will, and, though not admitted to probate, could be looked at by a court of construction, and that the entries therein were for the purposes of distribution of the estate conclusive—*i. e.*, the M. R. treated them as part of the will, and not merely as evidence. These cases remove the doubt regarding the competence of the court of construction expressed by Dr. Lushington in Sheldon *v.* Sheldon.] (*h*)

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 on the series of limitations commenced

(*h*) 1 Rob. 81, 3 No. Cas. 254, 8 Jur. 877. But as the regular practice of the court of probate is to require every paper entitled to probate to be proved, and the original (In re Pewtner, 4 No. Cas. 479), or if it cannot be procured, an authenticated copy (In re Dickens, 3 Curt. 60, 1 No. Cas. 398; In re Howden, 43 L. J., Prob. 26), to be deposited, it is inexpedient to declare trusts of personalty by reference to another instrument. And although where the paper is in the hands of strangers who refuse even to produce it (In re Battersbee, 2 Rob. 439; In re Sibthorp, L. R., 1 P. D. 106,) the rule is wholly dispensed with; and where the paper is of excessive length probate has been granted omitting the whole (In re Marquis of Lansdowne, 3 Sw. & Tr. 194, 32 L. J., Prob. 124; In re Dundas, 32 L. J., Prob. 165), or the immaterial parts (In re Countess of Limerick, 2 Rob. 313), showing that the question is one of convenience; yet it appears by the foregoing cases that special application is generally necessary to procure a relaxation of the rule. [The question of including documents in the probate often arises where a testator has made distinct wills, one of property here, another of property abroad. Generally the former only need be proved here (In re Astor, 1 P. D. 150.) But if one confirms the other so as to incorporate it, both will be included. In re Harris, L. R., 2 P. & D. 83; In re Howden, 43 L. J., Prob. 26.]

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. (*i*)

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. (*k*)

[In Stubbs *v.* Sargon (*l*) it was contended, that on the same principle a devise of realty to "the persons who shall be in co-partnership with me at the time of my decease, or to whom *I shall have disposed of my business," was void, as leaving it for the testator by some further act, not authorized by the statute of frauds, to select the devisee. But Lord Langdale, and on appeal Lord Cottenham, held the devise good. Lord Cottenham said that Habergham *v.* Vincent (*m*) was different, because there was in that case no disposition of the property, but only a power for the testator himself to dispose of it by instrument not attested according to the statute of frauds; but that here the disposition was complete. That the devisee, indeed, was to be ascertained by a description contained in the will, but that such was the case with many unquestionable devises where the devisees were to be ascertained by future natural events—*e. g.*, devises to a second or third son, or by the act of a third person—*e. g.*, where a father having two sons devises to such one of them as should not become entitled to an estate from a third person. In the latter case, the act of the third person determined who should take the father's estate. But the act was *not testamentary;* if it was,

Stubbs *v.* Sargon. Devisee to be ascertained by future event or act.

(*i*) Habergham *v.* Vincent, 2 Ves., Jr., 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 DeG. & S. 546; Johnson *v.* Ball, 5 DeG. & 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.]

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

[(*l*) 2 Keen 255, 3 My. & C. 507.

(*m*) 2 Ves., Jr., 204.]

one man would be making another man's will. And if not testamentary when done by a third person, it could not be so when done by the testator himself; otherwise a testator could not devise to such person as, at his death, should be his wife or servant. And Lord Langdale said, if the description was such as to distinguish the devisee from every other person, it was sufficient without entering into the question whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property.

The act must not be testamentary.

The question is, therefore, is the supplementary act testamentary? If it is, the devise is void; if it is not, then, although it is the sole act of the testator, the devise is good.]

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. (*n*)

*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 oneration, 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.

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

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. (*o*) 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 Swift *v.* Nash, (*p*) 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. (*q*)

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

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

"Hereinafter:" how construed.

*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, (*r*) 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

Whether the doctrine applies where real estate is primarily charged.

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

(*p*) 2 Kee. 20.

(*q*) 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; Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Att.-Gen., 3 Giff. 308.]

[(*r*) See, however, per Lord Cairns, L. R., 3 Ch. 587.]

owes at his decease, whether the personalty be exempted therefrom, or not.[25] 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. (*s*)

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, (*t*) 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

25. A will must be executed in the manner prescribed by statute for the devise of real estate, in order to charge lands of the deceased with the legacies bequeathed in the will. Ex parte Winslow, 14 Mass. 422. In order to make legacies a charge on lands devised, the intention of the testator, that they should be so charged, must clearly appear, either by explicit direction or by necessary implication. Brandt's Appeal, 8 Watts 198; Buchanan's Appeal, 72 Penna. St. 448; Massaker *v.* Massaker, 2 Beas. 264; White *v.* Olden, 3 Gr. Ch. (N. J.) 343; Leigh *v.* Savidge, 1 McCart. 124; Perry *v.* Hale, 44 N. H. 363; Gerkin's Estate, 1 Tuck. 49. See also Taylor *v.* Dodd, 58 N. Y. 335; Markillie *v.* Ragland, 77 Ill. 98; Gilder *v.* Gilder, 1 Del. Ch. 331. If a testator devise "all the rest and residue" of his estate, both real and personal, "not herein before disposed of," after the payment of debts, this will charge the legacies, previously given by the will, upon the real estate, the personal property being insufficient. Rafferty *v.* Clark, 1 Bradf. 473; Nichols *v.* Postlethwaite, 2 Dall. 131; McCredy's Appeal, 47 Penna. St. 442; Tucker *v.* Hassenclever, 3 Yeates 294; Dey *v.* Dey, 4 C. E. Gr. (N. J.) 137; Corwine *v.* Corwine, 9 C. E. Gr. (N. J.) 579. And if a testator blend his real and personal estate into one fund, the legacies will become a charge upon the real estate upon a deficiency of the personal estate. Gallagher's Appeal, 48 Penna. St. 121; Brisben's Appeal, 70 Id. 405; Okeson's Appeal, 59 Id. 99; Becker *v.* Kehr, 49 Id. 223. But see Paxson *v.* Potts, 2 Gr. Ch. (N. J.) 313; Lassiter *v.* Wood, 63 N. C. 360; Perkins *v.* Caldwell, 79 N. C. 441. But a specific legacy of a particular fund is not charged upon the realty by such blending. Mellon's Appeal, 46 Penna. St. 165. Nor will the legacies be charged upon lands specifically devised, where there are specific and residuary devises. Leigh *v.* Savidge, 1 McCart. 124. A provision that the daughters of the testator have a home upon, and a reasonable support from, lands devised to the sons, will constitute a charge upon such lands. Donnelly *v.* Edelen, 40 Md. 117. If a legacy be charged upon real estate, the land will be subject to the charge, not only in the hands of the devisee, but of his assigns. Perry *v.* Hale, 44 N. H. 363; Leavitt *v.* Wooster, 14 N. H. 550.

(*s*) Coxe *v.* Bassett, 3 Ves. 155.

(*t*) Brudenell *v.* Boughton, 2 Atk. 268; Att.-Gen. *v.* Ward, 3 Ves. 327.

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. (*u*) 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. (*x*) It seems difficult to say that the annuities were not payable in the first instance out of the personal estate; (*y*) and in this point of view, the case stands alone. (*z*)

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. (*a*) And it would be immaterial in such a case, that the will contained an express clause of revocation of all former wills. (*b*)

[Where a portion of a mixed fund, consisting of personal estate and of the proceeds of realty directed to be sold, was given by attested will, and the gift was revoked by an unattested

Nor a mixed fund.

(*u*) Beckett *v.* Harden, 4 M. & Sel. 1. [See also Locke *v.* James, 11 M. & W. 901, where a testator devised land charged with £600 a year, "which he gave to" A, and gave the residue of his estate, after paying annuities, &c., to B; he then erased the "6" and interlined "3," and by ill-attested codicil recognized the alteration. A distrained, and was held entitled to recover the full sum. In form, perhaps, this was rather an attempt to free the land than a partial revocation of the annuity; but Parke, B,. said that whether the amount had been reduced or not *in equity*, it made no difference *at law*.

(*x*) Mortimer *v.* West, 2 Sim. 274.

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

(*z*) See Sheddon *v.* Goodrich, 8 Ves. 500. See also per Lord Cairns in Kermode *v.* Macdonald, L. R., 3 Ch. 584 (where by attested codicil personalty only was expressed to be withdrawn); and Coverdale *v.* Lewis, 30 Beav. 409, where the land was held auxiliary only.

(*a*) Buckeridge *v.* Ingram, 2 Ves., Jr., 652.

(*b*) Sheddon *v.* Goodrich, 8 Ves. 499.

codicil, it was held that the legatee was entitled to such proportion of the legacy as the realty bore to the personalty.] (*c*)

SECTION II.

As to Personal Estate and Copyholds.

Nuncupative wills were not forbidden by the statute of frauds, but were placed under such restrictions, as practically abolished them; it being provided (§ 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 nuncu*pative 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 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 movables, wages, and personal estate, as before the act. Such wills have been subjected to peculiar regulations, by various statutes. (*d*) [26]

Stat. 29 Car. II., c. 3, § 19, concerning nuncupative wills.

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

(*d*) 26 Geo. III., c. 63; 32 Geo. III., c. 34, § 1; 11 Geo. IV., c. 20, §§ 48, 49, 50, and 2 and 3 Will. IV., c. 40, §§ 14, 15 [which are not affected by 1 Vict., c. 26; see §§ 11, 12.]

26. Nuncupative wills are not favorites of the law. It is desirable, therefore, that the *factum* of such a will should be strictly proved, and proved to conform to the legal requirements for such a will. Testamentary capacity, and the *animus testandi*, at the time of the alleged nuncupation, must be shown by the clear-

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, there-

What a good execution of a will of personalty.

est and most indisputable testimony. Dorsey *v.* Sheppard, 12 Gill & J. 192; Morgan *v.* Stevens, 78 Ill. 287; Yarnall's Will, 4 Rawle 46; Gibson *v.* Gibson, 1 Miss. 364; Reese *v.* Hawthorn, 10 Gratt. 548; Boyer *v.* Frick, 4 Watts & Serg. 357; Gould *v.* Safford, 39 Vt. 498; Mulligan *v.* Leonard, 46 Iowa 692; Biddle *v.* Biddle, 36 Md. 630; Mitchell *v.* Vickers, 20 Tex. 377; Parkison *v.* Parkison, 12 Sm. & M. 672. But, as in other wills, a substantial compliance with the requirements of the statute will be sufficient. Weir *v.* Chidester, 63 Ill. 453; Ridley *v.* Coleman, 1 Sneed (Tenn.) 616; Parkison *v.* Parkison, 12 Sm. & M. 672. It is not essential that the testator should not have time to reduce his will to writing, nor that he should have no hope of recovery. Harrington *v.* Stees, 82 Ill. 50. It is indispensable to the validity of a nuncupative will that the testator should request those present to bear witness to his dispositions, that they are his last will, but this request need not be made in any particular form, nor is it absolutely necessary that it be in words. Any act equivalent to such an expression will satisfy the statute. Arnett *v.* Arnett, 27 Ill. 247; Winn *v.* Bob, 3 Leigh 140; Dockum *v.* Robinson, 26 N. H. 372; Gwin *v.* Wright, 8 Humph. (Tenn.) 639; Garner *v.* Lansford, 12 Sm. & M. 558; Parkison *v.* Parkison, Id. 672; Babineau *v.* LeBlanc, 14 La. Ann. 739; Brown *v.* Brown, 2 Murph. 350; Sampson *v.* Browning, 22 Ga. 293. But see Mulligan *v.* Leonard, 46 Iowa 692. The word "habitation," as used in the Virginia statute, is held to signify dwelling-house. Nowlin *v.* Scott, 10 Gratt. 64. A nuncupative will, to be valid, should be made when the testator is *in extremis*, or overtaken by sudden and violent sickness, and has not time to make a writen will. Prince *v.* Hazleton, 20 Johns. 502. Yarnall's Will, 4 Rawle 46; Sykes *v.* Sykes, 2 Stew. (Ala.) 364; Jones *v.* Norton, 10 Tex. 120. What the words "last sickness" mean when used in connection with the making of a nuncupative will. Ib. See also Marks *v.* Bryant, 4 Hen. & Munf. 91; Werkheiser *v.* Werkheiser, 6 Watts & S. 184. But it is essential that a nuncupative will be merely *a verbal declaration* of the testator's disposition of his property; therefore a will in writing drawn by an attorney in accordance with instructions given by the testator, and in his last sickness, but not executed, although declared by the testator to be his last will, cannot be admitted to probate as a nuncupative will. In re Hebden's Will, 5 C. E. Gr. (N. J.) 473. Nor even if signed by the testator. Reese *v.* Hawthorn, 10 Gratt. 548; Stamper *v.* Hooks, 22 Ga. 603. See, too, Hunt *v.* White, 24 Tex. 643. A declaration made on his death-bed, by a husband to his wife, that if she pays off the mortgage on the farm and supports the family, the land would be hers, cannot be supported as a nuncupative will, even after full performance by her. Campbell *v.* Campbell, 21 Mich. 438. It has been determined that the true construction of the second section of the act of 1810, ch. 34, in Maryland, requires that the testamentary words, or the substance thereof, should be reduced to writing within six days after they are uttered, and that they should be, within that time, shown to and approved by *each* of the attesting witnesses. Welling *v.* Owings, 9 Gill 467. But a nuncupative will which contains no bequests, but merely appoints an executor, is not subject to the operation of the statute of frauds, nor to the Maryland act of 1810, ch. 34. Dorsey *v.* Sheppard, 12 Gill & J.

fore, was sufficient for the disposition of personal estate, though it had not been signed, and was never actually seen by the testator. (*e*) 27 In

192. And it seems that in committing the words to writing, if an independent and distinct part be omitted, this will not vitiate a nuncupative will, but the residue will stand as the will. Marks *v.* Bryant, 4 Hen. & Munf. 91. If a nuncupative will disposes of a greater amount of property than is permitted by statute, it will not be void on that account, but may be enforced to the statutory limit. Mulligan *v.* Leonard, 46 Iowa 692. The right of a mariner at sea and a soldier in actual service to make such wills is not an unqualified right; as they are only to be made *ex necessitate*, they will be tolerated only when made *in extremis*. Hubbard *v.* Hubbard, 12 Barb. 148. A will made by a seaman at sea, being sick, and one hour before his death, is made *in extremis*. Hubbard *v.* Hubbard, *ubi supra*. But a seaman who is a passenger on another vessel than his own, though *en route* to his own ship, is not "a seaman at sea" within meaning of the statute, and therefore cannot make a valid nuncupative will. Warren *v.* Harding, 2 R. I. 133. Nor is a mariner while on the Mississippi river. Gwin's Will, 1 Tuck. 44. But if he be upon his own vessel, on a voyage, though at the time of the nuncupation, the vessel is at anchor in a bay where the tide ebbs and flows, this is sufficient. Hubbard *v.* Hubbard, 8 N. Y. 196. In a well-considered case in New York, Bradford, surrogate, said: "So, also, the nuncupation of a mariner to be valid must be made at sea. It is sometimes difficult to determine when the mariner is to be considered at sea. For example —Lord Hugh Seymour, the admiral of the station at Jamaica, made a codicil, by nuncupation, while staying at the house on shore appropriated to the admiral of the station. The codicil was rejected on the ground that he only visited his ship occasionally, while his family establishment and place of abode were on land, at his official residence. But where a mariner belonging to a vessel lying in the harbor of Buenos Ayres, met with an accident when on shore by leave, made a nuncupative will, and died there, probate was granted, for the reason that he was only casually absent from his ship. The

(*e*) See Allen *v.* Manning, 2 Add. 490; In re Taylor, 1 Hagg. 641.

27. A memorandum intended as instructions for a scrivener and not signed by the testator may be admitted to probate as a will, if the formal execution of the will is prevented by the act of God. Boofter *v.* Rogers, 9 Gill 44; Mason *v.* Dunman, 1 Munf. 456; Phœbe *v.* Boggess, 1 Gratt. 129. And it is not essential that death be immediate or sudden. Boofter *v.* Rogers, *ubi supra*. But long-continued infirmity will not suffice. Stricker *v.* Groves, 5 Whart. 386. If the execution is prevented by the delirium of the testator, this is sufficient. Mason *v.* Dunman, *ubi supra*. Since January 1st, 1830, in New York, a will of personal, as well as of real, estate must be signed at the end thereof, in the presence of at least two witnesses. Watts *v.* Pub. Adm'r, 4 Wend. 168. Before the statute making the execution of wills of personal and real estate similar, it was held that where a will devised the "remainder of my property of whatsoever name or nature," and then was attached a schedule of such property, all of which was personal, it was sufficient to pass the property, although the expression in the devise suggested the question whether the will did not purport to dispose of both real and personal property, and the will was not so executed as to pass real estate. Very *v.* Very, 3 Pick. 374.

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

will of a ship-master, made off Otaheite, has also been allowed. In the present instance the decedent made a nuncupation, when the vessel to which he was attached was lying at the wharf in Bremen. He was at the time in actual service, on shipboard, and the nature of the service was continuous—not being limited to the particular voyage. I think therefore he was entitled to the privilege. A question arises, however, as to the character of his calling. He was cook on board the steam-ship, and not what is ordinarily understood as a mariner. The principle upon which the privilege of nuncupation is conceded, applies to all persons engaged in the marine service, whatever may be their special duty or occupation on the vessel. As, in the army, the term 'soldier' embraces every grade, from the private to the highest officer, and includes the gunner, surgeon, or the general:—so in the marine, the term 'mariner' applies to every person in the naval or mercantile service, from the common seaman to the captain or admiral. It is not limited or restricted to any special occupation on ship-board—but a purser, or any other person whose particular vocation does not relate to the sailing of the vessel, possesses the same right as the sailor. A cook is certainly as much a necessary part of the effective service of a vessel as the purser or the sailor, and there would seem to be no reason why he should be excluded from the advantage of a rule, designed for the benefit of men engaged in the marine, without reference to the particular branch of duty performed in the vessel." Ex parte Thompson, 4 Bradf. 154, 158. And it was said by Burrows, J.: "While the policy of the law is well settled to regard wills inoperative unless executed with the formalities which the law requires as safeguards against imposition, it is also true that the exemption of sailors at sea, and soldiers in actual service from the observance of these formalities has always been liberally considered, and so it is, as Merlin states it, that 'their form was properly to have no form.'" Leathers *v.* Greenacre, 53 Me. 561, 574. But a soldier at home on a furlough cannot make such a will. Will of Smith, 6 Phil. (Penna.) 104. But if, on account of sickness, he falls out of the march, and is sent to hospital and dies there, he will be considered to be in actual service. Gould *v.* Safford, 39 Vt. 498. Nor can one who, having enlisted in a regiment, is still in camp in the state where the regiment was raised. Van Deuzer *v.* Gordon, 39 Vt. 111. But if, afterwards, being in the enemy's country, and actually exposed to the perils of warfare, he adopt such will as his last testamentary act, it must be admitted to probate. Ib. And a letter written from the army, in the field, directing a final disposition of the writer's property, has been held to be a good nuncupative will. Botsford *v.* Krake, 1 Abb. Pr. (N. S.) 112. See also Leathers *v.* Greenacre, 53 Me. 561. Under the Ohio statute of 1824, a nuncupative will was valid to pass real estate, But, by subsequent statutory provision, the operation of such a will has been limited to personalty. Gillis *v.* Weller, 10 Ohio 462; Ashworth *v.* Carleton, 12 Ohio St. 381. When, in response

measure, rendered nugatory, by the doctrine established by Ripley *v.* Waterworth, (*f*) 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. II., 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 *specifi*cally* 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 statute 1 Vict. has abolished all distinctions in regard to the mode of execution between the various species of property. [28]

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

Although the law, until altered by that statute, 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 (*g*) brings it within that law, the probate courts do

to an inquiry as to what disposition a dying person wished made of his property, he said it was to go to his wife, and he then looked appealingly to the heir-at-law, who said, "Yes, yes;" and then the husband said to his wife, "You see my father acknowledges it," there being one other witness present, this was held to be a substantial compliance with the statutory requirement that he bid the persons present, or some of them, bear witness that such was his will, *or to that effect*. Parsons *v.* Parsons, 2 Greenl. 298; Baker *v.* Dodson, 4 Humph. (Tenn.) 342. But the words must be spoken when all the witnesses are present; the declaration to one witness on one day, and to another on the next day, is not sufficient to constitute a nuncupative will. Weeden *v.* Bartlett, 6 Munf. 123; Wester *v.* Wester, 5 Jones L. 95. A nuncupative will cannot be proved by one who, when called as a witness, is interested in its being established, though he did not acquire his interest until after the will was published. Gill's Will, 2 Dana 447. See Flood on Wills 43, 271, *et seq.*; Walkem on Wills 218, *et seq.*; 1 Redf. on Wills 184, *et seq.*; Wms. Ex'rs (6th Am. ed.) 152, *et seq.*

(*f*) 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.]

28. By the more recent statutes in the various American states all distinction between the formalities requisite for the execution and attestation of wills of real estate and wills of personal estate has been abolished.

[(*g*) 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 there-

not confine themselves to the mere proof of the handwriting of the testator: (*h*) 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 favor; 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 courts have invariably rejected the alleged testamentary paper. (*i*) Nothing, it is obvious, could be more dangerous than to assume and recognize 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. (*k*) Where, however, the evidence of handwriting is in favor of the genuineness of the signature, and there is corroborative evidence, derived from circumstances, showing the probability of such a document having been executed, it validity will be recognized. (*l*)

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

fore valid. In re Streaker, 4 Sw. & Tr. 192, 28 L. J., Prob. 50, the like presumption was made regarding unattested alterations. But cf. Benson *v.* Benson, L. R., 2 P. & D. 172.]

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

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

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

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

application to copyholds. (*m*) 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. (*n*) 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. (*o*) [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.] (*p*)

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 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

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

(*n*) See 7 East 322.

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

(*p*) 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.]

"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; (*q*) though adequate as a will in writing to satisfy the requisitions of the old law. On this ground, too, the Prerogative Court 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 Beaty *v.* Beaty, (*r*) 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." [29] 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. (*s*) Slight as it was, however, it must be rebutted by *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.

Paper rejected on account of an uncompleted form of attestation.

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

(*r*) 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.]

29. Watts *v.* Public Adm'r, 4 Wend. 168; Waller *v.* Waller, 1 Gratt. 454; Rochelle *v.* Rochelle, 10 Leigh 125.

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

In common parlance, a man may well say, that he has made a will, when he has *written* a testamentary paper, though unfinished. (*t*)

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 where 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 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 favor of the testamentary paper. (*u*)[30]

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 impossibility of the testator's completing it before his dissolution;

(*t*) 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 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. Ex'rs, pt. 1, bk. 2, ch. II., § 2.]

(*u*) Huntington *v.* Huntington, 2 Phillim. 213; see also Carey *v.* Askew, 1 Cox 241.

30. Where a party has prepared his will with intention to execute it, but is prevented from a formal execution of it by a sudden visitation from God, the will may be established as a good will, at least of personalty, and that, too, though some short time elapse between the time when he might have executed it and the time of such visitation, the failure to execute having been from convenience only, and not from any hesitancy as to the dispositions to be made of the property. Gaskins *v.* Gaskins, 3 Ired. 158; Boofter *v.* Rogers, 9 Gill 44; Sarah Miles' Will, 4 Dana 1; Showers *v.* Showers, 27 Penna. St. 485; Lyles *v.* Lyles, 2 Nott & McC. 531; Ex parte Henry, 24 Ala. 638. But see Rochelle *v.* Rochelle, 10 Leigh 125.

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 favor of the written instructions taken down by the attorney, on the oral dictation of the deceased. (*x*)[31]

Contents of the paper must be complete.

But this doctrine in favor 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

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

31. Under the Pennsylvania statute of 1833, requiring the will to be signed by the testator at the end thereof, unless prevented from signing, or directing another person to sign, by the extremity of his last sickness, a long-standing infirmity, as a chronic disease, would not constitute such extremity. Stricker *v.* Groves, 5 Whart. 386. But, where B. dictated his will, and attempted to sign it, but was unable to see, and R. signed at B.'s request, but B. swooned before R. had made the signature, it was held that this was a sufficient preventing cause. Phœbe *v.* Boggess, 1 Gratt. 129. So, too, where the testator became delirious before he could sign. Mason *v.* Dunman, 1 Munf. 456.

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. (*y*)

*In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behooves 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. (*z*)[32] And probate will not be granted of such defective papers, without the consent or citation of the next of kin. (*a*)

Presumption against unfinished papers.

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

Informal paper intended as a present will.

(*y*) 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. [But loss of part of a will *once complete* does not necessarily exclude the remainder from probate. Sugden *v.* Lord St. Leonards, 1 P. D. 154.]

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

32. In Public Adm'r *v.* Watts, 1 Paige 347, the entire question of unfinished and informal testamentary papers was extensively considered by Walworth, C., who arrived at the conclusion that such papers could not be established unless the testator was arrested by death before he was able to complete his will in the manner intended. See also Murry *v.* Murry, 6 Watts 353; Osgood *v.* Breed, 12 Mass. 525, 534; Devecnon *v.* Devecnon, 43 Md. 335; Lungren *v.* Swartzwelder, 44 Md. 482. In Devecnon *v.* Devecnon, *ubi supra*, it was held that the presumption against such papers is a presumption of fact only, and may, accordingly, be overcome by extrinsic evidence, and that if such evidence show that the decedent was prevented from completing such paper by death or other adequate cause, and that it was not so left from any change of intention, the presumption against the paper will be repelled, and it will be entitled to probate. See also Ex parte Henry, 24 Ala. 638; McLean *v.* McLean, 6 Humph. 452.

(*a*) In re Adams, 3 Hagg. 258.

adopted as his final will a paper so originally designed as instructions for, or in contemplation of, a more formal testament. (*b*)[33]

In all such cases, however, the Ecclesiastical Court required 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. (*c*) 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.

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*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, § 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 (*d*) and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Provision requiring the signature to be at the foot or end;

[The provision in this enactment requiring the signature of the testator to be at the "foot or end" of the will (which was evidently intended only to do away with the rule before noticed, that the name of the testator written in the com-

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

33. Arndt *v.* Arndt, 1 Serg. & R. 263. In this case, it is held that a "memorandum of last will," which was shown to other persons, may be established as a will, even to revoke a prior formally executed will, if proved by the persons to whom it is shown, in accordance with the Pennsylvania statute.

(*c*) Dingle *v.* Dingle, 4 Hagg. 388; Coppin *v.* Dillon, Id. 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.

(*d*) The word "attest" is omitted from the corresponding act of the Indian Council. See 5 Moo. P. C. C. 137.

mencement, 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. (*e*) To obviate the inconveniences arising from these decisions, it was enacted by stat. 15 and 16 Vict., c. 24:—

"1. That where by an act of 1 Vict., c. 26, 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, if the signature shall be so placed at, (*f*) or after, or following, or under, or beside, or *opposite to (*g*) 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, (*h*) and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately (*i*) 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, (*k*) or of the clause of attestation, (*l*) either with or without a blank space intervening, or shall follow, or be

—repealed by 15 and 16 Vict., c. 24.

(*e*) See the decisions on this point collected and observed upon, Sugd. R. P. Statutes.

(*f*) In re Woodley, 33 L. J., Prob. 154.

[(*g*) In re Williams, L. R., 1 P. & D. 4, and cases there cited; In re Ainsworth, L. R., 2 P. & D. 151.

(*h*) In re Hammond, 3 Sw. & Tr. 90, 32 L. J., Prob. 200. In Trott *v.* Trott, 29 L. J., Prob. 156, 6 Jur. (N. S.) 760, the testator's name, occurring as the last words of a holograph will, was held a sufficient signature. In Sweetland *v.* Sweetland, 4 Sw. & Tr. 9, 34 L. J., Prob. 42, the first five sheets were signed and attested, but not the sixth and last, and the whole was rejected. Parol evidence is admissible to show *quo animo* the testator signed his name, Dunn *v.* Dunn, L. R., 1 P. & D. 277.

(*i*) 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.

(*k*) In re Mann, 28 L. J., Prob. 19; In re Dinmore, 2 Rob. 641.

(*l*) In re Walker, 2 Sw. & Tr. 354, 31 L. J., Prob. 62; In re Huckvale, L. R., 1 P. & D. 375; In re Casmore, Id. 653; In re Pearn, 1 Prob. D. 70.

after, or under, or beside, the names (*m*) 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, (*n*) or by the circumstance that there shall appear to be sufficient space (*o*) 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: (*p*) *nor shall it give effect to any disposition or direction inserted after the signature shall be made. (*q*)[34]

"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 con-

(*m*) In re Jones, 34 L. J., Prob. 41; In re Puddephatt, L. R., 2 P. & D. 97; In re Horsford, L. R., 3 P. & D. 211.

(*n*) In re Horsford, L. R., 3 P. & D. 211; In re Williams, L. R., 1 P. & D. 4. If, however, at the time of execution, the paper is so folded that no writing is visible, it must be proved that the will was written before the testator signed. In re Hammond, 3 Sw. & Tr. 90, 32 L. J., Prob. 200.

(*o*) In re Williams, L. R., 1 P. & D. 4; Hunt *v.* Hunt, Id. 209; In re Archer, L. R., 2 P. & D. 252.

(*p*) In re Dallow, L. R., 1 P. & D. 189; In re Woods, Id. 556, (in which the appointment of executors followed the signature.) But, in a few cases, the court has been satisfied by the mode of writing, or by the context, that a part which physically followed the signature, belonged, properly, to that which preceded it. As, where a sentence, which want of space prevented being completed at the bottom of a page, was continued, with an asterisk of reference, on a previous page, or at the back, In re Kimpton, 33 L. J., Prob. 153; In re Birt, L. R., 2 P. & D. 214. So, where the will was written on the first and third sides, which it filled, and the signature was written crossways on the second, (In re Coombs, L. R., 1 P. & D. 302.) And where, a lithographed form, occupying the first page, the will was written on and filled the second and third, but was signed in the form, this was held good, In re Wotton, L. R., 3 P. & D. 159. In all these cases, it was proved that the part in question was written before execution. This proof failed in In re White, 30 L. J., Prob. 55, and the part was rejected.

(*q*) In re Arthur, L. R., 2 P. & D. 273.]

34. In New York, where a will consisted of eight unfolded sheets, securely attached at the end, and it was signed and properly attested at the bottom of the fifth sheet, and following the signature and attestation was a map of lots in New York, referred to in the will as part of the will, and property was devised, in the will, by the lot numbers on that map, it was held that the will was signed at the end thereof, under the statute, and the execution was valid. Tonnele *v.* Hall, 4 Comst. 140. See *ante* note 6, page 206.

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

The wording of this statute may perhaps seem needlessly particular to the reader who has not consulted the decisions which led to its enactment; but it is unnecessary to treat of those decisions here, since the 2d section of the statute renders it almost impossible that the validity of any will should hereafter come 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:—]

1. 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. [35]

Two witnesses required.

2. [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 parts; whereas formerly the signature might be in any part of the instrument. [36]

Position of testator's signature.

35. See *ante* note 1, page 197.

36. Where a will was written on the upper part of one side of a piece of paper, with a considerable blank under it, and both the signature of the testator and witnesses, and the whole of the attestation clause, were written on the back of the paper, it was held, on proof that the will was written before the execution, that the will was well executed. In the Goods of Archer, L. R., 2 P. & D. 252, 40 L. J., P. 80. See also In the Goods of Rice, 5 Ir. Rep. Eq. 176., Prob. But, if anything be added to the will after the signature of the testator is made, although it be written above such signature, and before the witnesses sign, it will not be considered that the will was signed and acknowledged as containing such clause, and probate of the will will issue without it. In

3. 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, (*r*) 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.] [37] Attestation.

4. A form of attestation is expressly dispensed with.

5. The witnesses are not required, as heretofore, to be "credible," and some modification has taken place in regard to the disqualification arising from interest. [38]

[As to the 1st point: no question arises.

As to the 2d point: Lord St. Leonards' act has left little room for question. The decisions will be found noted to the various clauses of the act in a previous page.

As to the 3d point: the following decisions have been made with regard to acknowledgment:— Acknowledgment of signature by testator.

(a) The signature to be acknowledged may be made by the testator, or by another for him. (*s*)

(b) A testator, whether speechless or not, may acknowledge his signatures by gestures. (*t*)

(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, (*u*) not even though the testator

the Goods of Arthur, L. R., 2 P. & D. 273; 25 L. T. (N. S.) 274. But the will is well executed, by being signed at the end thereof, according to the New York statute, if the testator sign after the attestation clause, and along with the attesting witnesses. Cohen's Will, 1 Tuck. 286. But it has been doubted, in Virginia, whether, when the testator had written his name at the beginning of the will, and not at the end, the will was not sufficiently signed. Waller *v.* Waller, 1 Gratt. 454. And it makes no difference what the substance of the writing that follows the signature may be; therefore, when a testator, after signing, added, beneath his signature, a clause stating his reasons for making the devise, which clause was not signed, it was held that the will was not good. Hays *v.* Harden, 6 Penna. St. 409 See *ante* note 6, page 206.

[(*r*) Moore *v.* King, 3 Curt. 243, 2 No. Cas. 45, 7 Jur. 205. As to what is the "presence" of the witnesses, see Smith *v.* Smith, L. R., 1 P. & D. 143, and the cases *supra*, on the "presence" of the testator.]

37. See *ante* note 8, page 210, and note 1, page 197.

38. See *ante* note 23, page 225.

[(*s*) In re Regan, 1 Curt. 908.

(*t*) In re Davies, 2 Rob. 337; and see Parker *v.* Parker, Milw. Ir. Eccl. Rep. 545.

(*u*) In re Harrison, 2 Curt. 863; Ilott *v.* Genge, 3 Curt. 160, 4 Moo. P. C. C. 265, 8 Jur. 323; In re Swinford, L. R., 1 P. & D. 631; and see Faulds *v.* Jackson, 6 No. Cas. Sup. 1.

should expressly declare that the paper to be attested by them is his will. (*v*)

(d) 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, (*x*) or a direction to them to put their names under his, (*y*) or even a *request by the testator, (*z*) or by some person in his presence, (*a*) to sign the paper, is sufficient.

(e) When the signature is seen or expressly acknowledged it is not material that the witnesses are not told that the instrument is a will, (*b*) or are deceived into thinking that it is a deed. (*c*)

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

Simultaneous presence of witnesses.

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. (*e*) The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times, (*f*) and they must them-

(*v*) Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 786; Shaw *v.* Neville, 1 Jur. (N. S.) 408. Beckett *v.* Howe, L. R., 2 P. & D. 1, is *contra: sed qu.*

(*x*) In re Davis, 3 Curt. 748; In re Ashmore, Id. 756, 7 Jur. 1045; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J., Prob. 31; In re Huckvale, L. R., 1 P. & D. 375.

(*y*) In 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. 338, *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. Ex'rs, pt. 1, bk. 2, ch. II., § 2.

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

(*a*) In re Bosanquet, 2 Rob. 577; Faulds *v.* Jackson, 6 No. Cas. Sup. 1; In re Jones, 1 Deane 3, 1 Jur. (N. S.) 1096; Inglesant *v.* Inglesant, L. R., 3 P. & D. 172. But see Morritt *v.* Douglass, Id. 1.

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

(*c*) Sugd. R. P. Stat., p. 340. But see the observations of Sir H. J. Fust, in Willis *v.* Lowe, 5 No. Cas. 432.

(*d*) In re Dewell, 17 Jur. 1130.

(*e*) In re Olding, 2 Curt. 865; In re Byrd, 3 Curt. 117; Cooper *v.* Bockett, Id. 648; Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433, 8 H. L. Cas. 160. See also In re Summers, 7 No. Cas. 562, 14 Jur. 791, 2 Rob. 295, where, however, the testator acknowledged the will (if anything) and not his signature. As to what is sufficient evidence that the testator signed before the witnesses in cases where there is no direct proof that they saw the testator's signature, see Coöper *v.* Bockett, *sup.*; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200, 29 L. J., Prob. 31; Pearson *v.* Pearson, L. R., 2 P. & D. 451; Fischer *v.* Popham, L. R., 3 P. & D. 246.

(*f*) In re Allen, 2 Curt. 331; In re Simmonds, 3 Id. 79; Moore *v.* King, Id. 243, 2 No. Cas. 45, 7 Jur. 205.

selves subscribe their names in the presence of the testator, though not necessarily in the presence of each other. (*g*)[39]

As to the 4th point of difference: the clause 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; (*h*) and is not inconsistent with the provision 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; (*i*) although upon the construction of the act it may be that no attestation will satisfy its requirements, except through the outward mark *of subscription. (*k*) The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different.] Attestation clause is unnecessary.

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 statutory requisition had been complied with, than where it is

(*g*) Faulds *v.* Jackson, 6 No. Cas. Sup. 1, Sugd. R. P. S: 342. The *dictum contra* in Casement *v.* Fulton, 5 Moo. P. C. C. 140, has not been followed. In re Webb, 1 Deane 1, 1 Jur. (N. S.) 1096.]

39. A will purported to be signed by a mark. The witnesses were asked, in presence of the testator, to sign the will, but, although there was a mark on the will, at the time, it did not appear that it was made by the testator, or that he knew the contents of the paper; nor did he refer to it. It was held that there was no sufficient acknowledgment of the signature of the testator. Morritt *v.* Douglass, L. R., 3 P. & D. 1, 42 L. J., Prob. 10. The execution is not good when it does not appear that the signature of the testator was on the will at the time of the attestation, nor that the deceased explained, in any manner, to the witnesses, the nature of the paper they signed. Pearson *v.* Pearson, L. R., 2 P. & D. 451.

[(*h*) Bryan *v.* White, 2 Rob. 315, 14 Jur. 791.]

(*i*) 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.

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

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.[40] 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;[41] 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.[42]

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

As to signing by mark, or by amanuensis.

As to the 5th point: 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,

Attesting witnesses not required to be credible.

40. See *ante* note 4, page 205.

41. Under 7 Will. IV., and 1 Vict., c. 26, § 9, no particular *form* of subscription is required, if a mark is made use of, which may be done, although the testator can write, it must be made *animo testandi*. The same is requisite, whatever form the subscription may assume. In the Goods of Enyon, L. R., 3 P. & D. 92, 42 L. J., Prob. 52. See *ante* note 2, page 202.

42. Where a beneficiary, under a will, subscribed as the third attesting witness, and deposed that he did so at the especial request of the testator, and as a mark of approval of the witness by the testator, it was held that the attestation invalidated the bequest. Cozens *v.* Crout, 42 L. J., Ch. 840. But, where a will is so attested, if a subsequent codicil be attested by disinterested witnesses, this will operate as a re-execution of the will, and the bequest will be valid. Anderson *v.* Anderson, 13 L. R., Eq. 381, 41 L. J., Ch. 247.

moreover, (§ 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.[43]

Persons incompetent to give evidence qualified.

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 would seem to imply that they should be mentally conscious of the transaction, according to the construction which was given (as we have seen) (*l*) 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

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

43. In Oregon, if a third person sign the name of the testator to the will, *at the request of the testator*, it is necessary to state such fact in the attestation, but this is not so if a third person make such signature without being asked so to do by the testator. Pool *v.* Buffum, 3 Oregon 438. This rule applies expressly to a case where the will is executed by a signing by the testator in a foreign language, and some one, unasked, signs to the will the same name in English. Yet it does not appear to be exactly correct to call such an act a *signing* of the testator's name. If that be a signing, we think that the doctrine of this Oregon case would, in that particular, be maintained by every court in the country.

(*l*) *Ante* p. *87; [and see the judgment of Dr. Lushington, in Hudson *v.* Parker, 1 Rob. 14, 8 Jur. 786.]

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 (*m*) or lunatic as an attesting witness to his will, unless he were content to have his own sanity called in question. And here it may be observed, that the enlarged license 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 favor 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. (*n*)

Suggestion as to selection of witnesses.

(*m*) 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.

(*n*) *Ante* p. *70.

[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."] (o)

Alterations to be signed and attested.

The recent enactments, it will be perceived, preclude in reference to all wills to which they apply, 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 qualifications 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; 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.

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

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.

[(o) See In re Wingrove, 15 Jur. 91; In re Hinds, 16 Jur. 1161; In re Treeby, L. R., 3 P. & D. 242.]

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 by stat. 1 Vict., c. 26,] where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid.

1. Before the act 1 Vict., c. 26.

Thus, in De Bathe *v.* Lord Fingal, (*p*) 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. II., c. 24, which required that the appointment should have been signed in the presence of two witnesses.

Where codicil refers to will and both are written on same paper.

So, in Doe d. Williams *v.* Evans, (*q*) 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 of my property in case she marry." (There was no date.) It was

(*p*) 16 Ves. 167.

(*q*) 1 Cr. & Mees. 42, [3 Tyr. 56.

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 court relied much on Carleton *v.* Griffin, (*r*) and on the circumstance of the codicil referring to *the will; Bayley, B., 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 Guest *v.* Willasey, (*s*) 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 only of such second codicil, but also of the first, between the contents of which and itself there was no connection. 44

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 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 K. B. in Utterton *v.* Robins (*t*) indicate a strong inclination in that court to a similar opinion. [And the point is not now open to question.

(*r*) 1 Burr. 549.]

(*s*) 12 J. B. Moo. 2, [3 Biog. 614.]

44. As to effect of subsequently executed valid codicils upon wills defectively executed, whether the codicil be attached or detached, see *post* chap. VIII. and notes; and see Harvy *v.* Chouteau, 14 Mo. 587; Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590; Kendall *v.* Kendall, 5 Munf. 272; Stover *v.* Kendall, 1 Coldw. 557; Payne *v.* Payne, 18 Cal. 291.

(*t*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

Thus in Aaron *v.* Aaron, (*u*) a testator made a will and two codicils, each on a separate paper. He described the first codicil as a codicil to his will dated, &c., and directed it to be annexed to his said will, but it was unattested: by the second the testator recited that he had made and duly executed his will dated, &c., and a codicil annexed thereto and dated, &c.; he described it as a second codicil to his said will, and directed it to be annexed thereto and to be taken as a second part thereof: this codicil was duly attested, and it was held by Sir K. Bruce, V. C., that the first codicil was *set up by the second. It could make no difference, he observed, whether the codicil was written on the same paper as the will or not; a codicil was referred to, and there was no dispute what the instrument was.] These authorities show that no reliance is to be placed on the early case of Att.-Gen. *v.* Baines, (*x*) 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 L. C. 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 Utterton *v.* Robins, (*y*) where a testator, by several unwitnessed memoranda, 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, which bears date 12th Sep., 1823; I give and devise all real estates, purchased by me since the execution of 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 certified on a case from chancery, that the house passed to the trustees and not to the daughter.

In this case the language of the second codicil seemed to repel the supposition, that the testator intended the estates purchased since the

[(*u*) 3 De G. & S. 475. See also Allen *v.* Maddock, 11 Moo. P. C. C. 427, stated *post* p. *119.]

(*x*) Pre. Ch. 270, 3 Ch. Rep. 10.

(*y*) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

execution of the will to pass by the prior codicil; unless, indeed, when he speaks of his "will," he is to be understood (*z*) as referring to all the prior testamentary documents, including the unattested codicil, according to the principle laid down by Sir L. Shadwell in Gordon *v.* Lord Reay, (*a*) 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 favor of a certain individual: and the V. C. 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 (*b*) of the first. "The first codicil," he said, "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 everything that is part of it."

Whether the "will" includes a codicil added thereto.

[But this decision has been questioned. "It may well be," said Sir G. Jessel, in Burton *v.* Newbery, (*c*) "that where you describe a will generally without date, and say, 'I confirm my will,' you might interpret the word 'will' as including the whole of the testamentary disposition; (*d*) but it appears to me that that was not the case in Gordon *v.* Lord Reay. . . . The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date." On this principle in Burton *v.* Newbery, where a testator made his will, and then made a

[(*z*) Not that he was, in fact, so understood; the court showed, not obscurely, that it thought there was no sufficient reference to the will. Besides, the testator had not purchased any real estate since the execution of his "will" in the wider sense.]

(*a*) 5 Sim. 274; see also Crosbie *v.* Macdoual, 4 Ves. 610; [Farrer *v.* St. Catherine's College, L. R., 16 Eq. 19; Green *v.* Tribe, 9 Ch. D. 231; all referred to *post* chap. VII., *ad fin.*, where the comprehensiveness of the word "will" is considered with reference to the subject of revocation and revival. In Green *v.* Tribe, Fry, J., points out the distinction between cases where the narrower sense would operate to revoke a clear gift contained in a previous valid codicil, and where it only fails to set up a previous invalid codicil.]

(*b*) As to republication, see *post* chap. VIII.

[(*c*) See Piggott *v.* Wilder, 26 Beav. 90, where the reference was to the will of another person. See also Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Attorney-General, 3 Gif. 308, where the question was whether "legacies herein mentioned" included legacies given by codicil.

(*d*) 1 Ch. D. 234, 240; Gordon *v.* Lord Reay was treated as an authority (together with Doe *v.* Evans) by K. Bruce, V. C., in Aaron *v.* Aaron. See also Radburn *v.* Jervis, 3 Beav. 460.

codicil, which was attested by A and B, who took benefits under the codicil, and afterwards made another codicil "to his last will dated," &c., which was duly attested, but did not refer to the prior codicil (all these instruments being on separate papers,) it was held by the M. R. that the second codicil did not republish the first, and, consequently, that the gifts to A and B under the first codicil failed. But this strictness of interpretation may be excluded by the context. Thus in Aaron *v.* Aaron, (*e*) where the second codicil referred specifically to the will and first codicil each by its date, and then confirmed the will only, it was argued that this indicated a clear intention to confirm the will exclusively, and the V. C. admitted that the argument was apposite; but referring to the other terms of the codicils, he said the intention of the second codicil, as collected from the whole of *it, was to confirm the first codicil. It was indeed obvious that the testator intended to leave two codicils.

2. Since 1 Vict., c. 26. A codicil not duly attested is not now included in the term "codicils" where there are duly attested codicils to satisfy its strict meaning.

Since the stat. 1 Vict., c. 26, there is this further reason against applying Gordon *v.* Lord Reay as an authority for holding an unattested paper to be included under a reference to the "will;" namely, that such a paper is not now, as it formerly was, admissible to probate, and cannot properly be regarded as part of the will or as a codicil to it. If therefore 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.

Case of Croker v. Hertford.

This point was determined in Croker *v.* Marquis of Hertford. (*f*) Dr. Lushington delivered the judgment of the privy council, and 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, (*g*) however capable the words might be of another and popular interpretation, or however strong the intention of the testator, the strict and

(*e*) 3 De G. & S. 475, stated above, p. *115.

(*f*) 4 Moo. P. C. C. 339, 8 Jur. 863, 3 No. Cas. 150, affirming S. C. (*nom.* Countess Ferraris *v.* Marquis of Hertford), 3 Curt. 468, 7 Jur. 261, 2 No. Cas. 230.

(*g*) Wigram on Wills, p. 17.

primary sense must be adhered to." On the same principle, Sir H. J. Fust held (*h*) that codicils not duly attested, though written on the same paper as the will, 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 (*i*) 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 * Ingoldby *v.* Ingoldby, (*k*) 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 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 Allen *v.* Maddock, (*l*) the subject was fully discussed by Lord Kingsdown. In that case a will was made and signed in the presence of one witness only. Afterwards the testatrix made a codicil which commenced—"This is a codicil to my last will and testament," and was duly executed. No other will having been found, it was held in P. C., upon parol evidence of the circumstances, that the two papers, as together containing the will and codicil, were entitled to probate. From Lord Kingsdown's judgment, 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

or duly attested will.

To supply defect of execution the defective instrument must be incorporated.

(*h*) Haynes *v.* Hill, 7 No. Cas. 256, 1 Rob. 795, 13 Jur. 1058.

(*i*) Wigram on Wills, Prop. 3.

[(*k*) 4 No. Cas. 493.

(*l*) 11 Moo. P. C. C. 427, affirming 3 Jur. (N. S.) 965.

sometimes arise upon the evidence; (*m*) 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 impor*tant 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. (*n*)

The principle being thus the same under both statutes, it follows that, subject to the distinction just noted, the circumstance of the well-executed instrument being written on the same paper as the imperfectly executed one, must still be regarded as materially helping to identify the latter as the document referred to by the former. (*o*) And a distinction may fairly be drawn between a case where the later and well-executed instrument contains a reference, more or less particular, to another document, and a case where the later and well-executed instrument contains no *express* reference to any other; in the latter case the mere circumstance of its being on the same paper with others may possibly furnish ground for *implying* a reference to all the others, so as to incorporate and set up all. Such appears to have been the case in Guest *v.* Willasey, (*p*) where the third codicil was thus—"I now appoint A to be my executor in the room of B above mentioned, with full power to act, &c. Witness my hand." So, in In re Cattrall, (*q*) where, underneath his will, a testator wrote and signed some unattested

(*m*) See In re Allnutt, 33 L. J., Prob. 86.

(*n*) See 11 Moo. P. C. C. 455, 461; and as to incorporation, *sup.* p. *89.

(*o*) In re Terrible, 1 Sw. & Tr. 140. In re Smith, 2 Curt. 796, 1 No. Cas. 1, and In re Claringbull, 3 No. Cas. 1, this circumstance existed; but, even without it, they are covered by Allen *v.* Maddock and Ingoldby *v.* Ingoldby, *sup.*

(*p*) 2 Bing. 429, 3 Bing. 614, *ante* p. *115.

(*q*) 33 L. J., Prob. 106.

additions; and under these he afterwards wrote some further additions, which were duly signed and attested; it was held by Sir W. P. Wilde that the presumption was that this signature and attestation were intended to apply, and that they gave effect, to all that went before. But this presumption is rebutted by an express reference of narrower scope. Thus, a reference to the "will" does not set up an unattested writing, though all three are on the same paper, the unattested writing, as we have seen, not being a part of the will. (*r*)

An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such *codicil the alteration be specially referred to, (*t*) or unless it be proved affirmatively by extrinsic evidence, that the alteration was made before the codicil; (*u*) and even then, if it appear to be deliberative only, it will not be included in the probate.] (*x*)

Unexecuted alterations, when rendered valid by subsequent codicil.

(*r*) In re Willmott, 1 Sw. & Tr. 36; In re Peach, Id. 38. See also Haynes *v.* Hill, 1 Rob. 795, 7 No. Cas. 256, 13 Jur. 1058; In re Phelps, 6 No. Cas. 695; In re Hutton, 5 No. Cas. 598.

(*t*) Lushington *v.* Onslow, 6 No. Cas. 183, 12 Jur. 465. As to presuming when alterations were made, see ch. VII., § 2, *ad fin.*

(*u*) See per Sir H. J. Fust, Ib.; In re Tegg, 4 No. Cas. 531; In re Wyatt, 2 Sw. & Tr. 494, 31 L. J., Prob. 197.

(*x*) In re Hall, L. R., 2 P. & D. 256.]

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*CHAPTER VII.

REVOCATION OF WILLS.[1]

SECTION I.

By Marriage and Birth of Children, or Marriage alone.

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 subse-

Effect of marriage alone under old law:

1. What are we to understand by the term revocation of a will? By revocation of a will is meant the destruction of its operative power, either in part, or entirely, by some extrinsic act done in regard to it, or by the making and publishing of a later instrument in the nature of a will, with the intention of destroying the operative power of the former. Chistmas *v.* Whinyates, 3 Sw. & Tr. 81; In the goods of Woodward, L. R., 2 P. & D. 206, 40 L. J., P. & M. 17. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation. White *v.* Casten, 1 Jones L. 197. It may be remarked in the outset, that the legal presumption is, when a will has once been properly executed, with all the formalities required by the statute, that it continued to exist until the death of the testator. 2 Greenl. Ev., § 680; Jackson *v.* Betts, 9 Cowen 208; Hildreth *v.* Schillinger, 2 Stock. 196. However, this presumption may always be rebutted by actual proof of its revocation. 2 Greenl. Ev., § 680. But it appears that it has been held, in Vermont, that if a will which was duly executed and properly published, cannot be found after the death of its maker, its absence will amount, *prima facie*, to proof of revocation. But the presumption being one of fact, may be rebutted, and the will established by proper proof of its contents. Minkler *v.* Minkler, 14 Vt. 125; Dudley *v.* Wardner, 41 Vt. 59. To the same effect, see Homerton *v.* Hewitt, 25 L. T. (N. S.) 854; Idley *v.* Bowen, 11 Wend. 227; Betts *v.* Jackson, 6 Wend. 173; Durant *v.* Ashmore, 2 Rich. 184; Legare *v.* Ashe, 1 Bay. 457. So, too, in absence of all proof as to who destroyed the will, this presumption will prevail. Appling *v.* Eades, 1 Gratt. 286. Revocation is a question of intention, and the acts, conduct, and declarations of the maker of the will are admissible for the purpose of ascertaining whether it was revoked. Smiley *v.* Gambill, 2 Head 164; Ford *v.* Ford, 7 Humph. 92, 104; Boudinot *v.* Bradford, 2 Yeates 170. The fact of revocation may be established by circumstantial evidence, as well as by positive proof. Smiley *v.* Gambill, *ubi supra*. What amounts to revocation is a question of law. Ib. Where the *animus revocandi* is doubtful, the *onus* of proving it is upon the party who alleges it. Means *v.* Moore, 3 McCord 282. It is said by Walworth, C., in Betts *v.* Jackson, 6 Wend. 173: "Decla-

quently restored by the event of her surviving her husband. (*a*)[2] [But a will made by a woman before marriage, and operating as an appointment under a power, was not necessarily —in case of a woman;

rations of a testator, in his last sickness, are admissible evidence to strengthen or repel the presumption, that a will once legally executed, but not found on the death of the testator, had been destroyed by him." But the presumption will not arise where the will was, in the first instance, obtained by unfair means, and, soon after its execution, the testator sickened and died, or where, from the time of the execution of such will until death, his mind was too weak to judge of the propriety of revocation. Irish *v.* Smith, 8 Serg. & R. 573. In regard to weakness of mind, in connection with revocation, it was said, in Warner *v.* Beach, 4 Gray 162, 164, by Shaw, C. J.: "The only other circumstances, intimated as ground of revocation of this will, are the increase in value of the real estate, and the long continued insanity of the testator which disabled him from altering his will. The former circumstance alone would have no weight; and it is only the great length of time, during which this disability lasted, which appears to give it any plausibility. It is said that a will is ambulatory during the life of the testator because he may at any time alter or change it. If this could be held to mean that he must always have the capacity to revoke, it would follow that any attack of insanity would operate as a revocation, which would prove far too much. And we have no law, no rule or maxim, intimating a distinction in this respect between the existence of insanity for a longer or shorter period of duration. No case was cited by the counsel, and we are aware of none, where any insanity after making a will is held to revoke the will. In Force and Hembling's case, 4 Co. 61 (*b*), the court, in commenting upon the ambulatory character of a will, to the end of life, suspended in case of a woman who makes a will and marries, and thus, by her own act, is disqualified by the disability of coverture, say: 'It would be against the nature of a will to be so absolute, that he who makes it, being of good and perfect memory, cannot countermand it. But when a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory, (as every man for the most part, before his death is) God forbid that this act of God should be a revocation of his will, which he made when he was of good and perfect memory.' This was not an adjudicated point in the case, but it was put by way of illustration, as an unquestionable rule of law, and as such, is an authority entitled to respect." See Wms. Ex'rs (6th Am. ed.) 162, *et seq.*; 1 Redf. on Wills 292, *et seq.*; Flood on Wills 331, *et seq.*; 4 Kent 520, *et seq.*; 1 Powell on Devises 515, *et seq.*

(*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.]

2. Fransen's case, 26 Penna. St. 204; Walker *v.* Hall, 34 Penna. St. 483; 1 Powell on Devises 545; 2 Greenl. Ev., § 684. The New York statute provides that the will of a *feme sole* shall be revoked by marriage. Rev. Stat., pt. 2, ch. 6, art. 3, § 42. So, too, in Oregon, (Deady's Stat., ch. 64, § 7); Missouri, (Wagner's Rev., ch. 145, § 6); Indiana, (Rev. 1876, pt. 4, ch. 3, § 5); Arkansas, (Rev. Stat., 1874, § 5767); Alabama, (Code 1876, § 2283,) and California, (Civil Code 1876, § 6300.) But in Ohio, the statutory provision is, that such will shall not be revoked by marriage. Rev. Stat., oh. 123, § 37. And where the will of a married woman, which was made while she was a *feme sole*, has been admitted to probate, in ignorance of the fact of her subse-

revoked by her marriage; (*b*) nor was a will so operating and made during the coverture necessarily revoked by the death of the husband.] (*c*)

—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;[3] nor did the birth of a child alone

quent marriage, she may be declared intestate upon the final accounting. Davis' estate, 1 Tuck. 107. The reason for the rule that the marriage of a woman subsequently to her having made a will, revoked it, rested on the fact that the woman becoming *covert* became thereby, on account of the marital rights of her husband, disabled to dispose of the property devised or bequeathed by the will, and so her will ceased to be ambulatory, thus losing one of the necessary characteristics of a will. Morton *v.* Onion, 45 Vt. 145. C. made her will, being, at the time, unmarried; she afterwards married; at the time of her marriage, her husband agreed that the will should not be affected by the marriage. It was held that, as there was no ante-nuptial agreement to keep the property of C. separate, nor to cut down her husband's right thereto, her will was revoked by the marriage, as to all personalty, whether choses in possession or action. In re Polly Carey's Estate, 49 Vt. 236. But in Illinois, since the act of 1861, the will of a *feme sole* is not revoked by marriage. In re Tuller, 79 Ill. 99. The act of 1872, in that state, referred to subsequent marriage only, and was not intended to, and did not, apply to marriages celebrated before the act took effect. Ib.

[(*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; Willock *v.* Noble, L. R., 7 H. L. 580; and will not even raise a case of election. Blaiklock *v.* Grindle, L. R., 7 Eq. 215.]

3. In reference to implied revocations, arising from change of circumstances, or alterations in the family relations of the testator, it was said by Shaw, C. J.: "Our statute of wills, in providing that wills shall not be revoked, unless by cancelling, or by another will, &c., excepts revocations implied by law, from subsequent changes in the condition and circumstances of the testator. Rev. Sta. ch. 62, § 9. What those changes are, the statute does not intimate; it is left to be decided by the 'general rules of law.'" Warner *v.* Beach, 4 Gray 162, 163. In Illinois, if a man make a will by which he disposes of all his estate without making any provision in contemplation of the relations arising from marriage, and then marry, the will will be revoked by his marriage alone. American Board *v.* Nelson, 72 Ill. 564; Duryea *v.* Duryea, 85 Ill. 41; Tyler *v.* Tyler, 19 Ill. 151. The wife is heir to the husband, and *vice versa*, in Illinois, if there be no child or descendant of a child, and hence the marriage after making a will which dis-

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*)[4]

poses of the whole estate, will revoke the will. Ib. Marriage only is a presumptive revocation of a will under the Rhode Island statute, but this presumption may be rebutted by showing acts done by the testator, or circumstances which show an evident intention on his part that his will shall remain in force, notwithstanding the marriage. Evidence of such acts and circumstances is, therefore, always admissible. Wheeler *v.* Wheeler, 1 R. I. 364; Miller *v.* Phillips, 9 R. I. 141. See 2 Greenl. Ev., § 684. But *quære*, whether marriage alone shall be a revocation in South Carolina. Jacks *v.* Henderson, 1 Desaus. 543. In Virginia, under the Code, ch. 122, § 7, marriage is a revocation of a will, except a will made in pursuance of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to the testator's heir, personal representative or next of kin. Phaup *v.* Wooldridge, 14 Gratt. 332. So, too, in Kentucky, (Gen. Stats. 1877, ch. 113, § 9); North Carolina, (Bat. Rev., ch. 119, § 42); Byrd *v.* Surles, 77 N. C. 435; and West Virginia, (Code 1868, ch. 77, § 6.) But in some of the states the provision is simply that marriage, *per se*, shall operate as a revocation. This is so in Rhode Island, (Gen. Stats., tit. 24, ch. 17, § 6); South Carolina, (Stats. 1873, tit. 3., ch. 86, § 8); and Georgia, (Code 1873, § 2477.) In Nevada, the statute provides that marriage shall revoke unless provision be made for the wife. Compl. Laws, § 821. But in Indiana the marriage of a man shall not, *per se*, revoke his will. Bowers *v.* Bowers, 53 Ind. 438. But in Missouri if a man leave a widow, of whom no mention is made in the will, he is held to have died intestate as to the widow. Stokes *v.* O'Fallon, 2 Mo. 29. In Pennsylvania, if a man having made his will marries, and dies leaving a widow, he dies intestate as to his widow, the will is revoked *pro tanto*. Walker *v.* Hall, 34 Penna. St. 483; Edwards' appeal, 47 Id. 144. And if he leaves no known heirs or kindred it will be such a revocation as to give the widow both his real and personal estate absolutely. Walker *v.* Hall, *ubi supra*. In a case in Ohio, when B., being about to marry J., made a will bequeathing "to my intended wife J. the sum of one thousand dollars, to be paid to her within one year after my decease," and directed the residue to be equally divided among his children; and was married to J., who deserted him, and he procured a divorce from her on that ground, it was held that there was no revocation, and that the will being positive and unconditional, J. was entitled to the legacy, after the death of B., without having revoked the will. Charlton *v.* Miller, Adm'r, 27 Ohio St. 298.

(*d*) Doe *v.* Barford, 4 M. & Sel. 10.

4. The rule of the civil law was that the birth of a child, not foreseen by the testator, operated as a revocation of the entire testament. It was not so, however, as to a codicil, where there was no testament. Bloomer *v.* Bloomer, 2 Bradf. 339. While the common law did not adopt this rule of the civil law, it allowed the birth of a child, in conjunction with other circumstances, to be sufficient to work an implied revocation. In the American states, this rule has been extensively, if not universally, adopted, at least to the extent of a revocation *pro tanto*, to let in children born subsequently to the making of the will. "In this country, we have much statute regulation on the subject. There is no doubt that the testator may, if he pleases, devise all his estate to

Marriage and the birth of a child conjointly, however, revoked a man's will, whether of real or personal estate; these *circumstances producing such a total change in the testator's

Old rule as to revocation by marriage and birth of children.

strangers, and disinherit his children. This is the English law, and the law in all the states, with the exception of Louisiana. Children are deemed to have sufficient security in the natural affection of parents, that this unlimited power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir takes, notwithstanding the testator may have clearly declared his intention to disinherit him. The estate must descend to the heirs, if it be not legally vested elsewhere. Denn *v.* Gaskin, Cowp. Rep. 657; Jackson *v.* Schauber, 7 Cowen's Rep. 187; S. C., 2 Wendell's Rep. 1. This is in conformity to the long established rule, that in devises to take place at some distant time, and no particular estate is expressly created in the meantime, the fee descends to the heir. But by the statute laws of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Ohio, and Alabama, a posthumous child, and, in all of those states except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit in like manner as if he had died intestate, unless some provision be made for them, in the will, or otherwise, or they be particularly noticed in the will. The reasonable operation of this rule is only to disturb and revoke the will *pro tanto*, or as far as duty requires. The statute law in Maine, New Hampshire, Massachusetts, and Rhode Island, goes further, and applies the same relief to all children, and their legal representatives, who have no provision made for them by will, and who have not had their advancement in their parent's life, unless the omission in the will should appear to have been intentional. In South Carolina, the interference with the will applies to posthumous children; and it is likewise the law, that marriage and a child work a revocation of the will. In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried, or an infant. If he had children before, after-born children, unprovided for, work a revocation *pro tanto*. In the States of Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland, and, probably in other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. This is confined, in Connecticut, to a child, or grandchlild; in Massachusetts, Rhode Island, and Maine, to them, *or their relations;* and in New York, *to children or other descendants*. The rule in Maryland goes further, and, by statute, no devise or bequest fails by reason of the death of the devisee or legatee before the testator; and it takes effect in like manner as if they had survived the testator By the New York Revised Statutes, vol. II., 64, § 43, if the will disposes of the whole estate, and the testator afterwards marries, and has issue born in his lifetime, or after his death, and the wife or issue be living *at his death*, the will is deemed to be revoked, unless the issue be provided for by the will, or by a settlement, or unless the will shows an intention not to make any provision. No other evidence to rebut the presumption of such revocation is to be received. This provision is a declaration of the law of New York, as declared in Brush *v.* Wilkins, with the additional provision of prescribing the exact extent of the proof which is to rebut the presumption of a revocation, and thereby relieving the courts from all difficulty on that embar

situation, as to lead to a presumption, that he could not intend a disposition of property previously made, to continue un-

rassing point." 4 Kent (5th ed.) 525, *et seq.* This contingency is provided for by statute in Georgia. The statute of that state enacts that the marriage of the testator, or the birth of a child to him, after the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will. In considering the provisions of this statute, it was said by McCay, J.: "The revocation is, by these words, (of the statute) made to turn, not upon any provision made *for* the wife or child, but upon whether the testator, *by his will*, has made a provision *for such an event*. If, by his will, he has done so, the will is not revoked; if he has not, it is revoked. It is immaterial whether this provision for the *event* is a provision for the benefit of the wife or child or not; it is enough if it is for the event. *If the provisions of the will* meet the requirements of the statute, it is not revoked; if *they* do not, it is revoked. Whether the wife or child is provided for in some other way has *nothing* to do with it; the law by its express, positive terms, makes it turn upon the provisions of the will." Deupree *v.* Deupree, 45 Ga. 415, 439. See also Holloman *v.* Copeland, 10 Ga. 79. And in Virginia, marriage and the birth of a child will work a revocation. Wilcox *v.* Rootes, 1 Wash. (Va.) 140. But this rule will not apply to children born to the testator by a second wife, to whom he was married after the making of the will, there being children of the first marriage. Yerby *v.* Yerby, 3 Call 334. And in Iowa it is held that the subsequent birth of a child will operate as a revocation of a will. Fallon *v.* Chidester, 46 Iowa 588; Negus *v.* Negus, Id. 487; McCullum *v.* McKenzie, 26 Iowa 510; Carey *v.* Baughn, 36 Iowa 540. The statute of Iowa in force prior to the code of 1851 provided for a partial revocation of the will in case of the birth of children to the testator after publication of the will, instead of a total revocation as at common law. The repeal of those statutes had the effect to restore the common law rule. Negus *v.* Negus, *ubi supra.* So, too, in Ohio, it seems that the birth of a child will operate as an implied revocation of a will. Ash *v.* Ash, 9 Ohio St. 383; Evans *v.* Anderson, 15 Ohio St. 324. And where the testator survives the child, the will having been revoked by the birth of the child, it is not revived by the fact that the testator survived the child. Ash *v.* Ash, *ubi supra.* And it seems that the same rule prevails in Pennsylvania as to the revocation by implication on account of the birth of a child. But such revocation is not absolute as at common law, but only *pro tanto*, and that, too, only in case no provision is made in the will for after-born children. Walker *v.* Hall, 34 Penna. St. 483; Young's Appeal, 39 Penna. St. 115; Edwards' Appeal, 47 Penna. St. 144; Tomlinson *v.* Tomlinson, 1 Ash. 224; Coates *v.* Hughes, 3 Binn. 498; Hollingsworth's Appeal, 51 Penna. St. 518; Grosvenor *v.* Fogg, 81 Penna. St. 400; Willard's estate, 68 Penna. St. 327. The provision extends to the case of a child *en ventre sa mere.* McKnight *v.* Read, 1 Whart. 213. A recital in the will, as follows: "Having the utmost confidence in her (wife's) integrity and believing that should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents," is not such a provision for an after-born child as would prevent revocation *pro tanto* of the will. Walker *v.* Hall, *ubi supra.* But see Beck *v.* Metz, 25 Mo. 70. In Tomlinson *v.* Tomlinson, *ubi supra*, it is said that the reason the birth of a child will work a revocation of the will is because it produces a change in the duties and obligations of the testator. But the appointment of the wife as testa-

changed.[5] This rule (which was borrowed from the civil law) (*e*) was applied by the ecclesiastical courts to wills of personalty, at an early

mentary guardian will not be revoked by the birth of a child. Hollingsworth's Appeal, *ubi supra*. In Indiana the birth of a child to the testator after the execution of his will works an entire revocation of the will, provided that no provision is made in the will for after-born children. Hughes *v.* Hughes, 37 Ind. 183. So, too, in the case of a posthumous child. Morse *v.* Morse, 42 Ind. 365. In Connecticut all wills, legacies and testamentary dispositions, whether total or partial, are revoked by the birth of a child. Rev. Stats. Conn. 1849, tit. XIV., ch. 1. And in Rhode Island a will is revoked *pro tanto*, at least, by the after birth of a child not provided for, even if such omission was intentional. Chace *v.* Chace, 6 R. I. 407; Potter *v.* Brown, 11 R. I. 232. But in Maryland it was doubted whether this would operate as a revocation. Tongue *v.* Morton, 6 Harr. & J. 21. It appears that in New Jersey legacies for "children born and to be born" will prevent the operation of the act of 1824, providing for revocation *pro tanto* of the will as to a posthumous child, "if neither provided for by settlement, nor disinherited." Stevens *v.* Shippen, 1 Stew. (N. J.) 487. And in Missouri it has been held that a provision in a will that a certain child shall take no part of the estate, is a sufficient provision for such child, under the statute to prevent a

5. The marriage of the testator, subsequently to his making his will, and the birth of issue from that marriage, works an implied revocation of the will, on account of the presumption that a testator intends to arrange the disposition of his estate in accordance with the new duties which devolve upon him from the new relations which he has assumed. But it being a *presumption* of intention, this presumption may be rebutted. Brady *v.* Cubitt, Dougl. 31. But it is said in Sherry *v.* Lozier, 1 Bradf. 437, that by the ecclesiastical and common law, this presumption could not be rebutted. Although the change of circumstances of the testator arising from marriage and the birth of issue has long been held to effect an implied revocation of a will, it is as strongly held that one of these ingredients is essential to work an implied revocation, and that, both of them being wanting, any other change in the testator's circumstances will not work an implied revocation of a previous will. Delafield *v.* Parrish, 1 Redf. 1. In the case of Brush *v.* Wilkins, 4 Johns. Ch. 506, this question was very thoroughly considered, and the Chancellor held that implied revocations were not within the statute of frauds, but that the subsequent marriage *and* birth of a child are an implied revocation of a will, both of real and personal estate; but that such implied revocations were presumptive, merely, and might be rebutted by circumstances. The rule that marriage and birth of children are an implied revocation of a will disposing of the whole estate, where there is no provision either in the will or out of it, for such change of circumstances, applies as well where the testator has children by a former wife. Havens *v.* Van Den Burgh, 1 Denio 27. But see Yerby *v.* Yerby, 3 Call 334. But such implied revocation may be rebutted by any circumstances showing that the testator intended the will to stand. Havens *v.* Van Den Burgh, *ubi supra*.

(*e*) **Rules of the civil law in regard to filial claims to a provision.**—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

period, (*f*) and was more recently and reluctantly extended to devises of freehold estates, its application to which had been supposed to be

revocation. Block *v.* Block, 3 Mo. 407; Pounds *v.* Dale, 48 Mo. 270. And a bequest to a son-in-law is a *naming* of the daughter within the statute. Hockensmith *v.* Slusher, 26 Mo. 237. And the mention of a deceased daughter, nothing being said of her children, raises the presumption that they were intentionally omitted. Guitar *v.* Gordon, 17 Mo. 408. See, too, Wetherall *v.* Harris, 51 Mo. 65. In Massachusetts, if it is evident from the will that the child was in contemplation of the testator, he cannot claim a distributive share of the estate. Church *v.* Crocker, 3 Mass. 17; Wild *v.* Brewer, 2 Mass. 570; Prentiss *v.* Prentiss, 11 Allen 47, 49. But after the making of the will, and the birth of the omitted child, if the testator say to his wife, "you will have all there is," that is not sufficient to show intention to omit the child. Bancroft *v.* Ives, 3 Gray 367. But that the omission of one child was intentional may be shown by parol. Wilson *v.* Fosket, 6 Metc. 400; Buckley *v.* Gerard, 123 Mass. 8; Converse *v.* Wales, 4 Allen 512; Ramsdill *v.* Wentworth, 101 Mass. 125; Lorieux *v.* Kellar, 5 Iowa 196. But in some states this cannot be shown by parol. Chace *v.* Chace, 6 R. I. 407; Bradley *v.* Bradley, 24 Mo. 311; Estate of Garraud, 35 Cal. 336. And where the testator omits to make provision for one child, the will will be approved and established, although it does not appear that the omission was intentional. Doane *v.* Lake, 32 Me. 268. In Blagge *v.* Miles, 1 Story C. C. 426, it was said that the

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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 prætererit, 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, c. 13, § 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, § 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 iuris aut per prætorem, secundum nostram constitutionem, eum, qui in potestate parentis fuerit, testamentum ejus rumpitur, quasi agnatione sui hæredis.*" Lib. 2, c. 16, § 1. 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.

precluded by the statute of frauds; (*g*) but 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 *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.

Revised Statutes of Massachusetts 1835, ch. 62, § 21, providing for the case of a descendant having no provision in the will of his ancestor, do not apply to cases where the testator has a power of appointment over an estate to dispose of the inheritance, but only to cases where the testator owns the estate in fee. See also Warner *v.* Beach, 4 Gray 162; Wilder *v.* Thayer, 97 Mass. 439; Brush *v.* Wilkins, 4 Johns. Ch. 506; Havens *v.* Van Den Burgh, 1 Denio 27; M'Cay *v.* M'Cay, 1 Murph. 447; Lorings *v.* Marsh, 6 Wall. 337; Waterman *v.* Hawkins, 63 Me. 156; Estate of Utz, 43 Cal. 200; Bradley *v.* Bradley, 24 Mo. 311; Hargadine *v.* Pulte,

(*g*) See Parsons *v.* Lanoe, 1 Ves. 192, [1 Wils. 243, Amb. 557;] Gibbons *v.* Caunt, 4 Ves. 848.

(*h*) Dick. 445, cit. 4 Burr. 2182.

(*i*) Sprague *v.* Stone, Amb. 721.

(*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 overlooked by Sir C. Cresswell in In re Cadywold, 1 Sw. & Tr. 34, 27 L. J., Prob. 36, which cannot, therefore, be taken as an authority.

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 connection 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 the revocation by marriage and the birth of children results from a tacit condition annexed to the will, that it shall be so revoked unless both wife and children are provided for, and is not dependent on the testator's intention, no circumstance demonstrative of a contrary intention on his part, such as a provision for children (though the birth of children necessarily supposes marriage,) can affect the question. And 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-*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

27 Mo. 423; Burch *v.* Brown, 46 Mo. 441; McCourtney *v.* Mathes, 47 Mo. 533; Schneider *v.* Koester, 54 Mo. 500; Bresee *v.* Stiles, 22 Wis. 120. See, too, 1 Redf. on Wills 292–302; Wms. Ex'rs (6th Am. ed.) 229–241; 1 Powell on Devises 530, *et seq.*; 2 Greenl. Ev., §§ 684, 685.

(*n*) Israell *v.* Rodon, Moo. P. C. C. 51; overruling Talbot *v.* Talbot, 1 Hagg. 705; Johnson *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.

(*q*) Kenebel *v.* Scrafton, 2 East 541.

[(*r*) Marston *v.* Roe d. Fox, 8 Ad. & Ell. 57.]

affirmative.] In Marston *v.* Roe, (*s*) it was contended, that the descent of an after-acquired real estate upon the child, in whose favor the will was contended to be revoked, prevented the revocation; but Tindal, C. J., 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 favor 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 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," he said, "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 will made before his birth. The condition implied in these cases was, that the testator, when *he made his will in favor 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."

(*s*) 8 Ad. & Ell. 14.

(*t*) 1 Ves. & B. 390.

The reasoning of the M. R. 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 uncanceled 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.

Remarks upon Sheath *v.* York.

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-*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*)[6]

Death of child in testator's lifetime immaterial.

(*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. by Evans, 593, n.

[(*x*) Not since 1 Vict., c. 26, § 22.]

(*y*) Wright *v.* Netherwood, 2 Salk. by Evans, 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. 324.

6. Ash *v.* Ash, 9 Ohio St. 383. The provision of the statute of Mississippi, (Rev. Code 1871, ch. 54, § 2389,) is to the effect that every last will and testament, made when the testator had no child living, where any child he might have is neither provided for nor mentioned, and

[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.] 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 Brady *v.* Cubit, (*a*) Lord Mansfield considered the evidence to be admissible; but his notion was warmly opposed in Goodtitle *v.* Otway (*b*) by Eyre, C. J., who observed 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 Buller, J., in Doe *v.* Lancashire, (c) also 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 K. B., 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 set at rest by Marston *v.* Roe, (*f*) 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

Rule to be deduced from the cases.

Parol evidence of intention inadmissible.

if at the time of his death he shall have a child or shall leave his wife *enciente* of child, which shall be born, shall have no effect during the life of such after-born child, and shall be void, unless the child die without having been married or without leaving issue capable of inheriting, and before such child shall have attained twenty-one years.

(*a*) Dougl. 31.
(*b*) 2 H. Bl. 522.
(*c*) 5 T. R. 61.
(*d*) 4 Ves. 848.
(*e*) 5 Ves. 663, 2 East 530.
(*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.]

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 act 1 Vict., c. 26, § 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 (section 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:—

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.

Remarks upon the enactment.

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 branch of testamentary law from the many perplexing distinctions which grew out of the pre-existing doctrine.

*[Wills made before 1838 are still governed by the old law, so far as respects revocation by marriage, and the birth of issue. By section 34 of the act 1 Vict., c. 26, it is enacted, that "the act shall not extend to any will made before the 1st

Wills made before 1 Vict., c. 26, how revoked since that act.

(*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 Marston *v.* Roe; 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. In re Fitzroy, 1 Sw. & Tr. 133; In re Fenwick, L. R., 1 P. & D. 319. *A fortiori* where the limitation in default is to some only of the statutory next of kin. In re M'Vicar, L. R., 1 P. & D. 671.

January 1838;" and although (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 before 1838. (*k*)]

SECTION II.

By Burning, Canceling, Tearing, or Obliterating.

Revocation of will of lands by burning, tearing, canceling, or obliterating, *under the old law.*

By the 6th section of the statute of frauds (*l*) [it is enacted "that no devise in writing of any 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, canceling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent; [but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will," &c., executed as therein mentioned. But the] burning,

Revocation of wills of personalty.

cancellation, tearing, or obliteration was not required to be attested by witnesses.[7] [As the revocation of a will of

[(*i*) Brooke *v.* Kent, 3 Moo. P. C. C. 334, and other cases *post* p. *143.

(*k*) Langford *v.* Little, 2 Jo. & Lat. 633; In re Shirley, 2 Curt. 657, overruling a contrary *dictum* in Hobbs *v.* Knight, 1 Curt. 768.

(*l*) 29 Car. II., c. 3, § 6; Irish Parl. 7 Will. III., c. 12, § 6.]

7. The provisions of the statute of frauds in regard to the revocation of wills by cancellation, &c., have been very generally adopted throughout the United States. Where the requirements of the statute in regard to wills have been complied with, it will require something more than verbal declarations to revoke a will. There must be some act done clearly indicating an intention to revoke it, such as cancellation, destruction, removal from the place of deposit or reclamation from the hands of the person with whom it may have been lodged. Marr *v.* Marr, 2 Head 303; Boylan *ads.* Meeker, 4 Dutch. 274; Mundy *v.* Mundy, 2 McCart. 290; Wright *v.* Wright, 5 Ind. 389; Gains *v.* Gains, 2 A. K. Marsh. 190; Overall *v.*

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

Overall, Lit. Sel. Cas. 513; Smith *v.* Clark, 34 Barb. 140; Johnson *v.* Brailsford, 2 Nott & McC. 272; Means *v.* Moore, 3 McCord 282; Smith *v.* Dolby, 4 Harr. (Del.) 350; White *v.* Casten, 1 Jones L. 197; Barker *v.* Bell, 46 Ala. 216; Timon *v.* Claffey, 45 Barb. 438; Burns *v.* Burns, 4 Serg. & R. 295; Clingan *v.* Mitcheltree, 31 Penna. St. 25; Brown *v.* Thorndike, 15 Pick. 388; Hise *v.* Fincher, 10 Ired. 139; Sumner *v.* Sumner, 7 Harr. & J. 388; Hollingshead *v.* Sturgis, 21 La. Ann. 450; Belt *v.* Belt, 1 Harr. & McH. 409; Spoonemore *v.* Cables, 66 Mo. 579. It was said, in Barker *v.* Bell, 46 Ala. 216, 222, by Peters, J.: "The revocation by cancellation or obliteration by the testator himself, destroys the instrument. From the date of the revocation, the will revoked ceases to be a testamentary disposition of the maker's estate. Such revoked will is nothing. It can have no effect as a will." But the mere act of cancellation, unless it be accompanied with the intention to revoke the will, will not operate as a revocation. Wolf *v.* Bollinger, 62 Ill. 368; Smock *v.* Smock, 3 Stock. 156; Beauchamp's will, 4 Mon. 361; Dan *v.* Brown, 4 Cowen 483; Dickey *v.* Malechi, 6 Mo. 177. And parol evidence of the acts and declarations of the testator may be admitted, to determine whether the will, found torn or cut, was mutilated by the testator, and with the intention, in that manner, to revoke it. Patterson *v.* Hickey, 32 Ga. 156; Lawyer *v.* Smith, 8 Mich. 411; Dan *v.* Brown, 4 Cowen 483; Collagan *v.* Burns, 57 Me. 449; Harring *v.* Allen, 25 Mich. 505. So, too, the declarations of the supposed testator, that he had no will, or that he had destroyed it, are competent evidence. Durant *v.* Ashmore, 2 Rich. 184. It is not necessary to prove positively and in terms that the destruction of the will took place in the presence of the deceased, this may be inferred from circumstances, if the intention to revoke and the destruction of the paper be clearly proved. Beauchamp's will, *ubi supra.* The antedating of a will is no revocation, especially if it appear that the intention of the testator was to confirm and not to revoke the will. Overall *v.* Overall, Lit. Sel. Cas. 501. When the seal and part of the name of the testator have been torn out, and the remainder of testator's name and the names of the witnesses have been obliterated, the will cannot be established by a general allusion to "my will" in a letter found with the canceled will, nor by a conversation with the executor named therein in regard to a request contained in the will. White's Will, 10 C. E. Gr. (N. J.) 501. Where a will was found after the death of the testator, and twenty-five years after it was made, in a barrel among waste paper, and torn or worn into pieces, which were scattered, it was held that the questions whether the injury was done by the testator or by other persons, and if by him, whether accidently or intentionally, and for the purpose of revocation, were questions of fact for the jury. Lawyer *v.* Smith, *ubi supra.* Where the testator wrote upon the will, "This will is invalid," &c., it was held to be a valid revocation, as such a writing upon the will is sufficient without witnesses. Witter *v.* Mott, 2 Conn. 67; Card *v.* Grinman, 5 Conn. 164. And if a will be duly executed, the declarations of the testator are not admissible to defeat the testamentary character of the paper, or to work a revocation of it as a will. Marr *v.* Marr, *ubi supra;* Perjue *v.* Perjue, 4 Iowa 520; Boylan *ads.* Meeker, 4 Dutch. 274; Lewis *v.* Lewis, 2 Watts & S. 455; Boudinot *v.* Bradford, 2 Yeates 170; Dan *v.* Brown, 4 Cowen 483; Hylton *v.* Hylton,

(*m*) See § 22 of Eng. & Ir. Statute.

the same were committed to writing, any of the acts mentioned in the 6th section were of course sufficient to revoke such a will.]

*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 evidence, indicating the *animus revocandi* to be wanting.[8] Thus,

Evidence of *animus* admitted.

1 Gratt. 161; Dickie *v.* Carter, 42 Ill. 376; Jackson *v.* Kniffen, 2 Johns. 31; Stevens *v.* Vancleve, 3 Wash. C. C. 465; Comstock *v.* Hadlyme, 8 Conn. 263; Wittman *v.* Goodhand, 26 Md. 95. And this is so although at the time of such declarations the testator says how he wishes his property disposed of. Perjue *v.* Perjue, *ubi supra.* From these rulings it is evident that no written will can be revoked by a nuncupative will. In Wisconsin the statute prohibits the revocation *pro tanto* of a written will by a nuncupative codicil. Brook *v.* Chappell, 34 Wis. 405. And by statute in Ohio no nuncupative will can avail to revoke, either wholly or in part, a duly-executed written will. McCune *v.* House, 8 Ohio 144. But under certain conditions it may in Tennessee. Code 1858, tit. III., ch. 1, § 2167. And where, there being two wills, the second will was stolen from the testator, proof that the testator thereupon decided that he would die intestate, and leave his estate to be distributed according to law, is not sufficient evidence of a revocation of the first will. Hylton *v.* Hylton, 1 Gratt. 161. But in Pennsylvania it is held that where the former of two wills is attempted to be set up, on account of the cancellation of the later one, all the facts evincing the intention of the testator should be received in evidence. Boudinot *v.* Bradford, 2 Yeates 170. It is held that the word "destroy," in the South Carolina statute, imports the same as the words used in the statute of frauds. Johnston *v.* Brailsford, 2 Nott & McC. 272.

8. Declarations of a deceased person, to the effect that he had a will, at the time of his death, may be admitted to show that a lost will is not revoked, and that, although the testator himself had destroyed it, it was not destroyed *animo revocandi.* Johnson's Will, 40 Conn. 587; Youndt *v.* Youndt, 3 Grant 140. It is said by Carpenter, J., "The mere absence of the will raises a presumption that it was revoked. Whether that presumption is one of law or of fact is perhaps immaterial, as in either case it must be rebutted by proof. Evidence for that purpose may be direct or circumstantial." Johnson's Will, 40 Conn. 587, 588. An addition to or alteration of a will, in order to work a revocation, must be made *animo revocandi.* The intention of the testator to revoke is necessary to constitute a revocation. Wright *v.* Wright, 5 Ind. 389; Runkle *v.* Gates, 11 Ind. 95; Burns *v.* Burns, 4 Serg. & R. 295. And, in order that the intention of the testator may be available as a revocation, it must be evinced in one of the modes prescribed by statute. Wright *v.* Wright, *ubi supra;* Runkle *v.* Gates, *ubi supra;* Gains *v.* Gains, 2 A. K. Marsh. 190; Delafield *v.* Parrish, 25 N. Y. 9; Clark *v.* Smith, 34 Barb. 140; Heise *v.* Heise, 31 Penna. St. 246; Lewis *v.* Lewis, 2 Watts & S. 455. And if a properly executed will be destroyed during the life of the testator, but without his authority, it may be established upon satisfactory proof of its contents and its destruction. Idley *v.* Bowen, 11 Wend. 227; Rhodes *v.* Vinson, 9 Gill 169; Davis *v.* Sigourney, 8 Metc.

if a testator inadvertently throws ink upon his will, instead of sand, (*m*)[9] or obliterates [or attempts to destroy] it during a fit of insanity, (*n*) [or tears it up under the mistaken impression that it is invalid, (*o*)] it will remain in full force, notwithstanding such accidental or involuntary [or mistaken] act.[10] So, the destruction of the

487; Dawson *v.* Smith, 3 Houst. 335. A cancellation of a will by accident or mistake will not amount to a revocation, such destruction being clearly without the intention to revoke. Smock *v.* Smock, 3 Stock. 156. The presumption will arise that a will having the name and seal cut off by a sharp instrument, and so found in the decedent's desk, was canceled by the testator himself. And the fact that he was in the habit of canceling other papers in that manner will strengthen the presumption. Ib. In Boyd *v.* Cook, 3 Leigh 32, the testator was blind. Proof was given of his declarations that he had made a will, but destroyed it, and that he had no will, but intended making one. The party contesting the will offered further to show that Sarah E. Vass, a daughter of the decedent, and a legatee under the will, had admitted that her father had directed her to destroy the paper produced in court as his will, and that he believed it was done. This evidence was rejected. The rejection was sustained by the Court of Appeals. In delivering the opinion of the court, Carr, J., said: "No direction given by a testator to another to destroy his will amounts to a revocation. The statute provides, that no will shall be revoked, but by the testator destroying, canceling, or obliterating the same or causing it to be done in his presence. Mere parol directions, given to a person to destroy the will, could never satisfy the requisitions of the statute and to suffer them would be to incur the danger the statute meant to avoid." Nor, if the testator believe his will to have been destroyed, and he declare his assent to and satisfaction with the destruction, will there be any revocation on that account. Runkle *v.* Gates, 11 Ind. 95; Clingan *v.* Mitcheltree, 31 Penna. St. 25. Where a testator had disinherited one of his children, declarations made by him on his death-bed that he wished all of his children to inherit equally, are not admissible to go to a jury to prove an intention to revoke. Jones *v.* Mosely, 40 Miss. 261. And where the testator, having two wills, intends to destroy one, but by mistake destroys the other, the destroyed will may be established as the will of the deceased on proof of its contents, and in order to revive and establish that will, the law does not require such proof as is necessary to give validity to an original will, Burns *v.* Burns, 4 Serg. & R. 295. See also 1 Powell on Devises 595, note (9); Wms. Ex'rs (6th Am. ed.) 184.

[(*m*) Per Lord Mansfield, Burtonshaw *v.* Gilbert, Cowp. 52.]

9. Or if he, being induced to believe that his will is invalid, tears it and puts it on the fire, but afterwards, thinking that he may be misinformed, he takes the pieces from the fire and carefully preserves them, there is no *animus revocandi*, and the will as contained in the pieces will be established. Giles *v.* Warren, L. R., 2 P. & D. 401, 41 L. J. P. 59.

(*n*) Scruby *v.* Fordham, 1 Ad. 74. [Borlase *v.* Borlase, 4 No. Cas. 139; In re Shaw, 1 Curt. 905; In re Downer, 18 Jur. 66; Brunt *v.* Brunt, L. R., 3 P. & D. 37.

(*o*) Giles *v.* Warren, L. R., 2 P. & D. 401.]

10. If the will were entirely destroyed during insanity, there could be no revocation on that account, for a testator can no more revoke his will, he being insane, than he can while insane make a compe-

instrument by a third person in the lifetime, but without the permission or knowledge of the testator, would not affect its validity; *a 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 after-

tent and valid will. Smith *v.* Wait, 4 Barb. 28; Rhodes *v.* Vinson, 9 Gill 169; Ford *v.* Ford, 7 Humph. 92. And if a testator, although not permanently insane, should destroy his will while laboring under such excitement as would incapacitate him from having a reasonable and intelligent intention to revoke the will, such destruction could not operate as a revocation. Forman's Will, 54 Barb. 274; S. C., 1 Tuck. 205. And it is said by Parker, C. J.: "If a person of sound mind had made a will and afterwards when of unsound, had been prevailed upon to make another, revoking the former, it could not be pretended that the latter should be set up as a revocation. Laughton *v.* Atkins, 1 Pick. 535, 547. Nor would a will obtained by undue influence be a revocation of a former will. O'Neal *ads.* Farr, 1 Rich. 80. See Wms. Ex'rs (6th Am. ed.) 184; 1 Redf. on Wills 307.

(*p*) Haines *v.* Haines, 2 Vern. 441.

(*q*) 2 W. Bl. 1043.

wards 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 without making another will. The jury thought this a sufficient revocation, and the Court of C. P. was of the same opinion, on a motion for a new trial; De Grey, C. J., 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.[11]

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 endeavor to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavor may have been frustrated by the improper behavior of a third person.[12]

11. But in a later case in England, where the first few lines of the will had been cut and torn off, but the remainder of the will was complete, it was held that from such mutilation it could not be inferred that the testator intended to revoke his entire will, and it was admitted to probate in its incomplete condition. In the goods of Woodward, L. R., 2 P. & D. 206, 40 L. J. P. 17. If the destruction be as complete as was in the power of the testator, it will operate as a revocation. Sweet *v.* Sweet, 1 Redf. 451; Johnson *v.* Brailsford, 2 Nott & McC. 272; 2 Greenl. Ev., § 681. And where a will has a seal attached to it, though it be not requisite to give validity to the will, yet if the testator, thinking it to be so, should tear off the seal *animo revocandi*, it would operate as a revocation. Avery *v.* Pixley, 4 Mass. 460. And, speaking to this point, it was said by Smith, J.: "The degree of destroying, canceling, or obliterating necessary to the revocation of a will, is not defined by the statute, but must, I apprehend, depend upon the circumstances of each case. In the present case, the *animus revocandi* has been clearly proved, and it has been settled by high authority that the slightest act of tearing or burning, if accompanied by satisfactory evidence drawn *aliunde* of the intention to revoke, will satisfy the statute and revoke the will." Bohanon *v.* Walcot, 1 How. (Miss.) 336, 338.

12. Gains *v.* Gains, 2 A. K. Marsh. 190; Clark *v.* Smith, 34 Barb. 140; Delafield *v.* Parrish, 25 N. Y. 9. It is said by Boyd, C. J.: "A devisee, who by fraud or force prevents the revocation of a will, may, in a court of equity, be considered a trustee for those who would be entitled to the estate in case it were revoked." Gains *v.* Gains, *ubi supra*. See Clingan *v.*

Thus, in 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

Mitcheltree, 31 Penna. St. 25; Blanchard *v.* Blanchard, 32 Vt. 62, 65. In Connecticut, before the statute of 1821, a will being revocable by parol, if one of the devisees, after the will had been revoked and testator had directed it to be destroyed, fraudulently took it and preserved it while leading the testator to believe it destroyed, parol evidence was admissible to prove these facts. Card *v.* Grinman, 5 Conn. 164. Where a testator, being sick in bed, called for his will, and directed his son to burn it, and the son took the will, but burned another paper, professing that it was the will of the testator, and the testator believed that his will had been destroyed, there was held to be no revocation, as the will had not been actually destroyed or in any manner injured. Hise *v.* Fincher, 10 Ired. L. 139; Mundy *v.* Mundy, 2 McCart. 290; Kent *v.* Mahaffey, 10 Ohio St. 204; Malone *v.* Hobbs, 1 Rob. (Va.) 346; Clingan *v.* Mitcheltree, 31 Penna. St. 25. So, too, if the testator be blind, and having directed his will to be destroyed, is deceived and believes that the will is destroyed, it not having been destroyed, this is no revocation. Boyd *v.* Cook, 3 Leigh 32. But see Smiley *v.* Gambill, 2 Head 164; Pryor *v.* Coggin, 17 Ga. 444. But if the testator throws his will upon the fire, with intent to destroy it, and it be rescued against his will, but not until it has been burnt in one or more places, this will amount to a revocation. White *v.* Casten, 1 Jones L. 197. Knox, J., said, in Clingan *v.* Mitcheltree, 31 Penna. St. 25, 36: "What safety would there be that a testator's intentions would be regarded and made efficacious, if his last will and testament, executed under all the solemnities and formalities of the law, could be set aside by the mere declarations of a devisee tending to prove fraud; testified to, as in the present case, by persons interested in the destruction of the will? There is certainly great safety in adhering to the words of the statute; besides which, is there not a want of power to interpolate other words, or to find equivalents for the express direction of the statute? At all events, there is danger in establishing exceptions to a statutory will, which, like the present, has been found to be essentially necessary, for the safe enjoyment and secure transmission of real estate, by the experience of ages; for if exceptions once begin, no one can say when, and where, they will end." In this case the testator was deceived into the belief that his will had been burned, while in fact the sole devisee in the will burned, in his presence, another paper, declaring it to be the will. The will was established. The statute should have a strict construction. Dunlop *v.* Dunlop, 10 Watts 153; Cavett's Appeal, 8 Watts & S. 26; Greenough *v.* Greenough, 1 Jones (Penna.) 496; Lewis *v.* Lewis, 2 Watts & S. 455. To make cancellation, burning or obliteration of a will efficacious as a revocation, it must be done by the *express direction* of the testator; a subsequent ratification would not be equivalent to a previous command. Clingan *v.* Mitcheltree, 31 Penna. St. 25.

(*r*) 6 Ad. & Ell. 209, [2 Nev. & P. 615.]

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 Q. B. 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." Patteson, J., 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."

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 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.]

(*s*) Doe d. Reed *v.* Harris, 8 Ad. & Ell. 1.

(*t*) 3 B. & Ald. 489; [and compare In 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 In re Cockayne, 1 Dea. 177, 2 Jur. (N. S.) 454.]

Presumption as to destruction of wills.

In one instance, the Prerogative Court decided in favor 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 [at his death] either cannot be found, (*z*) or is found torn, (*a*) the presumption is (in the absence of circumstances tending to a contrary conclusion, (*b*) that he destroyed or tore it *animo revocandi*;[13] but that if the will is traced out of

(*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; In re Shaw, 1 Sw. & Tr. 62; Finch *v.* Finch, L. R., 1 P. & D. 371.]

(*a*) Hare *v.* Nasmyth, 3 Hagg. 192, n.; Lambell *v.* Lambell, Id. 568; [Williams *v.* Jones, 7 No. Cas. 106; In re Lewis, 1 Sw. & Tr. 31, 27 L. J., Prob. 31.

(*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; In re Gardner, 1 Sw. & Tr. 109, 27 L. J., Prob. 55; In re Ripley, 1 Sw. & Tr. 68, 4 Jur. (N. S.) 342; In re Simpson, 5 Jur. (N. S.) 1366; In re Pechell, Id. 406; Eckersley *v.* Platt, L. R., 1 P. & D. 281. If declarations made by the testator after the date of the will are adduced to rebut the presumption, the like declarations are admissible in reply. Keen *v.* Keen, L. R., 3 P. & D. 105. As evidence of the *animus* with which an act was done, less weight is of course due to subsequent (Pemberton *v.* Pemberton, 13 Ves. 310; In re Weston, L. R., 1 P. & D. 633) than to contemporaneous (Johnson *v.* Lyford, L. R., 1 P. & D. 546) declarations of the testator. To prove the *act*, such subsequent declarations are wholly inadmissible. Staines *v.* Stewart, 2 Sw. & Tr. 320, 31 L. J Prob. 10. **Evidence to prove content of lost will.**—The will being lost or destroyed, and the *animus revocandi* disproved, probate will be granted of it contents as proved by secondary evidence, *e. g.*, draft, copy or parol testimony. See same cases, and Clarkson Clarkson, 2 Sw. & Tr. 497, 31 L. J Prob. 143; Podmore *v.* Whatton, 3 Sw & Tr. 449, 33 L. J., Prob. 143; Burls Burls, L. R., 1 P. & D. 472; James Shrimpton, 1 P. D. 431; Sugden *v.* Lor St. Leonards, 1 P. D. 154. In the las case the contents were proved by a singl interested witness. **Probate of part of will.**—The same case establishes the admissibility, as evidence of contents, of th testator's declarations whensoever made overruling Quick *v.* Quick, 3 Sw. & T 442, 33 L. J., Prob. 146; and further that probate may be granted of so much of the will as the evidence ascertains though other part is not ascertained.]

13. Minkler *v.* Minkler, 14 Vt. 125 Dudley *v.* Wardner, 41 Vt. 59; Idley Bowen, 11 Wend. 227; Betts *v.* Jackson 6 Wend. 173; Appling *v.* Eades, 1 Grat 286; Jones *v.* Murphy, 8 Watts & S. 275 Holland *v.* Ferris, 2 Bradf. 334; Week *v.* McBeth, 14 Ala. 474; Bulkley *v.* Red mond, 2 Bradf. 281; Johnson *v.* Brail ford, 2 Nott & McC. 272; Legare *v.* Ash 1 Bay (S. C.) 457; Beaumont *v.* Keim, 5 Mo. 28; Dawson *v.* Smith, 3 Houst. 33

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*)

Where a pencil instead of a pen is used, the cancellation is not necessarily ineffectual, (*e*) but is always *prima facie* considered deliberative, (*f*) and it must be shown that it was intended to be final.][14] Obliteration by a pencil.

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.[15] If the estate or interest of the co-devisees was joint, the entire property Effect of partial obliterations.

Davis *v.* Sigourney, 8 Metc. 487, 488; Johnson's Will, 40 Conn. 587. But this presumption may be rebutted. Minkler *v.* Minkler, *ubi supra;* Durant *v.* Ashmore, 2 Rich. 184; Weeks *v.* McBeth, *ubi supra;* Dawson *v.* Smith, *ubi supra;* Legare *v.* Ashe, *ubi supra;* Johnson's Will, *ubi supra;* Patterson *v.* Hickey, 32 Ga. 156; Davis *v.* Sigourney, *ubi supra;* Clark *v.* Wright, 3 Pick. 67. It was said by Waites, J.: "The non-production of it (the will) is only a *prima facie presumption* that it was canceled, and *not a legal conclusion.*" Legare *v.* Ashe, *ubi supra;* 4 Kent 532; 2 Greenl. Ev., § 681.

(*c*) Colvin *v.* Fraser, 2 Hagg. 327; [and see Wynn *v.* Heveningham, 1 Coll. 638, 639.

(*d*) Harris *v.* Berral, 1 Sw. & Tr. 153; Sprigge *v.* Sprigge, L. R., 1 P. & D. 608.

(*e*) Mence *v.* Mence, 18 Ves. 348.

(*f*) Francis *v.* Grover, 5 Hare 39, and the cases there cited; In re Hall, L. R., 2 P. & D. 256.]

14. If an immaterial alteration be made in a will by a stranger, such alteration will not destroy the will. Malin *v.* Malin, 1 Wend. 625; Jackson *v.* Malin, 15 Johns. 293; Doane *v.* Hadlock, 42 Me. 72. But a material alteration by a person claiming under the will avoids it. Wilson's Will, 8 Wis. 171. Whether the drawing of lines in pencil through a will, or any part of it, was deliberative, or a final act of cancellation, may be gathered from the contemporaneous acts of the testator. Bethell *v.* Moore, 2 Dev. & B. L. 311. See also Cogbill *v.* Cogbill, 4 Hen. & Munf. 467; 2 Greenl. Ev., § 681.

(*g*) Sutton *v.* Sutton, Cowp. 812.

15. An erasure in a will, after its execution, does not work such revocation as to avoid the will *in toto*. Smith *v.* Fenner, 1 Gall. C. C. 170; Kirkpatrick's Will, 7 C. E. Gr. (N. J.) 463; Clark *v.* Smith, 34 Barb. 140; Cogbill *v.* Cogbill, 4 Hen. & Munf. 467; Bigelow *v.* Gillott, 123 Mass. 102; Wolf *v.* Bollinger, 62 Ill. 368; McPherson *v.* Clark, 3 Bradf. 92; 2 Greenl. Ev., § 681. A careful interlinea-

would vest in the survivor or survivors; (*h*) if they were tenants in common, the share of the deceased devisee would lapse, and a partial intestacy be produced; (*i*) 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. [If certain words, forming part of a devise, are obliterated, it is to be seen what is the effect of those which remain: if they are sensible *per se*, and do not give any person (apart, of course, from their indirect operation of increasing the residue) a larger estate than he would have taken by the will, or a new estate, the obliteration works a valid partial revocation. This appears to be the effect of Swinton *v.* Bailey, (*k*) where a testator who died in 1836 devised certain lands to his "mother, Elizabeth Eley to hold to his said mother, Elizabeth *Eley, her heirs and assigns for ever.*" After

tion is not an obliteration. Dixon's Appeal, 55 Penna. St. 424; Clark *v.* Smith, *ubi supra;* Cogbill *v.* Cogbill, *ubi supra;* Means *v.* Moore, 3 McCord 282; Wheeler *v.* Bent, 7 Pick. 61; Jackson *v.* Holloway, 7 Johns. 395; Doane *v.* Hadlock, 42 Me. 72. Where, after execution of the will, the scrivener, in the presence of one of the witnesses and of the testator, interlined another legacy, and the will was then republished, in the presence of that one witness and the scrivener, it was held that this did not revoke the will. Wheeler *v.* Bent, *ubi supra.* So, too, where the name of one of the executors is erased and another inserted, this is not a revocation of the will. Wells *v.* Wells, 4 Mon. 152. Neither the changing of an executor nor the striking out of a devisee will amount to a revocation so as to require a republication. Ib. But if the name of a devisee be stricken out in one place, while it is left in other parts of the will, the court will not generally feel warranted in holding that the bequest is thereby revoked. 2 Greenl. Ev., § 681. Nor will the cutting out of a portion of the will work a revocation of the whole will, especially if the act be accompanied by declarations of the testator that the intention was to annul only what was so cut out. Brown's Will, 1 B. Mon. 56. But it seems that the word "obsolete," written on the margin of the first page only, and opposite one clause of the will, applies to the whole will, and not merely to the clause against which the word is written. Lewis *v.* Lewis, 2 Watts & S. 455. See also Warner *v.* Warner, 37 Vt. 356. If the testator draw lines with a pen through a legacy in the will, this is a sufficient revocation of that legacy. Kirkpatrick's Will, *ubi supra.*

[(*h*) Larkins *v.* Larkins, 3 Bos. & P. 16; Short *v.* Smith, 4 East 419; Humphreys *v.* Taylor, 7 Bac. Ab. Gwil. 363.

(*i*) Per Alvanley, C. J., and Chambre, J., 3 B. & P. 21, 22.

(*k*) 1 Ex. D. 110, affirmed in D. P., 48 L. J., Ex. 57, reversing the decision of the Exch. Division, where it was held that obliteration, to be effectual under section 6, must be of a complete "clause" or sentence. But this is inconsistent with Larkins *v.* Larkins.]

execution he drew his pen through the words in italics, and above them wrote "Eley." The question was whether the fee simple was cut down to a life estate. It was argued that for this purpose something more than revocation was needed, for the life estate was a new estate, and that the case was in substance one not of obliteration but of alteration, which failed for want of due execution. But it was held that the obliteration, operating simply by way of revocation, had cut down the fee simple to a life estate; for the life estate was clearly less than the estate in fee, and was included in it. "In the eye of the law," said Lord Cairns, "a gift to A., his heirs and assigns, is what it says, a gift to all those persons. No doubt the law says that the estate given to the heirs shall vest in A.; but it is a gift to the heirs *nevertheless." At this day the case is chiefly interesting on account of this dissection of the limitation in fee.]

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 an intention that the devise shall not stand; as where the testator draws his pen across the devisee's name. (*l*)[16] But where the name occurred several times in the course of a 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 V. C. observing, that as the description, and in some places the name, of the legatee remained uncanceled, the court would not be warranted in holding that the bequests to her were revoked. (*m*) 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. (*n*)

Effect of partial obliteration.

(*l*) See Mence *v.* Mence, 18 Ves. 350.

16. And where a will, the execution of which is duly proved, is found in the bureau of the testator after his death, with the names of the legatee (the proponent) and the testator partially obliterated, the legal presumption is that it was canceled and revoked by the testator. Clark's Will, 1 Tuck. 445. See also Baptist Church *v.* Robbarts, 2 Penna. St. 110; Evans' Appeal, 58 Penna. St. 238; Cook's Will, 5 Clark 1; Smock *v.* Smock, 3 Stockt. 156; Bethell *v.* Moore, 2 Dev. & B. L. 311. And in such case the contestant will not be required to account for the mutilation. Clark's Will, *ubi supra*.

(*m*) Martins *v.* Gardiner, 8 Sim. 73.

(*n*) Grantly *v.* Garthwaite, 2 Russ. 90.

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 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.[17] 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. (*o*)

17. Cancellation is *prima facie* a revocation, but if it be made with the intent to execute a new will, and that purpose fails, the cancellation is conditional, and shall have no effect. Bethell *v.* Moore, 2 Dev. & B. L. 311; Stover *v.* Kendall, 1 Coldw. 557; Barksdale *v.* Barksdale, 12 Leigh 535; Jackson *v.* Holloway, 7 Johns. 394; Semmes *v.* Semmes, 7 Harr. & J. 388; Means *v.* Moore, 3 McCord 282; Pringle *v.* McPherson, 2 Brevard 279; Hairston *v.* Hairston, 30 Miss. 276; Banks *v.* Banks, 65 Mo. 432; Wolf *v.* Bollinger, 62 Ill. 368. But if the will be deliberately canceled without accident or mistake, that will operate as a revocation, although the testator omits to make another will, contemplated at the time of the revocation. Semmes *v.* Semmes, *ubi supra;* Johnson *v.* Brailsford, 2 Nott & McC. 272; Hairston *v.* Hairston, *ubi supra.* And though the second will being made, is, through a mistake of law on the part of the testator, inoperative. Banks *v.* Banks, *ubi supra.* But the doctrine of dependent relative revocation will not be applied by the court, if the testator has destroyed a will through a mistaken idea of the legal effect of such destruction, if the court is satisfied that the testator intended wholly to revoke that will. Dickinson *v.* Swatman, 4 Sw. & Tr. 205. Nor will this doctrine be applied unless there be proof of the actual destruction of the instrument. Hornerton *v.* Hewett, 25 L. T. (N. S.) 854. But the rule is different as to a subsequent will duly executed, which contains an express clause of revocation, but which fails to take effect as a disposition of the estate. Hairston *v.* Hairston, *ubi supra.* And a misapprehension, on the part of the testator, as to the legal capacity of a devisee to take, is a mistake of law and not of fact, and will not affect a clause of revocation contained in the will. Hairston *v.* Hairston, *ubi supra;* Price *v.* Maxwell, 28 Penna. St. 23.

(*o*) 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; Clarkson *v.* Clarkson, 3 Sw. & Tr. 497, 31 L. J., Prob. 143; Dancer *v.* Crabb, L. R., 3 P. & D. 98.

*[In like manner, where the later of two inconsistent wills is destroyed on the supposition that the earlier will is thereby revived; if this supposition be (as by the existing law we shall presently see it is) erroneous, the later will remains unrevoked. In this case, as in the former, the act of destruction is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as the condition upon which alone the revocation was intended to operate is in neither case fulfilled, in neither does the *animus revocandi* exist.] (*p*)

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. (*q*)[18]

[But the mere intention to make at some indefinite future time a new will, is not enough to prevent revocation.] (*r*)[19]

Effect where a testator having made two inconsistent wills, revokes the later.

Where the later of two inconsistent wills was [lost (*s*) or] canceled, (*t*) or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly was, according to the old law, to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, came into operation at his decease; and the distinction sometimes suggested, between canceled wills which did, and those which did not, contain express clauses of revocation, in regard to their revoking effect upon an earlier uncanceled will, (*u*) was wholly without foundation.[20] The clause of revocation, like every other

[(*p*) Powell *v.* Powell, L. R., 1 P. & D. 209, overruling Dickinson *v.* Swatman, 4 Sw. & Tr. 205, 30 L. J., Prob. 84.]

(*q*) Short *v.* Smith, 4 East 419 (this case, however, did not raise the precise point); Kirke *v.* Kirke, 4 Russ. 435; [Locke *v.* James, 11 M. & Wels. 901; and see corresponding cases under 1 Vict., c. 26, *post* p. *142.]

18. McPherson *v.* Clark, 3 Bradf. 92. See also Holman *v.* Riddle, 8 Ohio St. 384.

[(*r*) Williams *v.* Tyley, Johns. 530, better reported 5 Jur. (N. S.) 35; In re Mitcheson, 32 L. J., Prob. 202.]

19. Semmes *v.* Semmes, 7 Harr. & J. 388.

[(*s*) Rainier *v.* Rainier, 1 Jur. 754.

(*t*) Goodright *v.* Glazier, 4 Burr. 2512.]

(*u*) See Roper on Revocation 94.

20. Lawson *v.* Morrison, 2 Dall. 286; Havard *v.* Davis, 2 Binn. 406. In Lawson *v.* Morrison, 2 Dall. 286, 289, McKean, C. J., said: "The mere circumstance of making the will of 1779 is not *virtually* a revocation of that of 1775, the contents of the latter being unknown, and it not appearing to have been *in esse* at her death. Neither will could be a *complete* will, until her death, therefore the

clause, was ambulatory and silent until the death of the testator called the will into operation. (*v*) In the Ecclesiastical Court, however, Sir J. Nicholl laid it down, that the legal presumption was neither adverse to nor in favor of the revival of a former uncanceled, upon the cancellation of a later revocatory, will. The question was, he said, open to decision either way, according to facts and circumstances.(*x*) 21

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.22 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

making of the second, which was before death destroyed, did not revoke the first." But if such subsequent will contain a clause expressly revoking the first will, and the second will be destroyed, this cannot revive the first will, for the revoking clause, *proprio vigore*, operated instantaneously to revoke the first will, which would make republication necessary to give that will vitality. James *v.* Marvin, 3 Conn. 576.

(*v*) Harwood *v.* Goodright, Cowp. 92.

(*x*) Usticke *v.* Bawden, 2 Ad. 116; [and see Moore *v.* Moore, 1 Phillim. 412; James *v.* Cohen, 3 Curt. 770, 8 Jur. 249.]

21. In Kentucky it has been held that where a testator destroyed a subsequent will, which contained an express revocation of a former will, intending by such destruction to give effect to the first will, and died under those circumstances, the first will is valid. Linginfetter *v.* Linginfetter, Hardin 119. But it has been held, in New Jersey, that if of two wills the first be revoked by the second, and both be improperly destroyed, the first, the contents of which can be proved, cannot be established as the will of the testator, although the contents of the second cannot be ascertained. Day *v.* Day, 2 Gr. Ch. (N. J.) 550.

22. But it will not be presumed from circumstances that the will was executed in duplicate when the attesting witnesses say that but one copy was executed. O'Neal *ads.* Farr, 1 Rich. 80. See 1 Powell on Devises 597; 2 Greenl. Ev., § 682.

(*y*) See Sir Edward Seymore's case, cit. Com. 453, 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. Temp. Lee, 532.

(*a*) In re Hains, 5 No. Cas. 621.]

one, and then destroys that which he had altered, there is also the presumption, but weaker still.

These several gradations of presumption were stated by Lord Erskine in 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 canceled, having various alterations in it, and the other not altered or canceled; 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 L. C. finally concurred.

Perhaps, in such a case, the presumption can hardly be said to lean in favor of the revocation at all; for the testator having made alterations in one part, and then canceled 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 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 *favor 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.

[As the destruction of one part of a duplicate will is generally a revocation of the will, so an obliteration made in one part will be considered of the same effect as if made in both; for the two parts form together (if such be the intention, which is a question for the jury to decide) but one will, and an obliteration in one part is equivalent to an obliteration in both.] (*d*)

Effect of alteration in one duplicate.

(*b*) 13 Ves. 310.

(*c*) 3 Hagg. 548.

[(*d*) Doe d. Strickland *v.* Strickland, 8 C. B. 724. The second copy or part of the will was made two years after the first; but was found by the jury to have been intended as a duplicate. See also Hubbard *v.* Alexander, 3 Ch. D. 738.]

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. Thus in Utterson *v.* Utterson, (*e*) 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 canceled the codicil by drawing his pen across it, *but did not strike out the interlineation in his will.* This raised the question, whether the canceling 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 canceled 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," he said, "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

(*e*) 3 Ves. & B. 122.

(*f*) As to expressions of resentment in wills.—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. [The Probate Court will not readily omit from the probate any such record of displeasure. In re Honywood, L. R., 2 P. & D. 251.]

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*) [23] and before 1 Vict., c. 26, the general presumption in the ecclesiastical courts was rather in favor of the intention to involve a codicil in the revocation of the will of which it was a part, where a contrary intention could not be collected either from the contents of the codicil itself or from extrinsic evidence. (*h*) [24]

But if the codicil was capable, from the nature of its contents, of subsisting independently of the will, its validity was not 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 favor 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 favor 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 *under the present law.*

The act 1 Vict., c. 26, has considerably modified the law relating to the species of revocation which forms the subject of the present section. It [enacts (section 20) "that no will or codicil, or any part thereof, shall be revoked otherwise than as *aforesaid (*i. e.*, by marriage), or by another will

(*g*) Usticke *v.* Bawden, 2 Add. 116.

23. But on the other hand, if a will be on one sheet and a codicil thereto on another sheet, and each be deposited with a different person, the revocation of the codicil alone will not be held, under any circumstances, to revoke the will. Malone *v.* Hobbs, 1 Rob. (Va.) 346.

(*h*) Medlycott *v.* Assheton, 2 Add. 229; Coppin *v.* Dillon, 4 Hagg. 369.

24. But recently, in England, it has been expressly held that a testamentary paper, in the form of a codicil, is not revoked by the revocation of the will. And that the codicil itself can be revoked only by one of the modes provided in the acts 7 Will. IV., and 1 Vict., c. 26, § 20. In the goods of Savage, L. R., 2 P. & D. 78, 39 L. J. P. 25, 22 L. T. (N. S.) 375; In the goods of Turner, L. R., 2 P. & D. 403, 27 L. T. (N. S.) 322.

(*i*) Tagart *v.* Squire, 1 Curt. 289.

or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed as a will," or] by the *burning, tearing, or otherwise destroying* the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same;" and (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 intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary *shall be shown.*"]

Revival of revoked wills.

The change, therefore, is that a revocation by cancellation or obliteration is not (as before) placed upon the same footing as a revocation by burning or tearing. Obliteration, [or other alteration which does not wholly efface the will, is no longer effectual unless executed in manner prescribed for the execution of a will.]

Points of difference under the new law.

But it may, of course, still be a question, (1) whether the destruction of a will by a testator in his lifetime [by burning, tearing, or otherwise] is partial or complete; and (2) whether it takes place under circumstances, in regard to the volition of the testator or otherwise, which invest it with a revoking effect; and (3) whether or not it was so connected with an intended new disposition as to be dependent for its operation upon the efficacy thereof.(*j*) All such questions the recent statute leaves untouched.

Points of similarity.

(*j*) See Powell *v.* Powell, *ante* p. *136.

*[Thus, with regard to the words, "tearing" and "burning," the decisions under the statute of frauds assist the construction of the act 1 Vict. Under the latter act it has been decided that the word "tearing" includes "cutting;" (k) for 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, to be effectual, need not be a cutting up of the whole will; cutting out that part of the will which may be said to be the principal part, (l) or that part which gives effect to the whole, as the signature of the testator, (m) or, it is presumed, of the witnesses, (n) will cause a revocation of the whole will.[25] 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. (o) It has also been decided by the Court of Exchequer (p) 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.[26] 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 by Sir W. P. Wood, V. C., in a case (q) where a testator made his will on five sheets of paper, signed the first

"Tearing."

When partial tearing effects total revocation,

[(k) Hobbs *v.* Knight, 1 Curt. 768; In re Cooke, 5 No. Cas. 390; and see Clarke *v.* Scripps, 16 Jur. 783, 2 Rob. 563.

(l) Williams *v.* Jones, 7 No. Cas. 106.

(m) Hobbs *v.* Knight, 1 Curt. 768; In re Gullan, 1 Sw. & Tr. 23, 27 L. J., Prob. 15; In re Lewis, Id. 31, 1 Sw. & Tr. 31; In re Simpson, 5 Jur. (N. S.) 1366; Bell *v.* Fothergill, L. R., 2 P. & D. 148.

(n) Evans *v.* Dallow, 31 L. J., Prob. 128. See also Birkhead *v.* Bowdoin, 2 No. Cas. 66; Hobbs *v.* Knight, 1 Curt. 780, 781; Abraham *v.* Joseph, 5 Jur. (N. S.) 179. So in a case of total obliteration. In re James, 7 Jur. (N. S.) 52.]

25. And if the signature, having been cut out, is afterwards pasted into the will again, and the will remain in the custody of the testator to the time of his death and his declaration that he intended to benefit his wife by will made subsequently to the date of the will is proved, and there is no other will, this will not rebut the presumption that the testator cut out his signature *animo revocandi*. Nor will the pasting of the signature into its former place revive the will. Bell *v.* Fothergill, L. R., 2 P. & D. 148, 23 L. T. (N. S.) 323. See also White's Will, 10 C. E. Gr. (N. J.) 501.

[(o) In re Gullan, 1 Sw. & Tr. 23, 27 L. J., Prob. 15, 4 Jur. (N. S.) 196; Gullan *v.* Grove, 26 Beav. 64. Compare Christmas *v.* Whinyates, 32 L. J., Prob. 73 (where the court was satisfied that the tearing was intended to work a partial revocation only)

(p) Price *v.* Powell, 3 H. & N. 341.]

26. Avery *v.* Pixley, 4 Mass. 460; Johnson *v.* Brailsford, 2 Nott & McC. 272.

(q) Williams *v.* Tyley, Johns. 530.

four, and signed and sealed the fifth, with an attestation clause describing the mode of execution: he afterwards tore off 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. But cutting out a particular clause or the name of a legatee is a revocation *pro tanto* only. (*r*)[27] Where a will is found torn, evidence is, of course, admissible to show *that it was done by mistake (*r*) or 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*) The intention without the act is equally ineffectual. (*u*)

When not.

The words "otherwise destroying" are new. They are to 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, or, at least, complete effacement of the writing, as, by pasting over it a blank paper; (*x*) and not a "destroying" in a secondary sense, (*y*) as by canceling 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. (*z*) Glasses have been used (*a*) for discovering what the words obliterated

Meaning of words "otherwise destroying."

(*r*) In re Cooke, *supra;* In re Lambert, 1 No. Cas. 131; In re Woodward, L. R., 2 P. & D. 206, where seven or eight lines at the beginning had been cut off.

27. The degree of "burning, tearing, canceling or obliterating" necessary to the revocation of a will, according to the statute of frauds, must depend on the circumstances of each case. Johnson *v.* Brailsford, 2 Nott & McC. 272. The slightest burning or tearing, &c., of a will, accompanied with satisfactory evidence, drawn *aliunde*, of the intent of the testator to revoke, will satisfy the statute, and the revocation will be complete. Ib. See also Means *v.* Moore, 3 McCord 282; Dan *v.* Brown, 4 Cowen 483; Brown's Will, 1 B. Mon. 56.

(*r*) Giles *v.* Warren, L. R., 2 P. & D. 401.

(*s*) Bigge *v.* Bigge, 9 Jur. 192, 3 No. Cas. 601; and see 1 Eq. Ca. Ab. 402, pl. 3, marg.

(*t*) In re Tozer, 2 No. Cas. 11, 7 Jur. 134; In re Hannam, 14 Jur. 558; Clarke *v.* Scripps, 16 Jur. 783, 2 Rob. 563.

(*u*) Cheese *v.* Lovejoy, 2 P. D. 251; *ante* p. *131.

(*x*) In re Horsford, L. R., 3 P. & D. 211.

(*y*) Stephens *v.* Taprell, 2 Curt. 458; Hobbs *v.* Knight, 1 Curt. 779.

(*z*) In re Dyer, 5 Jur. 1016; In re Fary, 15 Jur. 1114; Stephens *v.* Taprell, 2 Curt. 458; In re Beavan, Id. 369; In re Rose, 4 No. Cas. 101; In re Brewster, 29 L. J., Prob. 69, 6 Jur. (N. S.) 56.

(*a*) In re Ibbetson, 2 Curt. 337; Lushington *v.* Onslow, 6 No. Cas. 187, 12 Jur. 465. As to this, see In re Horsford, L. R., 3 P. & D. 211.

originally were:[28] but parol evidence is inadmissible, (*b*) 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; in which case, 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 substituted words not being properly attested, the former gift will now (as under the statute of frauds) remain good, and evidence must be admitted to show what the original words were. (*c*) The same rule, it is presumed, applies to an erasure of the name of the legatee; (*d*) as it appears to do to an erasure of the name of an executor. (*e*)

Parol evidence admissible in cases of conditional revocation.

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; (*f*) and the court of probate has sometimes granted a *fac-simile* probate of the will containing interlineations, or parts of the will struck through; and the court of construction has then considered the alterations as made before execution, and therefore effectual. Where this is really so, the duty of the court of probate, at all events since the judicature act, 1873, would seem to be to grant probate of the will as altered, in the same

Satisfaction proved by obliteration.

28. "By the expression 'destruction of a will,' is commonly understood a disintegration and decomposition of the material on which the will is written, but as we see, destruction can be effected by doing something tantamount thereto, and the whole document, in order to be revoked, need not necessarily be torn, burnt, or otherwise destroyed. 'There must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator; in short, it is sufficient to satisfy the words "otherwise destroying," if the essence of the instrument, not merely the material, be destroyed.'" Flood on Wills 344, 345.

(*b*) Townley *v.* Watson, 3 Curt. 761, 8 Jur. 111, 3 No. Cas. 17.

(*c*) Soar *v.* Dolman, 3 Curt. 121, 6 Jur. 512; Brooke *v.* Kent, 3 Moo. P. C. C. 334, 1 No. Cas. 99; In re Ibbetson, 2 Curt. 337; In re Reeve, 13 Jur. 370. If there is no evidence what the words were, probate is decreed in blank. In re James, 1 Sw. & Tr. 238.

(*d*) See Short *v.* Smith, 4 East 419.

(*e*) In re Parr, 1 Sw. & Tr. 56, 29 L. J., Prob. 70, 6 Jur. (N. S.) 56; In re Harris, 1 Sw. & Tr. 536, 29 L. J., Prob. 79. See also per Sir W. Grant, 7 Ves. 379; and Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817, noticed *post;* In re M'Cabe, L. R., 3 P. & D. 94. In re Bedford, 5 No. Cas. 188, is *contra*. *Sed qu.*

(*f*) Twining *v.* Powell, 2 Coll. 262.

way as if the alterations had been referred to in the attestation clause. (*g*)

Distinction as to acts apparent and acts not apparent on the face of a will.

With respect to a will executed before 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 act 1 Vict., c. 26; (*h*)[29] 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 before the act. (*i*)

Presumption when alteration is made.

Where obliterations and interlineations appear on the face of a will, and there is no evidence (*k*) to show when they were made, the presumption is that they were made after the execution of the will; (*l*) 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 the codicil. (*m*) And the same presumptions hold

(*g*) Gann *v.* Gregory, 3 D., M. & G. 777; Shea *v.* Boschetti, 18 Jur. 614, 23 L. J., Ch. 652.

(*h*) In re Livock, 1 Curt. 906; Hobbs *v.* Knight, Id. 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.

29. Where an inspection of the will itself leads to the conclusion that it has been altered in a material part since its execution, and the alteration is not explained, it must avoid the instrument. In re Wilson, 8 Wis. 171.

(*i*) *Supra*, p. *129, and cases in note (*h*) *supra*.

(*k*) As to the nature of the evidence necessary, see Keigwin *v.* Keigwin, 3 Curt. 607, 7 Jur. 840; In re Jacob, 1 No. Cas. 401; In re Hindmarch, L. R., 1 P. & D. 307; In re Treeby, L. R., 3 P. & D. 242. Generally declarations of the testator are admissible for this purpose, whether made before or at the time of the execution of his will. Doe d. Shallcross, *v.* Palmer, 16 Q. B. 747; In re Hardy, 30 L. J., Prob. 142; In re Sykes, L. R., 3 P. & D. 26; Dench *v.* Dench, 2 P. D. 60. But not those made afterwards. Doe d. Shallcross *v.* Palmer, *supra;* nor is it enough that the alterations bear earlier date than the will. In re Adamson, L. R., 3 P. & D. 253.

(*l*) 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; In re Thompson, 3 No. Cas. 441; Gann *v.* Gregory, 3 D., M. & G. 777; Doe d. Shallcross *v.* Palmer, 16 Q. B. 747; In re James, 1 Sw. & Tr. 238; In re White, 30 L. J., Prob. 55, 6 Jur. (N. S.) 808; Williams *v.* Ashton, 1 J. & H. 115. 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. In re Streaker, 4 Sw. & Tr. 192, 28 L. J., Prob. 50. And see Banks *v.* Thornton, 11 Hare 180. But such presumption was not made where the obliteration would have worked a total *revocation*. Benson *v.* Benson, L. R., 2 P. & D. 172.

(*m*) Lushington *v.* Onslow, 6 No. Cas 183, 12 Jur. 465; Rowley *v.* Merlin, 6 Jur. (N. S.) 1165; and compare In re Mills, 11 Jur. 1070.

regarding mutilation. (*n*) But where a will has been drawn with blanks left, *e. g.* for the names of the 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. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the court will conclude that it was written before execution. (*o*) In Birch *v.* Birch, (*p*) where some blanks were filled in with black ink and others with red, it was presumed that the additions in black ink were made before execution, but that those in red ink were made after execution, the envelope in which the will was found appearing to have been sealed, opened and re-sealed.

Effect under 1 Vict., c. 26, where will is destroyed but not the codicil.

The stat. 1 Vict., c. 26 appears not to have done away with the presumption made by the old law that the destruction of a will was an implied revocation of a codicil thereto. (*q*) Lord Penzance has indeed held otherwise, on the ground that sect. 20, enacting that "no will *or codicil* shall be revoked otherwise than" by certain specified methods, plainly excludes the method in question. (*r*) But, in Sugden *v.* Lord St. Leonards, (*s*) a demurrer depending for its validity on this view of the statute, was formally (though without argument) overruled by Sir J. Hannen. It is far from clear that the act forbids a codicil being, to the same extent as before, treated as part of, or accessory to, the will; or that the express mention of "codicil" does more than require, where it is the substantive subject of revocation, that it be revoked by one of the specified methods. (*t*) *Perhaps, however, the point is not of much importance.

(*n*) Christmas *v.* Whinyates, 32 L. J., Prob. 73.

(*o*) In re Cadge, L. R., 1 P. & D. 543.

[(*p*) 6 No. Cas. 581.

(*q*) See per Sir H. Fust, Clogstoun *v.* Walcott, 5 No Cas. 623, 12 Jur. 422; In re Halliwell, 4 No. Cas. 400, 9 Jur. 1042: followed by Sir C. Cresswell, Grimwood *v.* Cozens, 2 Sw. & Tr. 364, 5 Jur. (N. S.) 497; In re Dutton, 3 Sw. & Tr. 66, 32 L. J., Prob. 137. In Clogstoun *v.* Walcott, the judge is made to observe, as if it were a new requirement, that the statute expressly requires "an intention to destroy." But the *animus revocandi* was previously required by necessary intendment of law: ("destroy" is here an obvious oversight for "revoke.")

(*r*) Black *v.* Jobling, L. R., 1 P. & D. 685; In re Savage, L. R., 2 P. & D. 78; In re Turner, Id. 403.

(*s*) 1 P. D. 154, 206.

(*t*) Whether under the old law the presumption existed with respect to codicils dealing with freehold land appears never to have been decided. The statute of frauds, § 6, does not, for this purpose, differ materially from 1 Vict., c. 26, § 20.

The presumption already stated was never a strong one, even under the old law, and the question whether the codicil was revoked or not always depended, and (supposing the presumption to continue) will still depend, mainly upon the contents of the codicil, (*u*) and the effect of the evidence adduced to rebut the presumption. (*v*)

Alteration not duly attested by re-tracing names 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. (*w*) 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 erroneously supposed that this had been effectually done by tracing the former signatures with a dry pen.

Rule as to revival of a prior will by revocation of a later abolished.

The 22d 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: [30] 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. (*x*) [In either case, sect. 22 permits the prior will to be revived by one of two means only: the testator must re-execute the will, or he must make and duly execute a codicil showing an intention to revive the will. Even if he destroys the second will for the express purpose of setting up the first, he fails in his object; for parol evidence of his intention is not admissible in order to give effect to that object; (*y*) though it is admissible to prove that the destruction was effected under a mistake, and consequently to prevent the revocation of the destroyed will. (*z*)

Parol evidence inadmissible to show intention to revive.

(*u*) So imperative did Lord Penzance consider the act to be, that even where the codicil was unintelligible without the will, (the contents of which were unknown,) he held himself bound to admit the codicil to probate, and leave the question of its operation to the court of construction. In re Turner, L. R., 2 P. & D. 403. But since the judicature act, 1873, the whole matter must, it would seem, be disposed of in the Probate Division.

(*v*) In Clogstoun *v.* Walcott and In re Halliwell, the codicils were held not to be revoked. See also In re Ellice, 33 L. J., Prob. 27.

(*w*) In re Cunningham, 1 Searle & S. 132, 29 L. J., Prob. 71.]

30. See *post* ch. VIII., note 2, page 362. See also 1 Powell on Devises 527.

(*x*) Brown *v.* Brown, 8 Ell. & Bl. 876; Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Boulcott *v.* Boulcott, 2 Drew. 25.

(*y*) Major *v.* Williams, 3 Curt. 432, S. C., *nom.* Major *v.* Iles, 7 Jur. 219.

(*z*) Powell *v.* Powell, L. R., 1 P. & D. 209. And the contents of the destroyed

*Where a will was found with the signature cut off, but gummed on again, it was held that it was not duly re-executed.(a) Nor does a codicil show an intention within the meaning of the section to revive the earlier of two wills, by being physically annexed to it. The intention must appear by the contents of the codicil. (b) And the intention so appearing to revive one will cannot be corrected by parol evidence that the draughtsman made a mistake, and that the testator intended to refer to and revive another. (c)[31]

Revival by re-execution; —by codicil

By sect. 34, it is provided that the act "shall not extend to any will made before 1838." Now if the first of two inconsistent wills be made before 1838, and the second be destroyed after that date, does sect. 22 extend to the case so as to prevent revival of the first will? Though revived, it would not be republished. (d) It would therefore take effect wholly under the old law, and derive no virtue from the new. However, in Dickinson *v.* Swatman, (e) the argument for revival was considered untenable.

—where prior will made before 1838.

The concluding words of sect. 22, "unless a contrary intention shall *be shown*," deserve notice. Elsewhere in the act, the phrase "unless a contrary intention shall *appear by the will*" frequently occurs. But here the means of proof are not pointed out. An intention, therefore, to revive the whole of a will, which has been first partly and then completely revoked, may be shown by any means allowed by general principles. These principles would exclude parol evidence to explain a written document, *i. e.* a codicil (if that were the means of revival chosen;)

Parol evidence when admissible to determine extent of revival where revocation has been by steps.

(or lost) will may be proved by parol. Brown *v.* Brown, 8 Ell. & Bl. 876; Wood *v.* Wood, L. R., 1 P. & D. 309. The remarks *contra* in Wharram *v.* Wharram, 3 Sw. & Tr. 301, 33 L. J., Prob. 75, are unfounded. Sugden *v.* Lord St. Leonards, 1 P. D. 239. But such evidence must show clearly that the contents of the second will were such as to revoke the first. It is not enough to prove that the lost will contained the words "this is the last will and testament." Cutto *v.* Gilbert, 9 Moo. P. C. C. 131, cited again with others to the same effect, *post* § 5.

(a) Bell *v.* Fothergill, L. R., 2 P. & D. 148. On the question whether such an intention is shown by the contents, see the close of this chapter.

(b) Marsh *v.* Marsh, 1 Sw. & Tr. 528, 6 Jur. (N. S.) 380, 30 L. J., Prob. 77.

(c) Walpole *v.* Cholmondely, 7 T. R. 138; In 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. See accordingly ch. XIII., *post*, where they are treated of.

31. See *post* ch. XIII., note 4.

(d) R. P. C., Fourth Report, p. 33.

(e) 4 Sw. & Tr. 205.

but would admit it in order to show *quo animo* the bare *act* of re-execution was done.] (*f*)

Destruction must be in the presence of the testator.

*It is observable that both the statute of frauds and the act 1 Vict. 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: (*g*) and if in such case the will should be destroyed its contents might be proved *aliunde*.] (*h*)[32]

SECTION III.

By Alteration of Estate.

1. Under the old law.

Under the old law, it was essential to the validity of a devise of freehold lands, that the testator should be seized thereof at the making of the will, and that he should continue so seized 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.[33] The devise of a freehold lease, which was renewed by the testator subsequently to

By acquisition of new estate.

(*f*) See Upfill *v.* Marshall, 7 Jur. 819. On the question whether a "contrary intention" is shown by the contents of a codicil, see the close of this chapter.

[(*g*) Stockwell *v.* Ritherden, 6 No. Cas. 414, 12 Jur. 779.

(*h*) In re North, 6 Jur. 564.]

32. But see Beauchamp's Will, 4 Mon. 361.

33. But alteration of the circumstances of the testator will not amount to a revocation at law. Graves *v.* Sheldon, 2 D. Chip. 71. See also Blandin *v.* Blandin, 9 Vt. 210. The plain sense of the Vermont statute is that there shall be no revocation of a will by implication, except such as must result *ex necessitate rei*. Graves *v.* Sheldon, *ubi supra*. But a sale, under a tax levy, of real estate devised will operate as a revocation *pro tanto*. Borden *v.* Borden, 2 R. I. 94. But it has been held, in Indiana, where real estate was owned by the testator at the time of making the will, and was, some years later, conveyed by the testator, and, one year after such conveyance by him, reconveyed to the testator, that the will was not therefore revoked by implication, but that its operation was restored as to this real estate. Woolery *v.* Woolery, 48 Ind. 523. But it is probable that the doctrine stated in the text is the better law. See Walton *v.* Walton, 7 Johns. Ch. 258. See 1 Powell on Devises 547, *et seq.*; 2 Greenl. Ev., § 686.

the will, was evidently in this situation. (*i*) [But 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, was not such an alteration as worked a revocation, the will acting on the original interest in its new form.] (*k*)

Not by change from contingent to vested.

A revocation by alienation may be either partial or total.[34] 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 withdrawing the demised interest from its operation, (*l*) 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. (*m*) 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

Partial alienations.

(*i*) Marwood *v.* Turner, 3 P. Wms. 163.

[(*k*) Jackson *v.* Hurlock, 2 Ed. 263; stated on this point *ante* p. *48, n.]

34. Where a testator, after making his will, conveyed some of the real estate which he had devised, it being urged that such conveyance worked an implied revocation of the will, it was held that, to the extent of that conveyance, there was a revocation *pro tanto*, but no more. Hawes *v.* Humphrey, 9 Pick. 350; Carter *v.* Thomas, 4 Greenl. 341; Skerret *v.* Burd, 1 Whart. 246; Brush *v.* Brush, 11 Ohio 287; Brown *v.* Thorndike, 15 Pick. 388. To defeat the entire testamentary disposition by conveyance, there must be a conveyance of the whole estate. Hawes *v.* Humphrey, *ubi supra*. If the will be of both real and personal estate, and be revoked *pro tanto* as to the real estate, by a conveyance thereof, it shall stand as a good will of the personal estate. It may then be revoked by any act sufficient to revoke a will of personal estate. Brown *v.* Thorndike, *ubi supra*. The fact that, after the alienation of a portion of the estate, the testator suffered the will to remain uncanceled, evinces that his intention was not altered as to the other property therein devised or bequeathed. Carter *v.* Thomas, *ubi supra*.

(*l*) Hodgkinson *v.* Wood, Cro. Car. 23; Parker *v.* Lamb, 2 Vern. 495, 3 B. P. C. Toml. 12.

[(*m*) *A fortiori*, since 1 Vict., c. 26, Barrs *v.* Lea, 33 L. J., Ch. 437, where, on a mining lease, it was unsuccessfully argued that certain sums payable half-yearly were not rent, but purchase money for the minerals, though payable by installments: as to which, see further, Brook *v.* Badley, L. R., 4 Eq. 106; and compare In re Mary Smith, L. R., 10 Ch. 79.]

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 seizin of [or his estate in] 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 (*n*) 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, (o) 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.

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.[35] Thus, if a testator on his marriage, in

(*n*) Parker *v.* Lamb, 3 B. P. C. Toml. 12.

(*o*) 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.

35. 4 Kent 530; 1 Powell on Devises 548; Bowen *v.* Johnson, 6 Ind. 110; Adams *v.* Winne, 7 Paige 97; Cooper's Estate, 4 Penna. St. 88; Brown *v.* Brown, 16 Barh. 569; Beck *v.* McGillis, 9 Barh. 35; Jones *v.* Hartley, 2 Whart. 103; Epps *v.* Dean, 28 Ga. 533; Herrington *v.* Budd, 5 Denio 321. But the more general rule is that the will is revoked only *pro tanto*. Brush *v.* Brush, 11 Ohio 287; Carter *v.* Thomas, 4 Greenl. 341; Hawes *v.* Humphrey, 9 Pick. 350; Terry *v.* Edminster, 9 Pick. 355, note; Brown *v.* Thorndike, 15 Pick. 388; Balliet's Appeal, 14 Penna. St. 451; Wells *v.* Wells, 35 Miss. 638; Floyd *v.* Floyd, 7 B. Mon. 290; In re Nan Mickel, 14 Johns. 324; McNaughton *v.* McNaughton, 34 N. Y. 201; Bosley *v.* Bosley, 14 How. 390. But if land devised, and afterwards sold, be reconveyed to the testator, so that the title is in him at his death, it will pass by the will without formal republication. Brown *v.* Brown, *ubi supra;* Woolery *v.* Woolery, 48 Ind. 523. A man seized of two tracts of land, devised one to his child, and the other to the family of another child, and gave a pecuniary legacy to a bastard grandchild. Afterwards he sold one tract, and the other was swept away by debts, and he died leaving no more estate than enough to pay his debts and the legacy to his bastard grandchild. It was held that this did not amount to a revocation of his will. Wogan *v.* Small, 11 Serg. & R. 141. Where personal legacies are payable *only* out of certain real estate, the sale and conveyance of that real estate after the will is made will amount to an ademption of the legacies. Balliet's Appeal, *ubi supra*. And if a specific legacy does not exist at the time of the testator's death, it is adeemed. Beck *v.* McGillis, *ubi supra*. And where the conveyance is inoperative for want of completion, or from the incapacity of the

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*. (*p*)

*This doctrine, however, does not apply to copyholds. Thus, where A, who was seized 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 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; on the ground, that, according to the doctrine of Thrustout *v.* Cunningham, (*q*) the fee-simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance to the use of himself. (*r*)

As to conveyances of copyholds.

grantee to take, it may amount to a revocation, if it show the intention of the testator to revoke his will. Walton *v.* Walton, 7 Johns. Ch. 258. But the conveyance will operate as a revocation even where the grantee and the devisee is the same person, for he is then in by the deed, and not by the will. Kean's Will, 9 Dana 25. And if the deed be canceled during the lifetime of the testator, this will not revive the will without republication. Ib. And such conveyance will work a revocation, although the grantor reserves to himself a ground rent in fee, and such ground rent does not pass to the devisee of the realty. Skerrett *v.* Burd, 1 Whart. 246. Where the testator, having devised certain real estate to his daughters, and the residue to his four children, afterwards sold that real estate and took a bond and mortgage for the purchase money, which was outstanding at his death, it was held that the will was revoked *pro tanto* by the conveyance, and that the bond and mortgage passed to the residuary legatees. Adams *v.* Winne, *ubi supra*. The provision of the New York statute as to implied revocations of wills of real estate, does not extend to a case of actual conversion into personal property, after the making of a will, of the real estate devised, by selling the entire interest of the testator, and receiving a purchase money mortgage. Ib. See also Bosley *v.* Bosley, 14 How. 390.

(*p*) Goodtitle *v.* Otway, 2 H. Bl. 516, 1 B. & P. 576, 7 T. R. 399, 2 Ves., Jr., 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, 8 D., M. & G. 531; Power *v.* Power, 9 Ir. Ch. Rep. 178.]

(*q*) 2 W. Bl. 1046, Fea. C. R. 68.

(*r*) Vawser *v.* Jeffrey, 3 B. & Ald. 462, 3 Russ. 479.

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 seizin, thus occasioned, produces a complete and total revocation of the previous devise. Thus, if a testator, seized in fee of Blackacre, having by a 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*. (*s*)

Conveyances for a mistaken or unnecessary purpose.

But where the momentary interruption of the testator's seizin 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 disseized subsequently to the making of his will, and afterwards re-entered, the entry restored the original seizin, and by relation the disseizee was considered to have been seized *ab initio*, so that his devise remained unrevoked. (*t*)

Tortious eviction.

*But if the disseizee were out of possession at the time of making his will, or at his death, the devise would be inoperative. (*u*)

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. (*x*)

Exchanges.

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 Earl of Lincoln's case, (*y*) where a testator devised lands,

Revocation of devises of equitable interests by conveyance.

(*s*) Burgoigne *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.]

(*t*) Bunter *v.* Coke, 1 Salk. 237; Att.-Gen. *v.* Vigor, 8 Ves. 282.

[(*u*) Vin. Ab. Dev. R. (6,) pl. 1.]

(*x*) Att.-Gen. *v.* Vigor, 8 Ves. 256.

(*y*) 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 prin-

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 Lock *v.* Foote, (*z*) where A devised estates, of which he had only the equitable fee, and afterwards agreed to sell part 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. (*a*)[36] [The *manner in which the partition is made might, however, have revoked the devise; as if a testator having an undivided share of lands

Manner of partition may cause revocation.

ciple established by the case.] See also Pollen *v.* Huband, 1 Eq. Ab. 412, 7 B. P. C. Toml. 433.

(*z*) 5 Sim. 618.

(*a*) Luther *v.* Kidby, 3 P. Wms. 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. In Grant *v.* Bridger, L. R., 3 Eq. 347, it was attempted to bring within these authorities a case where commoners, after devise, joined with the owners of the soil in conveying the land to trustees, and took back shares of the land in severalty, but of course unsuccessfully.]

36. The case of partition is considered a sort of special case. The estate is the same, but, after the partition, enjoyed in a different quality and another mode, and, therefore, provided nothing more is done than *mere partition*, no revocation will result. Attorney-General *v.* Vigor, 8 Ves. 256, 281; Rawlins *v.* Burgis, 2 Ves. & B. 382; 1 Powell on Devises 554, 559. In the language of Harrington, J.: "The case of partition seems also to be an excepted case, even where to effect the partition a conveyance of the land be necessary. Such a conveyance by a coparcener or tenant in common, after he had made his will, has been held not to occasion a revocation of the will. The reason of this seems

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.] (*b*)

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. (*c*)[37]

Mortgage inaccurately termed a revocation *pro tanto*.

To designate a mortgage a revocation *pro tanto*, however, was inaccurate, and tended to create an erroneous impression of its actual effect on the rights of the person 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 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. (*d*) 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.[38]

to be, that the object of the conveyance is really not to pass title, but to effect a severance of the manner of holding; and the estate to which the will applies being liable to this change without enlargement or restriction, the will is reasonably to be regarded and held as applying to it in its severed form of holding, as well as when it was held in common." Duffel *v.* Burton, 4 Harr. (Del.) 290, 295.

[(*b*) Knollys *v.* Alcock, 5 Ves. 648, 7 Id. 558. Compare Phillips *v.* Turner, 17 Beav. 194.]

(*c*) 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.

37. McTaggart *v.* Thompson, 14 Penna. St. 149; Stubbs *v.* Houston, 33 Ala. 555, 564; 4 Kent 531; 1 Powell on Devises 556. So, too, a trust deed to be null and void at the death of the testator works a revocation *pro tanto* only. Hughes *v.* Hughes, 2 Munf. 209.

(*d*) Warner *v.* Hawes, 3 B. P. C. Toml. 21. [*Secus* since 17 and 18 Vict., c. 113.]

38. "The same principle is applicable to leases, which, it is clear, though made to the devisee, do not revoke the devise beyond the interest included in them. But Lord Hardwicke, in Villiers *v.* Villiers, 2 Atk. 71, suggested whether a distinction might not arise where the lease was not to commence until after the devisor's death, which seems to agree with the case of Coke *v.* Bullock, Cro. Jac. 49, to which his Lordship adverted; but the doctrine seems to be wholly indefensible, and is inconsistent with Hodgkinson *v.*

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; (*e*) whether the mortgage conveyance was made by fine, or any other mode of assurance; (*f*) whether the mortgagee were the devisee himself, (*g*) 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. (*h*)

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, (*i*) 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 [39] [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.] (*k*) Bankruptcy also left a testator's will unrevoked, as to any surplus remaining after satisfaction of the claims of creditors. (*l*)[40]

Conveyance upon trust for sale.

Bankruptcy.

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

Mortgages by demise.

Whood, Cro. Car. 23, where such a lease was held not to revoke a devise. The lease was not made to the devisee, but this we have now authority for saying does not vary the principle." 1 Powell on Devises 557, note (8).

[(*e*) Jackson *v.* Parker, Amb. 687.]

(*f*) Rider *v.* Wager, 2 P. Wms. 334; Jackson *v.* Parker, Amb. 687.

(*g*) Peach *v.* Phillips, Dick. 538; Baxter *v.* Dyer, 5 Ves. 656, overruling Harkness *v.* Bayley, Pre. Ch. 514.

(*h*) Cro. Car. 23.

(*i*) Vernon *v.* Jones, 2 Freem. 117, [Pre. Ch. 32, 2 Vern. 241;] Earl Temple *v.* Duchess of Chandos, 3 Ves. 685.

39. Such a conveyance is not a revocation of the will beyond such special purpose. Livingston *v.* Livingston, 3 Johns. Ch. 148; Jones *v.* Hartley, 2 Whart. 103. See also Padfield *v.* Padfield, 72 Ill. 322. And a conveyance by a testator to a trustee, for the use of his wife, would not operate as a revocation of the will. Clingan *v.* Mitcheltree, 31 Penna. St. 25. It was said by Kent, C., in Livingston *v.* Livingston, *ubi supra:* "A devise is not revoked in equity by a mortgage in fee, or a conveyance in fee, for payment of debts. The mortgagee is trustee for the devisee, and the devisor continues owner as before, subject to the mortgage." But in an action of ejectment, parol evidence is not admissible, between the heirs and a devisee in the alleged will, to prove that a conveyance, made after the will, and which is absolute on its face, was in fact made in trust to pay the debts of the grantor, with a resulting interest to him. Jones *v.* Hartley, *ubi supra.* See 1 Powell on Devises 558.

[(*k*) Hodges *v.* Green, 4 Russ. 28.]

(*l*) Charman *v.* Charman, 14 Ves. 580.

40. But the legacy of a debt is not

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.

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, (*m*) 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, (*n*) 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. 41

Again, in Harmood *v.* Oglander, (*o*) 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 £5500 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

deemed by the testator's having received dividends on a bankruptcy. Ashburner *v.* Macguire, 2 Bro. C. C. 108.

(*m*) Cit. 1 Wils. 309, and 3 Atk. 742–745, 750.

(*n*) Cit. 2 Ves., Jr., 601.

41. 1 Powell on Devises 559.

(*o*) 6 Ves. 199, 8 Ves. 106. [See Briggs *v.* Watt, 2 Jur. (N. S.) 1041; Power *v.* Power, 9 Ir. Ch. Rep. 178.]

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.

So in Hodges *v.* Green, (*p*) where a testator seized 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 moneys 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 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. (*q*)

What expressions newly modify equity of redemption.

Thus in Brain *v.* Brain, (*r*) where A subsequently to his will, by a conveyance by way of security, in consideration of £800 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,

(*p*) 4 Russ. 28.

(*q*) 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.]

(*r*) 6 Madd. 221.

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 encumbrances, and, in default of payment, the trustees 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 V. C. 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. (*s*)

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 (*t*) 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

[(*s*) And see Youde *v.* Jones, 14 Sim. 162.]

(*t*) 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.

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.] (*u*)

If, however, the conveyance does more than vest the legal estate in the testator, and newly modifies his ownership, revocation will, of course, be produced, as it would if 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. (*y*) 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. (*z*) 42

Contra, if deed modifies the equitable ownership.

So it has been decided, that where (*a*) 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.

Effect of conveyance upon a purchaser's devise after contract.

[(*u*) Seaman *v.* Woods, 24 Beav. 372.]

(*y*) Rawlins *v.* Burgis, 2 Ves. & B. 382; [Plowden *v.* Hyde, 2 Sim. (N. S.) 171, 2 D., M. & G. 684; Schroder *v.* Schroder, Kay 578.]

(*z*) Tickner *v.* Tickner, cited 1 Wils. 311, 3 Atk. 742; Parsons *v.* Freeman, 3 Atk. 741.

42. Before the revised statutes took effect in Massachusetts, it was held that if a testator, after devising a mortgage, either foreclosed it, or took a release of the equity of redemption, or an absolute deed, canceling the mortgage and paying the mortgagor the difference, it was a revocation of the will. Ballard *v.* Carter, 5 Pick. 112; Brigham *v.* Winchester, 1 Metc. 390. In Connecticut, it seems that as the foreclosure converts the mortgage from personal into real estate, the real estate would descend to the heirs, unencumbered by any bequest not charged upon real estate. Swift *v.* Edson, 5 Conn. 531.

(*a*) Ward *v.* Moore, 4 Mad. 368.

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, (*b*) 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 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 Plowden *v.* Hyde, (*c*) 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.

(*b*) Bullin *v.* Fletcher, 1 Kee. 369, 2 My. & Cr. 432.

[(*c*) 2 Sim. (N. S.) 171, 2 D., M. & G. 684.]

But this decision was reversed by Sir J. K. Bruce and Lord Cranworth, L. JJ., 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 before 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. [43]

In the case just stated Lord Cranworth suggested that a will was revoked by subsequent conveyance only when the *seizin* was changed; and added, that if an estate were limited to such uses as A should appoint, and in default to A in fee, and A, after making his will and devising the estate, had made an appointment, so as to take an estate with the ordinary uses to bar dower, he knew of no authority deciding that this would be a revocation of the will. (*d*) But in Langford *v.* Little, (*e*) which was not cited, Sir E. Sugden had decided that in such a case a will *was* revoked. He said, "A change of estate is sufficient to operate a revocation, and it is not necessary that the seizin should be changed. The doctrine rather is, that although nothing but the seizin is changed or transferred, and there is no disposition of the ownership, or but a partial one, yet the will is revoked, and the use, although the old one, cannot pass by the prior will."

Immaterial whether seizin is changed or not.

In Poole *v.* Coates, (*f*) a testatrix, being entitled to an undivided moiety of lands held on 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

Poole *v.* Coates, as to renewable leaseholds, is opposed to other cases.

43. 1 Powell on Devises 560, 568.

[(*d*) See 2 D., M. & G. 695.

(*e*) 2 J. & Lat. 613; and see Walker *v.* Armstrong, 21 Beav. 284, 8 D., M. & G. 531.

(*f*) 2 Dr. & War. 493, 1 Con. & L. 531. It may be collected that Sir E. Sugden never approved the decision in Rawlins *v.* Burgis. Apart from authority, his own opinion, which he followed on a slight distinction in Poole *v.* Coates, may be thought the more reasonable.]

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. The learned judge said that he did not intend to impeach the authority of Rawlins *v.* Burgis, Ward *v.* Moore, and similar cases. But did Ward *v.* Moore differ in substance? The owner of the equitable estate became a joint tenant 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.]

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. (*g*) [44]

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

(*g*) Parsons *v.* Freeman, 3 Atk. 761; 417, 7 B. P. C. Toml. 505.
Brydges *v.* Duke of Chandos, 2 Ves., Jr., 44. 1 Powell on Devises 562, note.

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, (*h*) [dissented from] the case of Williams *v.* Owens, (*i*) 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 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 Vawser *v.* Jeffery, (*k*) 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 predecessor (Sir R. P. Arden), held, that the covenantor was bound to convey the fee-simple to himself, according to his covenant; while 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 exe*cuted, the court need not have directed

Effect of covenant to convey to the use of covenantor.

(*h*) 8 Ves. 127.
(*i*) 2 Ves., Jr., 595.
(*k*) 16 Ves. 519, 2 Sw. 268.

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 K. B., in Wright *v.* Littler, (*l*) 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 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. (*m*)

Another obvious case of revocation in equity 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, (*n*) though it should happen to be rescinded after the testator's decease, (*o*) and also, by the better opinion, even though such transaction should have taken place in his lifetime, (*p*) supposing, of course, the will to be subject to the old law.[45] Notwithstanding the contract for sale, the legal estate

Effect of contract for sale after devise.

(*l*) 3 Burr. 1244, 1 W. Bl. 345; [Patch *v.* Shore, 2 Dr. & Sm. 589.]

(*m*) Vawser *v.* Jeffery, 3 Russ. 479.

(*n*) Mayer *v.* Gowland, Dick. 563.

(*o*) Tebbot *v.* Voules, 6 Sim. 40.

(*p*) See Knollys *v.* Alcock, 7 Ves. 558, 566; Bennett *v.* Earl of Tankerville, 19 Ves. 170; [Curre *v.* Bowyer, 5 Beav. 6.]

45. But it is held, in New Jersey, that an agreement by a testator, after the execution of his will, to sell land therein devised, is not a revocation at law. Hall *v.* Bray, Coxe 212. But it seems that a contract by a testator, after making his will, to lease land for ninety-nine years, reserving a ground rent, with a right to the lessee to extinguish the reversion by paying a fixed sum, works such a change of interest as will revoke the devise. Bosley *v.* Bosley, 14 How. 390. See also Wright *v.* Marshall, 72 Ill. 584; 1 Powell on Devises 571, note (3).

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 favor 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. [But if the contract is rescinded or abandoned, either before or after the testator's decease, there is no purchaser to convey to; and, the will being revoked, the devisee is a trustee for the heir. (*q*) So, where a testator devised an estate and then contracted to sell it, but no conveyance was executed, and afterwards the testator repurchased the estate, it was held that the will, once revoked in equity, was not set up again.] (*r*)

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. (*s*)

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, 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.[46] Thus, in Rider *v.* Wager, (*t*) 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

[(*q*) See Tebbott *v.* Voules, *supra*.

(*r*) Andrew *v.* Andrew, 8 D., M. & G. 336. See observations on this case, Sug. R. P. S., p. 361.]

(*s*) See Cotter *v.* Layer, 2 P. Wms. 624; Vawser *v.* Jeffery, 16 Ves. 519, 2 Sw. 268.

46. Langdon *v.* Astor, 16 N. Y. 9.

(*t*) 2 P. Wms. 334; [but must not this case be considered as depending solely on the republication?]

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.

*The revocation of devises by an alteration of estate is placed on an entirely new footing by the stat. 1 Vict., c. 26, which provides (§ 23,) 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.

Stat. 1 Vict., c. 26. Devises not to be revoked as to testator's disposable interest at decease, by conveyance or like act.

In regard to wills, the date of which or of any codicil thereto brings them within this section, a subsequent conveyance of the devised property will not produce revocation, except so far as it 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. (*u*) 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, [and the estate of the vendor being in contemplation of equity, "disposed of"] 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. (*x*)

Remarks upon the enactment.

Will is revoked by contract to sell,

(*u*) See Arnald *v.* Arnald, 1 B. C. C. 401.

[(*x*) Farrar *v.* Earl of Winterton, 5 Beav. 1; Moor *v.* Raisbeck, 12 Sim. 123. These decisions confirmed the author's previous opinion, (see 1st ed., p. 148,) where he cites Knollys *v.* Shepherd (*ante* p. *56) to show that, even under the old law, a devise of land which the testator had *previously* contracted to sell passed the legal estate only. But the devisee is entitled to the rent until completion. Watts *v.* Watts, L. R., 17 Eq. 217.

[And this rule applies equally to cases of conversion by operation of law; as, by act of parliament, (*y*) or by an order for sale pronounced by a court of competent jurisdiction, (*z*) or by compulsory sale under the land clauses and similar acts, (*a*) *or by sale under a *power* given by the testator to a mortgagee. (*b*) But, of course, an unauthorized sale (as, if the real estate of an insane person, not so found, is sold by persons assuming to act for him) will not work conversion, although the sale is confirmed by the court *after* the owner's death. (*c*) And the converting effect of a sale under an act of parliament or under an order of court is neutralized if the statute (*d*) or order (*e*) directs a reinvestment in land to be settled to the same uses; in which case, it should seem, the will would operate on the substituted land. So, if land were sold under the common power of sale in a

—or by other conversion, whether voluntary or compulsory,

—unless the proceeds are to be reinvested to same uses.

(*y*) Frewen *v.* Frewen, L. R., 10 Ch. 610; Richards *v.* Atty.-Gen. 6 Moo. P. C. C. 381; Cadman *v.* Cadman, L. R., 13 Eq. 470.

(*z*) Steed *v.* Preece, L. R., 18 Eq. 192, questioning Jermy *v.* Preston, 13 Sim. 356 (as to which see n. (*e*), *infra*), and Cooke *v.* Dealey, 22 Beav. 196. See also Arnold *v.* Dixon, L. R., 19 Eq. 113.

(*a*) Ex parte Hawkins, 13 Sim. 569; In re Manchester and Southport Railway, 19 Beav. 365; Ex parte Flamank, 1 Sim. (N. S.) 260. Notice to treat and agreeing on the price are together equivalent to a contract for sale, and work a conversion, Ex parte Hawkins, Ex parte Flamank, *supra;* Harding *v.* Metropolitan Railway, L. R., 7 Ch. 154; Watts *v.* Watts, L. R., 17 Eq. 217. But notice to treat, without more, has no such effect, Haynes *v.* Haynes, 1 Dr. & Sm. 426; nor a notice followed by vendor's unaccepted statement of price. In re Arnold, 32 Beav. 591; nor an agreement as to price per acre without defining the land. Ex parte Walker, 1 Drew. 508. Where an option to purchase at a specified price was given to A, and after the testator's death 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. See also Ex parte Hardy, 30 Beav. 206.]

(*b*) Wright *v.* Rose, 2 S. & St. 323; Bourne *v.* Bourne, 2 Hare 35. In both these cases no sale was made until after the testator's death, and, *therefore*, it was held there was no conversion—*quoad* the surplus. Compare Jones *v.* Davies, 8 Ch. D. 216.

(*c*) See per Wood, V. C., Taylor *v.* Taylor, 10 Hare 478, 479.

(*d*) As where the land of persons under disability is sold under the partition act, 1868, Foster *v.* Foster, 1 Ch. D. 588; Kelland *v.* Fulford, 6 Ch. D. 491; Mildmay *v.* Quicke, Id. 553; or under the lands clauses and cognate acts. Midland Railway *v.* Oswin, 1 Coll. 80; In re Taylor, 9 Hare, 596; In re Horner, 5 De G. & S. 483; In re Stewart, 1 Sm. & Gif. 32; In re Harrop, 3 Drew. 726. The lunacy regulation act, 1853, directs (§§ 124, 135,) that money arising by sale under that act of land belonging to lunatic tenant in fee shall devolve as realty. In re Mary Smith, L. R., 10 Ch. 79.

(*e*) Fellow *v.* Jermyn, W. N. 1877, p. 95. The land sold was in strict settlement, and the reinvestment (of surplus after answering charges) was necessary to prevent the money vesting absolutely

settlement containing a similar direction for reinvestment; though some doubt may seem to be thrown on this by Gale *v.* Gale, (*f*) where an estate stood settled in trust for A and his wife successively for life, with remainder as A should by deed or will appoint, and in default of appointment over: the trustees had power to sell, and the proceeds were to be reinvested in land to be settled to the same uses. By his will A appointed the estate to the children of B, and devised all other his real estate not thereinbefore specifically disposed of to his wife. Afterwards the trustees sold the estate, and then A died; and it was held by Sir J. Romilly, M. R., that the appointed property was adeemed by the subsequent sale, that the appointment had no effect either on the purchase-money (which had not yet *been reinvested) nor on the new estate to be purchased with it, but that the right to these passed by the residuary devise. (*g*) He said it must be treated as a new estate and a new power in relation to it. Having regard to the direction that the new estate should be settled to the old uses (which, of course, included the power of appointment,) it would be difficult to distinguish this case in principle from one where A had the estate and not a power only. But the decision is questioned by Lord St. Leonards, who says it was the old power that remained over the new estate. (*h*)

Gale *v.* Gale.

It is now scarcely possible for any residuum of interest remaining in the testator at his death to escape from the previous devise. In Lowndes *v.* Norton, (*i*) when a testator devised an estate to trustees during the life of his daughter, without impeachment of waste, for her separate use, and soon afterwards conveyed the same estate to a different trustee for the life of the same daughter (but not making her or the trustee unimpeachable for waste,) with several successive remainders for life, each without impeachment of waste, with reversion to himself in fee; it was argued that the right to the timber remained in the testator at the time of his death, and, notwithstanding the deed, passed by the devise to the

Devise to A for life exempt from waste, followed by a conveyance to A for life not so exempt.

in the first tenant in tail. Jermy *v.* Preston, 13 Sim. 356, 366, appears to have proceeded on a similar ground. And as to the propriety of reinvestment where the estate is settled, see 4 D., M. & G. 766, per K. Bruce, L. J.

(*f*) 21 Beav. 349.

[(*g*) As to this, see *post* ch. XX., § 5.

(*h*) R. P. S. 375 n., and Pow. 308, 8th ed. In In re De Beauvoir, 2 D., F. & J. 5, 29 L. J., Ch. 567, where the sale was under the L. C. act, and A had the *estate* in reversion, the point did not arise; for by his will the settled estate and "all other his real estate" were included in the same devise.

(*i*) 33 L. J., Ch. 583.

daughter, who was consequently unimpeachable for waste: but it was held by K. Bruce and Turner, L. JJ., that this was an argument not warranted in fact (presumably because the right in question was in fact disposed of by the deed to the tenants for life in remainder,) and that the estates given by the devise had been completely abolished by the deed.

How a specific bequest of leaseholds is affected, under this section, by the subsequent acquisition of the fee was considered in Cox *v.* Bennett, (*k*) where a testator having bequeathed "his houses at T., held on lease from B.," to X., and the residue of his real and personal estate to Y., afterwards purchased and *took a conveyance to himself of the reversion in fee. It was held by Sir G. Giffard, V. C., that the entire interest in the houses passed by the specific gift to X. He said, "the clause in the statute (*i. e.* § 23) says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will:" the reference to the lease was merely a method of describing the property.

Bequest of term how affected by purchase of the fee.

The section now under consideration does not apply to wills made before 1st January, 1838. Such wills are revocable by alteration of estate, although the alteration should be effected on or after that day.] (*l*)

Sect. 23 does not apply to wills made before 1838.

SECTION IV.

By Void Conveyances.

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

Attempt to convey revokes a devise, where.

(*k*) L. R., 6 Eq. 422. See also Struthers *v.* Struthers, 5 W. R. 809. Both these cases appear to require the further support of § 3, which enables a testator to dispose of all real estate to which he may be entitled at the time of his death, and of § 24, which enacts that every will shall be construed with reference to the real and personal estate comprised in it, to take effect as if it had been executed immediately before the testator's death: for § 23 says only that no subsequent act shall *prevent* the will operating, implying that but for the subsequent act the will would have operated on the interest in question; which it would not have done without the aid of §§ 3, 24.

[(*l*) Langford *v.* Little, 2 Jo. & Lat. 613.]

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.[47] Thus, in 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 seizin, and a bargain and sale without enrollment, 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 apppointment 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 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.

Qualifications of the rule.

It has been held, however, that a conveyance to charitable uses, which was void under the statute 9 Geo. II., c. 36, on account 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

47. "But in these cases of imperfect conveyances, resting entirely upon a change of the *intent*, it may be shown, that the devisor had no intention, in making such conveyance, to revoke the devise." 1 Powell on Devises 584; Walton *v.* Walton, 7 Johns. Ch. 258; 2 Greenl. Ev., § 687.

(*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.

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 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 since 1837, for as, under the 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 con-

(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*.

veyance cannot, under any circumstances, have, as such, a revoking effect. (*b*)

SECTION V.

By a subsequent Revoking or Inconsistent Will, Codicil or Writing.

Before 1838. Devises of lands, how to be revoked.

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 (*c*) 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."[48] The same statute (section 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

Bequests of personalty, how to be revoked.

[(*b*) Ford *v.* De Pontès, 30 Beav. 572, acc. And distinguish between a void conveyance inoperative as such to produce revocation, and a writing duly executed and "declaring an intention to revoke," which takes effect under 1 Vict., c. 26, § 20. See *post* p. *170.

(*c*) 29 Car. II., c. 3, § 6, Ir. Parl. 7 Will. III., c. 12, § 6.]

48. A writing, purporting to be a last will and testament, which revokes all former wills, must be executed and attested as is requisite to make it valid as a will, in order that it may operate as a revocation. Reid *v.* Borland, 14 Mass. 208; Hollingshead *v.* Sturgis, 21 La. Ann. 450; Deakins *v.* Hollis, 7 Gill & J. 311. And it cannot be offered in evidence as a revocation without probate. Laughton *v.* Atkins, 1 Pick. 535. But *quære*, whether a probate is necessary to an instrument purporting to be a revocation only. Ibid. Parker, C. J., said: "An instrument then to have the effect of a revocation of a will which devises real estate before made must itself be either a will or a codicil, or some other writing of the devisor, signed in the presence of three or more witnesses. If the instrument propounded as a revocation be in form a will, it must be perfect as such and be subscribed and attested as is required by statute. An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure, or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will, except for the purpose of substi-

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. VIII., c. 5, might be revoked by parol. (*d*)

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

Revocation connected with new disposition.

tuting the other, and that it would be making the testator die without a will, though it was clearly his design not to do so." Laughton *v.* Atkins, 1 Pick. 535, 543. A will which makes a complete disposition of all the property of the testator is clearly incompatible with the existence of any former will, and therefore it must operate as a revocation of all wills previously executed. Simmons *v.* Simmons, 26 Barb. 68; In re Fisher, 4 Wis. 254; Price *v.* Maxwell, 28 Penna. St. 23. And it is not necessary that such will should state in terms that it is intended so to operate. Clarke *v.* Ransom, 50 Cal. 595.

(*d*) Cranvel *v.* Sanders, Cro. Jac. 497. See also Ex parte Earl of Ilchester, 7 Ves. 348; Richardson *v.* Barry 3 Hagg. 249.

No revocation, where devise intended to be substituted fails.

case, become a subject of consideration. 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. (*e*) [49] 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. (*f*)

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 occur in the ecclesiastical courts, which, of course, no less than the temporal courts, are bound by the 22d 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 uncanceled, though it appeared that most of the bequests in the posterior will had lapsed. (*g*) 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

(*e*) 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. Compare] Richardson *v.* Barry, 3 Hagg. 249.

49. See *ante* note 17, page 294; note 18, page 295; note 19, page 295.

(*f*) Frenche's Case, 8 Vin. Ab., Dev. O., pl. 4; Roper *v.* Constable, 2 Eq. Cas. Ab. 359, pl. 9; S. C., *nom.* Roper *v.* Radcliffe, 5 B. P. C. Toml. 360, 10 Mod. 233; [Tupper *v.* Tupper, 1 K. & J. 665; Quinn *v.* Butler, L. R., 6 Eq. 225. See also In re Gentry, L. R., 3 P. & D. 80, where an express revoking clause was held absolute, though accompanied by a desire that an instrument, referred to as a will but which in fact was a valid deed, should stand as the will—which it could not do.]

(*g*) Daniel *v.* Nockolds, 3 Hagg. 777.

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. (*h*) [50]

Revocation depending on completeness of revoking will.

Revocation often depends on the completeness of the posterior *of two testamentary instruments.[51] 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, (*i*) 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

(*h*) Walcott *v.* Ouchterlony, 1 Curt. 580. [And see In re Ravenscroft, 18 L. J., Ch. 501; Meredyth *v.* Maunsell, Milw. Ir. Eccl. Rep. 132.]

50. In the goods of Durance, L. R., 2 P. & D. 406. But see Tynan *v.* Paschal, 27 Tex. 286; Hise *v.* Fincher, 10 Ired. L. 139; Mundy *v.* Mundy, 2 McCart. 290.

51. The addition of an unexecuted codicil will not revoke a perfect will. Heise *v.* Heise, 31 Penna. St. 246. A will, valid in its essential parts, but being inoperative on other grounds, may still operate to revoke a former will. Colvin *v.* Warford, 20 Md. 357, 394. But a will duly executed according to law will operate as a revocation of a former will, though it contain no clause of revocation, where it purports to dispose of all the property in a different and inconsistent manner. However, if not executed according to law, it cannot revoke, although it contain an express clause of revocation. Reese *v.* Portsmouth Probate Court, 9 R. I. 434. And if a codicil be so uncertain as to be void, it will not revoke the residuary bequest in the will. Carpenter *v.* Miller's Ex'rs, 3 W. Va. 174; Delafield *v.* Parrish, 25 N. Y. 9. Whether the revocatory clause in a subsequent will is operative or not, must depend upon the intention of the testator, but such intention must be ascertained from the contents of the instruments themselves. Parol testimony cannot be admitted for this purpose. The provisions of a will can never be contradicted by parol testimony. Smith *v.* McChesney, 2 McCart. 360. Where a testator executed a holographic will, to which he added a codicil, and subsequently executed a second holographic will, to which he added a postscript, expressly revoking all former wills, and thereafter canceled the second will, but carefully preserved it, together with the postscript, until his death, it was held that the postscript was a substantial revocation of the first will, and that canceling the second will did not necessarily cancel the postscript, so as to set up the first will. Bates *v.* Holman, 3 Hen. & Munf. 502. But in such a case parol evidence may be introduced to show the situation of the testator and *quo animo* he acted. Ibid. A paper, purporting to be a will, not signed by the testator, but with his name written at the beginning, in his own handwriting, is not a revocation of a former duly-executed will. Belt *v.* Belt, 1 Harr. & McH. 409.

(*i*) *Ante* p. *101.

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. (*k*)

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 statute 1 Vict., c. 26, § 20, has placed a revoking will [or writing (*l*)] upon precisely the same footing, in regard to the ceremonial of execution, as a disposing will; and when that ceremonial has been observed, it can never be said that the will is informal or unfinished.[52]

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.[53]

Distinction between revocation of a gift and of so much of will as contains the gift.

[Express revocation may, it seems, be produced in two different modes, 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 them, his share will not accrue to the others. (*m*) This is the ordinary mode. But if the testator revoke *so much of his will* as contains the gift to one of such persons, here, if the words that remain are sensible *per se*, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will

(*k*) Blewitt *v.* Blewitt, 4 Hagg. 410; Gillow *v.* Bourne, Id. 192.

[(*l*) The writing must "declare an intention to revoke," but need not be testamentary. And unless testamentary it will not be admitted to probate. In re Fraser, L. R., 2 P. & D. 40. See also In re Hicks, L. R., 1 P. & D. 683; In re Durance, L. R., 2 P. & D. 406. Such a writing may be executed by a married woman. Hawksley *v.* Barrow, L. R., 1 P. & D. 147.]

52. But if the deceased write a memorandum at the foot of his will, in the words, "This will was canceled this day," and such memorandum is properly executed, in the presence of two witnesses, it seems that such memorandum cannot be taken to be either a will or a codicil, and therefore cannot be admitted to probate. In the goods of Fraser, L. R., 2 P. & D. 40, 39 L. J. P. 20, 21 L. T. (N. S.) 680.

53. Where a testator bequeaths a legacy, by codicil, to his granddaughter "in lieu" of a devise in the will to her mother, who has since deceased, this is a revocation of the original devise to the mother. Brownell *v.* Dewolf, 3 Mason C. C. 486.

[(*m*) 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* ch. X., ch. XXIII., ch. XXXII., § 3.

being read as if the revoked words had never been in it. Harris *v. Davis, (*n*) affords an example of the latter mode. In that case there was first a gift to A and B in common; then, in a subsequent part of the will, a direction that C should take a share with A and B; and afterwards a codicil revoking "that part written in the will which left" the share to C: and it was held that A and B took the whole. The frame of the will was peculiar, and lent itself easily to this construction. If the words that are left require (as they generally would) some further alteration or addition to make them sensible, the construction will not be made.] (*o*)

In order that an express clause of revocation may be effectual it must indicate an actual and present intention to revoke the will; and if the testator's expressions are declaratory only of a future design, they will not be sufficient; (*p*) [54] 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. (*q*)

Intention to revoke whether present or future.

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.[55] Thus, where A (*r*) made a will, disposing of his real and personal property, and after-

Mere intention to revoke by a future act inoperative.

(*n*) 1 Coll. 416.

(*o*) Sykes *v.* Sykes, L. R., 4 Eq. 200.

(*p*) Cleobury *v.* Beckett, 14 Beav. 588.]

54. But where the testator declares his intention to make a codicil changing his will, and the principal legatee under the will refuses to comply with the testator's request to produce the will that it may be altered, the will will stand unaffected by such intention to change it. Leaycraft *v.* Simmons, 3 Bradf. 35.

(*q*) Burton *v.* Gowell, Cro. El. 306.

55. If an endorsement be made on a will indicating an intention to alter or modify it at a future day, this is no revocation of the will. Ray *v.* Walton, 2 A. K. Marsh. 71. But it has been held that a letter in these words: "Enclosed I hand you an order to get my will from Mr. D., which please burn as soon as you receive it, without reading it. I will leave you my share as a deed of gift, leaving it to your honor to pay out of it £100 each to each of my two sisters, and £100 to P.," which was attested by two witnesses, being a testamentary paper, revoked the will. In the goods of Durance, L. R., 2 P. & D. 406. But a letter from a testator to his attorney, directing the attorney to destroy the testator's will, does not, *ipso facto*, work an immediate revocation. Tynan *v.* Paschal, 27 Tex. 286. It was held in North Carolina that a will may be revoked by a paper drawn in the form of a will, but neither signed nor attested, if made *animo revocandi*. Clark *v.* Eborn, 2 Murph. 234. So, too, in Virginia. Glasscock *v.* Smither, 1 Call 479.

(*r*) Thomas *v.* Evans, 2 East 488. See also Griffin *v.* Griffin, 4 Ves. 197, n.

wards, 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, indicated an intention to revoke the prior will; but Lord Ellenborough and Lawrence, J., held that it was not a revocation.[56] They considered the case 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 all former wills may be reduced to total or partial silence, either by showing that the clause was inserted by mistake, (*s*) or that it is unreasonable to give unrestrained effect to the words; as 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, (*t*) or deals with his own property, and not with the subject of the former power: (*u*) in these cases it has been held that the former appointment is not revoked.]

Revocation by inconsistency of disposition.

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

56. But where a testator made an endorsement upon his will to the effect that it was revoked, *in case no other will should be made*, this was held a valid, present revocation. Brown *v.* Thorndike, 15 Pick. 388.

[(*s*) Powell *v.* Mouchett, 6 Madd. 216; In re Oswald, L. R., 3 P. & D. 162; and cases cited *ante* p. *78, n. (*j*).

(*t*) In 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 In re Merritt, 1 Sw. & Tr. 112, 4 Jur. (N. S.) 1192; In re Joys, 30 L. J., Prob. 169. It is otherwise if the testator, by the second instrument, again refers to the same power, though he fails thereby to dispose of the whole subject. In re Eustace, L. R., 3 P. & D. 183.

(*u*) Hughes *v.* Turner, 4 Hagg. Eccl. 52; Denny *v.* Barton, 2 Phillim. 575.]

different from the former, (*x*) and even the latter finding will not avail, if it be added that the nature of such difference is unknown to the jurors. (*y*) [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 (*z*) or personal estate.] (*a*)[57]

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. (*b*)[58] And 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

(*x*) Seymor *v.* Nosworthy, Hard. 374; Show. P. C. 146. [If the subsequent will is lost or destroyed, parol evidence is admissible to prove its contents. Brown *v.* Brown, 8 Ell. & Bl. 876.]

(*y*) Goodright *v.* Harwood, 3 Wils. 497, 2 W. Bl. 987, Cowp. 87, 7 B. P. C. Toml. 489. [So in the case of a revocable appointment by deed where the contents of a subsequent appointment are unknown. Rawlins *v.* Rickards, 28 Beav. 370.

(*z*) Freeman *v.* Freeman, 5 D., M. & G. 704.

(*a*) Cutto *v.* Gilbert, 9 Moo. P. C. C. 131; Richards *v.* Queen's Proctor, 18 Jur. 540; Lemage *v.* Goodban, L. R., 1 P. & D. 57; In re De la Saussaye, L. R., 3 P. & D. 42; In re Petchell, Id. 153.]

57. Leslie *v.* Leslie, 6 Ir. Rep. Eq. 332. Where there are several wills, the last being inconsistent with the former ones, it is clearly so far a revocation of the former ones, although it contains no revocatory clause. Den *v.* Van Cleve, 2 South. 589, 668; Simmons *v.* Simmons, 26 Barb. 68; Boudinot *v.* Bradford, 2 Dallas 266; Nelson *v.* McGiffert, 3 Barb. Ch. 158. But this implied revocation is effected only when the wills are inconsistent, for if they are of different property the two may be taken conjointly as the will of the testator. Smith *v.* McChesney, 2 McCart. 359. But, of course, if the second will contain an express revocation, it is immaterial whether they are inconsistent or not. Smith *v.* McChesney, *ubi supra;* Boudinot *v.* Bradford, *ubi supra.* If the second will be inconsistent in some provision only, it is a revocation but *pro tanto.* Nelson *v.* McGiffert, *ubi supra.* But a specific devise in a codicil revokes a power to sell the same land conferred by the will. Derby *v.* Derby, 4 R. I. 414.

(*b*) 3 Mod. 206, [Litt., § 168; In re Hough's Estate, 15 Jur. 943, 20 L. J., Ch. 422; Evans *v.* Evans, 17 Sim. 107.]

58. Where there are two devises by the same testator, the last operates as a revocation of the first only so far as it is inconsistent with it. As to the residue, the former devise is good. Brant *v.* Willson, 8 Cowen 56; Bartholomew's Appeal, 75 Penna. St. 169; Petters *v.* Petters, 4 McCord 151. Where a clause in the original will and one in a codicil thereto are entirely inconsistent, and both cannot be executed, the latter clause must prevail. Pickering *v.* Langdon, 22 Me. 413; Van Vechten *v.* Keator, 63 N. Y. 52; Brownfield *v.* Wilson, 78 Ill. 467.

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.

Gift of residue by will revoked by similar gift in codicil. Earl of Hardwicke *v.* Douglas.

[So if the residue of personal estate be given by will to A, and by codicil to B, the former gift is revoked. (c) And this was so held in Earl of Hardwicke *v.* Douglas, (*d*) though the gift by codicil was of personal estate "not hereinbefore or by my will or any other codicil disposed of." The words were construed to mean "not hereinbefore or by my will disposed of by way of particular legacies," thus leaving something for the gift to operate upon: literally construed they left nothing. Again, in Kermode *v.* Macdonald, (*e*) where a testatrix by her will bequeathed specific and pecuniary legacies, and gave the residue of her personal estate to A, and then by codicil gave "all her personal estate" to B; it was held, that "all her personal estate" meant the whole of the personal estate which by her will the testatrix had divided into two portions, the legacies and the residue, and that the will was therefore wholly revoked.

Gift of particular residue not revoked by codicil giving the general residue.

But where a testator bequeathed portions of "his money in the funds" to several legatees, and "the surplus of his money in the funds" to be distributed by his executors among the legatees, and then by codicil, after bequeathing some specific chattels, gave "the surplus remaining after the aforesaid legacies are paid" to the children of A; Sir J. K. Bruce, V. C., held that the gift of surplus money in the funds was not revoked by the residuary gift contained in the codicil, which was so expressed as to embrace other property. (*f*)

[(*c*) Fownes-Luttrell *v.* Clarke, W. N. 1876, pp. 168, 249.

(*d*) 7 Cl. & Fin. 795, West P. C. 555, per Lords Brougham and Lyndhurst, reversing Douglas *v.* Leake, 5 L. J. (N. S.) Ch. 25, *coram* Lord Cottenham, who in D. P. retained his opinion. Compare Lee *v.* Delane, 4 De G. & S. 1.

(*e*) L. R., 1 Eq. 457, 3 Ch. 584.

(*f*) Inglefield *v.* Coghlan, 2 Coll. 247.]

*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 uncanceled papers as was executed next before his decease; (g)[59] 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. (h)

Rule where several wills are subsisting at death.

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 vain. (i) 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; (k)[60] supposing, of course,

As to contradictory wills of uncertain date:

—to be reconciled if possible,

(g) 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, § 22.]

59. Den *v.* Van Cleve, 2 South. 589, 668; Smith *v.* McChesney, 2 McCart. 359. But where, upon the death of the testator, two wills are found, if the second will is not properly executed, or is held to be invalid, the former will remains in force, and will be taken to be unrevoked by the later invalid will. Boylan *ads.* Meeker, 4 Dutch. 274.

(h) The writer, however, understands that paper, made near the close of a year, sometimes (like literary publications) bears the date of the year following.

(i) See Phipps *v.* Earl of Anglesea, 7 B. P. C. Toml. 443.

[(k) Richards *v.* Queen's Proctor, 18 Jur. 540.]

60. But in such case the *onus* is upon the party impugning the earlier will to show the intention of the testator to revoke it by the later. Leslie *v.* Leslie, 6 Ir. R. Eq. 332. And in deciding such a question, conjecture, or slight probabilities, will not be sufficient, and the words, "this is my last will," will have no weight whatever. Ibid.

that such latter paper contains no express clause of revocation, [or other clear indication of a contrary intention.] (*l*)

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 encumbrances 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 of the specialty debts, and the charges affecting the estate. (*m*)

—provided that the subsequent document is a codicil, or an incomplete will.

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; (*n*)[61] or else where the posterior paper is styled a codicil: (*o*) 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 recognizes, should, if possible, be sustained. [If the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such *a priori* improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context,

[(*l*) Plenty *v.* West, 6 C. B. 201, 16 Beav. 173; Dempsey *v.* Lawson, 2 P. D. 98.]

(*m*) Weld *v.* Acton, 2 Eq. Cas. 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.

(*n*) See Freeman *v.* Freeman, Kay 479, 5 D., M. & G. 704. In Plenty *v.* West, 1 Rob. 264, 4 No. Cas. 103, 9 Jur. 458, Sir H. J. Fust would not, even in such cases, recognize the existence of the inclination as regards personalty; but see Cookson *v.* Hancock, 1 Kee. 817, 2 My. & Cr. 606; Lemage *v.* Goodban, L. R., 1 P. & D. 57; Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J., Prob. 90.]

61. Brant *v.* Willson, 8 Cowen 56.

[(*o*) In re Howard, L. R., 1. P. & D. 636; Robertson *v.* Powell, 2 H. & C. 762.]

wholly revoke the first. Thus, in Henfrey *v.* Henfrey, (*p*) where a testator by will gave his household effects and other benefits to his wife, and all the residue of his estate and effects to A, and appointed him executor, and then by subsequent will left all he possessed "containing furniture, books, &c." to his wife, but did not appoint an executor, the first will, including the appointment of the executor, was held to be wholly revoked. "Containing" was read "inclusive of."]

*Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition 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.

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, (*q*) that might be cited in illustration of the principle. 62

Codicil not to disturb will more than absolutely necessary.

(*p*) 2 Curt. 468, Moo. P. C. C. 29, 6 Jur. 355. And see Cottrell *v.* Cottrell, L. R., 2 P. & D. 397. By the civil law the appointment of an executor was a complete disposition of the personal estate; and in some early cases in the ecclesiastical courts the mere appointment of a different executor in a subsequent paper, purporting to be a distinct will, was held to be a revocation of a prior will and appointment. Whitehead *v.* Jennings and Burt *v.* Burt, cit. 1 Phillim. 412. But such new appointment was afterwards decided not to be conclusive. Richards *v.* Queen's Proctor, 18 Jur. 540; Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J., Prob. 90. And it seems doubtful whether even the appointment by subsequent will of a "sole" executor amounts *per se* to a revocation of the first. See, for revocation, In re Lowe, 3 Sw. & Tr. 478, 33 L. J., Prob. 155; In re Baily, L. R., 1 P. & D. 628. *Contra*, Geaves *v.* Price, 2 Sw. & Tr. 71, 32 L. J., Prob. 113; In re Leese, 2 Sw. & Tr. 442, 31 L. J., Prob. 169; In re Morgan, L. R., 1 P. & D. 323.

(*q*) 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.

62. But if the codicil contain provisions inconsistent with a devise in the will, it will revoke such devise without any express words of revocation. Den, Snowhill *v.* Snowhill, 3 Zab. 447. But if the codicil does not expressly revoke the former will, though it profess an intention to make a disposition of the whole estate, different from the will, if it does not in fact do so, but only in part, it is merely a revocation *pro tanto*. Brant *v.* Willson, 8 Cowen 56; Larrabee *v.* Larrabee, 28 Vt. 274; Neff's Appeal, 48 Penna. St. 501. Nor will a codicil, making a new disposition of the estate, be effectual as a revocation, unless it is effectual as to the new disposition of the estate. Jones *v.* Jones, 2 Dev. Eq. 387.

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. (*r*)[63]

Charge not revoked by revocation of devise of land charged.

So, where a testator devises lands to A subject to a charge in favor 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. (*s*)

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

Doe d. Hearle *v.* Hicks, 8 Bing. 475, [1 Cl. & Fin. 20;] Hicks *v.* Doe, 1 You. & J. 470; [Alexander *v.* Alexander, 2 Jur. (N. S.) 898, 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 Cookson *v.* Hancock, 1 Kee. 817, 2 My. & C. 606; [see also Schofield *v.* Cahuac, 4 De G. & S. 533; Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62. 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 Philipps *v.* Allen, 7 Sim. 446; Murray *v.* Johnson, 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, 8 D., M. & G. 221; Robertson *v.* Powell, 2 H. & C. 762. 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; and see Gibson's Trusts, 2 J. & H. 656, stated *post.*]

(*r*) Duffield *v.* Duffield, 3 Bli. (N. S.) 261, [1 D. & Cl. 268, 395, Sug. Law of Prop. 216; and see Doe d. Evers *v.* Ward, 16 Jur. 709, 21 L. J., Q. B. 145; In re Colshead, 2 De G. & J. 690; Norman *v.* Kynaston, 29 Beav. 96, 3 D., F. & G. 29, with which compare Nevill *v.* Boddam, 28 Beav. 554, where there was an express clause of revocation.]

63. If lands be devised to minor children, with a provision that the mother occupy during their minority, a different disposition of the fee, by codicil, will revoke the right of the mother to occupy. Den, Snowhill *v.* Snowhill, 3 Zab. 447; Kane *v.* Astor, 5 Sandf. 467.

(*s*) 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; Hinchcliffe *v.* Hinchcliffe, 2 Dr. & Sm. 96.]

was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir W. Grant, M. R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life. (*t*)

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, chinaware, 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. (*u*) [And where by his will a 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., 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. (*x*)

General expression in codicil confined to its meaning in the will.

Again, in Doe d. Murch *v.* Marchant, (*y*) where by will an estate was devised to A in fee, and by codicil "instead of" that devise the estate was given to A for life, with alternative contingent remainders to her children and her collateral relations, which failed; A was held entitled to the fee: "instead of the devise in the will" being read "instead of so much of it only as was incompatible with the codicil," and the codicil not disposing of the ultimate fee. 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

Gift in codicil "instead of" gift in will.

(*t*) Lushington *v.* Boldero, G. Coop. 216. [See also Green *v.* Britten, 1 D., J. & S. 649.]

(*u*) Clarke *v.* Butler, 1 Mer. 304; [see also Barclay *v.* Maskelyne, 5 Jur. (N. S.) 12; Hinchcliffe *v.* Hinchcliffe, 2 Dr. & Sm. 96.

(*x*) Evans *v.* Evans, 17 Sim. 86; Williams *v.* Evans, 1 Ell. & Bl. 727.

(*y*) 6 M. & Gr. 813, 7 Scott, N. R. 644. See the case more fully stated ch. VIII., on the question of republication.

was not revoked. (*y*) But though the expression "instead of" need not mean total substitution, it naturally implies some substitution; as was held—still in favor of non-revocation—in Barclay *v.* Maskelyne, (*z*) where the will gave legacies to the six children of A, naming them, and the codicil revoked the legacies "to the children of A, and in lieu thereof" gave a sum amongst "the children of A, to wit" (naming five of them); and it was held that the legacy to the sixth was not revoked, because nothing was substituted for her.

Specific gift in will not revoked by general gift in codicil.

Again, in In re Arrowsmith's Trust, (*a*) where by will a testator bequeathed a specific fund to his nephews and nieces, and after the death of his wife gave them all his remaining property; he then by codicil bequeathed certain legacies (one of them to be paid at his wife's death), and gave "all his real and personal estate" to his wife for her life: it was held that the specific gift to the nephews and nieces was not disturbed, and that the codicil was meant only to remove the doubt which might arise on the will whether the wife was to take the residue for life.

Case where held change of trustee merely and no revocation of trusts.

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 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. (*b*)

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 his appointment to one of the offices, is not a revocation of the appointment to any other office; (c) unless the context shows, as *by directing "trustees" to pay debts and legacies, that the several offices (of trustee and executor) are to be filled by the

[(*y*) Hill *v.* Walker, 4 K. & J. 168; see also Butler *v.* Greenwood, 22 Beav. 303.

(*z*) 5 Jur. (N. S.) 12.

(*a*) 2 D., F. & J. 474.

(*b*) 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.

(*c*) 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.

same persons; (*d*) nor is a legacy to a trustee, as a mark of respect, revoked by the appointment of another trustee in his place.] (*e*)

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 Darley *v.* Langworthy, (*f*) 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 residue, it was held that this was no revocation of the specific bequest. (*g*) [And where a testator bequeathed several pecuniary legacies, including one to A, and the residue to his before-mentioned legatees in proportion to their pecuniary legacies; and by codicil executed after A's death gave A's pecuniary legacy to B, but was silent as to the residue: it was held that B was not entitled to A's share of residue.] (*h*)

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 man-

(*d*) Barrett *v.* Wilkins, 5 Jur. (N. S.) 687.

(*e*) Burgess *v.* Burgess, 1 Coll. 367. See also Bubb *v.* Yelverton, L. R., 13 Eq. 131.]

(*f*) 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; Martineau *v.* Briggs, 21 W. R. 620, 23 W. R. 889 (in D. P.); Bridges *v.* Strachan, 8 Ch. D. 558.]

(*g*) Roach *v.* Haynes, 6 Ves. 153.

(*h*) [In re Gibson's Trusts, 2 J. & H. 656.]

ner: 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. (*i*) [This construction, however, does not seem to apply where plate, pictures, &c., are directed to go along with a mansion-house.] (*k*)

Rule different as to heir-looms.

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 M. R. in the last case, might seem to conduct to such a conclusion; for a different construction prevailed in Lord Carrington *v.* Payne, (*l*) 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 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 Lord Carrington *v.* Payne can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

Distinction where the first devise is modified only.

It is to be collected from Holder *v.* Howell, (*m*) that where a tes-

(*i*) Francis *v.* Collier, 4 Russ. 331.

[(*k*) Evans *v.* Evans, 17 Sim. 108.]

(*l*) 5 Ves. 404.

(*m*) 8 Ves. 97; [and see Cole *v.* Wade, 16 Ves. 46; Viscount Holmesdale *v.* West, L. R., 3 Eq. 486, on app., (but this point not touched,) L. R., 4 H. L. 543.]

tator 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, (*n*) 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, and it was held, that the legatees were tenants in common.

Absolute revocation held not restrained by recital.

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. 64

Clear gift in will not revoked by doubtful expressions in codicil.

(*n*) 3 Anst. 727, a reporter of very doubtful authority, [and see In re Lewis, 14 Jur. 514, 7 No. Cas. 436.]

(*o*) 3 Sim. 24, 2 R. & My. 624; [compare Baldwin *v.* Baldwin, 22 Beav. 413.

64. "A codicil is an addition or supplement to a will. * * * It is no revocation of a will, except in the precise degree in which it is inconsistent with it, unless there be words of revocation." 4 Kent 531. Therefore, if a codicil is void for uncertainty, it cannot work a revocation of the residuary bequest in a will. Carpenter *v.* Miller, 3 W. Va. 174. And it is a general rule, that in order to revoke a clear devise, the intention must be as clear as the devise. Wms. Ex'rs (6th Am. ed.) 220. And this rule has been sustained in many American cases. Kane *v.* Astor, 5 Sandf. 467; Bosley *v.* Bosley, 14 How. 390; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Jenkins *v.* Maxwell, 7 Jones L. 612; Boyd *v.* Latham, Busbee L. 365; Pickering *v.* Langdon, 22 Me. 413; Quincy *v.* Rogers, 9 Cush. 291, 295; Tilden *v.* Tilden, 13 Gray 103, 108; Homer *v.* Shelton, 2 Metc. 194, 202; Smith *v.* Bell, 6 Peters 68, 84; Collier *v.* Collier, 3 Ohio St. 369; Snowhill *v.* Snowhill, 3 Zab. 447; Boyle *v.* Parker, 3 Md. Ch. Dec. 42; Joiner *v.* Joiner, 2 Jones Eq. 68; Lee *v.* Pindle, 12 Gill & J. 288. And in commenting upon this topic, it was said by Battle, J.: "In construing a codicil in reference to the will, the leading and controlling object is * * * to ascertain the intention of the testator. So far as a purpose to vary the will, either by adding to or subtracting from it, can be discovered, that purpose, if a lawful one, is to be carried out, but the intention of the testator, as declared in his will, is not to be varied further than is necessary to carry out such purpose." Bradley *v.* Gibbs, 2 Jones Eq. 13, 15. In Homer *v.* Shelton, *ubi supra*, it was said by Wilde, J.: "The rule is that when two parts of a will are totally irre-

Thus, in Goblet *v.* Beechey, (*o*) 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 enumerating those articles introduced 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 Gordon *v.* Hoffman, (*p*) a legacy of £3000 was given by will, and by codicil a legacy of £4000 "in addition to the legacy of £2000 given by my will;" the mention of the legacy of £3000 as being only of £2000 was held not to reduce it to the latter amount. Again, in Bunny *v.* Bunny, (*q*) a testatrix by her will gave to the seven children of J. B. a legacy of £200 *each, and other interests; by a first codicil she revoked the legacies of £200 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 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 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 might mean all the previous unrevoked testamentary papers: (*r*) 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

concilable, the latter shall prevail, as that is presumed to be the most certain indication of the final intention of the testator. 6 Pet. 84, 2 Bl. Com. 381. * * * This rule, however, is not to be resorted to, except in cases where the repugnance is clear, so that one of the parts of the will must of necessity be rejected; for they are to be reconciled, if they possibly may be by any reasonable construction." See Brownfield *v.* Wilson, 78 Ill. 467; Evans *v.* Hudson, 6 Ind. 293; Holdefer *v.* Teifel, 51 Ind. 343; Orr *v.* Moses, 52 Me. 287; Pue *v.* Pue, 1 Md. Ch. Dec. 382. See also Theobald on Wills 423; 1 Powell on Devises 521, 522, note (5).

(*o*) 3 Sim. 24, 2 R. & My. 624; [compare Baldwin *v.* Baldwin, 22 Beav. 413.

(*p*) 7 Sim. 29; and Mann *v.* Fuller, Kay 624.

(*q*) 3 Beav. 109; and see Farrer *v.* St. Catharine's College, L. R., 16 Eq. 19; Pratt *v.* Pratt, 14 Sim. 129; Sawrey *v.* Rumney, 5 De G. & S. 698; Stokes *v.* Heron, 12 Cl. & Fin. 161.

(*r*) See above, p. *117, and below, p. *189.

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 Cleobury *v.* Beckett, (*s*) where 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 J. Romilly, M. R., that 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. (*t*) [On this principle, it is not necessary that the gift to be revoked should be accurately referred to, (*u*) or that the legatee by the will should be actually named in the codicil.](*x*)

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.[65]

(*s*) 14 Beav. 583. See also Agnew *v.* Pope, 1 De G. & J. 49.]

(*t*) Read *v.* Backhouse, 2 R. & My. 546.

[(*u*) Pilcher *v.* Hole, 7 Sim. 208; Carrington *v.* Payne, 5 Ves. 423.

(*x*) Ellis *v.* Bartrum, 25 Beav. 107.]

65. But it seems that, if a revoking will or codicil be made under a mistake as to the supposed death of a child of the testator, such mistake cannot be shown *dehors* the will; it must be apparent from the will itself. Gifford *v.* Dyer, 2 R. I. 99. See also Pringle *v.* McPherson, 2 Brev. 279; Dunham *v.* Averill, (S. C. Conn.) 18 Am. Law Reg. (N. S.) 208; *ante* note 9, page 285; 1 Powell on Devises 523, 525, note (6). But in Hayes *v.* Hayes, 6 C. E. Gr. (N. J.) 265, it was decided that a codicil which revoked, in express terms, one of the legacies in the will, because the testator had provided that legatee with a house, when in fact he had not so provided, will not be held to be inoperative because made by mistake, there being no other evidence of the mistake. The testator must have known whether he had provided such house. And in general the revocation will stand, though the testator was misinformed as to the supposed fact on which he grounded the revocatory act. Skipwith *v.* Cabell, 19 Gratt. 758.

Thus, in Campbell *v.* French, (*y*) where a testator, having by will bequeathed to the two grandchildren of his late sister £500 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 Doe d. Evans *v.* Evans, (*z*) 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 preceding cases, instead of making the death of the devisee or legatee under the circumstances 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 Att.-Gen. *v.* Lloyd, (*a*) where a testator, by a will made before the passing of the statute of 9 Geo. II., c. 36, (*b*) devised lands and bequeathed personalty to be laid out in lands for charitable uses. By a codicil posterior *to the act [he recited that he was in doubt whether the devise would be good or not, and that he was desirous of confirming it, nevertheless if the estate was not well devised, then he gave it to

(*y*) 3 Ves. 321.

(*z*) 2 Per. & D. 378, [10 Ad. & Ell. 228.]

(*a*) 3 Atk. 552, 1 Ves. 32; [and see the observations of Lord Eldon, 1 Mer. 148, 149. In Thomas *v.* Howell, L. R., 18 Eq. 198, 209, a testator by will bequeathed certain charity legacies, and by codicil, "presuming and believing that the rental of his estate would produce from £16,000 to £18,000," he doubled those legacies. The income of his whole estate fell short of £16,000, and Malins, V. C., held that the additional bequest failed as being founded on a mistake. The V. C. said Att.-Gen. *v.* Lloyd was a peculiar case, and added he thought the decision would now be the other way. *Sed qu.*: it was recognized by the Court of Appeal in Ireland, Newton *v.* Newton, 12 Ir. Ch. Rep. 118; and is not opposed to the V. C.'s decision, if the words which he had to construe are (as they appear to be) equivalent to "upon the assumption, which I believe to be correct, that, &c.," making the bequest clearly conditional.]

(*b*) See ch. IX., § 1, *post*.

B. Afterwards he made a second codicil] 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, (*c*) it was held that the devise to B took effect. [Lord Hardwicke said the testator had put it on the advice he had received, which was a fact within his own knowledge, and he had grounded it on that advice and not on the reality of the law. If he had intended a new devise only if the will was void he would have left it on the first codicil.]

So, where a testatrix by her will bequeathed £300 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 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." (*d*)

[The rule that revocation expressly grounded on a mistaken assumption of fact is inoperative is further exemplified by Barclay *v.* Maskelyne, (*e*) where a gift by will to A was referred to in a codicil as a gift to B, and as lapsed by the death of B, whereupon the subject of gift was otherwise disposed of by the codicil; and it was held that the gift to A was not revoked.

In Allen *v.* Bewsey, (*f*) a testator devised an estate as copy*hold; by codicil reciting that he had since discovered that the estate was freehold, he confirmed the devise. It turned out that the estate was copyhold, and it appears to have been argued that the confirmation was conditional,—that the devise was meant to stand *because* (and not

(*c*) Willett *v.* Sandford, 1 Ves. 178, 186.
(*d*) Att.-Gen. *v.* Ward, 3 Ves. 327.
[(*e*) Johns. 124.
(*f*) 7 Ch. D. 453, 464.]

unless) the estate was freehold and was in effect revoked: but it was held without difficulty that the intention was to confirm the devise whether the estate was freehold or copyhold, and that there was no revocation.]

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 restrictions, 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; (*g*) and [the same construction prevails] where the legacy by codicil is expressed to be in addition to, (*h*) [or in substitution for,] (*i*) 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.] (*k*)

When legacies by codicil are payable out of same fund as legacies by will.

The intention to assimilate the respective legacies or classes of legacies has in some instances been traced, though less distinctly indicated than in the cases mentioned above. As in Leacroft *v.* Maynard, (*l*) where a testator devised his real estate in trust to sell and apply the produce in paying (among

(*g*) Lloyd *v.* Branton, 3 Mer. 108. See also Cooper *v.* Day, Id. 154; [Corporation of Gloucester *v.* Wood, 3 Hare 131, 1 H. L. Cas. 272.]

(*h*) Crowder *v.* Clowes, 2 Ves., Jr., 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; Duffield *v.* Currie, 29 Beav. 284; but 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.

(*i*) 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; Knowles *v.* Sadler, W. N. 1879, p. 20. But express terms, annexed to a legacy given by codicil "instead of" one given by will, excluded the substitutional construction in Haley *v.* Bannister, 23 Beav. 336. As to whether legacies are cumulative, or the one instead of the other, see Wilson *v.* O'Leary, L. R., 7 Ch. 448, and the cases there cited.

(*k*) In re More's Trust, 10 Hare 171; Mann *v.* Fuller, Kay 624.]

(*l*) 1 Ves., Jr., 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.

other legacies) *£50 to each trustee, to the Foundling Hospital £2000, and to the hospitals of L. and S. £1000 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. He also revoked the legacies to the three hospitals, and gave £1500 to the Foundling, £500 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. Lord Thurlow seems to have thought, that the necessity which this would have occasioned of holding, that the legacy to the new trustee must also come 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.(*m*)

So, in Fitzgerald *v.* Field, (*n*) 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 "herein," or "by the will" bequeathed to them, and by codicil additional legacies are given to some of the legatees; the proportion in which the residue is to be divided here remains unaltered.] (*o*)

Whether a legacy bequeathed by a codicil is to participate in an exemption from duty created by the will in favor of the legacies in general given by the will, (*p*) or of some par- Whether legacy given by codicil is

[(*m*) Johnstone *v.* Earl of Harrowby, 1 D., F. & J. 183; In re Smith, 2 J. & H. 594.]

(*n*) 1 Russ. 428.

[(*o*) Hall *v.* Severne, 9 Sim. 515; see Sherer *v.* Bishop, 4 B. C. C. 55.]

(*p*) What expressions exempt legacy or annuity from duty.—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*

exempt from duty like those of will.

ticular *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

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 *free from any charge or liability in respect thereof,* although in the same will there was a bequest *free from any duty,* Warbrick *v.* Varley, 30 Beav. 241;] or a gift of real and personal estate to executors in trust, to pay to J. D. for life an annuity of £46 *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.

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 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 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. 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, where, 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; In re Cole's Will, L. R., 8 Eq. 271; 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 trust of the *corpus* is for persons in succession, Sanders *v.* Kiddell; Marris *v.* Burton; Bailey *v.* Boult; and it was actually decided in Pridie *v.* Field, 19 Beav. 499, that in such a case the word "clear" did not mean free of duty. See also Banks *v.* Braithwaite, 32 L. J., Ch. 35. But this distinction does not seem to be tenable on principle, Wilks *v.* Groom, 2 Jur. (N. S.) 798; Harper *v.* Morley, *ubi sup.*]

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

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.(*q*)

So, where a testator by his will gave to A and B an annuity of £300, 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, and gave A and B a clear annuity of £100 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.(*r*)

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 (as to "herein") Radburn *v.* Jervis, 3 Beav. 450; Fuller *v.* Hooper, 2 Ves. 242; Jauncey *v.* Att.-Gen., 3 Gif. 308; *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.

A direction to pay "legacies" free of duty will not generally include the proceeds of realty directed to be sold, White *v.* Lake, L. R., 6 Eq. 188; but probably would include legacies payable out of such proceeds, see Hodges *v.* Grant, L. R., 4 Eq. 140. "Legacy," "legatee," may however be explained by the context to refer to realty, *post* ch. XXII., § 6.

As to exemption from property tax. —Property tax is a charge on the person, and therefore a gift of an annuity *to be paid without any deduction* (Abadam *v.* Abadam, 33 Beav. 475), or *free from legacy duty and other deductions* (Lethbridge *v.* Thurlow, 15 Beav. 339; Sadler *v.* Rickards, 4 K. & J. 302), does not exempt from the tax unless the testator has elsewhere shown that he considers income tax to be a "deduction," Turner *v.* Mullineux, 1 J. & H. 334. But a gift of an annuity *without any deduction on account of any taxes*, &c. (Festing *v.* Taylor, 3 B. & S. 235), or a direction to trustees to pay *all taxes affecting the hereditaments given to* the devisee (Lord Lovat *v.* Duchess of Leeds, 2 Dr. & Sm. 62), exempts the annuitant or devisee from income tax as between himself and the testator's estate: and the exemption does not contravene the income tax acts. Ib. Wall *v.* Wall, 15 Sim. 513, appears to be overruled.]

(*q*) Chatteris *v.* Young, 2 Russ. 183; see also S. C., 6 Mad. 30, where the bequests are inaccurately stated.

(*r*) Burrows *v.* Cottrell, 3 Sim. 375.

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.(*s*)

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 recognizing 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; (*t*) and parol evidence that the testator actually intended to refer to the will of 1840 would be inadmissible. (*u*) 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. (*v*) And 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 canceling it. (*x*) [But in a case (*y*) where the reference was to "my last will dated," &c. (giving the date of the first will), it was held that the will which was really the last was meant, and that the date was a mistake.]

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 a constituent part of the will to which it belongs; for in a general and comprehensive sense a will consists

(*s*) Cooper *v.* Day, 3 Mer. 154. [See also Fisher *v.* Brierley, 30 Beav. 267.]

(*t*) 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; In re Chapman, 8 Jur. 902, 1 Rob. 1.]

(*u*) Crosbie *v.* Macdoual, 4 Ves. 610; [Payne *v.* Trappes, *supra.*]

(*v*) Jansen *v.* Jansen, cit. 1 Ad. 39.

(*x*) Rogers *v.* Pittis, 1 Ad. 30; see also Lord C. B. Eyre's judgment in Barnes *v.* Crowe, 1 Ves., Jr., 488; Guest *v.* Willasey, 12 J. B. Moo. 2, [2 Bing. 429.

(*y*) In re Ince, 3 P. D. 111; and see Thompson *v.* Hempenstall, 1 Rob. 783,

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;[66] and, accordingly in a case (*z*) 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.

[But the doctrine of Burton *v.* Newbery (*a*) is, that where by codicil a "will" is referred to by date, it is a reference to that instrument alone exclusive of any intermediate codicil. And Crosbie *v.* Macdoual is treated as a case where the intermediate codicil was not revoked, rather than as one where it was actively confirmed. (*b*) According to this, the direct action of the latest codicil is upon the instrument called a will, and on that only. The codicil is left untouched, and operates by its own inherent force, if it has any; and the ultimate result is, that the will is confirmed as medified by the codicil. (*c*) If that is the correct view of the case, it will not govern one where the intermediate codicil has previously been

Does it revive the latter if previously revoked?

13 Jur. 814, where the internal evidence was sufficient to correct the mistake as to date.]

66. But if the testator use the words, "I give, devise and bequeath to A and B all the residue of my real and personal estate, whatsoever and wheresoever, undisposed of by my will and this codicil thereto," an intermediate codicil will be revoked thereby. In the goods of Hastings, 26 L. T. (N. S.) 715.

(*z*) Crosbie *v.* Macdoual, 4 Ves. 610; see also Gordon *v.* Lord Reay, 5 Sim. 274, stated *ante* p. *116; [Wade *v.* Nazer, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627; In re De la Saussaye, L. R., 3 P. & D. 42; Green *v.* Tribe, 9 Ch. D. 231.]

[(*a*) 1 Ch. D. 234, *ante* p. *117.

(*b*) The M. R. is even reported to have said that Crosbie *v.* Macdoual "*goes to* this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument," p. 240.

(*c*) Where the first of two inconsistent wills is set up, the *modus operandi* would be similar, though the ultimate result (viz., the unavoidable revocation of the second will), is different.

revoked with the will to which it belonged, and where, therefore, it has no force except such, if any, as may be supplied by the subsequent codicil: and Burton *v.* Newbery deciding that a mere reference by date to an unrevoked will does not set up an invalid codicil to that will, goes far to decide also that in the case supposed the intermediate codicil would not be reinstated. However, Sir R. P. Arden's language, which has been adopted by later judges, (*d*) implies a more intimate connection between will and codicil, and a more active operation upon the latter by an instrument referring to and confirming the will, though described by its date, than Sir G. Jessel would appear to admit or approve. Where, however, a testator referring to his will by date revokes it, the case is different, because there the principle applies that a clear disposition is not to be revoked except by clear words.] (*e*)

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. (*f*) 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. (*g*)

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 22d section of the recent statute, (*h*) 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. (*i*) [It has been decided, however, that if the earlier and revoked will has been destroyed by the testator or by his authority, it cannot be thus revived, though its contents might be satisfactorily proved from other sources: on the ground

Recognition in a codicil of a revoked will may revive it;

—but such will, in order to be revived, must be in existence.

(*d*) Sir J. Hannen, in In re De la Saussaye, L. R., 3 P. & D. 42, and Sir E. Fry, Green *v.* Tribe, 9 Ch. D. 238.

(*e*) Per Fry, J., 9 Ch. D. 237, citing Farrer *v.* St. Catharine's College, L. R., 16 Eq. 19.]

(*f*) Smith *v.* Cunningham, 1 Ad. 448.

(*g*) Greenough *v.* Martin, 2 Ad. 239. [And see In re Reynolds, L. R., 3 P. & D. 35.

(*h*) *Ante* pp. *140, *145.

(*i*) Payne *v.* Trappes, 11 Jur. 854, 1 Rob. 583; In re Chapman, 8 Jur. 902, 1 Rob. 1; In re M'Cabe, 31 L. J.. Prob. 190; In re Reynolds, L. R., 3 P. & D. 35. Sir J. Wilde has expressed a contrary

that the will being non-existent as well in fact as in law, this would be to make a new will without the formalities required by section 9 of the statute. (*k*) And the reference to the earlier will being insufficient to effect its revival, is insufficient also, of itself, to effect the revocation of the latter will; (*l*) on the principle alluded to at the commencement of this section that an instrument inoperative to effect its direct purpose (viz. revivor) does not give effect to an intention (viz. revocation) of which nothing is known but by that purpose. (*m*)

The latter part of section 22 provides, that "when any will or codicil which shall be partly revoked and afterward 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." Now if partial revocation of a will—as, of a devise of Blackacre to A in fee—has been caused by a codicil devising Blackacre to B in fee; and if this codicil has itself been afterwards included in the final revocation of the will, and the "will" is then revived; the devise of Blackacre remains revoked unless a contrary intention is shown. The will is restored as modified by the codicil, but by a short statutory method, without having recourse to the codicil, concerning which the statute is silent; and it may still be a question what becomes of the codicil. In Neate *v.* Pickard (*n*) a will and codicil were revoked by marriage, and afterwards by another codicil the testator confirmed his "last will" without referring to the date; and it was held that both were revived. At the date of the second codicil there were several alterations (unexecuted it would seem) on the face of the will, and it was further held that the will was revived in its altered condition.]

opinion; see his judgment, In re Steele, L. R., 1 P. & D. 575; *sed qu.* the statute is there not quite accurately represented.

(*k*) Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Newton *v.* Newton, 12 Ir. Ch. Rep. 118; Rogers *v.* Goodenough, 2 Sw. & Tr. 342, 31 L. J., Prob. 49. "I limit this, in my judgment, to cases where the will has been destroyed by the testator or by some person in his presence and by his authority. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge; that question may arise another day." Per Cresswell, J., in Rogers *v.* Goodenough.

(*l*) Rogers *v.* Goodenough, 2 Sw. & Tr. 342, 31 L. J., Prob. 49. But see Hale *v.* Tokelove, 2 Rob. 318, 14 Jur. 817; Newton *v.* Newton, Law Times, Oct. 26th, 1861, reversed on app. 12 Ir. Ch. Rep. 118; in both of which cases the codicil, besides reference to the earlier (destroyed) will, contained an express confirmation thereof, and great stress was laid on this circumstance by the court. *Sed qu.*

(*m*) Ex parte Earl of Ilchester, 7 Ves. 377–8; Powell *v.* Powell, L. R., 1 P. & D. 209.

[(*n*) 2 No. Cas. 406. See also In re M'Cabe, 31 L. J., Prob. 190; In re Reynolds, L. R., 3 P. & D. 35, in neither of which, however, was § 22 mentioned.]

*CHAPTER VIII.

REPUBLICATION.

Republication is of two kinds, express and constructive.[1] 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.[2] It is not often necessary, however, to

Republication, what.

Express republication.

1. "By republishing a will was meant repeating, either expressly or by construction, the formal declaration which, before Jan. 1, 1838, used to be made by a testator at the time of signing his will, that the document signed was his last will and testament. Prior to that date, the term signified the revival of a revoked instrument. Since the wills act 1838, this formality has been dispensed with. * * * * For the term republication then we must now substitute that of re-execution, although the former is now occasionally used; yet really since the wills act 1838, there has been no such thing as the republication of a will, the execution of a codicil being equivalent to the re-execution of a will, if the act be done with such intention, or rather perhaps without any contrary intention." Flood on Wills 361. See also Wms. Ex'rs (6th Am. ed.) 245, *et seq.* In such of the American states as do not require any formal publication of a will, in the first instance, the term re-execution would be as appropriate as the term republication. Blackstone says that the republication of a former will revokes one of later date, and establishes the first again. 2 Comm. 502. Republished wills are as new wills. Musser *v.* Curry, 3 Wash. C. C. 481; Barker *v.* Bell, 46 Ala. 216; Pringle *v.* McPherson, 2 Brev. 279; Flood on Wills 362. The case of Ackerly *v.* Vernon, 1 P. Wms. 783, introduced the doctrine of constructive republication, which doctrine has been almost, if not quite, universally adopted.

2. As a general rule the same forms and solemnities are requisite for the republication of a will as for its original publication. Havard *v.* Davis, 2 Binn. 406, 425; Jack *v.* Shoenberger, 22 Penna. St. 416; Musser *v.* Curry, 3 Wash. C. C. 481; Barker *v.* Bell, 46 Ala. 216; Love *v.* Johnston, 12 Ired. 355; Sawyer *v.* Sawyer, 7 Jones L. 134; Warner *v.* Warner, 37 Vt. 356; Hickman *v.* Holliday, 6 Mon. 587; Mooers *v.* White, 6 Johns. Ch. 375; Hatch *v.* Hatch, 2 Hayw. 33; Dunlap *v.* Dunlap, 4 Desaus. 321; Jackson *v.* Holloway, 7 Johns. 394; Jackson *v.* Potter, 9 Johns. 312. But in Pennsylvania this does not prevent a parol republication. Havard *v.* Davis, *ubi supra;* Jones *v.* Hartley, 2 Whart. 103; Jack *v.* Shoen-

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.

berger, *ubi supra*. On this point it was said by Sergeant, J.: "The rule of law is, that the republication of a will must be accompanied by the same solemnities as were necessary to the publication in the first instance, (2 Binn. 419;) but no others are required. Hence, in England, since the statute of frauds, requiring a will to be in writing signed by the party, and to be attested and subscribed in his presence by three witnesses, a parol republication is not good; but in Pennsylvania, the witnesses to a will need not be subscribing witnesses. If there be a will in writing, signed by the testator, it is sufficient that it be proved by any two witnesses who can establish the fact, whether they attested as witnesses or not. As therefore the original proof of the will may be on parol, so may the proof of republication; but the number of witnesses must be the same. In this respect our law stands on the footing of the English law, under the statute of 32 Hen. 8th, prior to the statute of frauds; and under the statute of Hen. 8th, the decisions in England were uniform in favor of receiving parol evidence of the republication of a will in writing; and it was held that anything which expressed the testator's intention that the will should be considered as of a subsequent date, was sufficient. * * * Parol evidence of republication is proper in Pennsylvania, with the requisition, however, that the proof of the republication be by the same number of witnesses and be as conclusive of the facts as would be required to establish an original will. The *animus republicandi* must be shown, that is, it must be shown that it was the intention of the testator at that time, that the will in question was and should be his will. The *identity* of the will must be shown, or in other words, that the will produced is the same will to which the testator referred his declarations. The witnesses need not be called for the purpose, for that is not required in order to establish an original will; nor need the will be present at the time of such declarations. * * * Nor need declarations be at the same time to the witnesses; they may be to one on one day, and to another on the next. It is sufficient if they satisfactorily show that after the date of the revocation, the testator declared his intention that the writing was his last will, and that fact is proved by two competent witnesses to the satisfaction of the jury." Jones *v.* Hartley, 2 Whart. 103, 110. But, in Connecticut, a will once revoked by a written declaration cannot be set up or republished by parol. Witter *v.* Mott, 2 Conn. 67. And this is undoubtedly the rule of law in the greater number of the American states. Warner *v.* Warner, 37 Vt. 356; Love *v.* Johnston, 12 Ired. 355; Cogdell *v.* Cogdell, 3 Desaus. 346; Carey *v.* Baughn, 36 Iowa 540. Where one has made a holographic will, and placed it among his valuable papers, and afterwards, being about to go abroad, he deposits such will, together with other papers, with a friend for safe keeping, this depositing will not amount to a republication. Battle *v.*

(*a*) As to the republication of wills of personalty, *vide* Long *v.* Aldred, 3 Ad. 48; Miller *v.* Brown, 2 Hagg. 209.

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 neutralized 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

Speight, 9 Ired. L. 288. And it is probable that a holographic will once revoked can be republished only by a written instrument setting forth the testator's intentions, and duly attested by the statutory number of witnesses, or by a paper written by the testator himself and deposited by him as required for the original will. Love *v.* Johnston, 12 Ired. 355; Sawyer *v.* Sawyer, 7 Jones L. 134. And such subsequent writing would be construed to be a codicil. Ibid. But where a testator, just before his death, said that he had made a will, and deposited it with S., and that all the change he desired in it was to add another executor, this was not a sufficient republication. Jackson *v.* Potter, 9 Johns. 312. Nor is a memorandum endorsed upon the will and attested by two witnesses, where the statute requires three witnesses. Jackson *v.* Holloway, 7 Johns. 394. But such a memorandum endorsed upon the will and signed by the requisite number of witnesses, the testator having actually republished the will, is, in Ohio, a good republication, although the testator did not sign it. Reynolds *v.* Shirley, 7 Ohio, pt. 2, 39. It has been said that where a testator has two wills, the first not being actually canceled or destroyed, or expressly revoked on the making of the second, if the second be afterwards canceled, the first will is revived. However, it is not well settled whether this is so. But if a testator make a second will, and actually revoke the first by an absolute act, rendering it void, and then cancels the second will, the first is not thereby revived; in such case, republication is essential to restore the first will. 4 Kent 531, and notes; Bohannon *v.* Walcot, 1 How. (Miss.) 336; Lively *v.* Harwell, 29 Ga. 509; Marsh *v.* Marsh, 3 Jones L. 77; Barksdale *v.* Hopkins, 23 Ga. 332; James *v.* Marvin, 3 Conn. 576; Beaumont *v.* Keim, 50 Mo. 28; Rudisiles *v.* Rodes, 29 Gratt. 147; Colvin *v.* Warford, 20 Md. 357, 387. But the opposite rule prevails in Pennsylvania. Lawson *v.* Morrison, 2 Dall. 286; Flintham *v.* Bradford, 10 Penna. St. 82. In Bates *v.* Holman, 3 Hen. & Munf. 502, A made a will in legal form, to which he afterwards attached a codicil; he then made a second will, and annexed a postscript to it, by which he revoked all former wills, and *signed* the postscript; thereafter he canceled the second will, by cutting his name out from the body of the will, but leaving the postscript with his name subjoined to it. This paper A carefully preserved, as also the first will, and after the death of A both were found. It was held that the second will was a complete revocation of the first, and that the canceling of the second did not necessarily cancel the postscript so as to set up the first will. See 2 Greenl. Ev., § 683. "If a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will be afterward canceled, yet the better opinion seems to be, that the former is not thereby set up again." 1 Powell on Devises 528. And on this point it is said by Hosmer, C. J.: "An express revocation is a positive act of the party, which operates, by its own proper force, without being at all dependent on the consummation of the will in which it is found, and absolutely annuls all pre-

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

cedent devises." James *v.* Marvin, 3 Conn. 576, 577. Again the same learned judge said: "As a clear consequence resulting from this principle, all prior wills are revoked or reversed, — the proper meaning of the word, *revoked*,—and must remain in this condition, until revived by republication. * * * A deed of revocation, separate from a will, has the effect of annulling a prior will, instantaneously; and the operation is the same, whether the revoking clause be in deed or will." James *v.* Marvin, 3 Conn. 576, 578. In Taylor *v.* Taylor, 2 Nott & McC. 482, 485, it is said by Huger, J.: "By the common law the first will is presumed to be restored to its active energy by the canceling of the second. By the civil law the first is regarded as annihilated by the second; and it requires other evidence than a destruction of the second to revive the first. In both it is regarded as a question of intention, and may be controlled by other evidence." And as to the point of intention to revive the former will, it is said by Pearson, J.: "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can, in anywise, affect the validity of a will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death. Nor is it perceived how the fact, that the second contained a clause of revocation, can alter the case; because that clause is just as inactive and inoperative as the rest of it, and so continues up to the time that the whole is canceled. This principle is settled in the common law courts in England in regard to devises. But in the ecclesiastical courts, in regard to wills of personalty, the principle is modified to some extent, and the validity of the first will is made to depend upon the question of intention which, however, may be established by parol evidence of declarations and other circumstances tending to show an intention to restore the first will." Marsh *v.* Marsh, 3 Jones L. 77, 78. To the same effect is the language of Benning, J.: "A man has the *power*, then, to insert in his will, a revocation that shall be operative, though it turn out, that the will itself shall be inoperative. Having the power, a man may, if he *pleases*, insert in his will a revocation that shall be operative independently of the will. This being so, it follows that in every case, in which there are two wills, of which, the latter contains a clause revoking all other wills, or contains testamentary dispositions repugnant to the testamentary dispositions contained in the earlier, and the later fails as a will, the question whether the later revokes the earlier, will be a question of *intention*." Barksdale *v.* Hopkins, 23 Ga. 332, 340. But, in some of the states, it is provided by statute that the destruction of the second will shall not revive the first, unless it appear that such was the intention, or the first be actually republished. This is so in Indiana, Kansas, New York, Ohio, Missouri, Nevada, Georgia, Dakota, Connecticut, California, Arkansas and Alabama.

devise had been incorporated into the codicil itself. (*b*)[3] And the same principle applied to a devise of *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-

(*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; In re Earl's Trust, 4 K. & J. 673;] see also Doe *v.* Davy, Cowp. 158; Gibson *v.* Montfort, 1 Ves. 485.

3. It was decided in the case of Barnes *v.* Crowe, 4 Bro. C. C. 2, that, independently of other considerations, the execution of a codicil should be an implied republication of the will to which it belonged. But in Kendall *v.* Kendall, 5 Munf. 272, it was held that the question of intention would enter into the consideration of the matter, and that unless there appeared an intention that the codicil should republish the will it would not so operate. In Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590, 593, it is said by Cowen, J.: "It seems to me that at this day it would be a violation of all reliable authority, to deny that a codicil duly attested to pass real estate, would, *per se*, whether it relate to real or personal property, operate as a republication of a devise, unless the testator declare that he does not intend the codicil should have that effect." And in Simmons *v.* Simmons, 26 Barb. 68, 75, Gould, J., says: "It should be observed that, between a codicil and a subsequent will, there is this difference of construction; a codicil is a republication and ratification of so much of the prior will as it does not revoke; whereas a new will, (if it provides for a full disposition of all the testator's estate,) though inconsistent but *in part* with the former will, and absolutely agreeing in part, revokes the whole prior will, by substituting a new and last disposition for the former one." See also Musser *v.* Curry, 3 Wash. C. C. 481; Haven *v.* Foster, 14 Pick. 534; Payne *v.* Payne, 18 Cal. 291; Stover *v.* Kendall, 1 Coldw. (Tenn.) 557; Jones *v.* Shewmake, 35 Ga. 151; Brimmer *v.* Sohier, 1 Cush. 118; Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590; Murray *v.* Oliver, 6 Ired. Eq. 55; Rose *v.* Drayton, 4 Rich. Eq. 260; Dunlap *v.* Dunlap, 4 Desaus. 305, 321; Brownell *v.* De Wolf, 3 Mason C. C. 486, 494; Mooers *v.* White, 6 Johns. Ch. 375; Hickman *v.* Holliday, 6 Mon. 587; Hatch *v.* Hatch, 2 Hayw. 33; Duncan *v.* Duncan, 23 Ill. 364; Jones *v.* Jones, 1 Gill 395. And where a will is not valid to pass real estate, for lack of the statutory number of witnesses, a codicil attested by the requisite number of witnesses cures such defect in the execution of the will. Stover *v.* Kendall, 1 Coldw. 557. But a codicil attested by only one witness cannot amount to a republication. Armstrong *v.* Armstrong, 14 B. Mon. 333. And the effect of a republication by codicil is to make the will speak as if itself published at the time of the publication of the codicil. Brimmer *v.* Sohier, 1 Cush. 118; Haven *v.* Foster, 14 Pick. 534; Barker *v.* Bell, 46 Ala. 216; Jones *v.* Shewmake, 35 Ga. 151; Payne *v.* Payne, 18 Cal. 291; Musser *v.* Curry, 3 Wash. C. C. 481; Murray *v.* Oliver, 6 Ired. Eq. 55; Harvy *v.* Chouteau, 14 Mo. 587; Armstrong *v.* Armstrong, 14 B. Mon. 333, 338; Alexander *v.* Waller, 6 Bush 330; Wms. Ex'rs (6th Am. ed.) 255. But not so as to revive legacies which have been adeemed. Langdon *v.* Astor, 16 N. Y. 9. And an unattested

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

will may be set up and republished by a codicil which is attested by a sufficient number of witnesses to prove a will. Harvy *v.* Chouteau, *ubi supra*. And the codicil need not be physically annexed to the will. Ibid. Payne *v.* Payne, *ubi supra;* Van Cortlandt *v.* Kip, *ubi supra;* Wms. Ex'rs (6th Am. ed.) 251. In Haven *v.* Foster, 14 Pick. 534, 540, it was said by Shaw, C. J.: "If the will be republished, then all the words contained in it, and which have reference to time, must be considered as applying to the time of the republication and not to that of the original will. The very same words may embrace very different parcels and amounts of estate, as they are used at one time or at another. If they are words of description, more or less general, as 'all my real estate;'—'all my real estate in such a county;'—'all my warehouses and wharfs in such a city;'—'all my wild lands,' &c., it is manifest, that such words, used on one day, would embrace a different estate, from that included in the same description on another day, as the estate described by them may have been enlarged or diminished by acquisition or alienation, in the meantime. By the rule under consideration, the will is considered as speaking on the day of republication, and to have the same effect as if originally made on that day, and to embrace the subject-matter, as it exists at that time. Where, therefore, there is a general residuary clause, as if one devises, and afterwards acquires real estate, and does not republish his will, the residuary devise does not carry the after-purchased estate, because the devisee was not seized at the execution of the will. But if such will be republished, after the purchase of the real estate, it carries this real estate, because the words of the original, as used and spoken on the day of republication, embrace it in terms." Under the rule that a codicil republishes the will as of the date of the codicil, it has been held that where children are not named in the will, but are named in the codicil, this will prevent the children from taking under a statute which provides that children take a certain proportion of the estate by statute, if they are not mentioned in the will. Payne *v.* Payne, 18 Cal. 291. See also Flood on Wills 364; Wigram on Wills 385; 1 Powell on Devises 609, *et seq.;* Wms. Ex'rs (6th Am. ed.) 251, *et seq.* If a person who has executed a will under undue influence, afterwards, and when the testator is removed from such influence, execute a codicil to such will, this will operate as a republication of the will, so as to overcome the charge of undue influence as to the will. O'Neal *v.* Farr, 1 Rich. 80.

(*c*) Beckford *v.* Parnecott, Cro. El. 493; Barnes *v.* Crowe, 1 Ves., Jr., 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 Wm. Saund. 278, n.]

(*d*) Coppin *v.* Fernyhough, 2 B. C. C. 291; Hulme *v.* Heygate, 1 Mer. 285.

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*) [In Doe d. Murch *v.* Marchant, (*f*) where a testatrix devised and bequeathed all her real and personal estate, in an event which happened, to B. J., absolutely, and afterwards made a codicil, "to be annexed to" her will, by which she noticed that the event had happened, and that she had become entitled to other real and personal estate "which was not comprehended in my said will, but which also with my other estates and property I now intend to dispose of for the benefit of B. J. (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 contained in my said will, with a view the better to secure the same to her:" the testatrix then bequeathed some legacies, and devised all her real *and the residue of her personal estate in trust for B. J. for life, with remainder to the children of B. J. living at the death of B. J., or failing them, to the brothers of B. J. then living; but did not dispose of the ultimate fee. B. J. died leaving neither child nor brother surviving her; and all the estates limited by the codicil being thus exhausted, the question was whether the will was republished by the codicil, so as to include the after-purchased land in the devise of the fee simple to B. J., or whether the devise in the codicil, being expressly made "instead of the devise" in the will, must be considered as a revocation of it and as a substitution of that contained in the codicil. It was held that the words "instead of the devise" might well be interpreted to mean "instead of so much only of the devise in the will as was incompatible with the codicil," and that the disposition of the fee in the will, being thus unaltered by the codicil, must be considered

(*e*) Williams *v.* Goodtitle, 10 B. & C. 895, 5 Man. & Ry. 757.

[(*f*) 6 M. & Gr. 813; 7 Scott, N. R. 644.]

as republished and as operating as well upon the after-purchased lands as on the other real estate.]

Perhaps in scarcely any instance has the republishing operation of a codicil been carried to so great a length as in Rowley *v.* Eyton, (*g*) 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 been in the will, the lands comprised therein would have been subject to the charge. (*h*) 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.[4] 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, (*i*) 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 seized 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

(*g*) 2 Mer. 128.

(*h*) On this point, see [Maskell *v.* Farrington, 3 D., J. & S. 338.]

(*i*) 7 T. R. 482, 2 B. & P. 500; Hughes *v.* Turner, 3 My. & K. 666; [Hughes *v.* Hosking, 11 Moo. P. C. C. 1.]

4. See *ante* note 3, page 366.

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 alone dissented; the ground of his 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 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 Parker *v.* Briscoe, (*k*) 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

(*k*) 3 J. B. Moo. 24, [8 Taunt. 699.]

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, (*l*) 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. 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 case of Ashley *v.* Waugh (*m*) 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 Lord Cottenham 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. (*m*)

[On the other hand, in Doe d. York *v.* Walker, (*n*) the testator, by his will made before 1838, devised all the lands "of which I am seized 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. Case of Doe *v.* Walker.

(*l*) 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.]

(*m*) 4 Jur. 572.

[(*m*) The rule that a purchaser will not be compelled to take a doubtful title is no longer observed, Alexander *v.* Mills, L. R., 6 Ch. 124; except, perhaps, in cases of doubtful construction. Ib.

(*n*) 12 M. & Wels. 591; see also per Abinger, C. B., 4 Y. & C. 166, 167; and per Stuart, V. C., Langdale *v.* Briggs, 3 Sm. & G. 246, 252, affirmed, 8 D., M. & G. 391.

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 was, 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 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.] (*o*)

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. (*p*) 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

(*o*) 1 Vict., c. 26, § 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.]

(*p*) Carte *v.* Carte, 3 Atk. 180; see also Alford *v.* Earle, 2 Vern. 209.

of the revoking conveyance, passes by the effect of the republication, under the devise. (*q*)

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 confirmation of the will in the usual general terms. (*r*) The case of Holmes *v.* Coghill (*s*) 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 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 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 W. 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." (*u*)

Does not shift specific devise to a different property.

—nor an appointment to a new power.

(*q*) Jackson *v.* Hurlock, 2 Ed. 263.

(*r*) Izard *v.* Hurst, 2 Freem. 224, [2 Eq. Cas. 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.]

(*s*) 7 Ves. 499; S. C., 12 Ves. 206; [see also Jowett *v.* Board, 16 Sim. 352.

[(*u*) See accordingly Cowper *v.* Mantell, 22 Beav. 223; Du Hourmelin *v.* Sheldon, 19 Beav. 389; Hope *v.* Hope, 5 Gif.

[So, if the will refer expressly to the date of its own execution, (*x*) or to a particular custom then existing, (*y*) 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 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. (*z*) The case of Perkins *v.* Micklethwaite,(*a*) 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 (*b*) 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 K. B. held, that the will contained no devise, the expressions rather importing an intention

13. Cf. Gale *v.* Gale, 21 Beav. 349; *ante* p. *163. Under the act 1 Vict., c. 26, § 24, the power, if general, may be exercised although not in existence at the time the will was made; Cofield *v.* Pollard, 3 Jur. (N. S.) 1203; and *post* ch. X. *ad fin.*

(*x*) Stillwell *v.* Mellersh, 20 L. J., Ch. 356.

(*y*) Doe d. Biddulph *v.* Hole, 16 Q. B. 848.]

(*z*) See 2 Ves. 626; see also Doe *v.* Kett, 4 T. R. 601.

(*a*) 1 P. W. 275.

(*b*) Lane *v.* Wilkins, 10 East 241.

to *leave the property alone*, than to dispose of it, and that the codicil could not alter the construction.

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 life-time, 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 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*.

Whether, under old law, republication brings property comprised in a lapsed specific devise within residuary devise in will.

The [only] authority on the point [appears to be] Doe *v.* Sheffield,(c) where the Court of K. B. 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. (*d*)

*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

Suggested conclusion from Doe *v.* Sheffield.

(*c*) 13 East 526.

[(*d*) Williams *v.* Goodtitle, as reported 10 B. & Cr. 895, appears to be an authority that a residuary devise passed lands, a previous devise of which in the same will or codicil was void; but the report 5 Man. & Ry. 757, shows that no such question arose; 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-acquired lands.

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; (*f*) 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 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 (§ 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. (*g*) [And where by codicil the testator revoked the share of one tenant in common, and directed that it should "fall into the residue and be disposed of accordingly," it was held that these special words did not contain any gift to the *others, or distinguish the case from one of mere revocation of the share.] (*h*)

Republication, how far affected by the act 1 Vict., c. 26.

The doctrine of republication has lost much of its interest under the stat. 1 Vict., c. 26, 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

(*f*) See however ch. XX., § 1, *post*; and Smith *v.* Lomas, 33 L. J., Ch. 578.

(*g*) See Skrymsher *v.* Northcote, 1 Sw. 566; In re Wood's Will, 29 Beav. 236.

(*h*) Humble *v.* Shore, 7 Hare 247, 1 H. & M. 551, n. See for the case of mere revocation, Cresswell *v.* Cheslyn, 2 Ed. 123.]

the term *re*-publication scarcely appropriate, (*i*) 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 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 connection with the new law.

Effect of re-publication 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, 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. (*k*)[5]

*[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. (*l*)

(*i*) But see section 34.

[(*k*) 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.]

5. See Wms. Ex'rs (6th Am. ed.) 263.

[(*l*) In re Farrer, 8 Ir. Com. L. R. 370.

A singular question was raised in Dunn *v.* Dunn, (*m*) namely,—whether a legacy bequeathed by will dated before 1838, would fail, if after that date the will was re-executed in the presence of two witnesses, of whom the legatee was one. The contention appears to have been that this must be so, because the will was now to be deemed for the purposes of the act, to have been made at the time of re-execution. Sir J. Wilde said it would be a case of great hardship, but did not decide the question. Should the question recur, it will probably be found unnecessary to hold that the legacy is defeated: for though the re-execution is "a new making of the will," (*n*) the old making of it, under which the legacy is claimed, is not thereby merged or abolished.]

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, (*o*) to which the reader is referred.

(*m*) L. R., 1 P. & D. 277.
(*n*) 3 Q. B. 178, 12 M. & Wel. 600.
(*o*) *Ante* p. *188.]

*CHAPTER IX.

RESTRAINTS ON THE TESTAMENTARY POWER.

SECTION I.

Gifts to Superstitious and Charitable Uses.

[About the period of the Reformation, statutes were passed to defeat or prevent dispositions of property to purposes which were then accounted superstitious. Thus the statute 1 Edw. VI., c. 14, after premising that great cause of superstition and error in Christian religion was the fantasying of vain opinions concerning purgatory and masses satisfactory for the dead, declared *the king entitled* to all real (*a*) and certain corporate personal (*b*) property *theretofore* disposed of for the perpetual finding of a priest, or maintenance of any anniversary or obit *or other like thing*, or of any light or lamp in any church or chapel. This statute affects previous dispositions only. But by the earlier statute 23 Hen. VIII., c. 10, all uses *thereafter* declared of *land* (except for terms of not more than twenty years) to the intent to have obits perpetual, or the continual service of a priest or other like uses, were *made void*. But there is no statute making superstitious uses void generally: (*c*) and the latter statute does not relate to personalty.] Superstitious uses, which are not within the letter of these statutes, [and whether they seek to affect land or personal estate,] 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. (*d*)

Superstitious uses, what.

[(*a*) §§ 5, 6.] See Att.-Gen. *v.* Vivian, 1 Russ. 226; [Att.-Gen. *v.* Fishmongers' Company, 2 Beav. 151, 5 My. & Cr. 11.

(*b*) Section 7.

(*c*) Per Sir W. Grant, Cary *v.* Abbot, 7 Ves. 495.]

(*d*) West *v.* Shuttleworth, 2 My. & K. 684. [See also In re Blundell's Trusts,

*It has been decided, that devisees may be compelled to disclose whether they take subject to a secret trust of this nature.(e)

Secret trusts.

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 to be distributed among sixty pious ejected ministers, [(given, "because I know many of them to be pious and good men, and in great want,")] and legacies also to Mr. Baxter, one of them to be laid out in his book entitled "A Call to the Unconverted," were void, as superstitious; (f) but the decree was reversed by the Lords Commissioners.

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; (g) [thus bequests

Protestant Dissenters.

30 Beav. 360, better reported 31 L. J., Ch. 52; Heath *v.* Chapman, 2 Drew. 417; Att.-Gen. *v.* Fishmongers' Company, 2 Beav. 151, 5 M. & Cr. 11. See also an analogous Chinese superstition, Yeap *v.* Ong, L. R., 6 P. C. 396. Including the souls of others with his own in the supposed benefit will not save the bequest, see s. cc.] In West *v.* Shuttleworth there was a residuary bequest, and yet the void pecuniary legacies were held to belong to the next of kin. On this point, see Shanley *v.* Baker, 4 Ves. 732; [and observe that in West *v.* Shuttleworth, the residuary legatees made no claim to the void legacies, and in fact supported the bequest of them. If the superstitious use had charity for its object, it would be executed *cy pres*, see Cary *v.* Abbot, 7 Ves. 495, and per Lord Eldon, 19 Ves. 487. But it is not clear that any use (except of the kind mentioned in the stat. 1 Edw. VI.) would now be held void solely as being superstitious. In Thornton *v.* Howe, 31 Beav. 14, Lord Romilly held that even a trust for propagating the sacred writings of Joanna Southcote would be enforced by the court. Those writings aver that Joanna Southcote was with child by the Holy Ghost, &c., &c., delusions almost identical with those which in Smith *v.* Tebbitt, L. R., 1 P. & D. 398, were held to render a woman possessed by them incapable of making a will.]

(e) King *v.* Lady Portington, 1 Salk. 162, 1 Eq. Cas. Ab. 96, pl. 6; see further as to superstitious uses, Duke Char. Uses 106, 4 Rep. 104, Cro. Jac. 51, 1 Eq. Cas. Ab. 95, pl. 1, *et seq.*, and Shelf. Ch. Us. 89, where the cases, early and modern, are collected. [In Read *v.* Hodgens, 7 Ir. Eq. Rep. 17, it was decided that a bequest in *Ireland* for masses for the testator's soul was valid: *sed qu.*]

(f) Att.-Gen. *v.* Baxter, 1 Eq. Cas. Ab. 96, pl. 9, 1 Vern. 248, 2 Id. 105, [1 Ves. 537,] 7 Ves. 76.

(g) Att.-Gen. *v.* Hickman, 2 Eq. Cas. Ab. 193; West *v.* Shuttleworth, 2 My. & K. 684; [and see statutes 18 and 19 Vict., c. 81, §§ 2, 3, and c. 86, § 2.] In Doe *v.* Hawthorn, 2 B. & Ald. 96, Abbott, J., afterwards Lord Tenterden, said, that the trust there in question 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 either a superstitious use

*to an Unitarian chapel, (*h*) or for the benefit of poor Irvingite ministers, (*i*) or to the minister of a specified Baptist chapel, (*j*) are valid.]

Before the statute 2 and 3 Will. IV., c. 115, bequests for the propagation of the Roman Catholic religion were unlawful; (*k*) but section 1 of that act, after noticing the acts in favor of Protestant Dissenters, and a Scotch act imposing penalties on Roman Catholics; and reciting, that notwithstanding the provisions of various acts passed for the relief of his Majesty's Roman Catholic 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 section 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. (*l*)

Stat. 2 and 3 Will. IV., c. 115.

Roman Catholics placed on same footing as Protestant Dissenters in respect of their schools, &c.

within 23 Hen. VIII., c. 10, or a charitable use within 9 Geo. II., c. 36. But as to the former alternative it is notorious 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 fullness and perspicuity by Lord Eldon, in Att.-Gen. *v.* Pearson, 3 Mer. 353, which bears more immediately on the position of [Unitarians, as to whom see now 7 and 8 Vict., c. 45, and of whom Lord Campbell said, 2 H. L. Cas. 863, that he had no doubt they would now on most occasions be considered as Protestant Dissenters.

(*h*) Shrewsbury *v.* Hornbury, 5 Hare 406; In re Barnett, 29 L. J., Ch. 871.

(*i*) Att.-Gen. *v.* Lawes, 8 Hare 32.

(*j*) Att.-Gen. *v.* Cock, 2 Ves. 273.]

(*k*) Cary *v.* Abbot, 7 Ves. 490; see also 4 Ves. 433, 6 Ves. 566, 1 Ba. & Be. 145; [Gates *v.* Jones, cit. 2 Vern. 266.

(*l*) See also 23 and 24 Vict., c. 134.]

Bequest for propagation of Roman Catholic religion.

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; (*m*) 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 settled, 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.; (*n*) [nor, it is presumed, would it render valid such a trust as that which was the subject of discussion in De Themines *v.* De Bonneval, (*o*)

Public policy.

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 J. Leach rested his decision entirely on the ground that to allow such a publication was against public policy.

Jews.

Jews also are now by statute 9 and 10 Vict., c. 59, placed on the same footing as Protestant Dissenters.] (*p*)

What are charitable uses.

Charity has been defined to be a general public use. (*q*) In order to ascertain what are charitable purposes, recourse is usually had to the preamble of the statute 43 Eliz., c. 4,[1] which enumerates various kinds of charity: viz. the relief

Stat. 43 Eliz., c. 4.

(*m*) Bradshaw *v.* Tasker, 2 My. & K. 221; [and see In re Michel's Trusts, 28 Beav. 32; but Sir E. Sugden questioned this decision, 1 D. & War. 380.]

(*n*) West *v.* Shuttleworth, 2 My. & K. 684. [In re Blundell's Trusts, 30 Beav. 360; Heath *v.* Chapman, 2 Drew. 417.

(*o*) 5 Russ. 288.

(*p*) The cases relating to Jews before this act were, Da Costa *v.* De Pas, Amb. 228, 1 Dick. 258, 2 Ves. 274, 276, 7 Ves. 76, 2 Sw. 487, 2 J. & W. 308; and Straus *v.* Goldsmid, 8 Sim. 614. The only difference between 2 and 3 Will. IV., c. 115, § 1, and 9 and 10 Vict., c. 59, § 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. This enactment also has been held to be retrospective, In re Michel's Trusts, 28 Beav. 32.]

(*q*) Amb. 651.

1. As to the force of English statutes enacted prior to the settlement of the states of the Union, some of the states have provided, by statutes expressly declaring the acts of parliament as well as the common law, prior to the settlement, to be part or to be no part of the law of the state. Thus, in Illinois, all acts of the British parliament prior to 4 James I., except 43 Eliz., c. 6, § 2, 13 Eliz., c. 8, and 37 Hen. VIII., c. 9, are declared to be in force in the State of Illinois, (Rev. Stat., 1845, ch. 62, § 1,) and remained so until this act was repealed by the general repealer. (Rev. Stat., 1874, p. 1013.) In Indiana there is the same act (Rev. Stat., 1838, ch. 60, p. 398) as above referred to in

of aged, impotent, and poor people, (*r*) maintenance of sick and maimed soldiers and mariners, schools of learning, (*s*) free schools and scholars in universities; repair of bridges, ports, havens, causeways,

revised statutes of Illinois, 1845, which act was re-enacted in Indiana in 1852 (1 Ind. Stat., 1870, p. 415). In Kentucky (Rev. Stat., 1851, p. 177,) all statutes of a general nature, whether of this state, of Virginia, or of England, adopted prior to November 1st, 1851, are repealed. In New Jersey the constitution of 1776, § 22, kept in force, till altered by law, such English statutes as had been theretofore practised in the colony, but in 1799 (Pat. Rev. 436, § 4,) it was provided that "no statute or act of parliament of England or Great Britain should have force or authority within the state." This act was repealed in 1821, (Rev. Stat. 727, § 3,) but at the same time substantially re-enacted by section 2 of the same act, and so remained until the repeal of that act by the revised statute of 1846. In New York, by act of 1828, (3 Rev. Stat. 1119, § 3,) it is provided that, since May 1st, 1788, English statutes are not the law of New York. In South Carolina (2 Stat. at Large, 1712, p. 401,) the English statutes in force in the state are enumerated, not including either the statutes of mortmain or of charitable uses. In Virginia, it was early provided by the ordinance organizing the state government, that all English statutes prior to 4 James I., which were in aid of the common law and not local in their character, should be preserved as part of the common law of Virginia. This act was repealed December 27th, 1792, (Rev. Code, ch. 147, p. 291,) in these words: "So much of the ordinance as relates to any statute or act of parliament shall be and is hereby repealed and no such statute or act of parliament shall have any force or authority in this commonwealth." The ordinance thus repealed appears again in the form of a statute in the code, 1873 (tit. 9, ch. 15, § 2). In West Virginia (Code, 1868, p. 91, ch. 13, § 6,) such English statutes are preserved as were in force in Virginia June 20th, 1863. In the absence of express legislation on this subject, the principle has been generally accepted that, upon the settlement of the colonies, such statute law of England as was applicable to their situation, together with the common law, became the law of the new colony, notwithstanding Blackstone's theory (1 Com. 107) that they were conquered or ceded territory and without the common law. Story on Const., § 151; 1 Kent Com. 472. We beg leave to refer the reader, further, to a valuable note of Judge Stewart, the New Jersey equity reporter, in De Camp *v.* Dobbins, 2 Stew. 37, 40, *et seq.*, as to the effect and force given to British statutes in the United States, in which he says: "The following rules seem to have been generally followed in this country: (1.) The statute must have been adopted before the settlement of the colony. State *v.* Mairs, Coxe 328, note, Kinsey, C. J.; Dalgleisch *v.* Grundy, Cam. & Nor. (N. C.) 22; McKee *v.* Straub, 2 Binn. (Pa.) 1; Patterson *v.* Winn, 5 Pet. 233, 241, Story, J.; Carter *v.* Balfour, 19 Ala. 814, 829; Commonwealth *v.* Lodge, 2 Gratt. (Va.) 579; Swift *v.* Tousey, 5 Ind. 196; see Ludlam *v.* Ludlam, 26 N. Y. 356, 362; Coburn *v.* Harvey, 18 Wis. 156; Paul *v.* Ball, 31 Tex. 10. (2.) It must be applicable to our situation—*e. g.*, the following acts do not extend: Bankruptcy acts of England. Vanuxem *v.* Hazelhurst, 1 South. 192, 195; see Bunny *v.* Hart, 11 Moore P. C. C. 189. Collateral warranties, 4 and 5 Ann, c. 16 (A. D. 1706). Eshelman *v.* Hoke, 2 Yeates (Pa.) 509; see Den *v.* Crawford, 3 Hal. 90.

[(*r*) Nash *v.* Morley, 5 Beav. 177.

(*s*) Att.-Gen. *v.* Nash, 3 B. C. C. 587.

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,

Benefit of clergy, Fuller *v.* State, 1 Blackf. (Ind.) 63. Copyright laws, 8 Ann, c. 19 (A. D. 1710). Wheaton *v.* Peters, 8 Pet. 591, 660. *Quia emptores*, 18 Edw. I., c. 1 (A. D. 1290). Ingersoll *v.* Sergeant, 1 Whart. 337; Wallace *v.* Harmstad, 44 Pa. St. 492. 'The Black Act,' 9 Geo. I. (A. D. 1722). State *v.* Campbell, Charlt. (Geo.) 166. Maintenance and champerty, 32 Hen. VIII., c. 9 (A. D. 1541). Den, Bickham, *v.* Pissant, Coxe 220, 223; Morris *v.* Vanderen, 1 Dall. 64, 67; Harring *v.* Barwick, 24 Geo. 59; Sessions *v.* Reynolds, 7 Sm. & M. (Miss.) 131; Schaferman *v.* O'Brien, 28 Md. 565; Cresinger *v.* Welsh, 15 Ohio 156; Fetrow *v.* Merriwether, 53 Ill. 275; Cassedy *v.* Jackson, 45 Miss. 397; Duke *v.* Harper, 3 Cent. L. J. 288, where many cases are reviewed; 14 Am. Law Reg. 78, and note; see Gregerson *v.* Imlay, 4 Blatch. 503; Brinley *v.* Whiting, 5 Pick. 347; Earle *v.* Hopwood, 9 C. B. (N. S.) 566, 574, note. Mortmain, 9 Geo. II., c. 36 (A. D. 1736). Vidal *v.* Girard, 2 How. 189; Beall *v.* Fox, 4 Geo. 404; Potter *v.* Thornton, 7 R. I. 252; Perin *v.* Carey, 24 How. 465; Wright *v.* Trustees, etc., 1 Hoff. Ch. 202; McCarter *v.* Asylum, 9 Cow. 437, 451; see Schmucker *v.* Reel, 61 Mo. 592; Leazure *v.* Hillegas, 7 Serg. & Raule 321. Usury laws, 37 Hen. VIII., c. 9 (A. D. 1546). Houghton *v.* Page, 2 N. H. 42; see Rensselaer Glass Co. *v.* Reid, 5 Cow. 587, 609, 635. Pauper laws, Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111. Conspiracy, 33 Edw. I. (A. D. 1305). State *v.* Buchanan, 5 H. & J. (Md.) 317; Commonwealth *v.* Hunt, 4 Metc. (Mass.) 111. Bearing arms, 2 Edw. III. (A. D. 1329). Simpson *v.* State, 5 Yerg. (Tenn.) 356. Enrolment act, 27 Hen. VIII., c. 16 (A. D. 1536). Welsh *v.* Foster, 12 Mass. 93, 96; Jackson *v.* Dunsbogh, 1 Johns. Cas. 91, 97; see Patterson *v.* Winn, 5 Pet. 233, 241. The following have been construed as operative: *Lex mercatoria*, Ferris *v.* Saxton, 1 South. 1, 18; Pratt *v.* Eads, 1 Blackf. (Ind.) 81; Cook *v.* Renick, 19 Ill. 598; Nash *v.* Harrington, 2 Aik. (Vt.) 9; Hudson *v.* Mathews, Mor. (Ia.) 94; Commonwealth *v.* Leach, 1 Mass. 59, 61. Statute of uses, 27 Hen. VIII. (A. D. 1536). 1 Greenl. Cruise 340, note; see Croxall *v.* Sherrerd, 5 Wall. 268, 282; Society *v.* Hartford, 2 Paine C. C. 536; Matthews *v.* Ward, 10 G. & J. (Md.) 443, 454; Thompson *v.* Gibson, 1 Ohio 439. Statute of Gloucester, 6 Edw. I., c. 5 (A. D. 1278). Sackett *v.* Sackett, 8 Pick. 309, 312; see Moore *ads.* Townsend, 4 Vr. 284; Dawson *v.* Coffman, 28 Ind. 220. Statute of Merton, 20 Hen. III. (A. D. 1236). O'Ferrall *v.* Simplot, 4 Iowa 381; Hopper *v.* Hopper, 1 Zab. 543, 2 Zab. 715. Statute of frauds, 27 Eliz. (A. D. 1585). Cathcart *v.* Robinson, 5 Pet. 264; Brown *v.* Burke, 22 Geo. 574; Den *v.* De Hart, 1 Hal. 450, 457; Mayberry *v.* Johnson, 3 Gr. (N. J.) 116, 118; Lindsley *v.* Coats, 1 Ohio 113. *Contra*, Cleveland *v.* Williams, 29 Tex. 204; see Murphy *v.* Hubert, 7 Barr (Pa.) 420; Blackwell *v.* Ovenby, 6 Ired. (N. C.) Eq. 38. Fines and common recoveries, Lyle *v.* Richards, 9 S. & R. (Pa.) 322. Richman *v.* Lippincott, 5 Dutch. 44, 50; Croxall *v.* Sherrerd, 5 Wall. 268, 283. Distresses, 8 Ann, c. 14 (A. D. 1710). Hamilton *v.* Reedy, 2 McCord (S. C.) 38; Coburn *v.* Harvey, 18 Wis. 156; Dalgleish *v.* Grundy, Cam. & Nor. (N. C.) 22; Lambert *v.* Dessaussure, 4 Rich. (S. C.) Law 248; In re Trim, 2 Hughes (W. S. C. C.) 355; Damages from accidental fire, 6 Ann, c. 31, (A. D. 1708). Kellogg *v.* C. & N. W. R. R. Co., 26 Wis. 223, 272; as modified by 14 Geo. III., c. 78, (A. D. 1774). Lansing *v.* Stone, 37 Barb. 15. Discontinuance by husband of wife's in-

handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; (*t*) and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

terest in lands, 32 Hen. VIII., c. 28, (A. D. 1541). Bruce *v.* Wood, 1 Metc. (Mass.) 542; Coale *v.* Barney, 1 G. & J. (Md.) 324. Westminster the Second, 13 Edw. I., c. 34 (A. D. 1285). Coggswell *v.* Tibbetts, 3 N. H. 41. *Contra*, Lecompte *v.* Wash, 9 Mo. 551. Jointure, 27 Hen. VIII., c. 10 (A. D. 1536). Hastings *v.* Dickinson, 7 Mass. 153. Attornment, 4 Ann, c. 16 (A. D. 1706). Burden *v.* Thayer, 3 Metc. 76; Coker *v.* Pearsall, 6 Ala. 542; see Baldwin *v.* Walker, 21 Conn. 168. (3.) In aid or amendment of the common law. Commonwealth *v.* Leach, 1 Mass. 58, 61; Pearce *v.* Atwood, 13 Mass. 324, 354; Commonwealth *v.* Knowlton, 2 Mass. 530, 535; Boynton *v.* Rees, 9 Pick. 528, 531; Hamilton *v.* Kneeland, 1 Nev. 40; Gwin *v.* Hubbard, 3 Blackf. (Ind.) 14; Plumleigh *v.* Cook, 13 Ill. 669; see Steere *v.* Field, 4 Mason 486, 511. As an action of account, 4 Ann, c. 16 (A. D. 1706). Griffith *v.* Willing, 3 Binn. (Pa.) 317. (4.) Or declaratory thereof. Lynch *v.* Clark, 1 Sandf. Ch. (N. Y.) 583; Hudnal *v.* Wilder, 4 McCord (S. C.) 294; Hamilton *v.* Russel, 1 Cranch 310, 316; State *v.* Hudson Co., 1 Vr. 130, 131. (5.) Or merely cumulative. Goodwin *v.* Thompson, 2 Greene (Ia.) 329; Commonwealth *v.* Ruggles, 10 Mass. 391; see Commonwealth *v.* English, 2 Bibb (Ky.) 80. (6.) All statutes for the administration of justice were adopted. Sibbey *v.* Williams, 3 G. & J. (Md.) 52: Pemble *v.* Clifford, 2 McCord (S. C.) 31; Craft *v.* State Bank, 7 Ind. 219. 'Ease and Favor,' 23 Hen. VI., c. 9 (A. D. 1445). Koons *v.* Seward, 8 Watts (Pa.) 388; see Winthrop *v.* Dockendorf, 3 Me. 156, 161. Additions to names of defendants in indictments, 1 Hen. V., c. 5 (A. D. 1413). Commonwealth *v.* France, 2 Brewst. (Pa.) 568. Limitations of actions, 21 Jac. I., c. 16 (A. D. 1624), does *not* extend here. Den, Bickham *v.* Pissant, Coxe 220; Den, Johnson *v.* Morris, 2 Hal. 6, 11; Den, Gardner *v.* Sharp, 4 Wash. C. C. 609; Morris *v.* Vanderen, 1 Dall. 64; Boehm *v.* Engle, 1 Dall. 15. *Contra*, Calvert *v.* Eden, 2 H. & McH. (Md.) 290; Bogardus *v.* Trinity Church, 4 Paige 178, 198. Costs, 6 Edw. I., c. 1 (A. D. 1278). See Aller *v.* Shurts, 2 Harr. 188. Bills of exceptions, 13 Edw. I., c. 31 (A. D. 1285). See Colley *v.* Merrill, 6 Me. 50. The construction of an English statute is adopted with it. Brown *v.* Burke, 22 Geo. 574; Fowler *v.* Stoneum, 11 Tex. 478. As far as the revolution. Cathcart *v.* Robinson, 5 Pet. 264, 280." So in Carter *v.* Balfour, 19 Ala. 814, Coleman, J., says: "It appears to be settled that English statutes passed before the emigration of our ancestors to America, and which were applicable to our situation and not inconsistent with our institutions and government constitute a part of the common law and are in force (unless repealed) in all the states of the Union." And in Commonwealth *v.* Leach, 1 Mass. 59, Sedgwick, J., says: "It appears to me, generally speaking, that the English statutes which were in force at the time of the emigration of our ancestors are common law here;" and to the same effect, Dana, C. J., in the same case: "Generally when an English statute has been made in amendment of the common law of England it is here to be considered as part of our common law." "The common law, it is said, we brought with us from the mother country and we claim it

(*t*) 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.

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, (*u*) for the erection of water-works for the use of the inhabitants of a town; (*x*) to be applied for the "good" of a place, (*y*)

as a most valuable heritage. This is admitted but not to the extent sometimes urged. The common law in all its diversities has not been adopted by any one of the states. In some of them it has been modified by statutes, in others by usage, and from this it appears that what may be the common law of one state is not necessarily the common law of any other. We must ascertain the common law of each state by its general policy, the usages sanctioned by its courts and its statutes, and there is no subject of judicial action which requires the exercise of this discrimination more than the administration of charities. No branch of jurisprudence is more dependent than this upon the forms and principles of the common law," McLean, J., in Wheeler *v.* Smith, 9 How. 55. "Having adopted the common law of England so far as it was applicable to our circumstances and conformable to our institutions, the law of charitable uses is in force here unless, 1st, it was established by an English statute which has been abrogated; or 2d, unless there is something in the system repugnant to our form of government; or 3d, unless it can be shown by the history of our colonial jurisprudence that it was not in force here prior to the revolution; or, lastly, unless it has been abrogated by the revised statutes," Denio, J., in Williams *v.* Williams, 8 N. Y. 540. The statutes of 23 Henry VIII. and 1 Edward VI., referred to at the beginning of the chapter, forbid gifts to *superstitious* uses, neither of them, however, as has been remarked in the text, reaching the case of gifts of personal property made after the passage of the statute. These statutes have always been held to be local in their application, and have not been extended as part of the common law to the United States. The same thing is true of the so-called mortmain act of 9 George II., which reached beyond the earlier statutes against superstitious uses, and forbade gifts to charitable uses, unless made in a mode therein prescribed. 2 Redfield on Wills 510. In his Equity Jurisprudence, section 1194, Mr. Justice Story says of it: "This statute of 9th Geo. II., c. 36, was never extended to or adopted by, the American colonies generally. But certain of the provisions of it, and of the older statutes of mortmain, have been adopted by some of the states of the Union. And it deserves the consideration of every wise and enlightened American legislator, whether provisions similar to those of this celebrated statute are not proper to be enacted in this country with a view to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check an unfortunate propensity, (which is sometimes found to exist under a bigoted fanaticism,) the desire to acquire fame, as a religious benefactor, at the expense of all the natural claims of blood and parental duty." "It hath also been held that the statute 23 Hen. VIII. before mentioned did not extend to anything but *superstitious* uses, and that therefore a man may give lands for the maintenance of a school, a hospital or any other *charitable*

(*u*) 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.

(*x*) Jones *v.* Williams, Amb. 651.

(*y*) Att.-Gen. *v.* Earl of Lonsdale, 1 Sim. 105; Att.-Gen. *v.* Webster, L. R., 20 Eq. 483.

[or for "charities and other public purposes *in" a parish,] (z) or for the general improvement of a town, (a) or for the establishment of a life-boat, (b) or of a botanical garden; (c) to the trustees and for the benefit of the British Museum; (d) [to the Royal, the Geographical,

uses." 2 Bl. Com. 273. In the absence of church establishments and of all religious prohibitions in the United States, the very idea of superstitious uses has been almost lost. Of the cases adjudged to be superstitious in England, perhaps but a small part would still be so held even there under the present liberal reforms of the law, and scarcely any of them would be adjudged to be superstitious here. See Gass *v.* Wilhite, 2 Dana 170, where a gift to Shakers was upheld, although claimed to be superstitious, the court holding that there was no religious superstition in the United States. So, too, Atty.-Gen. *v.* Jolly, 1 Rich. Eq. 99; Frierson *v.* Gen'l Assembly, 7 Heisk. (Tenn.) 683. As to these statutes, Chancellor Kent says: "We have not in this country re-enacted the statutes of mortmain, or generally assumed them to be in force; and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts, by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects, and in the force to be given to the exception of corporations out of the statute of wills, which declares that all persons other than bodies politic and corporate may be devisees of real estate." 2 Kent Com. 282. In Perin *v.* Carey, 24 How. 465, 506, Mr. Justice Wayne says: "The English statutes of mortmain were never in England supposed to have been meant to extend to her colonies and were never in force in those of them in America which became independent states but by legal enactment." And to the same effect see Beall *v.* Fox, 4 Ga. 404; Moore *v.* Moore, 4 Dana 354. In Odell *v.* Odell, 10 Allen 6, Gray, J., says: "Many charitable devises have been defeated in England under the St. of 9 Geo. II., c. 36, prohibiting alienations or dispositions of land to charitable uses unless by deed made twelve months and enrolled in chancery six months before the donor's death. But that statute, like some earlier mortmain acts, was wholly English, dictated by considerations of local policy, and did not extend to Scotland, Ireland or the colonies. Ib., § 6, *ad fin.* Tudor on Charitable Trusts 94, 96, and cases cited. 4 Dane Ab. 5, 238, 239. 2 Kent Com. (6th ed.) 282, 283. Perin *v.* Carey, 24 How. 500. The similar provision in the Prov. St. of 28 Geo. II., c. 9, passed in the Province of Massachusetts Bay at a time when the influence of England was strongest, was repealed immediately after the revolution and has not been re-enacted in this commonwealth. St., 1785, c. 51. Bartlet *v.* King, 12 Mass. 545." See, too, Chambers *v.* St. Louis, 29 Mo. 543; Levy *v.* Levy, 33 N. Y. 97; King *v.* Woodhull, 3 Edw. Ch. 79; Dom. and For. Miss. Society Appeal, 30 Penna. St. 425. In Methodist Church *v.* Remington, 1 Watts 218, Gibson, J., says: "The statutes of mort-

[(z) Dolan *v.* Macdermot, L. R., 5 Eq. 60, 3 Ch. 676.]

(a) Howse *v.* Chapman, 4 Ves. 542; Att.-Gen. *v.* Heelis, 2 S. & St. 67; [Mitford *v.* Reynolds, 1 Phil. 185.]

(b) Johnston *v.* Swann, 3 Mad. 457.

(c) 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.]

(d) British Museum *v.* White, 2 S. & St. 595.

and the Humane Societies;] (*e*) to the widows and orphans, (*f*) or the poor inhabitants (*g*) of a parish, ("poor" being construed those not receiving parochial relief;) (*h*) to the churchwardens in aid of the poor's rate; (*i*) to the widows and children of seamen belonging to a

main have been extended to this state only so far as they prohibit dedications of property to superstitious uses and grants to corporations without a statutory license." Potter *v.* Thornton, 7 R. I. 252; McCarter *v.* Orphan Asylum, 9 Cow. 437. So, too, in the State *v.* Griffith, 2 Del. Ch. 400, Chancellor Johns says: "The mortmain acts did not extend to the British colonies and Sir William Grant says in Att.-Gen. *v.* Stewart, 2 Mer. 164, that in its causes, obligations, provisions, qualifications and exceptions it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in its effects, of being transported, as it stands, into the code of any other country. It thus appears that anterior to the statute 9 Geo. II., ch. 36, a devise of land to charitable uses was not invalid and was only rendered so by the provisions of that act and further that the rule of perpetuity was inapplicable." In many of the states statutes have been passed restricting the power of corporations to take and hold land, and this more especially as to religious societies and churches. These latter restrictions relate generally to the quantity or value of the land which such society may take and hold. Whether a devise to such society of property in excess of the permitted amount can be objected to on that ground by any private contestant of the will, or by anyone but the state, is a question on which the authorities are not perfectly agreed. It may be added that the statutory restriction upon charitable or other corporations taking land in excess of a certain value, is now held to be rather a restriction laid upon the testator than upon the corporation, (especially if it be incorporated, as is usual, in the statute of wills,) and as such will not prevent the corporation so incorporated from taking lands by devise in another state, where such restriction does not exist. In Thompson *v.* Swoope, 24 Penna. St. 474, Lowrie, C. J., says: "Where a corporation of another state is generally competent to take and hold lands, the prohibition in the statute of wills against all devises of lands to corporations does not prevent them from taking and holding land in this state by devise; for the statute of wills is intended to regulate the testamentary power of their own citizens, not of ours—to define the capacity of testators, not of corporations." See also Methodist Episcopal Church *v.* Remington, 1 Watts 218. "It is however," says Runyon, C., in De Camp *v.* Dobbins, 2 Stew. (N. J.) 42, "enough to say on this head; as has been before suggested, that if the corporation exceeds the prescribed amount, though it be by an original purchase, nobody but the state can interfere with the holding of the property which it acquires, and it is a matter of which individuals cannot avail themselves in

[(*e*) Beaumont *v.* Oliveira, L. R., 6 Eq. 534, 4 Ch. 309.]

(*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.

(*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.

port; (*k*) [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*) for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the

any way. Ang. & Ames on Corporations, § 152; 2 Washb. on R. P. 567; Attorney-General *v.* Bowyer, 3 Ves. 727; Vidal *v.* Philadelphia, 2 How. 191; Wade *v.* American Colonization Society, 7 Sm. & M. (Miss.) 663." In some of the United States, acts similar to that of 9 Geo. II. have been passed. Thus, in California, (Code 1874, § 6313,) it is provided that, "No estate real or personal shall be bequeathed or devised to any charitable or benevolent society or corporation or to any person or persons in trust for charitable uses except the same be done by will duly executed at least thirty days before the decease of the testator and if so made at least thirty days prior to such decease, such devise or legacy, and each of them shall be valid, provided that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving legal heirs, and in such case a *pro ratâ* deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one-third of such estate; and all dispositions contrary hereto shall be void and go to the residuary legatee, next of kin or heirs according to law." In Delaware (Rev. Stat. 1874, p. 194,) all gifts shall be by deed irrevocable and unconditional, executed at least one year before donor's decease. In Georgia (Code 1873, § 2419,) "No person leaving a wife or child or descendants of a child shall by will devise more than one-third of his estate to any charitable, religious, educational, or civil institution to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the decease of the testator or such devise shall be void." In Mississippi the statute (Revised Code 1871, §§ 2440, 2441,) makes void all gifts by will, of either real or personal property, to any religious society or for any charitable use. In New York (3 Rev. Stat. 58, § 4,) the statute provides that no person having husband, wife, child or parent may devise or bequeath more than one-half of his real estate to charity. In Ohio (4 Sayler's Stat. 3361, § 1,) if the testator leave issue, or their legal representatives, a devise or legacy to charitable purposes is void, unless the will be executed twelve months before the testator's decease. In Pennsylvania (Rev. Stat. 1871, p. 190, § 11,) a gift to charity by will must be made in the presence of two witnesses, at least one month before testator's decease. In Michigan (Comp. Laws, § 2009,) it is provided that no gift shall be made by will to any church, congregation or religious society, or for the use of any ecclesiastical eleemosynary institution connected with or under control of any church, &c., unless the will be executed at least two months before testator's decease, nor shall such gift by will be made during testator's last sickness. In Missouri the constitution makes void every devise of land and bequest of chattels to a minister, public teacher or preacher of the gospel, as such, or to any religious sect or denomination.

(*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;* 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. See Mahon *v.* Savage, 1 Sch. & L. 111, stated *post* ch. XXIX.

singers in church; (*m*) for building an organ gallery in a church, (*n*) or repairing and ornamenting a chancel, (*o*) or repairing a memorial window and mural monuments in a church; (*p*) for endowing or erecting a hospital; (*q*) to a society formed principally for teaching poor

It is believed that the statute of charitable uses (43 Eliz., c. 4,) has been expressly and specifically repealed in none of the United States: though this result has probably been effected in more than one state by a general repealer of all English or British statutes, or an act making such statutes of no force, as mentioned above. In other states a general act giving force to English statutes has been held to include this act as one of a general nature. In a few states the statute has been substantially re-enacted by the passage of a similar act. In Connecticut (Gen. Stats. 1875, tit. 18, ch. 6, § 62,) it is provided by an old statute, dating from 1684, that "all estates that have been or shall be granted for the maintenance of ministers of the gospel or of schools of learning or for the relief of the poor or for any public and charitable use shall forever remain to the uses to which they have been or shall be granted according to the true intention and meaning of the grantor and to no other use whatever." In Kentucky, the general statutes of 1877, p. 188, ch. 13, § 1, validate gifts "for the relief or benefit of aged or impotent and poor people, sick and maimed soldiers and mariners, schools of learning, seminaries, colleges, universities, navigation, bridges, ports, havens, causeways, public highways, churches, houses of correction, hospitals, asylums, idiots, lunatics, deaf and dumb persons, and blind, or in aid of young tradesmen, orphans, or for the redemption of prisoners or captives, setting out of soldiers or for any other charitable or humane purposes." In Rhode Island a similar statute was passed in 1721, and is still found in the revised statutes of 1844. In Virginia an act (Code 1873, tit. 23, ch. 71, § 2, p. 668,) makes valid devises for purposes of education. In West Virginia, (Code 1868, ch. 57, § 1, p. 484,) provides for devises for religious worship. In most, if not all, of the other states, the matter has been left without express legislation. In some of these the statute has been held to be in force still, in principle and substance, if not in letter. See Perry on Trusts, § 748, and note; Wms. Ex'rs (6th Am. ed.) 1133, n.; 2 Redfield on Wills 524, n. In Carter *v.* Balfour, 19 Ala. 814, legacies to Baptist Missionary and American Bible Society were sustained, Coleman, J., saying: "I think it clear that according to the English authorities those bequests would be sustained independent of the statute of Elizabeth. There seems to be greater contrariety among the American than the English decisions on this subject, but I think the weight of American authority is decidedly in favor of such bequests. With the view I take of this case it is not necessary to inquire whether the statute of 43 Elizabeth is in force in this state. It appears that the statute was passed in the year 1601 and the first settlement of Virginia (this being the first settlement in any part of the United States) was in 1607." In the same state, eleven years later (1862), in Williams *v.* Pearson, 38 Ala. 299, gifts for the support of ministers and education of poor children were sustained. In this case Judge Walker says, "Our investigation of the cases has satisfied us

(*m*) Turner *v.* Ogden, 1 Cox 316; see also Durour *v.* Motteux, 1 Ves. 320.

(*n*) Adnam *v.* Cole, 6 Beav. 353.

(*o*) Hoare *v.* Osborne, L. R., 1 Eq. 585.

(*p*) Hoare *v.* Osborne, *sup.*; In re Rigley's Trust, 36 L. J., Ch. 147.

(*q*) Pelham *v.* Anderson, 2 Ed. 296, 1 B. C. C. 444; Att.-Gen. *v.* Kell, 2 Beav. 575.

children and nursing the sick; (*r*) to found prizes for essays; (*s*) to deserving literary men who have been unsuccessful; (*t*) for letting out land to the poor at low rent; (*u*) for the increase and encouragment

that the current of American authority is in favor of the doctrine that trusts for charitable uses are favored by courts of equity and that, independent of the statute of Elizabeth and of the prerogative power, there is an original and inherent jurisdiction in those courts to sustain on account of their charitable purposes trusts, which but for the charity feature would be held void. * * * It will be perceived that we do not recognize the whole of the English doctrine of charities as in force here. A considerable portion of it is not adapted to our political condition and has been rejected by our courts. * * * But, the *cy pres* doctrine and the prerogative power to carry out, indefinite charities being excepted, the law of charities as administered in the English Court of Chancery is substantially our law." In Connecticut the statute of charitable uses is not in force. Adys *v.* Smith, 44 Conn. 60. In Georgia it has been held that the statute of Elizabeth in its principles but not in its forms of proceeding has been adopted in that state. Beall *v.* Fox, 4 Ga. 404. In Illinois it is said, "Our state not only adopts the common law of England but also all statutes in aid thereof passed prior to 4 James I., (except three statutes, of which the statute of Elizabeth is not one)." Plumleigh *v.* Cook, 13 Ill. 669; see, too, Starkweather *v.* American Bible Society, 72 Ill. 50; Heuser *v.* Allen, 42 Ill. 425. In Indiana the statute of Elizabeth has been held to be in force. McCord *v.* Ochiltree, 8 Blackf. 15. Dewey, J., saying in that case, "The statute in question we conceive to be in aid of the common law, for though it gave no new jurisdiction to the Court of Chancery, it enumerated and specified subjects of its cognizance which prior to its passage seem to have been involved somewhat in doubt and obscurity;" but see the case of Grimes *v.* Harmon, 35 Ind. 246, (A. D. 1871,) in which this seems to be questioned by Judge Buskirk, whose remarks are, however, called forth by, and seem to relate almost wholly to, the question of *cy pres* execution of charities, considered in a later place in this chapter. So in Gass *v.* Wilwhite, 2 Dana 170, Nicholas, J., says, "The statute of Elizabeth has never been repealed nor is there anything in it of so peculiar and local a character as to exclude it from adoption under the rule embracing all English statutes of a general character prior to 4 James I. It is treated as in force and has been acted on in several of the states." And two years later (in 1836) Chief Justice Robertson said of the same statute in Moore *v.* Moore, 4 Dana 354, "The first object of the statute being general and beneficial and not local or peculiar to the policy of England, when the Virginia colony was first planted at Jamestown under the auspices of Smith in 1607, we should presume that so much of the statute as was applicable was imported and recognized as a part of the law of the mother country claimed by the colonists in the provincial settlement. As the statute was in force at and before 1606 (the date of the Virginia charter) there was no necessity for re-enacting it in the colony, as there would have been, had it been enacted in England since the 4th James I., the year of the charter." And so again in 1867 in the language of Robertson, J., in Cromie *v.* Louisville

(*r*) Cocks *v.* Manners, L. R., 12 Eq. 574.

(*s*) Farrer *v.* St. Catharine's College, L. R., 16 Eq. 19.

(*t*) Thompson *v.* Thompson, 1 Coll. 395.

(*u*) Crafton *v.* Frith, 15 Jur. 737, 20 L. J., Ch. 198.

of good servants; (*x*) for the benefit of ministers of any denomination of Christians; (*y*) or for the *benefit, advancement, and propagation of *education and learning* in every part of the world; (*z*) for establish-

Orphan House, 3 Bush 371, "While the statute of Elizabeth concerning charities was constructively abolished in Kentucky (1 R. S. 177), it was in American phrase substantially re-enacted (Id., page 235,) and thus, though the ultra-judicial *cy pres* doctrines, which royal prerogative altered as excrescences, had by its repeal been cut off as tumors. The aim of our own statute for upholding charities is to make such as it enumerates available, whenever so defined as to be judicially identified and applied—that judicial legislation or rather royal usurpation of the prerogative of changing or making wills was repudiated by this court, while the statute of Elizabeth was itself recognized as the law of this state. It has also been renounced in some other states." In Maine, the statute has been held to be in force. Tappan *v.* Debois, 45 Maine 122. And in Drew *v.* Wakefield, 54 Maine 297, Appleton, C. J., says of it: "It was determined in Going *v.* Emery, 16 Pick. 107, that the statute of 43 Eliz., chap. 4, relating to charitable gifts and uses forms in principle and substance a part of the law of Massachusetts. The same course of reasoning adopted in that court shows it a part of the common law of this state." In Massachusetts, the statute has been repeatedly and expressly held to be in force, without reference to many other cases in which it is assumed and acted upon. Going *v.* Emery, 16 Pick. 107 (A. D. 1834); Sanderson *v.* White, 18 Pick. 328, (A. D. 1836,) in which case Shaw, C. J., says: "Since the passage of the act of 43 Eliz., ch. 4, it has been an established rule that all gifts are to be deemed charities which are enumerated in the statute as such and none other. * * * We consider the statute to be in force here, at least so far as to determine which are gifts to charitable uses." So Burbank *v.* Whitney, 24 Pick. 146 (A. D. 1839); Washburn *v.* Sewall, 9 Metc. 280 (1845); Taintor *v.* Clark, 5 Allen 66, (1862,) in which case the trust was declared to be "within the statute of 43 Elizabeth which in principle and substance is in force in this state." So Judge Chapman, in Dexter *v.* Gardner, 7 Allen 243 (1863): "Since the decision of Earle *v.* Wood it must be considered as settled that the statute 43 Eliz., ch. 4, is a part of our common law and that a trust for the use of a well-known religious community is valid though that community may be a voluntary body and not incorporated." So, too, Drury *v.* Natick, 10 Allen 169 (1865). In Mississippi, in Wade *v.* American Colonization Society, 7 Sm. & M. 695, Judge Clayton, after saying that definite charities, such as those in question, are trusts which equity will execute, adds: "It is therefore wholly unnecessary for us to inquire whether the statute of 43 Elizabeth is in force in this state." In Missouri, in the case of Cham-

(*x*) Liscombe *v.* Wintringham, 13 Beav. 87.

(*y*) 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., Jr., 548; Milbank *v.* Lambert, 28 Beav. 206; Thornber *v.* Wilson, 3 Drew. 245, 4 Id. 350; *secus* if it he to the person *now* minister, *semb.* Id. 351.

(*z*) Whicker *v.* Hume, 14 Beav. 509, 1 D., M. & G. 506, 7 H. L. Cas. 124. "Learning" was taken to mean "being taught:" not "knowledge," which would have been too indefinite.

ing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man, and for maintaining a lecturer thereon; (*a*) and gifts in aid of the public revenue of the

bers *v.* St. Louis, 29 Mo. 543, already referred to, the statute has been held to be in force. In North Carolina, it was held, in 1842, in the case of the State *v.* Gerard, 2 Ired. Eq. 210, that the statute of 43 Elizabeth was in force in that state until superseded by the revised statutes. The statute has been held to be local—not in aid but in restraint of the common law—and not in force. Dashiell *v.* Attorney-General, 5 Harr. & J. 392; Ould *v.* Washington Hospital, 5 Otto 303. So in Norris *v.* Thompson, 4 C. E. Gr. (N. J.) 307, it was declared that this statute was not in force in New Jersey, Chancellor Zabriskie holding it to be an enlargement and not a limitation of the authority of chancery. But the cases are numerous in New Jersey in which charities have been upheld. In De Camp *v.* Dobbins, 2 Stew. (N. J.) 36, already cited, it is said by Chancellor Runyon, in 1878, that "the general principle is that courts of chancery uphold and administer gifts, where they are made to particular purposes which are charitable within the letter and spirit of the statute just referred to (43 Elizabeth) or where they are made to charity generally, if there is a trustee with power to make them definite. But the word charity has obtained a signification in law, and courts do not uphold and administer trusts for particular purposes which are not charitable within the meaning of the law nor trusts expressed in general terms which do not come within the legal signification of the word *charity*." In New York, the statute 43 Elizabeth is included in the general repealer of all English statutes, and is not in force. Levy *v.* Levy, 33 N. Y. 97; Yates *v.* Yates, 9 Barb. 345. In Ohio it has been held, by the United States Supreme Court, that the principles of the statute form part of the common law, but the statute as such is not in force there. See Perin *v.* Carey, 24 How. 465, 506. In the language of Mr. Justice Wayne, in this case: "Without there is a particular enactment for such purposes the statute of 43 Elizabeth chapter 4 could never have been in force in Ohio. Nor do we think it to be a point of judicial uncertainty there, for we cannot find a decision in the courts of Ohio directly declaring that it ever was. * * * Though it was a remedial statute to correct abuses it was a restraining statute of the common law right of every man to dispose of his property by will as he pleased. The law taken from Virginia for Ohio made statutes and acts of parliament *in aid* of the common law, which were of a general nature and not local to the kingdom, in force in Ohio. It was not in aid of the common law but being restrictive of it, it should have, as to the place assigned for its operation, a strict interpretation." In Pennsylvania, where charitable bequests are of frequent occurrence, and are liberally construed, it has been held by a long course of decisions that the statute as such is not in force, but that in substance and spirit it is still the law of the state. Thus, in 1832, in Methodist Church *v.* Remington, 1 Watts 218, Gibson, C. J., says: "Equity powers in support of charitable uses seem to be found rather in necessity and in the constitution of the court than in the provisions of the 43 Elizabeth which is not in force here." In 1843, in the case of Zimmerman *v.* Anders, 6 Watts & S. 218, Sergeant, J., says: "Though the statute of Elizabeth is not in force in

(*a*) London University *v.* Yarrow, 23 Beav. 159, 1 De G. & J. 72. And see Marsh *v.* Means, 3 Jur. (N. S.) 790.

state; (*b*) and finally, gifts for any purpose which is either for the public or general benefit of a place, (*c*) or tends towards public religious

Pennsylvania, it would seem it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding than in reference to its conservative powers; these I conceive have been in force here by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it." In 1844, in the case of Thomas *v.* Ellmaker, 1 Pars. Cas. 98, King, P. J., says: "Although it has been held in our Supreme Court that the statute of 43 Elizabeth, under which the English courts of chancery in general regulate and control such charities, is not in force in Pennsylvania, yet a common law analogous in its results to those of the statute exists in this state, by which such subjects are placed under legal control and protection." In 1848, in the case of Wright *v.* Linn, 9 Penna. St. 433, and in 1858, in the case of Cresson's Appeal, 30 Penna. St. 437, it was said to be in principle, though not in terms, adopted as part of the common law of Pennsylvania. In 1857, in the case of Price *v.* Maxwell, it is said by Lewis, C. J.: "It is well settled that charity neither originated in this statute nor is confined to its enumeration of objects." In 1858, in the case of Domestic and Foreign Missions Appeals, 30 Penna. St. 425, it is said by Strong, J.: "The British statutes of mortmain were never in force here and though the statute of 43 Elizabeth has not been enacted, yet its spirit has been fully recognized in judicial decisions." "In the case of a will making a charitable bequest, it is immaterial how vague, indefinite and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects." So, in 1866, in the case Miller *v.* Porter, 53 Penna. St. 292, Woodward, J., declared that the statute did not extend to Pennsylvania, "though its principles have been often recognized and declared to be part of our common law." And, lastly, in the case of Bethlehem *v.* Perseverance Company, 81 Penna. St. 445, in 1876, the same rule is repeated by Mercur, J.: "While the statute of 43 Elizabeth ch. 4 of charitable uses is not extended to Pennsylvania yet the principles of it as applied by chancery in England have long been recognized as in force here by common usage." And to the same effect as to Pennsylvania: Vidal *v.* Girard, 2 How. 127; Fountain *v.* Ravenel, 17 How. 369. So, in Tennessee, it is held not to be in force. Green *v.* Allen, 5 Humph. 170; Franklin *v.* Armfield, 2 Sneed 305. So, in Texas. Hopkins *v.* Upham, 20 Texas 89. In Burr *v.* Smith, 7 Vt. 241, Williams, C., says: "We are not disposed, however to say that the statute is in force here, although there is not wanting a very high authority for the position." In Virginia the statute has been repealed with other English statutes. (See former part of this note.) See also Baptist Association *v.* Hart, 4 Wheat. 1; Gallege *v.* Att.-Gen., 3 Leigh 450; Roy *v.* Rowzie, 25 Gratt. 599; Wheeler *v.* Smith, 9 How. 55.

(*b*) 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, 4 De G. & S. 402.

(*c*) 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.]

instruction or edification,] (*d*) have been respectively held to be charitable.[2] [And in this respect the court makes no distinction between one sort of religion, or one sect and another. Their promotion or advancement are all equally "charitable," provided their doctrines are

(*d*) Att.-Gen. *v.* City of London, 1 Ves., Jr., 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; Wilkinson *v.* Lindgren, L. R., 5 Ch. 570; Cocks *v.* Manners, L. R., 12 Eq. 585, per Wickens, V. C.

2. Boyle, in his work on Charitable Uses, enumerates as charities "not in terms mentioned or described in the statute," "yet considered to be comprised within its scope and equity:" Hospitals, churches, repairing parsonage, maintaining preacher, church-organ and singers, societies for propagation of the gospel, and such public uses as supplying a town with water, city improvements, botanical garden, life-boat, British museum, and "almost every act, purpose or object which can be considered as having any legitimate connection with charity." Boyle on Char., pp. 39–60. To the above enumeration and that in the text may be added the following objects held to be charitable in the different states:

Alabama—missionary and Bible societies, Carter *v.* Balfour, 19 Ala. 814; associations for ministerial relief, Williams *v.* Pearsou, 38 Ala. 299; toward erecting a monument to A, Gilmer *v.* Gilmer, 42 Ala. 9.

Arkansas—churches, Grissom *v.* Hill, 17 Ark. 483.

Connecticut—churches "for the purpose of supporting the gospel," Lockwood *v.* Weed, 2 Conn. 287; asylum for deaf and dumb, American Asylum *v.* Phœnix Bank, 4 Conn. 172; schools, Fuller *v.* Plainfield Academy, 6 Conn. 544; societies for the support of the bishop, Trustees of Bishop's Fund *v.* Eagle Bank, 7 Conn. 476; burying ground, Chatham *v.* Brainard, 11 Conn. 60; societies for the propagation of the gospel, Brewster *v.* McCall, 15 Conn. 274; to church for support of rector, Ayres *v.* Mead, 16 Conn. 291; missionary and Bible societies, American Bible Society *v.* Wetmore, 17 Conn. 181; for the support of indigent young men preparing for the ministry, White *v.* Fisk, 22 Conn. 31; to a town for repairing highways and bridges, Hamden *v.* Rice, 24 Conn. 350; education, Treat's Appeal, 30 Conn. 113; Birchard *v.* Scott, 39 Conn. 63.

Delaware—for maintenance and education of the poor, State *v.* Griffith, 2 Del. Ch. 392.

Georgia—missionary and Bible societies, Beall *v.* Fox, 4 Ga. 404; American Colonization Society, Walker *v.* Walker, 25 Ga. 420; School, Silcox *v.* Harper, 32 Ga. 639; Baptist Convention of Georgia, Reynolds *v.* Bristow, 37 Ga. 283; education of poor children, Newson *v.* Starke, 46 Ga. 88, overruling Beall *v.* Drane, 25 Ga. 430.

Illinois—for education of poor children, Heuser *v.* Allen, 42 Ill. 425; public drainage, Henry County *v.* Winnebago Drainage Company, 52 Ill. 454.

Indiana—for the diffusion of useful knowledge and instruction amongst the institutions, clubs, libraries or meetings of the working class, Sweeny *v.* Sampson, 5 Ind. 465; for the education of pious indigent young men preparing for the ministry, McCord *v.* Ochiltree, 8 Blackf. 15; education of children of this town, Common Council of Richmond *v.* The State, 5 Ind. 334; masonic lodge, Indianapolis *v.* Grand Master, 25 Ind. 518; education of colored children in the state, Ex parte Lindley, 32 Ind. 367; masonic lodge for erection of a building, Cruse *v.* Axtel, 50 Ind. 49; education, Craig *v.* Secrist, 54 Ind. 420; relief of poor widows, De Bruler *v.* Ferguson, 54

not subversive of all religion, or all morality.] (*e*) It is evident from the preceding examples, that, to constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects; on which principle, Sir J. Leach treated a school for the

Ind. 549; poor orphans of county, Commissioners *v.* Rogers, 55 Ind. 297.

Iowa—for church erection, Miller *v.* Chittenden, 2 Iowa 315; Johnson *v.* Mayne, 4 Iowa 180.

Kentucky—Shaker community, Gass *v.* Wilhite, 2 Dana 170; education of poor orphans, Moore *v.* Moore, 4 Dana 354; public seminary, Curling *v.* Curling, 8 Dana 38; institutions for disseminating the gospel, Chambers *v.* Baptist Education Society, 1 B. Mon. 219; Att.-Gen. *v.* Wallace, 7 B. Mon. 611; church and cemetery, Baptist Church *v.* Presbyterian Church, 18 B. Mon. 635; orphan asylum, Cromie *v.* Louisville Orphan Home, 3 Bush 371.

Louisiana—asylum for widows and orphans, Fink *v.* Fink, 12 La. Ann. 301; Milne *v.* Milne, 17 La. (O. S.) 46.

Maine—for support of gospel ministry, Shapleigh *v.* Pillsburg, 1 Greenl. 271; for glebe and parsonage, Sewall *v.* Cargill, 15 Me. 414; for support of Universalist preaching, Kimball *v.* Universalist Society, 34 Me. 424; American Peace Society, for the cause of peace, Tappan *v.* Debois, 45 Me. 122; Howard *v.* American Peace Society, 49 Me. 288; missionary society, same case; also Maine Baptist Missionary Convention *v.* Portland, 65 Me. 92; Straw *v.* Trustees, 67 Me. 493; orphan asylum, Drew *v.* Wakefield, 54 Me. 297; church erection, Swasey *v.* American Bible Society, 57 Me. 526; masonic lodge, Everett *v.* Carr, 59 Me. 325; for relief of testator's deserving relations and such indigent persons as executors may think worthy, Drew *v.* Wakefield *ubi supra;* for education of pious relative of Calvinistic faith, a student for the ministry—for education and clothing of needy children in B.—for relief of testator's needy relations, and repair of family burying ground, Swasey *v.* American Bible Society, *ubi supra.*

Massachusetts—for theological seminary, Phillips Academy *v.* King, 12 Mass. 546; missionary society, Bartlett *v.* King, 12 Mass. 537; Sunday-school library, Fairbanks *v.* Lamson, 99 Mass. 533; for books, papers, lectures, &c., to "create a public sentiment that will put an end to negro slavery in the United States," Att.-Gen. *v.* Garrison, 101 Mass. 227; Jackson *v.* Phillips, 14 Allen 550; also for relief of fugitive slaves, Ib.; "for the promotion of agricultural and horticultural improvements or other philosophical or philanthropical purposes," Rotch *v.* Emerson, 105 Mass. 433; home for aged women, Gooch *v.* Association, 109 Mass. 558, (though requiring payment on admission of inmate); for aged poor, Fellows *v.* Miner, 119 Mass. 541; hospital, McDonald *v.* Mass. General Hospital, 120 Mass. 432; Bible society, Bliss *v.* American Bible Society, 2 Allen 334; fuel for poor,

(*e*) Per Romilly, M. R., Thornton *v.* Howe, 31 Beav. 19, 20. In Briggs *v.* Hartley, 14 Jur. 683, 19 L. J., Ch. 416, a legacy for the best essay on the Sufficiency of Natural Theology when treated as a science, was held inconsistent with Christianity, and void. But this would probably not be followed. In Pare *v.* Clegg, 29 Beav. 589, the doctrines of Robert Owen (as to which see also Russell *v.* Jackson, 10 Hare 214,) were held by Romilly, M. R., to be visionary and irrational, but not illegal as being irreligious or immoral. The court is sometimes compelled to declare good as a charitable bequest what it deems of very doubtful public utility, per Lord Selborne, L. R., 16 Eq. 24.]

education of gentlemen's sons, as a "school of learning" within the statute 43 Eliz. (*f*)

[A gift to procure masses for the soul of the testator and others is not charitable; (*g*) nor is a gift to a convent of nuns whose sole object is the sanctifying their own souls, and not per- What are not charitable uses.

Webb *v.* Neal, 5 Allen 575; school "wherein no book of instruction is to be used except spelling books and the Bible," Tainter *v.* Clark, 5 Allen 66; yearly meeting of Quakers, Dexter *v.* Gardner, 7 Allen 243; home for the destitute, Odell *v.* Odell, 10 Allen 1; public library and reading room for town, Drury *v.* Natick, 10 Allen 169; education and relief of the poor, Saltonstall *v.* Sanders, 11 Allen 446; for the poor of a particular church, Att.-Gen. *v.* Old South Church, 13 Allen 474; support of evangelical preaching and promotion of religious and charitable enterprises, Brown *v.* Kelsey, 2 Cush. 243; Bible society, Bartlett *v.* Nye, 4 Metc. 378; Winslow *v.* Cummings, 3 Cush. 358; "such charities as shall be deemed most useful by executors," Wells *v.* Doane, 3 Gray 201; for support of the Universalist religious denomination, North Adams *v.* Fitch, 8 Gray 421; prize for the most important discovery or useful improvement on heat or light made and published in America, Amherst Academy *v.* Harvard College, 12 Gray 582; Seaman's Aid Society, Tucker *v.* Seaman's Aid Society, 7 Metc. 188; female charitable society, Washburne *v.* Sewall, 9 Metc. 280; for support of city missionary of the Protestant Episcopal church, Sohier *v.* St. Paul's Church, 12 Metc. 250; parish of S., Sutton *v.* Cole, 3 Pick. 232; school, Hadley *v.* Hopkins Academy, 14 Pick. 240; to the cause of Christ for the promotion of true evangelical piety and religion, Going *v.* Emery, 16 Pick. 107; maintaining school teacher at A., Sanderson *v.* White, 18 Pick. 328.

Michigan—school library, Maynard *v.* Woodward, 36 Mich. 423; school, Hathaway *v.* Sackett, 32 Mich. 97.

Mississippi—for removal of slaves to Liberia, Wade *v.* American Colonization Society, 7 Sm. & M. 695.

Missouri—for the poor, Chambers *v.* St. Louis, 29 Mo. 543; for relief of emigrants and travelers, Ib.; Roman Catholic convent, Academy *v.* Clemens, 50 Mo. 167; church erection, Goode *v.* McPherson, 51 Mo. 126.

New Hampshire—for church purposes, Union Baptist Society *v.* Candia, 2 N. H. 20; for support of ministry, Baptist Society *v.* Wilton, 2 N. H. 508; Second Congregational Society *v.* First Society, 14 N. H. 315; Brown *v.* Concord, 33 N. H. 296; Dublin case, 38 N. H. 459; Newmarket *v.* Smart, 4 Am. Law Register (N. S.) 390, N. H. Supreme Court, 1865; Methodist seminary, Trustees *v.* Peaslee, 15 N. H. 317; missionary society, Parker *v.* Cowell, 16 N. H. 149; supporting school, Chapin *v.* School District, 35 N. H. 445; masonic lodge funds, Duke *v.* Fuller, 9 N. H. 536.

New Jersey—for public school, McBride *v.* Elmer, 2 Halst. Ch. 107; education of poor orphans, Mason *v.* Methodist Episcopal Church, 12 C. E. Gr. 47; Baldwin *v.* Baldwin, 3 Halst. Ch. 211; Stevens Institute of Technology, Stevens *v.* Shippen, 1 Stew. Eq. 532; church building and work, Baldwin *v.* Baldwin, *ubi supra;* De Camp *v.* Dobbins, 2 Stew. Eq. 36; to employ Universalist preacher, Trustees of Cory Universalist Society *v.* Beatty, 1 Stew. Eq. 570; relief of poor widows, Mason *v.* Methodist Episcopal Church, *ubi supra;* orphan asylum, Att.-Gen. *v.* Moore, 3 C. E. Gr. 256.

(*f*) Att.-Gen. *v.* Earl of Lonsdale, 1 Sim. 109.

[(*g*) See the cases cited, n. (*d*), *ante* p. *205.

forming any external duty of a charitable nature; (*h*) nor a gift for the erection or repair of a monument, vault, or tomb, (*i*) *whether it be to the memory or for the interment of the donor alone, (*j*) or of himself and his family and relations, (*k*) unless it forms part of the

New York—support of ministry, Williams *v.* Williams, 8 N. Y. 525 (overruled on other points); public school, Newcomb *v.* St. Peters, 2 Sandf. Ch. 636; professorship in seminary, Trustees *v.* Kellogg, 16 N. Y. 83; charitable school, Matter of New York Schools, 31 N. Y. 574; hospital, Burrill *v.* Boardman, 43 N. Y. 254; Utica Female Academy, Wetmore *v.* Parker, 52 N. Y. 450; church, for church uses, Christie *v.* Gage, 2 T. & C. (Sup. Ct.) 344; Roman Catholic convent, Banks *v.* Phelan, 4 Barb. 80; Methodist society and Friends, Wright *v.* Trustees of the Methodist Episcopal Church, Hoffman Ch. 202; to town for erecting a town-house, Coggeshall *v.* Pelton, 7 Johns. Ch. 292; Friends' meeting, Shotwell *v.* Mott, 2 Sandf. Ch. 46; Bible and missionary societies, Hornbeck *v.* American Bible Society, 2 Sandf. Ch. 133.

North Carolina—orphan schools, State . McGovern, 2 Ired. Eq. 9; free schools, Griffin *v.* Graham, 1 Hawks 96; the poor of B. county, State *v.* Gerard, 2 Ired. Eq. 210.

Ohio—for the poor in A and B townships, Urmey *v.* Wooden, 1 Ohio St. 160; Bible society, American Bible Society *v.* Marshall, 15 Ohio St. 537; for the use of the poor children of A county, McIntyre *v.* Zanesville, 17 Ohio St. 352; poor school, Zanesville C. and M. Company *v.* Zanesville, 20 Ohio 483; for the advancement and benefit of the Christian religion, to be applied in discretion of executors, Miller *v.* Teachout, 24 Ohio St. 525; American Tract Society *v.* Atwater, 30 Ohio St. 77.

Pennsylvania—Roman Catholic priest, McGirr *v.* Aaron, 1 Penna. (Penr. & W.) 49; church and burying ground, Beaver *v.* Filson, 8 Penna. St. 327; public school, Wright *v.* Linn, 9 Penna. St. 433; Friends' meeting, Magill *v.* Brown, Brightly 346; Pickering *v.* Shotwell, 10 Penna. St. 23; Friends' school, Price *v.* Maxwell, 28 Penna. St. 23; missionary society, Domestic and Foreign Missionary Society Appeal, 30 Penna. St. 425; to the city of Philadelphia for planting shade trees, Cresson's Appeals, 30 Penna. St. 437; for public improvements, Philadelphia *v.* Girard, 45 Penna. St. 9; for public library, Donohugh's Appeal, 86 Penna. St. 306; for erection of college buildings and library, Miller *v.* Porter, 53 Penna. St. 292; fire engine company, Bethlehem *v.* Perseverance Company, 81

(*h*) Cocks *v.* Manners, L. R., 12 Eq. 574.

(*i*) Hoare *v.* Osborne, L. R., 1 Eq. 585; In re Rigley's Trust, 36 L. J., Ch. 147.]

(*j*) Mellick *v.* President of the Asylum, Jac. 180; [Adnam *v.* Cole, 6 Beav. 353; Lloyd *v.* Lloyd, 2 Sim. (N. S.) 255; Willis *v.* Brown, 2 Jur. 987; Trimmer *v.* Danby, 25 L. J., Ch. 424.]

(*k*) See [Gravenor *v.* Hallum, Amb. 643;] Doe d. Thompson *v.* Pitcher, 3 M. & Sel. 407, 2 Marsh. 61, 6 Taunt. 359; [Rickards *v.* Robson, 31 Beav. 244; Fowler *v.* Fowler, 33 Beav. 616; Hoare *v.* Osborne, L. R., 1 Eq. 585; In re Rigley's Trust, 36 L. J., Ch. 147; Fisk *v.* Att.-Gen., L. R., 4 Eq. 521; Dawson *v.* Small, L. R., 18 Eq. 114.] Lord Ellenborough suggested (3 M. & Sel. 407) that although repairing a donor's own tomb was not a charitable purpose, it was otherwise where the tomb was for his family. But the statute had been complied with, [and the later cases admit no such distinction. These cases also show that a trust for the perpetual repair of a tomb, not being charitable, is void as a perpetuity.

fabric or ornament of the church. (*l*) Again, bequests for purposes of benevolence, (*m*) or benevolence and liberality, (*n*) or general utility, (*o*) or for pious purposes, (*p*) are not charitable bequests; and a gift to one of the chartered companies of the city of London to

Penna. St. 445; Thomas *v.* Ellmaker, 1 Pars. Cas. 98; for relief of Jewish poor, Mayer *v.* Society for Visitation, &c., 2 Brewster 385; societies for relief of bodily suffering, Blenon's Estate, Bright. 338; education of nephew for Roman Catholic priest, Flaherty's Estate, 2 Pars. Cas. 186; relief of disabled firemen, Potts *v.* Philadelphia Society, 8 Phila. 326; to prepare students for gospel ministry, Heddleson's Estate, 8 Phila. 602; for hospital for blind and lame, Philadelphia *v.* Elliot, 3 Rawle 170; to churches for bread for the poor of the congregation, Whitman *v.* Lex, 17 Serg. & R. 88; so gifts towards paying the church debt and education of young students in the ministry, Ib.; erection of church, Methodist Episcopal Church *v.* Remington, 1 Watts 218; erection of school, Martin *v.* McCord, 5 Watts 493; Morrison *v.* Beirer, 2 Watts & Serg. 81; religious society, (Schwenkenfelder Society,) Zimmerman *v.* Anders, 6 Watts & Serg. 218; society for relief of the poor, Grandom's Estate, 6 Watts & Serg. 537.

Rhode Island—relief of the destitute, Derby *v.* Derby, 4 R. I. 414; erection of Baptist meeting-house, Potter *v.* Thornton, 7 R. I. 252; school and meeting-house, M. Street Baptist Society *v.* Hail, 8 R. I. 234; Brown *v.* Baptist Society, 9 R. I. 177.

South Carolina—church, for relief of preachers and missionary purposes, Gibson *v.* McCall, 1 Rich. L. 174; for Sunday-school and purchase of Bibles, Attorney-General *v.* Jolly, 1 Rich. Eq. 99.

Tennessee—General Assembly of Presbyterian Church, Frierson *v.* General Assembly of Presbyterian Church, 7 Heisk. 683; Methodist Conference, Green *v.* Allen, 5 Humph. 170; for an academy, Franklin *v.* Armfield, 2 Sneed 305; Missionary Society, Dickson *v.* Montgomery, 1 Swan 348; for the poor of a city, Hornberger *v.* Hornberger, 12 Heisk. 635; so for flower garden and burying-ground, Ib.

Texas—public schools, Bell *v.* Alexander, 22 Texas 350; Paschal *v.* Acklin, 27 Texas 196.

Vermont—for the education of freedmen, McAllister *v.* McAllister, 46 Vt. 272; or "of the scholars of poor people of the county of A.," Clement *v.* Hyde, 50 Vt. 716.

Virginia—to the minister and vestry of the parish, for the poorest inhabitants, Richmond County *v.* Tayloe, Gilm. 336; school, (valid under code,) Kelly *v.* Love, 20 Gratt. 123; so, too, under code, to the literary fund of a county, Kinnaird *v.* Miller, 25 Gratt. 107; Literary Fund *v.* Dawson, 10 Leigh 147; and to theological seminary, though excluded by code, being authorized to take by special law, Ray *v.* Rowzie, 25 Gratt. 599.

In the United States Supreme Court, the following gifts have been upheld as valid charities, according to the law of the states controlling the question: Lorings *v.* Marsh, 6 Wall. 337, "for the benefit of the poor," as determined by trustees; Ould *v.* Washington Hospital, 5 Otto 303, for hospital to be incorporated by congress; in New York, for erection

(*l*) *Ante* p. *209.

(*m*) James *v.* Allen, 3 Mer. 17; In re Jarman's Estate, 8 Ch. D. 584.

(*n*) Morice *v.* Bishop of Durham, 9 Ves. 399, 10 Ves. 532; *contra* by the law of Scotland, Millar *v.* Rowan, 5 Cl. & Fin. 99.

(*o*) Kendall *v.* Granger, 5 Beav. 300.

(*p*) Heath *v.* Chapman, 2 Drew. 417. The trust was for masses "and other pious uses:" and it was further held that even if the latter could, standing alone, be supported as "such pious uses as were charitable," yet they were vitiated by being connected with the direction for masses.

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. (*q*) 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.] (*r*)

Liley *v.* Hey.

In Ommanney *v.* Butcher (*s*) 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 recognized by the court were public in their nature, and such as the court could see

Bequests to be given in private charity bad.

of asylum or marine hospital, Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99; in Ohio, for schools and for support of orphans, Perin *v.* Carey, 24 How. 465; in Pennsylvania, for Girard College and for city improvements, Vidal *v.* Girard's Ex'rs, 2 How. 127; for executors to distribute among such charitable institutions as they may deem most beneficial to mankind, Fontain *v.* Ravenal, 17 How. 369; in Maryland, for the education of the poor, McDonough *v.* Murdock, 15 How. 367.

And in England—for the education of certain members of the testator's family in a certain college, and to say certain prayers on anniversaries of the testator's death, Michel's Trusts, 28 Beav. 39; for almshouses and schools, Dent *v.* Allcroft, 30 Id. 336; Bible Society, Graham *v.* Paternoster, 31 Id. 30; school, Fisher *v.* Brierly, 1 DeG., F. & J. 643; to the town of Sheffield, for such objects of public utility or for such other charitable purposes as other funds held in trust for the town were applicable to, Wilkinson *v.* Barber, 14 L. R., Eq. 96.

Apart from the questions of indefiniteness of donation and incapacity of donee, to be discussed hereafter, the following objects have been held *not* to be charitable in their nature: erecting a house of worship for an established society specified, Old South Society *v.* Crocker, 119 Mass. 1, (Mr. Justice Wells saying of this, that "to give it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof or an indefinite class of persons;") "to secure the passage of laws granting women, whether married or unmarried, the right to vote, hold office, manage and devise property and all other civic rights enjoyed by men," Jackson *v.* Phillips, 14 Allen 550; for a school to be sustained by subscription, Kirk *v.* King, 3 Penna. St. 436; to the Infidel Society of Philadelphia, Zeissweiss *v.* James, 63 Penna. St. 465; to a "friendly society," whose funds are contributed by its members for the benefit of those who become disabled, Swift *v.* The Beneficial Society of Easton, 73 Penna. St. 362; Babb *v.* Read, 5 Rawle 151; Blenon's Estate, Brightly 338.

(*q*) Att.-Gen. *v.* Haberdashers' Company, 1 My. & K. 420.

(*r*) Liley *v.* Hey, 1 Hare 580. But see Gillam *v.* Taylor, L. R., 16 Eq. 581; and further as to gifts to poor relations, *post* *213.]

(*s*) T. & R. 260. [And see Nash *v.* Morley, 5 Beav. 177.

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. (*t*) [So a gift to found a private *museum, (*u*) or in aid of a subscription library, (*x*) or of a friendly society, (*y*) or for the benefit of an orphan school kept by an individual substantially at his own expense, (*z*) is not charitable.

A gift to an institution having a charitable object specified in the gift, or to the governors of such an institution, (*a*) or to the minister of a chapel *and his successors*, (*b*) will generally be deemed a gift for the specified charitable object or chapel.] But 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 Doe d. Phillips *v.* Aldridge, (*c*) 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

Bequest not necessarily charitable on account of professional or official character of legatee.

(*t*) Lord Langdale, M. R., 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.

(*u*) Thomson *v.* Shakespear, Johns. 612, 1 D., F. & J. 399.

(*x*) Carne *v.* Long, 29 L. J., Ch. 503, 2 D., F. & J. 75.

(*y*) In re Clark's Trust, 1 Ch. D. 497; also In re Dutton, 4 Ex. D. 54 (Mechanics' Institute).

(*z*) Clark *v.* Taylor, 1 Drew. 642.

(*a*) Per Lord St. Leonards, Incorporated Society *v.* Richards, 1 D. & War. 294; and per Lord Hatherley, Att.-Gen. *v.* Sidney Sussex Coll., L. R., 4 Ch. 730; In re Maguire, L. R., 9 Eq. 632.

(*b*) Grieves *v.* Case, 4 B. C. C. 67, 2 Cox 301, 1 Ves., Jr., 548; Thornber *v.* Wilson, 3 Drew. 245, 4 Id. 351. See also Smart *v.* Prujean, 6 Ves. 567; and Cocks *v.* Manners, L. R., 12 Eq. 574. In the last case the gift to the convent, though held not charitable, was still treated as a trust for the purposes of the institution; not involving a perpetuity, but capable of being performed by the existing members spending the gifts as they pleased; (as to which, see Brown *v.* Dale, 9 Ch. D. 78: and cf. Thomson *v.* Shakespear, Carne *v.* Long, In re Clark's Trust, *sup.*, which were void for perpetuity). In Aston *v.* Wood, L. R., 6 Eq. 419, a legacy "to the trustees of Zion Chapel, to be apportioned according to statement appending," no such statement forthcoming, was held to fall into the residue. The express reference to a trust to be declared appears to have rebutted any presumption in favor of the chapel.]

(*c*) 4 T. R. 264.

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, (*d*) 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; it was held, that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in Bishop of Durham *v.* Morice, [and it was not argued that the trust was restricted to charitable purposes merely because the Methodist minister was appointed a trustee. (*e*)

Legacy may be charitable though payable at once to individuals.

A legacy payable once for all may be charitable as well as one given for the creation of a perpetual trust; as, a legacy to the widows and orphans of a named place, (*f*) or to six honest and sober clergymen that are not provided with a living of £40; (*g*) which could not in their nature have proceeded from motives of personal bounty to particular individuals.

A legacy to "poor relations" is not charitable:

But a legacy payable once for all to poor relations (which includes none more remote than the statutory next of kin) (*h*) is not charitable. (*i*) If it were, only such as were actually

(*d*) 6 East 328.

[(*e*) 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.

(*f*) Att.-Gen. *v* Comber, 2 S. & St. 93; see also Russell *v.* Kellett, 3 Sm. & Gif. 264.

(*g*) Att.-Gen. *v.* Glegg, Amb. 584. But see Thomas *v.* Howell, L. R., 18 Eq. 198, 209, where it is said that the legacy to sixty poor clergymen in Att.-Gen. *v.* Baxter (stated *ante* p. *206), was held not to be charitable. Lord Hardwicke's note of the decision is that it was good, "as if a legacy of those sixty individuals" (7 Ves. 176); but that appears to be in answer to the argument (1 Vern. 219) that "to suffer them to take by such a devise was almost to make a corporation of them, and would keep them in a perpetual schism." Elsewhere (1 Ves. 536) he says of the case, "The court held the *charitable use* was not contrary to law." If Baxter had declined to select, would the gift have been void for uncertainty?

(*h*) See ch. XXIX.

(*i*) Brunsden *v.* Woolredge, Amb. 507, where by will dated 1757 (see R. L. 1764,

poor in contemplation of the court could take; (*k*) there might be many comparatively poor relations, yet none of them would take, and the legacy would be applied *cy pres*, or (if the doctrine of *cy pres* were thought inapplicable) (*l*) would wholly fail; either of which results would probably be a surprise to a testator who had intended to benefit his "poor relations."

*But the gift of a fund for the perpetual benefit of poor relations has frequently been supported as a charitable trust. (*m*) If otherwise it would be void for uncertainty, since it would be impossible to confine a trust for relations whensoever existing to next of kin by statute. It would also be void as a perpetuity, though this is not a recognized ground for varying the construction.

—unless intended as a perpetual provision.

And in the case of a simple legacy the context may show that charity and not kinship is the prevailing consideration; as seems to have been the case in Mahon *v.* Savage, (*n*) where the bequest was to "poor relations or such other objects of charity as the testator should mention," and Lord Redesdale held it to be a charitable bequest and not transmissible to representatives.

Mahon *v.* Savage.

The court does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All moneys, therefore, not bequeathed in charity must have some definite object,[3] or must devolve as undisposed of, (*o*) except in

All indefinite trusts void unless for charity.

A, fo. 536,) land was given to poor relations, which, if a charity, would have been void by 36 Geo. II., c. 9 (1736). See also Widmore *v.* Woodroffe, Amb. 636 (stated *post* ch. XXIX.), where the L. C.'s arguments from uncertainty and from degrees of poverty assume that it was not a charity.

(*k*) Att.-Gen. *v.* Duke of Northumberland, 7 Ch. D. 745.

(*l*) As to *cy pres*, see below.

(*m*) Isaac *v.* Defriez, 17 Ves. 373, n.; White *v.* White, 7 Ves. 423; Att.-Gen. *v.* Price, 17 Ves. 371; Gillam *v.* Taylor, L. R., 16 Eq. 581; Att.-Gen. *v.* Duke of Northumberland, 7 Ch. D. 745. See also this distinction made in Brunsden *v.* Woolredge, Amb. 508.

(*n*) 1 Sch. & L. 111.]

3. With reference to the matter of *uncertainty and indefiniteness*, it may be remarked in general that a stricter rule is observed in the American than in the English courts. In the latter, the established construction of the statutes of Elizabeth, and the practice that has grown up under it, has made of "*charity*" a charm to dispel all that in another gift would be deemed fatal uncertainty, and the rule applied to other non-charitable trusts has been in this regard greatly enlarged. Whether this is so at all, or how far it is so in American law, is matter of disagreement between the states, and, in some instances, between the courts of the same state. The discussion to which this question has given rise, as to

[(*o*) Morice *v.* Bishop of Durham, 9 Ves. 399, 10 Id. 522; James *v.* Allen, 3 Mer. 17.]

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 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 apportion-

Bequests for charitable and other indefinite purposes void altogether.

the original jurisdiction and power of the English courts of chancery prior to and independent of the statute of 43 Elizabeth, is reserved for a note at the end of this section. Indefiniteness and uncertainty may relate either to the person of the donee or to the character and purpose of the gift, and where the gift is in form of a trust, either to the person of the trustee or of the beneficiary. 1. **Uncertainty as to the object of the gift.**—"It appears," says Story, J., "that since the statute of Elizabeth the Court of Chancery will not establish any trusts for indefinite purposes of a benevolent nature not within the purview of the statute, although there is an existing trustee in which it is vested; but it will declare the trust void and distribute the property among the next of kin." Story Eq. Jur., § 1158. But while a distinction is made both by English and American courts between vague and indefinite trusts which are charitable and those which are not, yet in this the American distinction is far less decided than in England, and many charitable trusts to which the English courts, with their fuller powers of *cy pres* execution, would have been able to give effect, have in America been adjudged void for uncertainty. See Perry on Trusts, § 713. Effect will be given to a gift as though precisely ascertained, *if provision is made for its precise ascertainment—e. g.*, a gift to executors, "to be disposed of among testator's brothers and sisters and their children, as the executors shall judge shall be most in need of the same—this is to be done in their best discretion." Bull *v.* Bull, 8 Conn. 47. But a gift to trustees "for the support of indigent pious young men preparing for the ministry in New Haven," was held void for uncertainty—Church, C. J., saying in this case: "There may be other cases in this country, and there certainly are many in England, in which charities more equivocal than the one we are considering have been sustained; but we are persuaded that this has been done either avowedly or under the influence of the principles of *cy pres*. Several such cases have been brought to our notice on this argument; but we repel the authority of them, as we have not adopted that principle into our system of jurisprudence." To the same effect is White *v.* Fisk, 22 Conn. 31; and in Treat's Appeal, 30 Conn. 113, it is said by Ellsworth, J., upholding a gift as sufficiently certain: "The law on this subject is, we suppose, well settled in this state regarding certainty in the persons to be benefitted and an ascertained mode of selecting them if they are to be taken from a definite class." The gift was to A, B and C "and their successors forever (who shall, as a board of trustees, add to and perpetuate their number, so long as in their opinion the objects of this bequest shall require), in trust for the promotion of education and science among the Indian and African children and youth of the United States of America, as in their judgment they shall deem best. I leave it entirely with them to decide in what manner to expend this bequest, to secure the object for which it is designed, either by using the principal for the education of a number of children or youth and thus prepare them for immediate usefulness, or only using the annual interest and educating a smaller number and thus

ment of the bequest is made by the will, so that the whole might be applied for either purpose, 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

continue; or, if they judge best, let them use the whole amount and establish an academy," &c. So, a gift to trustees to be applied to the "maintenance and education of the poor white citizens of K. Co. who may be kept from being carried to the poor-house," has been held to be sufficiently certain, State *v.* Griffith, 2 Del. Ch. 392. In Georgia, however, a similar gift for the education of the poor orphan children of the county of C. was held void for uncertainty, Beall *v.* Drane, 25 Ga. 430. This case was afterwards overruled in 1872, in Newson *v.* Starke, 46 Ga. 88, and a bequest in trust for the education of *poor children* of the county, held certain and valid under the Rev. Stat., McCoy, J., declaring the case of Beall *v.* Drane to be contrary to the unanimous decision of the court in the Fox Will Case (4 Ga. 404), and adding: "It is true there is some indefiniteness in the objects since the word *poor* and the word *children* are both to some extent indefinite. But, as we have seen, if such an indefiniteness is to make the bequest illegal for want of certainty, then all charities must fail, since in the very nature of them *this* kind of indefiniteness must exist. An examination of the authorities will, however, clearly show that such a bequest as this has uniformly been held to be sufficiently certain for the exercise of the peculiar jurisdiction, which the courts of chancery as such undertake to exercise over charitable bequests." To like effect, see Heuser *v.* Allen, 42 Ill. 425 (1867). In Indiana, a gift, similar to that in Connecticut, in trust, to be applied to the education of pious indigent youths who are preparing themselves for the ministry of the Gospel, and those only who strictly adhere to the Westminster Confession of Faith, was held to be valid, McCord *v.* Ochiltree, 8 Blackf. 15 (1846); so, too, a gift for the education of colored children in the State of Indiana, *Ex parte* Lindley, 32 Ind. 367 (1869); and Craig *v.* Secrist, 54 Ind. 420 (1867); and to like effect, in De Bruler *v.* Ferguson, 54 Ind. 549, a devise to trustees, to be applied to the relief of "poor widows over the age of fifty years of irreproachable character, who have resided not under three years within eight miles of the town of W. and who have no certain income," also women "whose husbands have left them unprovided for and without any just cause, who," &c., (as above,) was held to be certain and valid. See, also, to the same effect, Commissioners of Lagrange Co. *v.* Rogers, 55 Ind. 297, where the gift was to the Commissioners of Lagrange Co., "in trust for the uses and benefit of the orphan poor." On the other hand, a different view has been expressed in Grimes *v.* Harmon, 35 Ind. 246 (1871). In this case, a gift to the orthodox Protestant clergymen of D., to be expended in the education of colored children, was held void for uncertainty. It was also adjudged to be void, because the donees (being unincorporated and unorganized) were not capable of taking. For a full statement of the views of Judge Buskirk in this case, we refer the reader to the summary of his opinion in the case given in the note at the end of this section. In Lepage *v.* McNamara, 5 Iowa 146, a power given by will to the bishop to "dispose of my real estate and apply so much thereof to the church or to the education and maintenance of poor children, as he in his wisdom may think proper and legal," was held not to be indefinite and void. In Moore *v.* Moore, 4 Dana (Ky.) 354, a devise to the county "for educating some poor orphans for this

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 presently noticed; and it

county to be selected by the county court," was held certain and valid. In Curling *v.* Curling, 8 Dana 38, a gift for "the use of a public seminary" was held to be valid and not indefinite. In the words of Robertson, C. J.: "Though a devise to a public seminary may not necessarily identify any one institution of learning, yet according to the well established exposition of the statute of Elizabeth, this devise is not as at common law void. The statute makes it valid according to the British doctrine and if it can be judiciously executed, it is good according to the Kentucky doctrine also;" so an asylum for Protestant widows and orphans, Fink *v.* Fink, 12 La. Ann. 301. In Wilderman *v.* Baltimore, 8 Md. 551, a gift to the city of Baltimore, "for the relief and support of the indigent and necessitous poor persons who may from time to time reside within the limits of the 12th ward," was held bad for indefiniteness; so, likewise, a devise in trust "for the education of free colored persons in the city of Baltimore," Needles *v.* Martin, 33 Md. 609; so, "to the real distressed private poor of T. county," Trippe *v.* Frazier, 4 Harr. & J. 446; so, a gift "to be applied toward feeding and clothing and educating the poor children belonging to the congregation of St. Peter's Protestant Episcopal Church in the city of Baltimore," and "for the poor children of C. county," Dashiell *v.* Attorney-General, 5 Harr. & J. 392; 6 Id. 1. But in Bartlett *v.* King, 12 Mass. 537, a gift "for the purposes of the American Board of Commissioners of Foreign Missions and to promote the pious objects thereof," was held not to be indefinite. In Attorney-General *v.* Trinity Church, 9 Allen 422, a devise to a church in trust to pay out of the income a certain sum to the use of the church and of certain public charities, and also to repair the testator's tomb, and to invest the surplus," there being other references in the will to the gift "for the benefit of the church," was held sufficiently definite to entitle the church to take the surplus; while, in the same year, (1864,) in the similar case of Fowler *v.* Fowler, 10 Jur. (N. S.) 648, a bequest to apply the income to the maintenance of the graves, tombstones, railing, &c., of the testator's wife, her parents and relatives, and the surplus to the rector of B., was decreed to fail wholly on account of the indefiniteness and uncertainty of the gift. This case, however, seems not to have been followed in 1872, in Hunter *v.* Bullock, 14 L. R., Eq. 45, where the gift was to trustees "to pay the required amount for painting and keeping in repair testator's tombstone if required," and the balance to charity, and the amount was held to be sufficiently certain; while, in Williams Re, 5 L. R., Ch. D. 735, (1877,) in a similar trust, the provision in regard to the tombstone was held void, and the whole fund given to the charity. So, in the case of Saltonstall *v.* Sanders, 10 Allen 446, already mentioned, a gift in trust, to be applied as the trustees may think proper, "for the furtherance and promotion of the cause of piety and good morals or in aid of objects and purposes of benevolence and charity, public or private, or temporary, or for the education of deserving youths," was held sufficiently certain; so a bequest "for the support of evangelical preaching and

[(*p*) Waldo *v.* Cayley, 16 Ves. 206; Horde *v.* Earl of Suffolk, 2 My. & K. 59; the latter case, though decided after Vesey *v.* Jamson, did not notice it; and see the observations of Cottenham, C., 1 My. & Cr. 293.]

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

for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Missionary Union Association." Brown *v.* Kelsey, 2 Cush. 243; or to "such charities as shall be deemed most useful" by A's executors, Wells, Ex'r, *v.* Doane, 3 Gray 201; or to the Universalist religious denomination in the county of B., "to be applied to the support of the denomination," North Adams *v.* Fitch, 8 Gray 421; so, a gift "to the cause of Christ for the benefit and promotion of true evangelical piety and religion," to be paid by the executors to trustees and by them immediately applied and distributed "in such divisions and to such societies and religious charitable purposes as they may think fit and proper," Going *v.* Emery, 16 Pick. 107. In Att.-Gen. *v.* Soule, 28 Mich. 153, a bequest for the establishment of a school at M. for the education of children, was held to be indefinite and uncertain, because it might be a private school, and not a charity, and therefore void. In Wade *v.* American Colonization Society, 7 Sm. & M. (Miss.) 695, Clayton, J., in sustaining a bequest to the society, as not indefinite or uncertain, says: "If the trusts created by this will he valid, then there is no room and no necessity for the application of the doctrine of charities. It is only where the bequest or devise is too vague or indefinite for those intended to be benefited to claim any interest under them that the doctrine as to charities arises. It is clearly settled that definite charities are trusts which equity will execute by virtue of its ordinary jurisdiction." Legacies to an executor "for a purpose explained to him"—"for a specific charitable purpose he understands"—for charity "in his discretion"—or for masses—are all held to be uncertain and void in Missouri. Schmucker *v.* Reel, 61 Mo. 592. In Owens *v.* Missionary Society, 14 N. Y. 380, a residuary gift to the Methodist American Missionary Society, "appointed to preach the gospel to the poor," was held to be indefinite and void. So, too, a gift to such charitable societies for relieving the indigent and comfortless as the executors may select, Beekman *v.* Bonsor, 23 N. Y. 298. And a gift to the United States or such persons as congress may appoint for an agricultural school for orphan children of warrant officers of the United States navy, Levy *v.* Levy, 33 N. Y. 97. So, a gift to be employed in preaching the gospel in the destitute regions of the west, Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546. So for the poor orphans of North Carolina to he by the trustees selected, Miller *v.* Atkinson, 63 N. C. 537. "For some promising young man of good talents and of the Baptist order" is too indefinite, Hester *v.* Hester, 2 Ired. Eq. (N. C.) 330. So, too, a legacy to foreign missions, and to the poor saints, "to be applied as my executors may think the proper objects according to the scriptures, the greater part to missionary purposes," was held too indefinite and void, Bridges *v.* Pleasants, 4 Ired. Eq. (N. C.) 26. While a residuary gift "for the advancement and benefit of the Christian religion to be applied as in my executors' judgment will best promote the object named," was held to be certain and definite, Miller *v.* Teachout, 24 Ohio St. 525; and also a gift to certain societies "for the interests of religion and for the

[(*q*) Nash *v.* Morley, 5 Beav. 192.] (*r*) 1 S. & St. 69.

*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

advancement of the Kingdom of Christ in the world," American Tract Society *v.* Atwater, 30 Ohio St. 77; and "it is immaterial how uncertain the object may be, provided there is a discretionary power vested anywhere over the application of the testator's bounty to these objects. In Pennsylvania religious and charitable institutions have always been favored without respect to forms," Rogers, J., in Beaver *v.* Filson, 8 Penna. St. 327. According to this rule of favorable construction the following gifts have been held in Pennsylvania to be sufficiently certain and definite in their object, and upheld as charities: For the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institution or free school in or near Philadelphia, Pickering *v.* Shotwell, 10 Penna. St. 23; towards the education of young students in the ministry of the German Lutheran congregation under the direction of the vestrymen of St. M.'s Church, Witman *v.* Lex, 17 Serg. & R. (Pa.) 88; but not to an infidel society for discussion of religion, politics, &c., Zeissweiss *v.* James, 63 Penna. St. 465. "It is decided," says Harper, C., "that devises to charitable uses will be established and enforced, when similar devises for other purposes would be void for vagueness and uncertainty," Att.-Gen. *v.* Jolly, 1 Rich. Eq. (S. C.) 99. And a gift for the benefit and support of primary schools is valid, Bell Co. *v.* Alexander, 22 Tex. 350. So, for the education of the poor of S. county, Paschal *v.* Acklin, 27 Tex. 196. In Burr's Ex'rs *v.* Smith, 7 Vt. 241, it is held that a charitable bequest will not fail for indefiniteness except in the amount given, or "unless it be so absolutely dark that they cannot find the testator's meaning." So, Button *v.* American Tract Society, 23 Vt. 336. In Gallego *v.* Att.-Gen., 3 Leigh (Va.) 450, on the other hand, a gift "for distribution among needy poor and respectable widows" was held too indefinite; so, a gift for "the propagation of the gospel in foreign lands" (Carpenter *v.* Miller, 3 W. Va. 174,) or "for the benefit of Roman Catholic orphans," Heiss *v.* Murphy, 3 Cent. L. J. 639—(Wisc. S. C.) In Wheeler *v.* Smith, 9 How. (U. S.) 55, a residuary gift "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of A. in such manner as appears to them promises to yield the greatest good," was held to be too indefinite in Virginia, Judge McLean saying: "It is doubtful whether so vague a bequest could be sustained under the 43d Elizabeth. Without the application of the doctrine of *cy pres* it could not be carried into effect. In Virginia charitable bequests stand upon the same footing as other trusts and consequently require the same certainty as to the objects of the trust and the mode of its administration." In Fontain *v.* Ravenel, 17 How. (U. S.) 369, a gift for distribution among such charitable institutions in Pennsylvania and South Carolina as executors may deem most beneficial to mankind, and "so that part of the colored population in each of the said states shall partake of the benefits thereof," would be valid in England, it was held, but not in the United States. And a gift for the support of orphans—Perin *v.* Carey, 24 How. (U. S.) 465—or for the benefit of the poor—Lorings *v.* Marsh, 6 Wall. (U. S.) 337—is definite and valid. **English cases as to uncertainty.**—In England, if the gift is clearly charitable, the object is seldom held to be

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 execu-

too indefinite—thus a gift to be applied, in the discretion of the trustees, to "the advancement and propagation of education and learning all over the world," or "to any religious institution or purposes as executors may think proper," has been held sufficiently definite, Whicker *v.* Hume, 7 H. L. Cas. 124; Wilkinson *v.* Lindgren, 5 L. R., Ch. App. 570. But in Astor *v.* Wood, 6 L. R., Eq. 419, a legacy to trustees of Mt. Zion Chapel, to be appropriated according to a statement, was held too indefinite in the absence of such statement, Gifford, V. C., saying "the object of the bequest is clearly so indefinite that the gift must fail. The court will not infer that the purpose thus intended to be referred to was charitable." 2. **Indefiniteness in the person of the donee.**—The rule as laid down by Mr. Perry, in his treatise on Trusts, § 732, is that "it is immaterial how uncertain, indefinite and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument has power to appoint trustees, to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust required them to be." See, too, Story Eq. Jur., § 1169; Wms. Ex'rs (6th Am. ed.) 1142. In Williams *v.* Pearson, 38 Ala. 299, Walker, J., says: "It must be regarded as the settled law of this state that charitable donations are so far exempted from the rules applicable to other trusts that it is not necessary to their validity that there should be a grantee or devisee capable of taking and holding by law or that there should be a *cestui que trust* so definitely described as to enable a court of equity to execute the trust upon its ordinary principles." So Birchard *v.* Scott, 39 Conn. 63; State *v.* Griffith, 2 Del. Ch. 392; Newson *v.* Starke, 46 Ga. 88. And the same rule is found in Miller *v.* Chittenden, 2 Iowa 315, (rev'g 3 G. G. 382,) in the words of Wright, C. J.: "By the common law all grants between individuals must be made to a grantee in existence or capable of taking. This rule does not apply however to grants or devises to charitable or benevolent purposes and especially where the legal estate is vested in trustees to hold for the use of the contemplated charity. In such cases if the intent of the donor can be ascertained and it be legal, courts of equity will carry it out. The exercise of jurisdiction in such cases is not dependent upon the statute of Elizabeth, commonly known as the statute of charitable uses. * * * In this country also this jurisdiction must be exercised judicially and not as a prerogative power. If the intention of the donor can be legally executed, whether the gift is to a given charity or specific object, it will be done; but if this cannot be accomplished the claim of the heir will not be defeated by appropriating the property to another and different object." So Chambers *v.* St. Louis, 29 Mo. 543; Beekman *v.* Bonsor, 23 N. Y. 298. In this latter case Comstock, C. J., says: "(1.) A gift to charity is maintainable in this state, if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree, though it may be void according to general rules of law for want of an ascertained beneficiary. (2.) In other respects the rules of law applicable to charitable uses are within those which appertain to

tors 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

trusts in general. (3.) The *cy pres* power is unsuited to our institutions and has no existence in the jurisprudence of this state on this subject." And in Downing *v.* Marshall, 23 N. Y. 366: "A charitable donation precise and definite in its purpose, void at law because the beneficiaries are unascertained, may be sustained if there be a competent trustee to take the fund and effectuate the charity." To the same effect, see Sherwood *v.* American Bible Society, 4 Abb. App. 227, 1 Keyes 561; Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546, where Johnson, J., says: "It seems to be now settled that a gift to a charity, if there is a competent trustee, although there is no ascertained or ascertainable beneficiary, may still be upheld, provided the charitable use is so clearly and certainly defined as to be capable of being specifically executed and enforced, as intended by the donor, by judicial decree." In Levy *v.* Levy, 33 N. Y. 97, rev'g 40 Barb. 585, in the words of Wright, J., p. 121: "A trustee is not necessary to the validity of a trust, for a use being well declared, the law will find a trustee wherever it finds the legal estate; and the definiteness of the purpose of the trust does not make a good use if there is no definite object or beneficiary." See also Paschal *v.* Acklin, 27 Tex. 196; and an absolute devise to A, with intention that he should apply it to certain charities, he knowing nothing about the devise before the testator's death, is valid, though not enforceable as a trust, Schultz's Appeal, 80 Penna. St. 396. The cases illustrating this rule, and the exceptions to it, may be considered in the following classes: A. Where the legal estate is given in trust to a trustee who is not capable of taking by devise. B. Where the beneficiary is definitely declared but incapable of taking the legal estate, and no trustee appointed. C. Where there is no trustee appointed, and no beneficiary designated with sufficient certainty.

A. The donee of the legal estate is sometimes held *incapable of taking because of its corporate character*—sometimes because of its want of such character. In addition to the salutary restriction as to quantity of property that may be held by a religious society, mentioned in a previous note to this chapter, the statute in New York, and in some other states, prohibits a devise *to a corporation* unless it is expressly authorized by its charter or other statute to take property in that way. While in some states, where there is no statute expressly prohibiting a corporation to take by devise, the courts have held it incapable of so doing without legislative authority; see State *v.* Wiltbank, 2 Harring. (Del.) 18, where it was held that a religious society could not take land *by devise* for parish church, being only authorized by statute to take *by deed;* and to the same effect, State *v.* Walter, 2 Harring. (Del.) 151. In Walker *v.* Walker, 25 Ga. 420, the American Colonization Society was not allowed to take a devise, for want of express authority in its charter, but in this case the court appointed the executors trustees to carry out the intention of the testator; nor can a foreign corporation, not authorized by laws of Illinois to take by devise, Starkweather *v.* Am. Bible Society, 72 Ill. 50; nor a domestic religious society, not authorized by statute to take by devise, State *v.* Warren, 28 Md. 338; Murphy *v.* Dallam, 1 Bland Ch. 529; but in Massachusetts a foreign corporation is allowed to take by devise, Burbank *v.* Whitney, 24 Pick. 146. In New York, on the

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

other hand, as above mentioned, a corporation cannot take land by devise unless specially authorized by statute, Jackson *v.* Hammond, 2 Caines' Cas. 337; McCartee *v.* Orphan Asylum, 9 Cow. 437; Potter *v.* Chapin, 6 Paige 639; Downing *v.* Marshall, 23 N. Y. 366; Goddard *v.* Pomeroy, 36 Barb. 546; White *v.* Howard, 52 Barb. 294; affirmed, 46 N. Y. 144; Holmes *v.* Mead, 52 N. Y. 332. This rule, however, does not restrict the power of a corporation to take personal property by will, Sherwood *v.* Am. Bible Soc., 4 Abb. App. 227, 1 Keyes 561; Am. Tract Soc. *v.* Atwater, 30 Ohio St. 77. In Leazure *v.* Hillegas, 7 Serg. & R. 313, Tilghman, C. J., says: "The English Statutes of Mortmain are in part inapplicable to this country and in part applicable and in force. They are so far in force that all conveyances by deed or will of lands, tenements or hereditaments made to a *body corporate* are void unless sanctioned by charter or act of assembly." It has been held, nevertheless, that the object of such a statute as that of New York, prohibiting a corporation to take lands by devise unless specially authorized to do so, was made to limit testators and not corporations, and therefore the State of Ohio will not give effect to such provision of the State of New York by prohibiting the American Bible Society, incorporated in New York with general power to hold, purchase and convey real property, but not specially authorized to take by devise, from taking by devise in Ohio, Am. Bib. Soc. *v.* Marshall, 15 Ohio St. 537; Thompson *v.* Swoope, 24 Penna. St. 474.

In general, however, a mere *misnomer* or *misdescription* of the corporation intended is construed to be immaterial, if the corporation can be clearly identified. Perry on Trusts, § 730; Story Eq. Jur., § 1170; Theobald on Wills 185; Brewster *v.* McCall, 15 Conn. 274; Ayres *v.* Mead, 16 Conn. 291; Am. Bib. Soc. *v.* Wetmore, 17 Conn. 181; Craig *v.* Secrist, 54 Ind. 420; Preachers' Aid Soc. *v.* Rich, 45 Me. 552; Howard *v.* Am. Peace Soc., 49 Me. 288; Winslow *v.* Cumming, 3 Cush. 358; Tucker *v.* Seamen's Aid Soc., 7 Metc. 188; Sutton *v.* Cole, 3 Pick. 232; Parker *v.* Cowell, 16 N. H. 149; Chapin *v.* School District, 35 N. H. 445; Wright *v.* Methodist Epis. Ch., Hoffm. Ch. (N. Y.) 202; Banks *v.* Phelan, 4 Barb. 80; Dickson *v.* Montgomery, 1 Swan (Tenn.) 348; McBride *v.* Elmer, 2 Halst. 107; Baldwin *v.* Baldwin, 3 Halst. Ch. 211; N. Y. Conference *v* Clarkson, 4 Halst. Ch. (N. J.) 541; Smith *v.* Smith, 11 C. E. Gr. 139; Minot *v.* Boston Asylum, 7 Metc. 416; De Camp *v.* Dobbins, 2 Stew. (N. J.) 36; Leferre *v.* Leferre, 59 N. Y. 434; Hornbeck *v.* Am. Bib. Soc., 2 Sandf. Ch. 133; Newall's App., 24 Penna. St. 197; Frierson *v.* Gen. Ass. Pres. Ch., 7 Heisk. 683; Button *v.* Am. Tract Soc., 23 Vt. 336; McAllister *v.* McAllister, 46 Vt. 272. See, too, Kilvert's Tr., 12 L. R., Eq. 183 (1871), where a gift was made to the society for the relief of the widows and orphans of the clergy in the diocese of W., and there was no such society, but two similar societies, one in each archdeaconry of the diocese, one of the latter took as the legatee intended. See, too, Alchin's Tr., 14 L. R., Eq. 230, where a legacy was given to Kent County Hospital, and there was none such, but a Kent County Ophthalmic Hospital, a Kent and Canterbury Hospital, and a West Kent General Hospital, and the gift was divided between the last two, as together filling the place of a general county hospital.

On the other hand, where the trustee named in the will is *a voluntary unincor-*

general and undefined, they must fail altogether, and the next-of-kin become entitled.

So, in Ellis *v.* Selby, (*s*) where a bequest for such charitable *or other* purposes as the trustees and survivors or survivor of them, his execu-

porated society, some states have still upheld the trusts (and even provide a trustee if the unincorporated body had no officer or other person authorized to receive the gift). See Perry on Trusts, § 730; Story Eq. Jur., § 1169. See also Carter *v.* Balfour, 19 Ala. 814; Williams *v.* Pearson, 38 Ala. 299, where Judge Walker says, "it must be regarded as the settled law of this state, that charitable donations are so far exempted from the rules applicable to other trusts, that it is not necessary to their validity that there should be a grantee or devisee, capable of taking and holding by law, or that there should be a *cestui que trust* so definitely described as to enable a court of equity to execute the trust upon its ordinary principles." Chatham *v.* Brainard, 11 Conn. 60; Am. Bib. Soc. *v.* Wetmore, 17 Conn. 181. In Green *v.* Dennis, 6 Conn. 293, and in Brewster *v.* McCall, 15 Conn. 274 (both commented on in the later case of the Am. Bib. Soc. *v.* Wetmore, *ubi supra*), a voluntary unincorporated society was held to be incapable of taking the *legal title*, when that alone was in question. So, too, McCord *v.* Ochiltree, 8 Blackf. 15, where the devisee was a theological seminary, not incorporated, and was held capable in equity of taking, though incapable at law; Cruse *v.* Axtel, 50 Ind. 49; but *contra*, Grimes *v.* Harmon, 35 Ind. 246, cited below; Preachers' Aid Society *v.* Rich, 45 Me. 552, Tenney, C. J., saying in this case: "A bequest to charitable uses to an unincorporated society may be enforced by virtue of the statute of 43 Elizabeth, which has been regarded as a part of the common law of this state, even if it could not be made effectual without that statute." And in Dexter *v.* Gardner, 7 Allen 243, Chapman, J., says: "It must be considered as settled that a trust for the use of a well-known religious community (Friends) is valid, though the community may be a voluntary body and not incorporated." In Bartlett *v.* Nye, 4 Metc. 378, a devise to the Am. Bib. Soc. (which was unincorporated) was held to be valid, so far as to vest the legal title in the persons charged with the said trust. See, too, Tucker *v.* Seamen's Aid Soc., 7 Metc. 188; Washburn *v.* Sewall, 9 Metc. 280; Burbank *v.* Whitney, 24 Pick. 146; Parker *v.* Cowell, 16 N. H. 149; Wright *v.* Meth. Epis. Ch., Hoffm. Ch. 202. But not the members of an unincorporated society, Vanderbolgen *v.* Yates, 3 Barb. Ch. 242. It was held in Banks *v.* Phelan, 4 Barb. 80, in 1848, that an unincorporated Roman Catholic church could take a legacy. And to the same effect see Hornbeck *v.* Am. Bib. Soc., 2 Sandf. Ch. (N. Y.) 133. Both of the cases last mentioned were, however, overruled in 1856, by Owens *v.* Miss. Soc., 14 N. Y. 380, which last case has been since followed as the law of New York. In this case it was held that the Methodist Gen. Am. Missionary Society was not a competent trustee. Other states have adhered to the rule above given. See McIntire *v.* Zanesville C. & M. Co., 9, Ohio 203; Zimmerman *v.* Anders, 6 Watts & S. 218; Thomas *v.* Ellenmaker, 1 Pars. Cas. 98. So a gift to a Friends' meeting, Pickering *v.* Shotwell, 10 Penna. St. 23; or even to a religious unincorporated society without designation of the purpose or use, Judge Strong making a distinction in this case between a natural person and an artificial being having but one and that a charitable object, the

(*s*) 7 Sim. 352, [affirmed 1 My. & Cr. 286.]

tors 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 bequest absolutely devoting the property to charity; Sir L. Shadwell, V. C., said, "Here the testator has expressly

character of the latter determining the character of the gift, Evangelical Assembly's Appeal, 35 Penna. St. 316; Bethlehem *v.* Perseverance Co., 81 Penna. St. 445. But see *contra*, an early case (1846), where a conveyance to the (unincorporated) "employers of the school at A," which was a private school and not a charity, was held only to vest the equitable interest in the grantees, the legal title remaining in the grantor, Kirk *v.* King, 3 Penna. St. 436. In Gibson *v.* McCall, 1 Rich. L. (S. C.) 174, a legacy to an unincorporated church was held valid. So, too, the early case of Magill *v.* Brown, Bright. 346, and so Burr's Ex'r *v.* Smith, 7 Vt. 241. To the same effect is Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99, where a devise to the Chancellor of New York, Mayor of New York and others (subsequently incorporated), for the erection of a marine hospital and asylum, was held to be valid, the legal title being subject to the trust until the incorporation of the devisees. See, too, Pawlet *v.* Clark, 9 Cranch 292, in which case a grant to the unincorporated inhabitants of a town for a church glebe was upheld.

And a gift for an orphan asylum or other charity *to be incorporated*, has been frequently held to be valid; see Milne *v.* Milne, 17 La. (O. S.) 46; Sewall *v.* Cargill, 15 Me. 414; Shapleigh *v.* Pillsbury, 1 Greenl. (Me.) 271, where the gift was by grant to the first gospel minister who should settle in A, and the grantor was held to be a trustee until there should be a person *in esse* to take the grant; Kimball *v.* Universalist Society, 34 Me. 424; Swasey *v.* Am. Bib. Soc., 57 Me. 526. But see *contra*, Leonard *v.* Bell, 1 N. Y. Sup. Ct. (T. & C.) 608. On the like principle are dedications of land to a public use, in which case it is well established that there need be no certain grantee. See Antones *v.* Eslava, 9 Port. (Ala.) 527; Bryant *v.* McCandley, 7 Ohio 135; Cincinnati *v.* White's Lessees, 6 Pet. 431; Beatty *v.* Kurtz, 2 Pet. 566; Dartmouth College *v.* Woodward, 4 Wheat. 518; Vincennes University *v.* State of Indiana, 14 How. 274; Pawlet *v.* Cranch, 9 Cranch 292; Ould *v.* Washington Hospital, 5 Otto 303; Witman *v.* Lex, 17 S. & R. 88. But other states have held a gift to be wholly inoperative when the only person designated as trustee to take the legal title was a voluntary or unincorporated society. Thus in Grimes *v.* Harmon, 35 Ind. 246, Judge Buskirk, in an able opinion, held a devise to the orthodox Protestant clergymen of D., who were neither organized nor incorporated, to be void. See, too, State *v.* Warren, 28 Md. 338, where a gift to a church, organized but not incorporated, failed on that ground. In the words of Judge Miller, in that case: "As a general rule it is clear that a bequest or devise to an unincorporated association is void and it is only by virtue of that peculiar jurisdiction exercised by courts of equity in regard to charitable uses that such bequests have ever been sustained." And in Barker *v.* Wood, 9 Mass. 419, where the devise was to the inhabitants living in the parish of B., which was not incorporated; or to a town for inadmissible charitable purposes, Chapin *v.* School Dist., 35 N. H. 445; or any unincorporated society, Owens *v.* Miss. Soc., 14 N. Y. 380; Downing *v.* Marshall, 23 N. Y. 366; Sherwood *v.* Am. Bib. Soc., 4 Abb. App. 227, 1 Keyes 561; or an indefinite body, such as "the people of the United States," Levy *v.* Levy, 33 N. Y. 97; White *v.* Howard, 52 Barb. 294, affirmed 46 N. Y. 144; Holland *v.*

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 trus-

Peck, 2 Ired. Eq. (N. C.) 255. In Meth. Epis. Church *v.* Remington, 1 Watts 218, it was held that the gift to an unincorporated religious society would have been valid if all the members had resided in Pennsylvania. In the following cases also, gifts were held void where the donee was an unincorporated body: White *v.* Hall, 2 Cold. (Tenn.) 77; Heiss *v.* Murphy, 40 Wis. 276; Ruth *v.* Oberbrunner, 40 Wis. 238. It may be added that a *municipal corporation* is in general considered capable of taking as trustee for public uses in the town, such as street improvements, public buildings, relief of the poor, &c. See Fellows *v.* Miner, 119 Mass. 541; Webb *v.* Neal, 5 Allen 575; Sutton *v.* Cole, 3 Pick. 232; or for the benefit of poor emigrants, Chambers *v.* St. Louis, 29 Mo. 543; for the support of the ministry, Bapt. Soc. *v.* Wilton, 2 N. H. 508; for administering a fund given for the purchase and display of United States flags, Sargent *v.* Cornish, 64 N. H. 18; Philadelphia *v.* Elliot, 3 Rawle 170; for erecting a hospital for the indigent, blind and lame, Perin *v.* Carey, 24 How. 465; for support of orphans and for schools, Vidal *v.* Girard's Heirs, 2 How. 127. And only the state as *parens patriæ* can question the right of a municipal corporation to accept and administer such trust, Girard's Heirs *v.* Phila., 7 Wall. 1; Vidal *v.* Girard's Heirs, 2 How. 191.

B. The rule may be considered as established that equity will not suffer a trust, charitable or otherwise, to fail for want of a trustee. Story Eq. Jur., § 1169; 2 Redfield on Wills 630. On this head Mr. Perry, in his work on Trusts, § 731, says: "If a testator creates a trust for a particular charitable purpose as for a school, hospital, almshouse, church, or other institution, and points out all the details, so that there is certainty in the purposes and objects of the charity, and appoints no trustees, or if the trustees fail for any reason, courts will appoint other trustees, for such is the plain intention of the donor; and it is a maxim of courts never to allow a certain and valid trust to fail for want of a trustee. In such cases, the courts say that there is no ground to suppose that the discretion of any particular trustee has anything to do with the essence of the gift. Again if a testator makes a bequest for a charitable use in the most general and indefinite terms, and appoints trustees to exercise their discretion in selecting the objects and in reducing the general intent to a particular and practical application, and such trustees fail for any reason, without having exercised their discretion or power of appointment in reducing the general and indefinite charity to a practical certainty of administration, courts will be governed by the intention of the donor, in determining whether they will appoint other trustees to exercise the power given to the first trustees named in the will. If the power given to the first trustees is a personal trust and confidence, the court should not appoint other trustees to exercise that power, contrary to the intention of the donor; but the court ought to act upon liberal principles of construction in finding such intention. If a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee, according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a

tees, or some other purposes, the testator has nowhere made clear. It is uncertain whether the trust was to be for charitable purposes or for

vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint, there is no power in the American courts to administer such an inchoate and imperfect gift." See, too, Williams *v.* Pearson, 38 Ala. 299. In the words of Walker, J., in this case: "Where an ascertainable object recognized as charitable is designated by the donor in general or collective terms, as the poor of a given county or parish, or the clergymen of a particular denomination having charge of churches within a specified district, the gift or legacy will be upheld by courts of equity. Nor is it any objection to the validity of such a gift that the donor has appointed no trustee or that the trustee appointed is incapable of taking the legal interest. If the object of a charitable donation can be ascertained the want of a trustee will be supplied by appointment by a court of equity," Bull *v.* Bull, 8 Conn. 47 (where the trustees named were dead); Treat's Appeal, 30 Conn. 113; Birchard *v.* Scott, 39 Conn. 63; Walker *v.* Walker, 25 Ga. 420, where the devisee (the American Colonization Society) was held unable to take for want of express authority in its charter, and the court appointed trustees; Preachers' Aid Society *v.* Rich, 45 Me. 552; Swasey *v.* American Bible Society, 57 Me. 526. So where the corporation named as trustee was dissolved before testator's death, Bliss *v.* American Bible Society, 2 Allen 334; Brown *v.* Kelsey, 2 Cush. 243. So where the donee was a voluntary society, dissolved before testator's death, Winslow *v.* Cumming, 3 Cush. 358; North Adams *v.* Fitch, 8 Gray 421; Washburn *v.* Sewall, 9 Metc. 280; Sanderson *v.* White, 18 Pick. 328; Mason *v.* Methodist Episcopal Church, 12 C. E. Gr. 47; Shotwell *v.* Mott, 2 Sandf. Ch. 46. In the words of Mr. Justice Wright, in Levy *v.* Levy, 33 N. Y. 121, "A trustee is not necessary to the validity of a trust, for, a use being well declared, the law will find a trust wherever it finds the legal estate, and the definiteness of the purpose of the trust does not make a good use, if there is no definite object or beneficiary." In Urmey *v.* Wooden, 1 Ohio St. 160, it was held that the court would provide a trustee for a gift "to the use of the poor and needy" of a township. In McGirr *v.* Aaron, 1 Penr. & W. (Pa.) 49, a charitable gift to a Roman Catholic priest of an unincorporated church was not allowed to fail for want of a trustee. See, too, McLain *v.* School Directors, 51 Penna. St. 196; Zeissweiss *v.* James, 63 Penna. St. 465; Burr's Ex'r *v.* Smith, 7 Vt. 241; Stone *v.* Griffin, 3 Vt. 400. See, too, McAllister *v.* McAllister, 46 Vt. 272, where a gift for the education of the freedmen, with no trustee named, was sustained. But in New *v.* Bonaker, 4 L. R., Eq. 655, a bequest to the President and Vice President of the United States, and the Governor of the State of Pennsylvania for the time being, to endow a college for instruction in moral philosophy, and for the advocacy of the natural rights of the negroes to civil equality, was suffered to fail for want of a trustee, on refusal of the United States government and the Governor of Pennsylvania to accept the trust, it being held that the whole object failed with the refusal of the designated trustees.

C. Where there is neither competent trustee nor definite beneficiary in accordance with the foregoing rules, the gift, though charitable, will generally fail, Ayres *v.* Methodist Church, 3 Sandf. (Super. Ct., N. Y.) 351; Beekman *v.* Bonsor, 23 N. Y. 298; Bridges *v.* Pleasants, 4 Ired. Eq. (N. C.) 26; Gallego *v.* Att.-Gen., 3 Leigh (Va.) 450. For further on this whole subject of indefiniteness, see the note at the end of this section, on the jurisdiction of the English Court of Chancery.

purposes not charitable. Then it is nothing more than if he had given an estate to A or to B, which would be void: and my opinion is, that the gift of this portion of the personal estate is void for uncertainty."

So in Williams *v.* Kershaw, (*t*) 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. [4]

[And in Kendall *v.* Granger, (*u*) where 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 was void for uncertainty. He said that to make the bequest valid, it must be obligatory on the trustees to apply the *whole* (*x*) of it in charity; it was not a question

[(*t*) 5 L. J. (N. S.) Ch. 84,] 5 Cl. & Fin. 111.

4. In Norris *v.* Thomson, 4 C. E. Gr. (N. J.) 307, affirmed 5 Id. 489, a gift to "such benevolent, religious or charitable institutions as executor may think proper" was held to be indefinite and void. In the words of Zabriskie, C.: "It is conceded that by the English decisions the words '*charitable and religious*' are sufficiently definite, and it is contended that by the same authorities the word '*benevolent*' is not, and that a gift to *benevolent* objects or *benevolent* institutions is void. The word *benevolent* is certainly more indefinite and of far wider range than *charitable* or *religious;* it would include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning. The word '*charitable*' has acquired a settled limited meaning in law, which confines it within known limits." See also, to the same effect, DeCamp *v.* Dobbins, 2 Stew. (N. J.) 36; Adye *v.* Smith, 44 Conn. 60; Saltonstall *v.* Sanders, 11 Allen 446; Chamberlain *v.* Stearns, 111 Mass. 267. In this case, Judge Gray says: "The word 'benevolent' of itself without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity but also any acts dictated by kindness, good will or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense." "On the other hand it has been held by this court and the House of Lords that 'benevolent' when coupled with 'charitable' or any equivalent word or used in such connection or applied to such public institutions or corporations as to manifest an intent to make it synonymous with charitable must have effect according to that intent."

[(*u*) 5 Beav. 303. See also Thomson *v.* Shakespear, John. 612, 1 D., F. & J. 399; In re Jarman's Estate, 8 Ch. D. 584.

(*x*) See James *v.* Allen, 3 Mer. 17.

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.

Nor will the addition of an ascertained object to the charitable and the indefinite objects save the trust: for consistently with the will the whole might still be applied to the indefinite object. Thus, in Down *v.* Worrall, (*y*) where the trust was for charitable *or pious* uses at the discretion of the trustees or otherwise for the benefit of the testator's sister and her children; one of the trustees died while part of the fund was still unappointed, (*z*) and Sir J. Leach, M. R., held that the unappointed part was undisposed of and belonged to the next-of-kin.

Such being the rule, the terms of the trust will first be closely examined to see whether, though not the most correct or most appropriate for describing only a charitable object, they ought not in fair construction to be so confined. Thus, in Dolan *v.* Macdermot, (*a*) where the trust was to lay out "in such charities and *other public* purposes as lawfully might be in the parish of T.," as the trustees should think proper, it was held that the words "other public purposes" meant purposes *ejusdem generis, i. e.* charitable, and that they were used only as filling up a description of purposes which, although charitable within the statute Eliz. (and in *that sense included in "charities") were not within the popular meaning of the word "charities."

Charity held the sole purpose, notwithstanding doubtful expressions.

Again, in Pocock *v.* Att.-Gen., (*b*) where a testator, after giving several charitable legacies out of a particular fund, directed the residue of it "to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift, then to be distributed by his executors at their discretion;" the testator made no further codicil, and it was held that the direction in favor of charity ran through the whole sentence: that the testator

(*y*) 1 My. & K. 561. That "pious" uses are not charitable, see Heath *v.* Chapman, 2 Drew. 417.

(*z*) No question was raised regarding the appointed part, but according to the cases, the bequest was void as to the whole.

(*a*) L. R., 5 Eq. 60, 3 Ch. 676. Consult Ellis *v.* Selby as to the effect of omitting the word "public."

(*b*) 3 Ch. D. 342. Cf. Wheeler *v.* Sheer, Mos. 288, cit. 1 Mer. 91, 97.

intended to choose the charitable institutions himself, but that if he failed to do so his executors were to choose them.

Distinction where the gift is for charitable and other *ascertained* objects, though apportionment left to trustees.

The foregoing cases, where the gifts were held void for uncertainty, must be distinguished from those where the bequest is for a charitable purpose, and for another ascertained object; for here, even though the amount to be devoted to each object be not specified, and the apportionment be left to the discretion of trustees, yet 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; whereas in the former cases the non-charitable object, (which may absorb the whole,) 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. [5]

5. The reader's attention is called to the following English cases where the question has been as to the disposition to be made of a surplus after paying the amount specifically given to charity—this surplus generally arising from increase of the income of the fund: Mayor and Council of Beverly *v.* Att.-Gen., 6 H. L. Cas. 310 (1857). In this case there was a devise in trust of a farm, renting then for £47, to pay £10 per annum to one charity, £10 to another charity, and £20 to a third charity after life estate to testator's sister and as to taxes, "which the trustees cannot spare out of the *overplus* of rent, viz. £7 (for the farm is now let for £47,)" shall be taken out of the first two gifts. The income having increased to £180, it was held that the trustee (the municipal corporation) was entitled to take the excess over £40 beneficially, following the case of South Molton, 5 H. L. Cas. 1, and reversing the Master of the Rolls, 15 Beav. 540. This case was followed in 1860 by that of the Att.-Gen. *v.* Dean of Windsor, 8 H. L. Cas. 393, which was a devise in the will of Henry VIII. to the Dean, &c., of Windsor, charged with specific sums to be paid to the Poor Knights of Windsor, and the income having greatly increased, the Dean, &c., took the increase beneficially. In 1866, in the case of the Att.-Gen. *v.* Marchant, 3 L. R., Eq. 424, where the whole fund was given to charity in amounts named, it was declared to be the general rule that the increased income of the fund should be divided *pro rata* among the charities, subject, however, to the discretion of the court. In 1871, in the case of the Mcht. Taylors' Co. *v.* Att.-Gen., 6 L. R., Ch. App. 512, a devise was made to the company to the intent and upon the condition that they provide twelve poor men and twelve poor women with certain garments, at specified prices, and accumulate residue of income, and repair, and, when necessary, rebuild the premises devised. Here the company was held to take all increase of income as trustee for charity, affirming 11 L. R., Eq. 35, and distinguishing the case from that of the wax chandlers, which was, however, afterwards reversed and made to conform to this decision. In 1873, in the case of the Att.-Gen. *v.* Wax Chandlers' Co., 6 L. R., H. L. 1, reversing 8 L. R., Eq. 452, a like decision was reached as to increase of income of a devise to distribute £8—£7 15s. to charity, and 5s. to the corporation. This case can be readily distinguished from that of the Mayor and Council of Beverly *v.* Att.-Gen., first above cited, as

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.

Trustees declining to apportion, donees take equally.

Thus, in Att.-Gen. *v.* Doyley, (c) 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 Saulsbury *v.* Denton, (*d*) 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, (*e*) where a testator bequeathed the residue of his personal estate (consisting partly of leasehold property) 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 nature 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

that was not a devise in trust, but an absolute gift with a condition to do a specific thing.

(c) 4 Vin. Abr. 485, 2 Eq. Cas. Ab. 194, 7 Ves. 58, n.

(*d*) 3 K. & J. 529.

(*e*) 6 Beav. 363. The trust for building the organ gallery failed of course under 9 Geo. II., c. 36, so far as it depended on the leaseholds.

case is equally an authority against holding the bequest void for uncertainty. (*f*)

And if, instead of a trust for a charitable *and* another definite object, there be a trust for a charitable *or* another definite object, as trustees shall appoint, there would be an implied trust for both in default of appointment.] (*g*)

Policy of early times in regard to charity.

The policy of early times strongly favored 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, 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, (*h*) and even to enlarge the devising capacity of testators, by rendering valid devises to those uses by a tenant in tail; (*i*) *and also by a copyholder, without a previous surrender to the use of the will, (*k*) though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like. (*l*)

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

(*f*) In like manner, if there are several charitable objects, and the share of each is undefined, the court will direct inquiries to ascertain the proportion due to each, In re Rigley's Trust, 36 L. J., Ch. 147; or, if that, from the nature of the gift, is impracticable, will make equal division among the charities, Hoare *v.* Osborne, L. R., 1 Eq. 585.

(*g*) Brown *v.* Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; Fordyce *v.* Bridges, 2 Phill. 497. But see Thompson *v.* Thompson, 1 Coll. 399, 8 Jur. 839.]

(*h*) Flood's case, Hob. 136. [But see 1 D. & War. 303, 4, 5.]

(*i*) Att.-Gen. *v.* Rye, 2 Vern. 453; Att.-Gen. *v.* Durdett, Id. 755. See also 3 Ch. Rep. 154.

(*k*) Rivett's case, Moore 890, pl. 1253, 3 Ch. Rep. 220.

(*l*) See Collinson's case, Hob. 136.

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. Accordingly, the stat. of 9 Geo. II., c. 36, (usually, but rather inaccurately, called the statute of mortmain,) enacted, that from and after 24th June, 1736, no hereditaments, or personal estate (*m*) 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 encumbered, in trust or for the benefit of any charitable uses whatsoever, (*n*) unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented, (*o*) sealed and delivered in the presence of two credible witnesses, (*p*) twelve calendar months before the death of the donor, including *the days of the execution and death, and enrolled (*r*) 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 (*s*) for the charitable use, and be without any power of revocation, reservation, (*t*) trust, &c., for the benefit of the donor, or of any persons claiming under him.

Stat. 9 Geo. II., c. 36.

No hereditaments, or personal estate to be laid out in the purchase of hereditaments, to be disposed of or charged for any charitable use, other than by indenture enrolled in chancery, &c.

[(*m*) A voluntary covenant to pay a sum to a charity after covenantor's death is void under this act, so far as it would affect chattel real assets, Jeffries *v.* Alexander, 8 H. L. Cas. 594, and see S. C. as to validity of "devices to evade the statute," and as to the object of the act; and Fox *v.* Lownds, L. R., 19 Eq. 453. As to subscription fund, and as to parol declaration of trust, see Girdlestone *v.* Creed, 10 Hare 480.

(*n*) A conveyance of land to churchwardens and overseers of a parish to build a poor-house, under 59 Geo. III., c. 12, is not within the act, Burnaby *v.* Barsby, 4 H. & N. 690.

(*o*) The deed need no longer be indented, 24 Vict., c. 9, § 1.

(*p*) In Wickham *v.* M. of Bath, L. R., 1 Eq. 17, it was held that the witnesses must not only be present, but subscribe the attestation clause.

(*r*) As to copyholds, and cases where the conveyance to trustees is by one deed, and the declaration of trust by another, see 24 Vict., c. 9, §§ 2, 4; 25 Vict., c. 17, §§. 1, 3, 4. A deed conveying to a charity land already in mortmain does not require enrolment, Ashton *v.* Jones, 28 Beav. 460.

(*s*) *I. e.*, giving the right to possession, Fisher *v.* Brierley, 10 H. L. Cas. 159. As to actual retention of possession by the donor, not expressly authorized by the deed, furnishing evidence of a secret reservation, S. C. and Way *v.* East, 2 Drew. 44. A lease for years to take effect in possession within one year is good, 26 and 27 Vict., c. 106.]

(*t*) This does not preclude the donor from reserving to himself a power of regulating the charity, 2 Cox 301. See also 1 Mer. 327. [And by 24 Vict., c. 9, § 1, certain restrictive covenants and other provisions are now permissible.

[The 2d 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. (*u*) The 3d section declares all gifts, conveyances, settlements, of any hereditaments, or of any estate or interest therein, or of any charge or encumbrance 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 colleges thereof, and the scholars upon the foundation of the colleges of Eton, Winchester, or Westminster. The 5th section puts a restriction, since removed, (*x*) on the number of advowsons to be held by any such college. The 6th section excepts Scotland from the act.]

Exception.

The act extends to[6] leaseholds and money secured on mortgage, whether in fee or for years, (*y*) [or by deposit of title-deeds, (*z*) and to arrears of interest on any such mortgage:] (*a*) and even to judgment debts, so far as they

What species of property within the statute.

(*u*) On this section see Price *v.* Hathaway, 6 Mad. 304; Milbank *v.* Lambert, 28 Beav. 206; and 9 Geo. IV., c. 85; 24 Vict., c. 9, §§ 1, 3, 4; 25 Vict., c. 17, §§ 2, 5; 27 Vict., c. 13, § 4; 29 and 30 Vict., c. 57.

(*x*) 45 Geo. III., c. 101.]

6. What constitutes an interest in land within the meaning of the English mortmain acts, has been a question much debated there. In the general absence of American mortmain laws, it is of less practical importance here, but a brief note is made of the later cases in England, many of which are more fully considered in the text.

Land in a foreign country is not within the act; Whicker *v.* Hume, 7 H. L. Cas. 124; Beaumont *v.* Oliveira, 6 L. R., Eq. 534, affirmed 4 L. R., Ch. App. 309.

Proceeds of real property in England are within the act, whether the sale of the real property is expressly directed by the testator, or only made necessary by the amount and circumstances of the gift; Jeffries *v.* Alexander, 8 H. L. Cas. 594 (1860); Brook *v.* Bradley, 4 L. R., Eq. 106, affirmed 3 L. R., Ch. App. 672 (1868).

An *annuity* (based on a share in the proceeds of sale of land) left to the testator, is not; Marsh *v.* Att.-Gen., 2 Johns. & H. 61 (1860).

An unpaid *premium for a lease*, which is a lien on the land, is; Shepheard *v.* Beetham, 6 L. R., Ch. D. 597 (1877).

A *leasehold* is; Aspinwall *v.* Bonne, 29 Beav. 462 (1861), Romilly, M. R., saying in this case: "I have always considered the statute to mean, that whatever might be its legal character and in whatever form it might be disposed of, no interest

(*y*) Att.-Gen. *v.* Graves, Amb. 155; Att.-Gen. *v.* Caldwell, Id. 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 § 3 of the act, and Toppin *v.* Lomas, 16 C. B. 159.]

(*z*) Alexander *v.* Brame, 30 Beav. 153; Lucas *v.* Jones, L. R., 4 Eq. 73.

(*a*) Ib.

operate as a charge on real estate. (*b*) 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. (*c*)

Sum charged on land for testator, and not yet raised.

Again, 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

in land could pass to a charity by devise."

Improvement certificates, water works debentures, &c., charged on the undertaking, rates, &c., are; Cluff *v.* Cluff, 2 L. R., Ch. D. 222 (1875); Holdsworth *v.* Davenport, 3 L. R., Ch. D. 185 (1876); Chandler *v.* Howell, 4 L. R., Ch. D. 651 (1875); especially if secured by mortgage of the land, Alexander *v.* Brame, 30 Beav. 153 (1861); Chandler *v.* Howell, *ubi supra.*

So, also, a legacy secured by *charge on harbor* tolls, Ion *v.* Ashton, 28 Beav. 379 (1860); on a *railway debenture* with mortgagee rights, Attree *v.* Hawe, 37 L. T. R. (N. S.) 399 (1877); but not a simple railway debenture, Mitchell's Estate, 6 L. R., Ch. D. 655 (1877); nor *railway shares*, Taylor *v.* Linley, 2 DeG., F. & J. 84, affirming 1 Giff. 67; nor *shares in stock company*, Bennett *v.* Blain, 15 C. B. (N. S.) 518; nor *shares in a land company* for purchasing and improving land, Entwistle *v.* Davis, 4 L. R., Eq. 272 (1867); but when there is an option given with the gift, that it be invested in real securities or government funds, or in the former with power to change to the latter, the gift will be upheld, Graham *v.* Paternoster, 31 Beav. 30 (1862); Beaumont's Trust, 32 Beav. 191 (1863). Attention is also called to the following valuable note of Mr. Wharton, in Acland *v.* Lewis, 9 C. B. (N. S.) 46 (Am. ed.): "In some of the earlier American cases shares in turnpike and railroad companies and other corporations dealing in land have been held to be real estate and descendible as such: Willes *v.* Cowles, 2 Conn. 567; Price *v.* Price, 6 Dana 109; see Cape Sable Co.'s case, 3 Bland's Ch. 606. If this be so it might perhaps be contended that the members of such a corporation have a direct interest in the land itself, in other words that the corporation should be considered as a sort of partnership with limited liability. For it is difficult to see except upon some such hypothesis how the nature of the corporation proper can determine the character of a corporator's rights. The tendency of the decisions is now however to treat such shares as personal property and indeed they are usually made such by statute: Johns *v.* Johns, 1 Ohio St. 351; Arnold *v.* Ruggles, 1 R. I. 165; Tippets *v.* Walker, 4 Mass. 596; Howe *v.* Starkweather, 17 Mass. 243; Russell *v.* Temple, 3 Dana's Abr. 108. There is doubtless great practical convenience in the latter doctrine which excludes many

(*b*) Collinson *v.* Pater, 2 R. & My. 344. [And see Jeffries *v.* Alexander, 8 H. L. Cas. 594.]

(*c*) Harrison *v.* Harrison, 1 R. & My. 71. [See also Shepheard *v.* Beetham, 6 Ch. D. 597 (lien for premium payable on grant of lease).]

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 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. (*d*) [And it makes no difference, as sometimes supposed, (*e*) whether B (in the above case) was alone entitled to the whole proceeds of the land directed to be sold, and entitled, therefore, to take the land unconverted; or whether he was entitled only to a share of the proceeds, or to a sum payable thereout. In either case, if the real estate has not in fact been sold before B's death, his interest is then an interest in land and within the statute. (*f*) "It may very well be," said Lord Cairns, "that no one of the several persons entitled to the proceeds could insist upon entering on the land, or taking the land, or enjoying the land *qua* land, but the interest of each one of them is, in my opinion, an interest in land."] (*g*)

Legacy, partly real and partly personal, void *pro tanto*.

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 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

embarrassing questions which must otherwise arise between heirs and executors where the company also possesses and deals with personal property as is most often the case. It seems also the most correct on principle, because the rights of the shareholder, so far as he can be considered as distinct from the corporation itself, only extend to compelling the latter to employ the corporation property for its legitimate purposes and to share in any profits arising therefrom and are therefore strictly in the nature of rights of action. See Union Bank of Tennessee, *v.* State, 9 Yerg. 119; Brightwell *v.* Mallory, 10 Yerg. 196; State *v.* Franklin Bank, 10 Ohio 91; Slaymaker *v.* Gettysburg Bank, 10 Barr 373."

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(*d*) Att.-Gen. *v.* Harley, 5 Mad. 321.

[(*e*) Marsh *v.* Att.-Gen. 2 J. & H. 61; Lucas *v.* Jones, L. R., 4 Eq. 73.

(*f*) Conversely where a testator, having a reversionary interest in personalty, which during the life of the tenant for life (who survived him) was subject to a power of investment in real securities, but which was never so invested, bequeathed it to a charity, the bequest was held valid. The actual condition of the fund when it fell in was the criterion, In re Beaumont's Trusts, 32 Beav. 191.

(*g*) Brook *v.* Badley, L. R., 3 Ch. 672. See also Aspinall *v.* Bourne, 29 Beav 462; Cadbury *v.* Smith, L. R., 9 Eq. 43. Thus Shadbolt *v.* Thorton, 17 Sim. 49, is overruled.]

was good as to the residue, which was raised out of the personal estate. (*f*)

[By the older authorities the act was held to] extend to every description of property savoring of the realty; as, the privilege by a grant from the crown of laying chains in the river Thames for mooring ships; (*g*) canal shares; (*h*) and money secured by assignment of turnpike tolls, (*i*) or of the poor's rate and county rates. (*k*) [These authorities were followed in comparatively recent times by similar decisions regarding money secured by mortgage of the rates imposed on the occupiers of houses by improvement commissioners, (*l*) or by mortgage of railway, (*m*) harbor, (*n*) dock, (*o*) or canal, (*p*) tolls, all which are commonly called debentures. (*q*) All these were held within the plain words of the act, "charges or encumbrances affecting hereditaments."

Property savoring of realty.

Early decisions respecting canal shares and debentures.

But "the current of modern decisions is against the older cases, 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." (*r*) And it is now settled that shares in all joint stock companies or partnership, whether incorporated or not, (*s*) having power to hold land for trading purposes, (*t*) where such land is vested in the corporation or in individuals (as the case may be,) in trust only to use the

Shares in joint stock companies not within the act.

(*f*) Waite *v.* Webb. 6 Mad. 71.

(*g*) Negus *v.* Coulter, Amb. 367.

(*h*) Howse *v.* Chapman, 4 Ves. 542; [Tomlinson *v.* Tomlinson, 9 Beav. 459.]

(*i*) Knapp *v.* Williams, 4 Ves. 430, n.; [Ashton *v.* Lord Langdale, 4 De G. & S. 402.]

(*k*) Finch *v.* Squire, 10 Ves. 41.

[(*l*) Thornton *v.* Kempson, Kay 592; Chandler *v.* Howell, 4 Ch. D. 651; see also Howse *v.* Chapman, 4 Ves. 542 (where, however, the form of security is not given); Toppin *v.* Lomas, 16 C. B. 159 (Westminster improvement bonds having the benefit of a general mortgage of lands); Cluff *v.* Cluff, 2 Ch. D. 222 (consol. stock of Metrop. Bd. of Works).

(*m*) Ashton *v.* Lord Langdale, *sup.*

(*n*) Ion *v.* Ashton, 28 Beav. 379.

(*o*) Alexander *v.* Brame, 30 Beav. 153.

(*p*) In re Langham's Trust, 10 Hare 446.

(*q*) If the debenture was in form a bond or promissory note for money borrowed on the credit of the undertaking, but not by assignment of the tolls or of the undertaking, it was held not within the act, Myers *v.* Perigal, 16 Sim. 533; and per Wood, V. C., In re Langham's Trust, *sup.*; and Bunting *v.* Marriott, 19 Beav. 163 (Tothill Fields Improvement).

(*r*) Per Lord St. Leonards, 2 D., M. & G. 619.

(*s*) 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 (case on the stat. of frauds); Hayter *v.* Tucker, 4 K. & J. 243; and the authorities cited in those cases.

(*t*) See 10 and 11 Vict., c. 78.

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, *market, gas, canal, mining, and land-jobbing 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 exempted from the operation of the act. (*u*) The exemption does not depend on the clause frequently inserted in acts and deeds of settlement declaring shares to be personal estate and transmissible as such, (*x*) nor on the nature of the business, (*y*) but on the nature of the individual shareholder's interest. "The true way to test it," said Lord St. Leonards, in Myers *v.* Perigal, (*z*) "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 encumbrancer 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." And the 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

(*u*) Att.-Gen. *v.* Giles, 5 L. J. (N. S.) Ch. 44; Sparling *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, 4 De G. & S. 402; Myers *v.* Perigal, 16 Sim. 533; In re Langham's Trust, 10 Hare 446; Edwards *v.* Hall, 11 Hare 1, 6 D., M. & G. 74; Bennett *v.* Blair, 15 C. B. (N. S.) 518 (corn-exchange); Hayter *v.* Tucker, 4 K. & J. 243 (cost-book mine); Entwistle *v.* Davis, L. R., 4 Eq. 272 (land company); overruling Ware *v.* Cumberlege, 20 Beav. 503, and Glynn *v.* Morris, 27 Beav. 218. 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, 2 D., F & J. 84.

(*x*) 10 Hare 449. A deed would of course be insufficient for the purpose, Baxter *v.* Brown, 7 M. & Gr. 216. Besides personalty, unless "pure," is within the act.

(*y*) Entwistle *v.* Davis, L. R., 4 Eq. 272, stated below.

(*z*) 2 D., M. & G. 620.

avoided, because it might ultimately become a judgment debt, and thus a charge upon realty. (*a*)

*This doctrine was fully adopted in Entwistle *v.* Davis, (*b*) where shares in land companies established, one for the purpose of buying, improving, letting and selling land, the other for raising by subscription a fund out of which every member should receive the amount or value of his share for the erecting or purchase of a dwelling-house, or other real or leasehold estate, (giving satisfactory mortgage security for the advance,) were held by Sir W. P. Wood not to be within the statute. In neither case could a shareholder claim any portion of the land which was held by the company for the purposes of its business.

If, in the case of the second company, an option had been given to every shareholder of taking a plot of land, the V. C. thought something might have been said. And 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. II., 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, he could not do. (*c*)

Railway debentures, &c.

Later decisions.

The current of decision regarding debentures has also been reversed. The course taken was this. It was held in Q. B. that a mortgage by a railway company by assignment of the "undertaking" and tolls would not support ejectment against the company. Coleridge, J., said it was a pure question of construction; that the word "undertaking" was ambiguous; it might possibly include the land; but if it did, the instrument gave the

(*a*) See 5 Beav. 442, 2 D., M. & G. 620, 7 Id. 525, 10 Exch. 222, 245, L. R., 4 Eq. 276. Whether shares of the nature now under consideration are goods and chattels within the bankrupt act, see Ex parte Vauxhall Bridge Company, 1 Gl. & J. 101, and In re Lancaster Canal Company, Dilworth's case, Mont. & Bli. 94. On the nature of shares as qualification for the county vote, see Baxter *v.* Brown, 7 M. & Gr. 198; Bulmer *v.* Norris, 9 C. B. (N. S.) 19. Shares in an incorporated company held not an interest in land within § 4 of stat. of frauds, Bradley *v.* Holdsworth, 3 M. & Wel. 422; nor within § 17, Duncuft *v.* Albrecht, 12 Sim. 189. So (as to § 4) shares in a cost-book mine, Hayter *v.* Tucker, 4 K. & J. 243; Watson *v.* Spratley, 10 Exch. 222; Powell *v.* Jessop, 18 C. B. 337; Walker *v.* Bartlett, Id. 845. Shares in the Chelsea Waterworks Co. were held (before 1 Vict., c. 26,) to pass by unattested codicil, Bligh *v.* Brent, 2 Y. & C. 268.

(*b*) L. R., 4 Eq. 272.

(*c*) Per Wood, V. C., Hayter *v.* Tucker, 4 K. & J. 251.

mortgagee power, if he took possession, to put an end to the undertaking: which was a monstrous and improbable supposition. (*d*) This was followed by Turner and Cairns, L. JJ., who decided that all that the mortgagee could touch under such an instrument, was the profits of the undertaking; that the undertaking was made over to him as a going concern, and *plainly with a view to its continuance, and not so as to give him any power to break it up or interfere with its management. (*e*) The two decisions are perhaps not identical; the former being that the land did not pass, the latter that, if it did, it was only as an ingredient in a going concern. From these decisions, however, it was concluded in Attree *v.* Hawe, (*f*) that money secured by such debentures was not *such* a charge on hereditaments as was within the act: for the mortgagee having "no power to take the land, or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers," the gift of money so secured to charitable uses was not within the mischief against which the act was directed: "the mischief, and the sole mischief," aimed at being, it was said, the making land inalienable.

Attree *v.* Hawe.

Railway debentures not within the act.

It will be remembered that Lord Hardwicke very distinctly denied that this was an accurate definition of the objects of the act. (*g*) It was an object mentioned in the title to the act: but only there, and the title was no part of the act. It will also be remembered that the mere absence of power "to take the land or to enter on the land" does not necessarily take a case out of the act. (*h*) However, the decision in Attree *v.* Hawe is convenient, and must be taken to have finally settled the law with regard to railway debentures: for although the subject of gift in that case was debenture stock, no distinction appears to have been intended or to be possible on that account; since the holder of such stock has by statute "all the rights and powers of a mortgagee of the undertaking," except the right to

Remarks on Attree *v.* Hawe.

(*d*) Doe d. Myatt *v.* St. Helen's Railway, 2 Q. B. 364.

(*e*) Gardner *v.* London, Chatham and Dover Railway, L. R., 2 Ch. 201.

(*f*) 9 Ch. D. 337. See also In re Mitchell's Estate, 6 Ch. D. 655; Walker *v.* Milne, 11 Beav. 507.

(*g*) Att.-Gen. *v.* Lord Weymouth, Amb. 22. "That which a man fancies to be a discovery of a new and correct reading (of a statute) which has escaped the attention of eminent men in time past, will often, on more mature consideration, be found not to have been overlooked by them, but rejected for some sufficient reason." Per Lord St. Leonards, 1 D. & War. 326.

(*h*) *Ante* p. *221.

require payment of his principal. The principle of the decision is applicable to the debentures of all public bodies with parliamentary powers and duties to be exercised for the public benefit, as harbor, dock, canal, and waterworks companies, (*i*) and public bodies constituted for the improvement of towns.

Debentures of other companies.

Growing crops, which pass under a devise of the land on *which they are growing, and clearly, therefore, savor of realty, are within the act. (*i*) But rent, when due, is in the nature of fruit fallen: it is severed from the land, and the right of distress is not an interest in land, but merely a right to enter and enforce payment of the debt by seizure of the chattels there found. Arrears of rent may, therefore, be bequeathed to a charity. (*k*) So may tenant's fixtures, which, on the determination of his lease, the testator might carry away with him.] (*l*)

Growing crops. Arrears of rent. Tenant's fixtures.

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; (*m*) and therefore, in such cases, the heir may recover at law; except where there are other trusts not charitable; (*n*) [or where the trust is secret, that is, where the devisee has verbally promised to hold in trust for a charity; (*o*) in either of which excepted cases the devise carries the estate to the trustee,] and the heir (*p*) must prosecute his claim in equity.

Charitable trust vitiates the legal estate.

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

(*i*) Holdsworth *v.* Davenport, 3 Ch. D. 185; Walker *v.* Milne, 11 Beav. 507. The cases of Ashton *v.* Lord Langdale, 4 DeG. & S. 402 (railway debentures), and Chandler *v.* Howell, 4 Ch. D. 651 (mortgage of "works," &c., by improvement commissioners), must be considered overruled.

[(*i*) Symonds *v.* Marine Society, 2 Giff. 325.

(*k*) Edwards *v.* Hall, 11 Hare 6, 6 D., M. & G. 74; Brook *v.* Badley, L. R., 4 Eq. 106 (a mining "rent"); Thomas *v.* Howell, L. R., 18 Eq. 203.

(*l*) Johnston *v.* Swann, 3 Mad. 467.]

(*m*) 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 K. & J. 479.]

(*n*) Willett *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, 31 L. J., Q. B. 196.

(*o*) Sweeting *v.* Sweeting, 3 N. R. 240. As to secret trusts, *post* p. *233.]

(*p*) 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.

convey Whiteacre (part of the devised estate) to a charity, the condition alone is void, and the devise is absolute. (*q*)

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, (*r*) on the ground, it should seem, that the legatee *might* have elected to take it as land; (*s*) and a legacy payable out of such a fund of course shares the same fate. (*t*)

So, of bequest of money to be laid out in land.

The act, however, does expressly embrace the converse case of money being directed to be laid out in land, (*u*) 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. (*v*)

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. (*x*)

Where trustees have an option to invest in land or other security, the bequest is good.

But, if an option be given to the trustees to lay out the money in land, or upon government or personal security, (*y*) [or, generally, to execute the trust in either of two ways, the one lawful, the other not, (*z*) 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, (*a*) the

(*q*) Poor *v.* Miall, 6 Mad. 32.

[(*r*) Att.-Gen. *v.* Lord Weymouth, Amb. 20;] Curtis *v.* Hutton, 14 Ves. 537; Trustees of British Museum *v.* White, 2 S. & St. 595.

[(*s*) It is an interest in land, per Lord Cairns, L. R., 3 Ch. 674.]

(*t*) Page *v.* Leapingwell, 18 Ves. 463.

(*u*) Att.-Gen. *v.* Heartwell, 2 Ed. 234; Pritchard *v.* Arbouin, 3 Russ. 458.

(*v*) Widmore *v.* Woodroffe, Amb. 636; Middleton *v.* Clitherow, 3 Ves. 734. [And see Denton *v.* Manners, 25 Beav. 38, 2 DeG. & J. 675.]

(*x*) Att.-Gen. *v.* Davies, 9 Ves. 546; Kirkband *v.* Hudson, 7 Pri. 212; [Pilkington *v.* Boughey, 12 Sim. 114.]

(*y*) 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; Dent *v.* Allcroft, 30 Beav. 335; Salusbury *v.* Denton, 3 K. & J. 529; Graham *v.* Paternoster, 31 Beav. 30; Wilkinson *v.* Barber, L. R., 14 Eq. 96; Morley *v.* Croxon, 8 Ch. D. 156.

(*z*) Mayor of Faversham *v.* Ryder, 18 Beav. 318, 5 D., M. & G. 350; Baldwin *v.* Baldwin, 22 Beav. 419; London University *v.* Yarrow, 1 DeG. & J. 72; Sinnett *v.* Herbert, L. R., 7 Ch. 243; Lewis *v.* Allenby, L. R., 10 Eq. 668.

(*a*) Church Building Society *v.* Barlow, 3 D., M. & G. 120; Carter *v.* Green, 3 K. & J. 591; Denton *v.* Manners, 2 DeG. & J. 675, 682. Unless the purpose of the gift be expressly confined by the will to the illegal object; see last case. If the will be expressly worded to include the illegal as well as the legal objects, it

bequest is valid. Thus, in Lewis *v.* Allenby, (*b*) a bequest of residue, comprising pure and impure personalty, to trustees for division among such charities in London or elsewhere in England as they in their discretion should think proper, was upheld on the ground that the trustees had power to name the charities, and could properly exercise it as to the impure personalty only in favor of such charities as were exempted from the act.] It was 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 savored too much of refinement, held the bequest to be void. (*c*)

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; (*d*) [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.] (*e*) These determinations have clearly overruled Grimmett *v.* Grimmett; (*f*) and it seems somewhat difficult to reconcile with them the more recent case of Att.-Gen. *v.* Goddard, (*g*) where a testatrix, after bequeathing £1000 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

Where the purchase of land is the ultimate object, the trust is bad.

Even though there be an option "in case land cannot be conveniently purchased."

would seem that there must be an apportionment, In re Rigley's Trusts, 36 L. J., Ch. 147; Hoare *v.* Osborne, L. R., 1 Eq. 585, and the share apportioned to the illegal object would be undisposed of.

(*b*) L. R., 10 Eq. 668.]

(*c*) Baker *v.* Sutton, 1 Kee. 224. [Cf. London University *v.* Yarrow, *sup.*, where a choice between London and Dublin was expressly given.]

(*d*) Grieves *v.* Case, 4 B. C. C. 67, Dick. 251, [1 Ves., Jr., 548, 2 Cox 301;] English *v.* Orde, Duke Ch. Uses 432; Pritchard *v.* Arbouin, 3 Russ. 458; [Mann *v.* Burlingham, 1 Kee. 235.

(*e*) Att.-Gen. *v.* Hodgson, 15 Sim. 146.]

(*f*) Amb. 210.

(*g*) T. & R. 348.

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.

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 £2800 three per cent. reduced annuities, and directed the dividends to be applied "for and towards establishing a school," Lord Loughborough said, that this did not include the purchase or renting of land: the master might teach in his own house, or in the church. (*h*) 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. (*i*) And even where the interest of the bequeathed fund was directed to be applied in "providing a proper schoolhouse," 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. (*k*) So, where the trustees were expressly directed to apply the income of a charity fund in the purchase or rental of an appropriate building. (*l*)

Gifts of *income* to establish a school;

—to endow one;

—to provide a school-house.

[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. 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 indicated an intention to occupy a site in the neighborhood referred to; and that the latter words removed all doubt,

Contra where purchase of land intended.

Capital, to establish a school;

(*h*) 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.]

(*i*) Kirkbank *v.* Hudson, 7 Price 221.

(*k*) Johnston *v.* Swann, 3 Mad. 457; [and see Crafton *v.* Frith, 15 Jur. 737, 20 L. J., Ch. 198.]

(*l*) Davenport *v.* Mortimer, 3 Jur. 287, (V. C. Shadwell).

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. (*m*)

So, in Dunn *v.* Bownas, (*n*) where a testator bequeathed 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.

—a hospital;

And in Tatham *v.* Drummond, (*o*) a bequest of money to be applied towards the "establishment" of slaughter-houses in the neighborhood of London was held void by Lord Westbury, who thought it could not be doubted that if there were no statute of mortmain, a bequest to "establish" a charity such as a school or a hospital in any parish or district would be carried into effect *by the purchase of land and the erection of buildings thereon; and he adopted Lord Loughborough's rule (*p*) that the court would not alter its conception of the purposes of a testator merely because they happened to fall within the prohibitions of the statute.

—a slaughter-house;

So a bequest to "found" a chapel (*q*) is *prima facie* void.

—to found a chapel.

But a bequest to "endow" churches and chapels in populous districts, (*r*) or to "support" a school at A, (*s*) or to "found a charitable endowment," (*t*) is good. A bequest to estab-

Legacy to endow churches, schools, &c., good.

[(*m*) Att.-Gen. *v.* Hull, 9 Hare 647; and see Att.-Gen. *v.* Hodgson, 15 Sim. 146; Longstaff *v.* Renneson, 1 Drew. 28; In re Clancy, 16 Beav. 295.

(*n*) 1 K. & J. 596.

(*o*) 4 D., J. & S. 484, reversing Wood, V. C., 33 L. J., Ch. 438.

(*p*) Att.-Gen. *v.* Williams, 2 Cox 387.

(*q*) Hopkins *v.* Phillips, 3 Gif. 182.

(*r*) Edwards *v.* Hall, 11 Hare 1, 6 D., M. & G. 74.

(*s*) Morley *v.* Croxon, 8 Ch. D. 156; Kirkbank *v.* Hudson, 7 Pri. 221, per Richards, C. B., *sup.*

(*t*) Salusbury *v.* Denton, 3 K. & J. 529.

"Institution."

lish an "institution" may also be good if the purpose of the institution as described does not require the purchase of land.] (*u*)

Legacy to be applied in erecting or building, 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; (*x*) but the contrary is now settled: (*y*) [and to make such a bequest valid, the testator must either point to land already in mortmain, or he must forbid the purchase of land. (*z*) Thus, in Mather *v.* Scott, (*a*) 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.] And it is equally

Legacy on condition that legatee provides land, void.

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.] (*b*) 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; (*c*) [nor is a bequest to build made valid by a proviso that the legacy shall not be paid until the building has been commenced. (*d*)

(*u*) Baldwin *v.* Baldwin, 22 Beav. 413 (trust to provide annuities for indigent persons, with directions for the management of the "institution"). And see per Lord Cranworth, London University *v.* Yarrow, 1 De G. & J. 81, but *qu.*, for that was a hospital for animals.]

(*x*) Vaughan *v.* Farrer, 2 Ves. 182; Att.-Gen. *v.* Bowles, Id. 547, [3 Atk. 806.]

(*y*) 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 Id. 404; Att.-Gen. *v.* Parsons, 8 Id. 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.

(*z*) Att.-Gen. *v.* Davies, 9 Ves. 544; Pratt *v.* Harvey, L. R., 12 Eq. 544.

(*a*) 2 Kee. 172.

(*b*) Att.-Gen. *v.* Davies, 9 Ves. 535; and see Dunn *v.* Bownas, 1 K. & J. 602.]

(*c*) Giblett *v.* Hobson, 5 Sim. 651, 3 My. & K. 517; [In re Watmough's Trusts, L. R., 8 Eq. 272; Cox *v.* Davie, 7 Ch. D. 204.] In Giblett *v.* Hobson, Lord Brougham held that circumstances *dehors* the will might be investigated for the purpose of getting at the intention [*i. e.*, evidence of "surrounding circumstances," according to the general rule; see ch. XIII.

(*d*) Pratt *v.* Harvey, L. R., 12 Eq. 544,

Bequest to build good, if the will forbids the purchase of land.

But if the testator has expressly forbidden a purchase, though he declares his expectation or desire that land will be provided from other sources, (*e*) or if the direction is to build "when and so soon as land shall at any time be given for the purpose," (*f*) 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. And a direction to the trustees to have due regard to the application of the fund being consistent with the laws then in force, has been held to refer to the mortmain laws, and to be equivalent to forbidding the purchase of land.] (*g*) If the testator shows that he means the gift to take effect, whether land be provided or not, the legacy is valid. (*h*)[7]

correcting the dictum of Alderson, B., Dixon *v.* Butler, 3 Y. & C. 677.

(*e*) Philpott *v.* St. George's Hospital, 6 H. L. Cas. 338, reversing 21 Beav. 134, and overruling Trye *v.* Corporation of Gloucester, 14 Beav. 173. See also Cawood *v.* Thompson, 1 Sm. & Gif. 409.

(*f*) This was assumed in Chamberlayne *v.* Brockett, L. R., 8 Ch. 206, and is according to Lord Cranworth's judgment in Philpott *v.* St. George's Hospital, 6 H. L. Cas. 357. If the gift itself were made to depend on such a contingency, it would be void for remoteness, L. R., 8 Ch. 208, n., 212.

(*g*) Dent *v.* Allcroft, 30 Beav. 335.]

(*h*) Henshaw *v.* Atkinson, 3 Mad. 306. [But the decision did not depend on that. Per Lord Cranworth, 6 H. L. Cas. 359.]

7. The following devise was held valid within the mortmain act: a gift to the town of Sheffield, "for such objects of public utility in Sheffield or for such other charitable purposes as other funds held in trust for the town are used for" (notwithstanding that some public uses, like street widening, may require the purchase of land), Wilkinson *v.* Barber, 14 L. R., Eq. 96. On the other hand, the following gifts have been held to be within the act, as requiring the purchase of land by implication, and therefore void: "to aid the deaf and dumb to found a chapel for them in L.," Hopkins *v.* Phillips, 3 Giff. 182 (1861); to the Royal Soc. Prev. Cruelty to Animals, "to be applied in such manner as they shall think best towards the establishment of slaughter-houses away from the densely populated places where they are now situated, and for the relief and protection of the animals taken to be slaughtered," Tatham *v.* Drummond, 4 De G., J. & S. 484 (1864). Attention is also called to the following cases relating to the provisions of the mortmain and charity statutes in America:

Connecticut—the act of 1702, exempting from tax lands granted "for the ministry of the gospel or schools of learning or for the relief of the poor, or for any other public and charitable use," no longer (since act of 1859) applies to such lands after they have been sold by the institution, New Haven *v.* Sheffield, 30 Conn. 160; Brainard *v.* Colchester, 31 Conn. 407.

New York—a gift to the testator's wife for her life, with remainder to charitable societies, is valid as to one-half by the act of 1860, Leary's Estate, 1 Tuck. 233. The charter of the Am. Fem. Guardian Society, authorizing them to take by devise, "subject to the restrictions of the

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, (*i*) or in the repair and improvement of buildings appropriated to charity, (*k*) is unquestionably valid, as by such gifts no additional land is thrown into mortmain. (*l*) [But,

Reference to land in mortmain must be found in the will.

as before stated, a reference to land already in mortmain must be found in the will. A bequest to build a parsonage house at C. "in manner as I have already promised the same," was held to refer to a transaction by which a site had already been appropriated for the purpose, and so by implication to the site itself. (*m*) So a bequest *to build a parsonage house in connection with B. church was upheld, on the ground that a site had in fact (*though this was not noticed in the will*) been appropriated to the purpose, and that the trustees would not have been justified in purchasing any other land for the purpose. (*z*) And a bequest to help enlarge the parish church at M. was held good as impliedly referring to the glebe or churchyard. (*a*) But a bequest "to erect a new chapel at H. instead of the one now in use when such an erection shall take place," was held not to be a reference to the site on which the old chapel stood.] (*b*)

general act as to religious societies," leaves them subject to the requirement that the will be executed two months before the testator's death, contained in the general act, Lefevre *v.* Lefevre, 59 N. Y. 434.

Pennsylvania—a devise in trust for a "Friends'" school at A, not executed one month before the testator's death, is void, Price *v.* Maxwell, 28 Penna. St. 23; and a similar devise by will, executed February 10th, the testator dying March 9th, is insufficient, Carnell's Estate, 9 Phila. 322; and where the testator died March 13th, a charitable legacy by a will, executed several years before, but revoked and changed March 11th, is of no effect, Paulson's Estate, 33 Leg. Int. 400 (1876).

Georgia—the restriction of charitable gifts to one-third of testator's property, and to wills made at least ninety days before the testator's death, applies only to a testator leaving children, Reynolds *v.* Bristow, 37 Ga. 283.

(*i*) 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, 1 D., F. & J. 643.]

(*k*) Harris *v.* Barnes, Amb. 651; Att.-Gen. *v.* Bishop of Chester, 1 B. C. C. 444.

(*l*) 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.* Dobsou, 4 Russ. 342; [Shaw *v.* Pickthall, Dan. 92.

(*m*) Sewell *v.* Crewe-Read, L. R., 3 Eq. 60.

(*z*) Cresswell *v.* Cresswell, L. R., 6 Eq. 69.

(*a*) In re Hawkin's Trusts, 33 Beav. 570.

(*b*) In re Watmough's Trusts, L. R., 8 Eq. 272, dissenting from Booth *v.* Carter, L. R., 3 Eq. 757, which is *contra*.]

A legacy to be applied in the liquidation of a subsisting encumbrance on real estate, which is already subject to charitable uses, appears to have been considered as not falling within the same principle as a legacy to build on land so subject, 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; (*c*) and it matters not that the encumbrance is equitable only. (*d*)

Legacy to be applied in discharging an encumbrance on charity property invalid.

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. (*e*) 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; (*f*) 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. (*g*)

Legacy founded on a devise which fails, void.

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. (*h*)

Equity will not execute trust though the legacy has been paid.

(*c*) 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.]

(*d*) Waterhouse *v.* Holmes, 12 Sim. 162.

(*e*) 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, Id. 304; [Smith *v.* Oliver, 11 Beav. 481; Att.-Gen. *v.* Hodgson, 15 Sim. 146; Cox *v.* Davie, 7 Ch. D. 204.]

(*f*) 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.* Fackerell, 4 B. C. C. 394, 2 Ves., Jr., 238; [Att.-Gen. *v.* Stepney, 10 Ves. 22.]

(*g*) Grieves *v.* Case, 2 Cox 301, 4 B. C. C. 67.

(*h*) 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

[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.] (*i*)

Contra after lapse of time.

The statute 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. (*k*) And such promise, if denied by the devisee, may be proved by evidence *aliunde*. (*l*) 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 favor 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. (*m*) The case would be different, however, if the devisee had induced 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, (*n*) [or under a promise, either express or by silence implied, that if the estate were devised to him he would perform the trust. (*o*) *And generally it is immaterial whether the promise be made before or after the execution of the will. "The only distinction between a will made on the faith of a previous promise and a will followed by a promise

Secret trust for charity.

Effect where trust is declared by separate unattested paper.

Verbal promise by devisee.

where a legatee is called upon to refund, he is not, in general, liable to interest. (Gittins *v.* Steele, 1 Sw. 199.)

[(*i*) Att.-Gen. *v.* Moor, 20 Beav. 119; and see Att.-Gen. *v.* Drummond, 1 D. & War. 380.]

(*k*) Boson *v.* Statham, 1 Ed. 508; Muckleston *v.* Brown, 6 Ves. 52; Martin *v.* Hatton, cit. Id. 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, Way *v.* East, 2 Drew. 44; Fisher *v.* Brierly, 1 D., F. & J. 643, in which, however, the evidence failed to show any such understanding.]

(*l*) Edwards *v.* Pike, 1 Cox 17, 1 Ed. 267.

(*m*) Adlington *v.* Cann, 3 Atk. 141, 9 Ves. 519; [Wallgrave *v.* Tebbs, 2 K. & J. 313; Lomax *v.* Ripley, 3 Sm. & Giff. 48; Jones *v.* Badley, L. R., 3 Ch. 362.]

(*n*) See Adlington *v.* Cann, 3 Atk. 152.

[(*o*) Russell *v.* Jackson, 10 Hare 204; Moss *v.* Cooper, 1 J. & H. 352; Springett *v.* Jennings, L. R., 10 Eq. 488; cf. M'Cormick *v.* Grogan, L. R., 4 H. L. 82.

is this—If on the faith of a promise by A a gift is made to A and B, the promise is fastened on to the gift to both, for B cannot profit by A's fraud. (*p*) But if the will is first made in favor of A and B, and the secret trust is then communicated only to A, the gift will be fixed with a trust with respect to A, but not so as regards B; because in this case the gift to B is not obtained by the procurement of A and is not tainted with any fraud in procuring the execution of the will." (*q*) In the former case the whole beneficial interest results to the heir; and the ground upon which the entirety, and not a moiety only, so results, namely, A's fraud, is as pertinent where upon the face of the will A and B are made tenants in common as where they are made joint tenants. In a case of the second kind, where upon the will A and B were tenants in common, it was held by Sir W. P. Wood, in conformity with his *dictum* cited above, that B retained the beneficial interest in a moiety, and that only the trust of A's moiety resulted to the heir. (*r*) It is said, however, that a (subsequent) communication to A might affect B if a joint tenant, which would not affect him if he were tenant in common. (*s*) But this point has not been clearly decided, nor the ground of the distinction stated. In both cases the trust is founded on the promise, and the promise is proved against A alone. Supposing that B, though joint tenant under the will, is not bound by the trust proved against A, it would seem that this trust, though void, is a severance of the joint tenancy in equity, and that B is beneficially entitled to a moiety only.]

Where devise is to several, and trust established against one only.

Marshaling 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 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;[8] and, accordingly, where prop-

Assets not marshaled in favor of charity.

(*p*) Russell *v.* Jackson, 10 Hare 204 (joint tenants).

(*q*) Per Wood, V. C., in Moss *v.* Cooper, 1 J. & H. 352.

(*r*) Tee *v.* Ferris, 2 K. & J. 357.

(*s*) Rowbotham *v.* Dunnett, 8 Ch. D. 437, per Malins, V. C. The head-note overstates the *dictum*. In Jones *v.* Badley, L. R., 3 Eq. 635, where the devise was to A and B as joint tenants, Lord Romilly declared both to be trustees; but the point was not taken.]

8. See Story Eq. Jur., §§ 1180, 1180 **a**; Perry on Trusts, § 740.

erty 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. (*t*)

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 rata;* 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; (*u*) 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 partly of pure personalty, the legacies will be void *pro tanto, i. e.* in the proportion which the funds savoring of realty bear *to the entire property, though the pure personalty should be sufficient to pay all the legacies. The

(*t*) 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 Id. 153; Hobson *v.* Blackburn, 1 Kee. 273; [Williams *v.* Kershaw, 5 L. J. (N. S.) Ch. 84, 5 Cl. & Fin. 111.]

(*u*) Howse *v.* Chapman, 4 Ves. 542; Paice *v.* Archbishop of Canterbury, 14 Ves. 372; Curtis *v.* Hutton, Id. 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. Lapsed or void specific legacies form part of this general fund, Scott *v.* Forristall, 10 W. R. 37.

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 rata*, (*x*) and then to provide for the pecuniary legacies in like manner; the effect of which is that the charity legacies, so far as this ratable apportionment throws them upon the leaseholds and real securities, are void. (*y*) Thus, 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 pure personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void *pro tanto*.

General conclusion.

[The effect of this doctrine may sometimes be to render the whole legacy void. Thus, in Cherry *v.* Mott, (*z*) 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 savoring 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.

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 creditors on the real estate. (*a*) In such a case, it is the testator himself who has marshaled (so to speak) his own assets, and the court only prevents the arrangement made by him from being defeated by accidental circumstances. The efficacy of such a direction to make a charity legacy payable in full, out of the *pure personalty in priority

Testator may himself marshal his assets.

[(*x*) In making the apportionment, the respective values of the real and personal estates are to be taken as at the time of the death of the testator, and not as at the time of apportionment, Calvert *v.* Armitage, 1 H. & M. 446, overruling Robinson *v.* London Hospital, 10 Hare 29.

(*y*) 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.

(*z*) 1 My. & Cr. 123.

(*a*) Att.-Gen. *v.* Lord Mountmorris, 1 Dick. 379.

to other legacies, was established by Lord Truro in Robinson *v.* Geldart. (*b*) As between the charity and the other legatees, he said the case was analogous to that of a demonstrative legacy. But this was by way of illustration only, and not of definition: the direction does no more than regulate the priority of the legatees *inter se;* it does not exempt the charitable legacy from contribution to the payment of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly demonstrative. These prior charges will still come ratably, and, in the first place, out of the pure and impure personalty. (*c*) Therefore, in order to make charitable legacies effectual as far as possible, the debts, funeral and testamentary expenses should be expressly and exclusively charged on the personalty savoring of realty. (*d*)

Express marshaling where the charitable bequest is residuary.

And where the charitable legacies are themselves residuary, this is the most appropriate form of direction with regard also to the payment of other legacies. (*e*) But of course it matters not what the form is if it sufficiently shows the testator's intention. Thus, in Wills *v.* Bourne, (*f*) where a testator directed his debts, legacies, and funeral and testamentary expenses to be paid out of his real estate, and, so far as that was deficient, out of his personal estate, and bequeathed the residue of his personal estate to certain charities, declaring that "only such part of his estate should be comprised in the residue as might by law be bequeathed for charitable purposes:" it was held by Lord Selborne that the testator had thereby excluded impure personalty from the residue; and that it followed by necessary implication that the realty and impure personalty must be applied for those purpose (*debts as well* as legacies) which were to be satisfied before a residue was arrived at. So, in Miles *v.* Harri-

(*b*) 3 Mac. & G. 735; and see Nickisson *v.* Cockill, 3 D., J. & S. 622, 635; Beaumont *v.* Oliveira, L. R., 4 Ch. 309. In Sturge *v.* Dimsdale, 6 Beav. 462, Lord Langdale had doubted the sufficiency of such a direction, and in Philanthropic Society *v.* Kemp, 4 Beav. 581, had decided that it was insufficient to counteract in favor of the charities some special words which he thought expressly regulated the order in which the several portions of the personal estate were to be applied in payment of debts and legacies. But as to this see Miles *v.* Harrison, L. R., 9 Ch. 321.

(*c*) Tempest *v.* Tempest, 7 D., M. & G. 470; Beaumont *v.* Oliveira, L. R., 4 Ch. 309.

(*d*) See Williams' Executors, p. 1234. (5th ed.)

(*e*) As in Jauncey *v.* Att.-Gen., 3 Giff. 308; or in the more sweeping form used in Wigg *v.* Nicholl, L. R., 14 Eq. 92, that "the estate shall be so marshaled and administered as to give the fullest possible effect to" the charity legacies. See also Gaskin *v.* Rogers, L. R., 2 Eq. 284; In re Fitzgerald, W. N. 1877, p. 216.

(*f*) L. R., 16 Eq. 487.

son, (*g*) where a testator directed that his personal estate should be con*verted, and that out of the proceeds his debts and legacies should be paid, and gave the residue to three charities in equal shares, with a direction to pay the charitable legacies out of the pure personalty, "which shall be reserved by my trustees for that purpose," it was held that the debts and other legacies were thrown wholly on the impure personalty. Lord Cairns observed, that although the testator intended creditors and those other legatees to have the security of his whole personal estate, yet that, as between them and the charities, those who had the two funds should go first on that which the charities could not take.

Again, the pure personalty may be the subject of a specific bequest to a charity, in which case it will be entitled to the privileges and exemptions that belong to a legacy of that character. (*h*)

In Miles *v.* Harrison, there was also a particular pecuniary bequest to another charity, unaided by any direction concerning its payment; and the further question arose whether this legacy, which could in no part be satisfied out of the impure personalty, was not also debarred from the pure personalty by the direction reserving the latter for payment of the residuary bequest. "If, *as I assume*," said Lord Cairns, "the gift of the residue amounts to a direction that the personal estate shall be marshaled, a direction of that kind cannot operate to defeat *in toto* the pecuniary legacy to the charity: that legacy will stand as if nothing at all had been said about marshaling in the residuary gift; for the essence of marshaling is that it puts those only to marshal who have got two funds, and this charitable legatee has only one."]

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. [9]

Effect where land is charged as an auxiliary fund.

(*g*) L. R., 9 Ch. 317. Cf. Lewis *v.* Boetefeur, W. N. 1878, p. 21, 1879, p. 11.

(*h*) Shepheard *v.* Beetham, 6 Ch. D. 597. "A legacy is not the less specific for being general," per Lord Cottenham, 1 My. & Cr. 117.]

9. Thus, in Nickisson *v.* Cockill, 3 De G., J. & S. 622, where there were charitable and other legacies with a power to the executors to sell the land for legacies and debts, and the charitable legacies were directed to be paid out of the personal estate, there being pure personalty sufficient to pay the charitable legacies,

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 favor of charity. (e)

Judicial treatment of act of 9 Geo. II., c. 36.

Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute 9 Geo. II. 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 formerly adopted in the case of a similar gift to an alien; (f) and, secondly, the refusal of equity to marshal assets in favor 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

the executors were directed to marshal the assets, set apart the pure personalty for the charitable legacies, and sell land sufficient with other personalty to pay the other legacies and the debts; likewise in Beaumont *v.* Oliveira, 4 L. R., Ch. App. 309, (1869,) the assets were marshaled by direction of the testator for the benefit of the charitable donations; so in Lewis *v.* Allenby, 10 L. R., Eq. 668, (1870,) where the residue was bequeathed in trust to divide among such charities in England as the trustees "in their sole and uncontrolled discretion shall think proper, and the residue included both pure and impure personalty, the gift was valid as to all, the latter being applied to charities exempt from the operation of the act. In this case Stuart, V. C., quotes Hardwicke, L., in Grimmett *v.* Grimmett, Amb. 210: "If a devise is in the disjunctive and leaves the executors to two methods to do a particular thing by, one of which is lawful and the other prohibited by law, can any court say because one method is unlawful that therefore the other is so too and the whole bequest void? No, for if one method is lawful this should be pursued and take effect;" and to the same effect is Wigg *v.* Nicholl, 14 L. R., Eq. 92 (1872); see also Wills *v.* Bourne, 16 L. R., Eq. 487 (1873); Thomas *v.* Howell, 18 L. R., Eq. 198 (1874); Miles *v.* Harrison, 9 L. R., Ch. App. 316 (1874).

(e) See Leacroft *v.* Maynard, 1 Ves., Jr., 279, *ante* p. *185. 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.

(f) *Ante* p. *69. [However, the disherison of the heir, against which the statute is directed, is equally produced whether the land is sold or not.]

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. (*i*)

Exception in favor 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. (*k*) 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; (*l*) but Lord Loughborough appears to have dissented from this opinion. (*m*) It is clear that the statute does not authorize a devise to a college in trust for other charitable objects; (*n*) 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. (*o*) 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. (*p*) 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, (*q*) it might, as the lands were originally devised to a valid purpose, be executed *cy pres*. (*r*)

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

(*i*) As to the policy of the stat. of 9 Geo. II., c. 36, [see a note by the author in previous editions, urging a relaxation of its prohibitions. But *contra* see Jeffries *v.* Alexander, 8 H. L. Cas. 594, 648; and per Lord Romilly, 20 Beav. 508, L. R., 4 Eq. 111.]

(*k*) For an instance of such a devise, see 3 Ves. 641.

(*l*) 1 Ed. 16.

(*m*) See Att.-Gen. *v.* Bowyer, 3 Ves. 728.

(*n*) 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., Jr., 238; Att.-Gen. *v.* Mundy, 1 Mer. 327.

(*o*) Att.-Gen. *v.* Tancred, 1 Ed. 10.

(*p*) Att.-Gen. *v.* Whorwood, 1 Ves. 534.

(*q*) See 2 Kee. 163.

(*r*) [Att.-Gen. *v.* Andrew, 3 Ves. 633.]

is consistent with the Scotch law, which permits the destination of real estate to *some* kinds of charity. (*s*) It has been held, that the circumstances of the charity being Scotch, and Scotchmen only being eligible as trustees of it, do not conclusively show that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute. (*t*)

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. (*u*) [But by a modern statute (*x*) 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. II., 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 establish*ments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country. (*z*)

Custom of London.

By the custom of London resident freemen might devise land in mortmain. (*a*) [By the general act *De religiosis* (*b*) the custom would have been abolished, but that afterwards there came a general confirmation of the customs of London by statute. (*c*) There is no saving of any custom in the statute of George, any more than there was in the statute *De religiosis;* and as there has

(*s*) Oliphant *v.* Hendrie, 1 B. C. C. 571; Curtis *v.* Hutton, 14 Ves. 537; Mackintosh *v.* Townsend, 16 Ves. 330. [And the English rule, arising out of the act, against marshaling in favor of charities does not exist in Scotland. See Macdonald *v.* Macdonald, L. R., 14 Eq. 60.]

(*t*) Att.-Gen. *v.* Mill, 4 Russ. 328, 5 Bli. (N. S.) 593, 2 D. & Cl. 393, [Sudg. Law of Prop. 419.]

(*u*) 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.

(*x*) [7 and 8 Vict., c. 97, § 16. A deed must also be registered within the same period, Ib.]

(*z*) 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. L. Cas. 124; Mayor of Lyons *v.* East India Company, 1 Moo. P. C. C. 298. So of course as to lands in a foreign country where there is no law corresponding to stat. 9 Geo. II., c. 36; Beaumont *v.* Oliveira, L. R., 6 Eq. 537.

(*a*) 8 Rep. 129 a.

(*b*) 7 Ed. I., c. 1, *ante* ch. V.

(*c*) Per Lord Coke, 2 Bulst. 190. And local customs are expressly saved by the stat. 23 Hen. VIII., c. 10, § 5.

been no subsequent confirmation of the customs of London, (*d*) it follows, according to Lord Coke, that the statute of George is binding on the city of London. (*e*) An express power given to a charitable corporation by statute 6 Ann. to take and hold land by devise without license in mortmain has been held to be taken away by the statute 9 Geo. II.] (*f*) At all events it is clear that the custom of London applies only to lands in London. (*g*)

The legislature has, in several instances, relaxed in favor of particular objects the restriction on disposing of land to charitable purposes.[10] Thus, by the land tax redemption act (42 Geo. III., c. 116, § 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 statute 43 Geo. III., c. 107, authorizes the devise of lands to the governors of Queen Anne's bounty; and again, the statute 43 Geo. III., c. 108, empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value £500, (*h*) for erecting, rebuilding, repairing, purchasing, or *providing any

Statutes allowing land to be devoted to particular charities.

(*d*) The latest confirmation by statute appears to be 2 W. & M., sess. 1, c. 8, § 3.

(*e*) See also per Sir R. P. Arden, M. R., Highmore on Mortmain p. 127; and see generally as to these customs the authorities cited in Reg. v. Mayor, &c., of London, 13 Q. B. 1.

(*f*) Luckraft *v.* Pridham, 6 Ch. D. 205.

(*g*) Middleton *v.* Cater, 4 B. C. C. 409.

10. The statutory authority to take lands by devise, notwithstanding the statute of mortmain, is strictly construed. Thus, in Nethersole *v.* School for Indigent Blind, 11 L. R., Eq. 1, (1870,) authority to take lands, tenements, hereditaments and money, was held not to give authority to take impure personalty; so in Chester *v.* Chester, 12 L. R., Eq. 444, (1871,) authority as above, with proviso that grants which would be void under the statute of 9 Geo. II. should not be thereby validated, was held not to authorize the taking of a bequest of debts secured by equitable mortgage of leaseholds. But authority to a hospital to take by gift, purchase or otherwise, land or personal property, gives an implied right to take by devise a gift of mixed personalty, Perring *v.* Trail, 18 L. R., Eq. 88, (1874).

[(*h*) By section 2, if the devise exceed the limit, the excess only is void, and the specific five acres may be allotted by the L. C. In Sinnett *v.* Herbert, L. R., 7 Ch. 232, a gift comprising pure and impure personalty, for building or endowing a church, was held to carry £500 worth of the impure personalty, besides all the pure personalty, on the ground that the £500 being all which could properly be spent in building (see In re Ireland's Will, 12 L. J., Ch. 381), it must be assumed that the trustees would apply all the rest for the other purposes. As under this act, one may devise, so he may convey, reserving a life estate, per Sir G. Turner, L. J., Fisher *v.* Brierly, 1 D., F. & J. 664. But the act does not authorize a gift of money, even within the limit of £500, to arise by sale of land, Church Building Society *v.* Coles, 1 K. & J. 145, 5 D., M. & G. 324.

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, (*f*) or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre; (*g*) [and the promotion of these or similar objects has been further encouraged by an act (*h*) legalizing the devise of lands to or in trust for (*i*) the ecclesiastical commissioners, in aid of the endowment and erection of district churches. Again, the public parks, schools, and museums act, 1871, authorizes gifts by will, made twelve calendar months before, and enrolled in the books of the charity commissioners within six calendar months after, the testator's death, of limited portions of land for any of the objects mentioned in the title to the act.] (*k*) The statute of mortmain has also been repealed *pro tanto* in favor of the British Museum, (*l*) [the Department of Science and Art,] (*m*) the Bath Infirmary, (*n*) Greenwich Hospital, (*o*) the Foundling, (*p*) Westminster, (*q*) Middlesex, (*r*) and St. George's Hospitals, (*s*) the Royal Naval Asylum, (*t*) the Seaman's Hospital Society, (*u*) and of some other public institutions. (*x*) [But it must be borne in mind that an act of parliament which confers an a charitable corporation the right to purchase, take, hold, receive, or enjoy lands, does not enable it to *acquire* land otherwise than in the mode prescribed by the statute Geo. II., c. 36, the effect of the clause being equivalent only to a license from the crown to

Act of parliament when only equivalent to license from the crown.

(*f*) A bequest for maintenance of a family vault in a churchyard cannot be supported as one for repair of a churchyard under this act, In re Rigley's Trusts, 36 L. J., Ch. 147.]

(*g*) See also 55 Geo. III., c. 147, and 58 Geo. III., c. 45, § 33.

[(*h*) 6 and 7 Vict., c. 37, § 22.

(*i*) Baldwin *v.* Baldwin, 22 Beav. 425.

(*k*) 34 Vict., c. 13. The acts 4 and 5 Vict., c. 38, (school sites,) 31 and 32 Vict., c. 44, (sites for religious, educational, literary, &c., purposes,) and the elementary education act, 1873, § 13, subs. 3, exclude gifts by will. The act 8 and 9 Vict., c. 43, empowered municipal corporations to take by devise sites for museums, &c., and also (as was held in Harrison *v.* Corporation of Southampton, 2 Sm. & G. 387,) money to be laid out in such sites; but was repealed by the public libraries act, 1850.]

(*l*) See stat. 5 Geo. IV., c. 39.

(*m*) 38 and 39 Vict., c. 68. This act does not expressly refer to 9 Geo. II., c. 36; and according to a suggestion of James, L. J., (6 Ch. D. 212,) the case is therefore not taken out of the stat. Geo. II. *Sed qu.*]

(*n*) 19 Geo. III., c. 23; see Makeham *v.* Hooper, 4 B. C. C. 153.

(*o*) 10 Geo. IV., c. 25, § 37.

(*p*) 13 Geo. II., c. 29.

[(*q*) 6 Geo. IV., c. 20 (loc. and pers.)

(*r*) 6 Will. IV., c. 7 (loc. and pers.)]

(*s*) 4 Will. IV., c. 38 (loc. and pers.)

(*t*) 51 Geo. III., c. 105.

(*u*) 3 and 4 Will. IV., c. 9, § 1.

(*x*) See Shelf. Char. Uses 49.

hold in mortmain, (*y*) and not therefore enabling it to take by devise.]

*The act 9 Geo. II. leaves the disposition of pure personalty 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 (*z*) to charitable purposes capable of enduring forever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favored in point of construction; (*a*) for by a rule peculiar to gifts of this nature, if the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor 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. 11 Thus, in the case of a gift to the poor in general, (*b*) or to charitable uses generally, (*c*) or for the advancement of religion, expressed in

Bequest of pure personalty to charitable purposes not restrained.

Such bequests executed *cy pres*, when.

[(*y*) Mogg *v.* Hodges, 2 Ves. 52; British Museum *v.* White, 2 S. & St. 595; Nethersole *v.* Indigent Blind School, L. R., 11 Eq. 1; Chester *v.* Chester, L. R., 12 Eq. 444. This appears to have been overlooked in the late edition (1865) of Chitty's Statutes, where several charitable institutions are stated to be exempted, by special enactment, from the operation of the act of Geo. II., 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. A power *to take* land *by will* is of course sufficient, Perring *v.* Trail, L. R., 18 Eq. 88 (The Westminster Hospital. So the Middlesex and St. George's Hospitals). See and consider with reference to this point, 13 and 14 Vict., c. 94, § 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.]

(*z*) Anon., Freem. Ch. Cas. 262; Baylis *v.* Att.-Gen., 2 Atk. 239; Da Costa *v.* De Pas, Amb. 228, cit. 7 Ves. 76, 3 Mad. 457.

(*a*) 7 Ves. 490.

11. Notwithstanding the general rule that the *cy pres* doctrine is not to be applied where a particular charity is designated by the donor, there are numerous exceptions, classified as follows by Mr. Boyle (pp. 169–211): "1. Where the charitable objects are attended with uncertainty. 2. Where the donor has left the enumeration of objects incomplete. 3. Where the gift is made to or concerns an indefinite class of persons. 4. Where circumstances intervene to prevent a strict execution of the charity. 5. Where certain preliminaries to the enjoyment of a gift have been neglected by the trustees. 6. Where there occurs a failure of

(*b*) Att.-Gen. *v.* Matthews, 2 Lev. 167; S. C., *nom.* Frier v. Peacock, Finch 245; Att.-Gen. *v.* Rance, cit. Amb. 422.

(*c*) Clifford *v.* Francis, Freem. Ch. Cas. 330; Att.-Gen. *v.* Herrick, Amb. 712.

the most vague and indefinite terms; (*d*) or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor; (*e*) [or the executor renounces probate (in which case he cannot claim to exercise his discretion)]; (*f*) or to

trustees. 7. Where the charity is for a time impeded. 8. Where a surplus accrues after the gift. 9. Where there exists an original surplus. 10. Where the surplus or property arises from a failure of objects." The application of the *cy pres* rule for the execution of charitable devises which would otherwise be void for uncertainty or illegality, has been much discussed in the United States, without invariable results however. The rule established by the cases seems to be that the court will *not* divert an illegal or uncertain gift to a different charitable object, nowise intended by the testator and clearly at variance with his expressed will. The existence of this *cy pres* power as inherent in our equity courts, has been affirmed or denied according as it has been held to be or not to be a part of the original jurisdiction of the Court of Chancery, acting *judicially*, and not as *parens patriæ*, exercising the royal prerogative. It will therefore be found more fully treated of in note 12 of this chapter. The reader's attention is here only called to the states where the question has been most discussed.

Alabama—In Carter *v.* Balfour, 19 Ala. 814, Coleman, J., says of it: "I do not recognize the doctrine of *cy pres* which in substance is, if you cannot find the society specified in the will or apply the fund to the charity intended by the testator, the court will then apply it to some other charity as nearly analogous to it as possible. The bequest should be paid only to the societies specified in the will or to their authorized agent. If the societies or either of them did not exist at the time of the testator's death or cannot now be found organized and known as above stated, then the bequest to such society or societies should be considered and disposed of as lapsed legacies;" and in Williams *v.* Pearson, 38 Ala. 299, Walker, J., speaks of it as "not adapted to our political condition and has been rejected by our courts. In England whenever anything is given to charity and no charity appointed—that is to say, where the testator declares his intention in favor of charity indefinitely without specification of objects, or where the charity which is appointed, is superstitious, the power of applying vests in the king as *pater patriæ* and is exercised by him through the Chancellor. So, likewise, when a definite object of charity is specified which fails or becomes impracticable, so that the fund cannot be applied to the charity intended by the testator, the court will under the doctrine of *cy pres* apply it to some kindred or analogous object of charity. The power exercised by the English courts of chancery in the two classes of cases just mentioned, is not judicial power and does not belong to our courts. But the *cy pres* doctrine and the prerogative power to carry out indefinite charities being excepted, the law of charities administered in the English Court of Chancery is substantially our *law*."

Connecticut—In White *v.* Fiske, 22 Conn. 31, it is said by Church, C. J.: "We have not adopted that principle into our system of jurisprudence. We think it inconsistent with the limited and defined powers of the judiciary as understood and approved in this

(*d*) Powerscourt *v.* Powerscourt, 1 Mol. 616.

(*e*) White *v.* White, 1 B. C. C. 12.

[(*f*) Att.-Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75.]

such charitable uses as A shall appoint, and A dies in the lifetime of the testator, (*g*) or neglects or refuses to appoint; (*h*) or to such charitable uses as the testator himself shall appoint [or has appointed,] and he dies without making an appointment, (*i*) [or the instrument of

state;" but see Birchard *v.* Scott, 39 Conn. 63, where a legacy to a school society, for the use and benefit of poor families in said society, in their schooling, was applied, on the abolition of school societies and establishment of free schools, to the purchase of books and other schooling expenses of poor scholars.

Georgia—In Adams *v.* Bass, 18 Ga. 130, where a gift was to purchase homes for testator's slaves in Indiana or Illinois, (where it was forbidden by law,) the court refused to execute the legacy *cy pres* by purchasing homes in some other state where it was lawful. In Georgia the code (1873) provides for chancery jurisdiction over charities, and execution *cy pres*. §§ 2468, 3155, 3156. In the latter section, it is provided that "if the specific mode of execution be, for any cause, impossible and the charitable intention be still manifest and definite the court may by approximation give effect in a manner next most consonant with the specific mode described."

Illinois—In Gillman *v.* Hamilton, 16 Ill. 225, the court refused to divert to a professorship in Illinois College an insufficient fund given for the erection of a theological seminary. So, in Starkweather *v.* American Bible Society, 72 Ill. 50, where a devise to a foreign corporation was void, the court refused to execute it *cy pres* by ordering the land to be sold and the proceeds paid over, Walker, J., saying: "The fact that the 43d Elizabeth may be in force in this state does not by any means confer the power claimed in this case and it is believed that the doctrine of executing trusts *cy pres* had its origin in that enactment." It was declared, however, in Henry County *v.* Winnebago Drainage Company, 52 Ill. 454, that the court had jurisdiction to execute a public charity *cy pres*.

Indiana—In Grimes *v.* Harmon, 35 Ind. 246, this power of *cy pres* execution of trusts was held not to exist in Indiana. See opinion of Buskirk, J., in this case, given at some length in note 17.

Iowa—In Miller *v.* Chittenden, 2 Iowa 315, it is said by Miller, C. J., that "courts in this country will execute the will of the benevolent donor but cannot create an object or person or class of persons on whom to confer the gift. We need not add besides that the doctrine of *cy pres*, at least in its original form as administered in the English courts has no application here." So, too, Lepage *v.* McNamara, 5 Iowa 146.

Kentucky—In Curling *v.* Curling, 8 Dana 38, Robertson, C. J., says of it: "So far as the Chancellor of England has applied an indefinite charity to a specific object in a class of objects not designated by the donor or has applied the donor's bounty to a purpose different from that to which it was dedicated by himself, we should be unwilling to follow the example. The *cy pres* doctrine of the civil law as applied by the Chancellor of England to charities is not to its full extent, a judicial doctrine and so far as it is *ultra-judicial* it cannot be recognized by courts of equity here."

(*g*) Moggridge *v.* Thackwell, 1 Ves., Jr., 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.

[(*h*) Att.-Gen. *v.* Boultbee, 2 Ves., Jr., 380, 3 Ves. 220.]

(*i*) Freem. Ch. Cas. 261; Mills *v.* Farmer, 1 Mer. 55; [Commissioners of Ch. Don *v.* Sullivan, 1 D. & War. 501.]

appoint*ment cannot be found;] (*k*) or where the testator makes a disposition in favor of an object which has no existence, (*l*) or which is void in law, (*m*) or has become impossible; (*n*) or bequeaths to the trustees of a charity who refuse to accept; (*o*) or to a particular charity

Massachusetts—In this state, legacies in trust for books, papers, &c., to create sentiment for abolition of slavery, taking effect after slavery was abolished, have been executed *cy pres* by giving to school for education of negroes in Boston, Jackson *v.* Phillips, 14 Allen 550; or to a freedman's school in Maryland, Attorney-General *v.* Garrison, 101 Mass. 227.

Missouri—In this state, the power of the court to make such application has been maintained in Academy *v.* Clemens, 50 Mo. 167; Goode *v.* McPherson, 51 Mo. 126.

New York—In Beekman *v.* Bonsor, 27 Barb. 260, this power is denied. See also, as to many New York cases, note 12.

North Carolina—So, too, in North Carolina; see McAuley *v.* Wilson, 1 Dev. Eq. 276; Holland *v.* Peck, 2 Ired. Eq. 255.

Ohio—So, too, in Ohio; see Board of Education *v.* Edson, 18 Ohio St. 221; but see, *contra*, McIntire *v.* Zanesville, 17 Ohio St. 352.

Pennsylvania—In this state, it seems to have been rejected in the earlier and adopted in the later cases. Thus, in 1832, in the case of the Methodist Church *v.* Remington, 1 Watts 218, it was held that the courts in Pennsylvania would not execute a trust *cy pres*, and so, in 1851, in the case of Flaherty's Estate, 2 Pars. Cas. 186; but the decisions incline to such execution in Phila. *v.* Girard, 45 Penna. St. 9, (1863,) and Heddleson's Estate, 8 Phila. 602, in 1871. See also, for Pennsylvania cases, note 12.

South Carolina—Such executions have been also refused in South Carolina, Pringle *v.* Dorsey, 3 S. C. (N. S.) 509; and in

Vermont—See Smith *v.* Nelson, 18 Vt. 554; and in

Wisconsin—See Heiss *v.* Murphy, 40 Wis. 276.

In the English cases, as appears by the text, the inclination of the courts is favorable to *cy pres* execution; but this will not be done where the gift is clearly to a charitable institution by name, which has ceased to exist before the testator's death, Langford *v.* Gowland, 9 Jur. (N. S.) 12; nor where the gift is to the trustees of Mt. Zion Chapel, to be appropriated according to the statement appended, and the statement was not appended, the court refusing to presume a charitable object, Aston *v.* Wood, 6 L. R., Eq. 419; but in the similar case, where the residue was directed to be given by the executors

(*k*) Att.-Gen. *v.* Syderfen, 1 Vern. 224, 7 Ves. 43, n.

(*l*) Att.-Gen. *v.* City of London, 3 B. C. C. 171; [Loscombe *v.* Wintringham, 13 Beav. 87;] but see Att.-Gen. *v.* Oglander, 3 B. C. C. 166.

(*m*) 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.; Carey *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.

(*n*) 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.* Margham, 14 Id. 230; Incorporated Society *v.* Price, 1 J. & Lat. 498.]

(*o*) Att.-Gen. *v.* Andrew, 3 Ves. 633; [Denyer *v.* Druce, Taml. 32; Reeve *v.* Att.-Gen., 3 Hare 191.]

by a description equally applicable to more than one, (and it is wholly uncertain which was intended); (*p*) [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]; (*q*) 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 pres*.

[Nor is the rule displaced or superseded by a residuary bequest to other charitable uses contained in the same will. The legacy does not fall into the residue; for the doctrine is that it fails in the mode only and not in substance; and *cy pres* means the nearest to that which has so failed, not the nearest to the testator's other charitable purposes. (*r*) But if the testator expressly provides that, in case the particular mode of application directed by him should fail, the legacy shall fall into the residue, it should seem that the rule is excluded. (*s*) For however exceptional, it is a rule of construction, and must yield to a contrary intention.

Although there is a residuary bequest.

And such contrary intention may, though (considering the length to which the doctrine has been carried,) (*t*) not very readily, be collected by construction from the very terms of the gift; which may so strictly define the purpose as to render it *incapable of execution otherwise than in the mode pointed out by the will. The mode is then of the substance, and if it cannot be pursued the legacy will fail altogether. Thus in Att.-Gen. *v.* Bishop of

But not if contrary intention appears by the will.

to the *charitable* institutions to be designated by a codicil, which was not made, the court held it to be a trust to be distributed to charity at the discretion of the executors, Pocock *v.* Attorney-General, 3 L. R., Ch. D. 342. In the case of the Prison Charities, 16 L. R., Eq. 129, a gift for "poor prisoners" in London, taking effect after the abolition of imprisonment for debt, was held to lapse, and a *cy pres* execution by transfer to a reform school was refused. For additional recent cases of *cy pres* execution in England, see Parfitt *v.* Hember, 4 L. R., Eq. 443; In re Maguire, 9 L. R., Eq. 632; Attorney-General *v.* Stewart, 14 L. R., Eq. 17; Alchin's Trustees, 14 L. R., Eq. 230; Mayor of Lyons *v.* Advocate-General, 1 L. R., App. Cas. 91.

(*p*) Simon *v.* Barber, 5 Russ. 112; [Bennet *v.* Hayter, 2 Beav. 81; In re Clergy Society, 2 K. & J. 615.

(*q*) 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.

(*r*) Mayor of Lyons *v.* Adv.-Gen. of Bengal, 1 App. Cas. 91.

(*s*) See Mayor of Lyons *v.* Adv.-Gen. of Bengal, 1 App. Cas. 111, 115 (the Lucknow Fund).

(*t*) See Lord Eldon's judgment, Moggridge *v.* Thackwell, 7 Ves. 68.

Gift to particular charity.

Oxford (*u*) the bequest was "to build a church at W. where the chapel now is;" the bishop (who was patron and parson) would not let it be built there, and the churchwardens suggested that "the old chapel should be repaired, the living augmented, &c.," while the next of kin insisted that a new church must be built and the surplus divided among them: but Lord Kenyon observed that if the bishop objected he could not interfere; that as to repairing, &c., he could not do that; the intention must be implicitly followed, or nothing could be done. So in Corbyn *v.* French (*x*) the legacy was to the trustees of a chapel to discharge a mortgage thereon: the mortgage had been already paid off; and Lord Alvanley held the legacy void by the statute Geo. II., c. 36; but he also held that if it had not been so, it would have been void because the object intended could not be effected, and there was no ground to apply it to any other purpose.

Cherry v. Mott.

Again, in Cherry *v.* Mott, (*y*) where a testator desired that, if his personal estate should be sufficient for the purpose, a presentation to Christ's Hospital should be bought for the son of a freeman of H.; the personal estate proved insufficient. Sir C. Pepys, M. R., said "This legacy is conditional. There is no gift if the personal estate be not sufficient to fulfill the contract." He added, "Another objection is that this is a gift for a particular purpose which cannot take effect by reason of the refusal of the governors, and that it therefore fails altogether." After citing Att.-Gen. *v.* Bishop of Oxford, and Lord Alvanley's view of the doctrine, he referred to the more extended sense in which it was understood by Lord Eldon, and concluded, "In this case, however, there is no gift except in the direction to do that which cannot be effected. It is not within the principle of those cases in which the court executes a general purpose *cy pres*, the particular mode being impossible."

This case has been referred to as standing on special ground as a conditional legacy. But as the condition required only that the estate should suffice for the particular mode, the appellation of "conditional" appears not to mark any difference in *kind, but only the cogency of the terms to indicate that the mode was of the substance of the gift.

[(*u*) 1 B. C. C. 444, n., and cited 4 Ves. 432, also 2 Ves., Jr., 388, 3 Ves. 646.

(*x*) 4 Ves. 431.

(*y*) 1 My. & C. 123.

Lord Alvanley said he thought the legacy in Corbyn *v.* French (supposing it not illegal,) as well as the legacy in Att.-Gen. *v.* Bishop of Oxford, might each have been applied in repairing the particular building, though not for any other purpose. (*z*) But partial exclusion of the rule is scarcely less significant than total exclusion. For the rule is that where the substantial intention is charity, but the particular mode cannot be carried into effect, the court (or the crown) supplies *another* mode: (*a*) which other mode need not bear any absolute resemblance to that intended by the testator; only it must first be ascertained that none can be found nearer to it. (*b*) Thus a trust for redemption of British slaves in Barbary having, after a long continuance, failed for want of objects, was executed by Lord Cottenham in favor of charity schools in England and Wales. (*c*) This must be borne in mind in considering the cases that remain to be noticed.

Partial exclusion of the *cy pres* doctrine.

Cy pres does not imply an absolute resemblance.

In Clark *v.* Taylor, (*d*) a legacy was bequeathed "to the treasurer of the female orphan school at G., patronized by Mrs. E., for the benefit of that charity;" the school had been established and maintained by Mrs. E. at her own expense, without treasurer or other official, and still subsisted at the testator's death; but afterwards, and before payment of the legacy, was discontinued; Sir R. Kindersley, V. C., said there was a recognized distinction between a gift showing a general charitable purpose, and pointing out the mode in which it was to be carried into effect, and a gift to a particular institution; that here the institution being *a mere private school* maintained by the beneficence of Mrs. E., he could not say the legacy was to go to any other institution.

Cases of "lapse." Clark *v.* Taylor.

In Russell *v.* Kellett, (*e*) some of the poor persons for whom the gift was intended having survived the testator, but died before payment, it was held by Sir J. Stuart, V. C., that their

Russell *v.* Kellett.

[(*z*) See also New *v.* Bonaker, L. R., 4 Eq. 655, where a legacy to be applied for a charitable purpose in a foreign country having been refused by the government of that country, apparently on grounds of public policy, it was not argued that it should be applied *cy pres* in this country. Cf. Att.-Gen. *v.* City of London, 3 B. C. C. 171.

(*a*) Per Lord Eldon, 7 Ves. 69. See also per Grant, M. R., 9 Ves. 405.

(*b*) Per Lord Cottenham, Cr. & Ph. 227. Originally the rule seems to have been wholly unqualified, for, according to Wilmot, C. J. (Opin. 32, 33), "the court thought one kind of charity would embalm a testator's memory as well as another."

(*c*) Att.-Gen. *v.* Ironmongers' Company, Cr. & Ph. 208, 10 Cl. & Fin. 908.

(*d*) 1 Drew. 642.

(*e*) 3 Sm. & Gif. 264, *ante* *209.

*legacies lapsed. He said the doctrine of *cy pres* meant that some other object could be found in a reasonable degree nearly answering the object mentioned by the testator, but that here was such a singular and particular definition of the objects as made it impossible to find any other so nearly resembling them as to justify the application of the doctrine.

Marsh v. Means.

In Marsh *v.* Means, (*f*) a testator gave a legacy, payable after the death of his wife, for continuing a certain publication (which had been published by the Association for Promoting Humanity to Animals) according to principles stated in one of its numbers, viz. to expose cruelty to animals, to diffuse moral and religious information, &c. At the date of the will the publication had been discontinued, and the association itself was extinct; and it was held by Sir W. P. Wood, V. C., that this was not a bequest for promoting these principles, but for continuing the publication of this particular book, which brought the case within Clark *v.* Taylor, so that the doctrine of *cy pres* was not applicable, and the gift lapsed by extinction of the object.

Fisk v. Att.-Gen.

Again, in Fisk *v.* Att.-Gen., (*g*) where a legacy was given "to the Ladies Benevolent Society at L. as part of its ordinary funds," and before the testator's death the society ceased to exist, Sir W. P. Wood, V. C., said it has been expressly decided by Clark *v.* Taylor and Russell *v.* Kellett, that when a gift was made by will to a charity which had expired, it was as much a lapse as a gift to an individual who had expired; and that though the point might some day require further consideration, he could not interfere with the settled authorities. Whether the charitable object fails before or after the testator's death, it is thus equally lapse within the meaning of this decision; whereas in Hayter *v.* Trego, (*h*) where the bequest was to "the D. asylum for female penitents," which was dissolved after the testator's death, it was assumed that the legacy was to be applied *cy pres*, the only question argued being whether this should be done by the crown or by the court.

Remarks on the cases.

Considering that in Clark *v.* Taylor, the institution was "a mere private school;" that Russell *v.* Kellett depended on an erroneous view of the doctrine of *cy pres*; (*i*) that Marsh

[(*f*) 5 W. R. 815, also reported (but obscurely) 3 Jur. (N. S.) 790.

(*g*) L. R., 4 Eq. 521. See also Langford *v.* Gowland, 3 Gif. 617.

(*h*) 5 Russ. 113.

(*i*) Langford *v.* Gowland, before the same judge, is probably referable to the same ground.

v. Means and Fisk *v.* Att.-Gen. were decided on the authority of *Clark *v.* Taylor and Russell *v.* Kellett, which were followed (on the latter occasion at least) with hesitation, it cannot be considered that the suggested rule of lapse is very strongly supported, at least in those cases where the bequest is to an institution established for charitable purposes which plainly appear in its name. (*k*)

It is admitted that there is a distinction where there never was any such institution as that named by the testator; for in that case it is clear he could not have intended to benefit a particular institution, and the legacy will be applied *cy pres.* (*l*) So if the bequest is to the institution merely as the instrument for executing the testator's charitable intent, which he fully describes, the failure of the institution will not involve the failure of the charitable trust. (*m*)

Distinction, where the named charity never existed,

—or is a mere trustee,

There is another sort of case less easily distinguishable from Fisk *v.* Att.-Gen.; that is, where the gift is in terms to a particular institution by a description equally applicable to more than one. It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied *cy pres.*] (*n*)

—or there are several charities equally answering the description.

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. (*o*)

[Cherry *v.* Mott (*p*) shows that there may be a conditional legacy to a charity as well as for any other purpose, and that if the condition is not fulfilled the legacy fails in substance. And if the condition is such that it need not be performed within the limits allowed by the rule against perpetuity, the gift is void. (*q*) Such cases must be distinguished from those where the intention is to give a fund to charity at once, though there may be an indefinite suspense or abeyance in its actual application. If the particular purposes may be

Conditional legacy to charity.

(*k*) See per Sugden, C., 1 D. & War. 294. But see L. R., 8 Ch. 211.

(*l*) Loscombe *v.* Wintringham, 13 Beav. 87; In re Maguire, L. R., 9 Eq. 632.

(*m*) Marsh *v.* Att.-Gen., 2 J. & H. 61; see also cases cited *ante* p. *244, n. (*o*).

(*n*) Bennet *v.* Hayter, 2 Beav. 81; In re Clergy Society, 2 K. & J. 615.]

(*o*) Att.-Gen. *v.* Whiteley, 11 Ves. 241.

[(*p*) 1 My. & C. 132.

(*q*) See Chamberlayne *v.* Brockett, L. R., 8 Ch. 208, n. 212.

answered, though not immediately, the fund will be retained—how long does not clearly appear: *but if those purposes turn out on inquiry to be impracticable, then the fund will be applied *cy près*. And during such retention there is no resulting trust for heir or next-of-kin.] (*r*)

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; (*s*) but where the object is charity without a trust interposed, the direction must be by the sign manual of the sovereign. (*t*) In a case (*u*) 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. (*x*)

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 itself for its appropriation. (*y*) 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. (*z*) 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 a scheme of its own. (*a*) [Where the legacy is to a foreign charity the court will direct it to be paid to

Foreign charity.

(*r*) Att.-Gen. *v.* Oglander, 3 B. C. C. 166; Abbott *v.* Fraser, L. R., 6 P. C. 96; Chamberlayne *v.* Brockett, L. R., 8 Ch. 206, and the cases there cited.

(*s*) 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.]

(*t*) Att.-Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75, Pepys, M. R.; Denyer *v.* Druce, Taml. 32.

(*u*) Hayter *v.* Trego, 5 Russ. 113.

[(*x*) 7 Ves. 87.]

(*y*) Society for the Propagation of the Gospel in Foreign Parts *v.* Att.-Gen., 3 Russ. 142; [Walsh *v.* Gladstone, 1 Phil. 290.]

(*z*) See Wellbeloved *v.* Jones, 1 S. & St. 43; [In re Barnett, 29 L. J., Ch. 871.]

(*a*) Ib.

the persons appointed by the testator to receive it, and will not take upon itself to settle a scheme. (*b*) Nevertheles 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. (*c*) The legality of the charity is to be determined by the law of the country where it is to be applied.] (*d*)

It seems that the court discourages the investment of the funds of the charity in the purchase of land, under the 2d section of the statute 9 Geo. II. (*e*)

Cy pres doctrine not applied to cases within the stat. 9 Geo. II., c. 36.

It remains to be noticed, that the *cy pres* doctrine does not apply to bequests which are made void by the statute in question, and therefore a bequest of money to be laid out in land is not executed *cy pres*, *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.] (*f*)[12]

A gift over, in case a gift to charity be void, is good.

[(*b*) Collyer *v.* Burnett, Taml. 79; Mitford *v.* Reynolds, 1 Phil. 194. See Mayor of Lyons *v.* East India Company, 1 Moo. P. C. C. 293.

(*c*) Att.-Gen. *v.* Lepine, 2 Sw. 181; Att.-Gen. *v.* Sturge, 19 Beav. 597.

(*d*) New *v.* Bonaker, L. R., 4 Eq. 655.]

(*e*) Att.-Gen. *v.* Wilson, 2 Kee. 683.

(*f*) Att.-Gen. *v.* Tancred, 1 Ed. 10, 1 W. Bl. 90, Amb. 354; De Themines *v.* De Bonneval, 5 Russ. 288; Robinson *v.* Robinson, 19 Beav. 494; Carter *v.* Green, 3 K. & J. 591; Warren *v.* Rudall, 4 Id. 618; and per Lord Eldon, Sibley *v.* Perry, 7 Ves. 522; overruling Att.-Gen. *v.* Tyndall, 2 Ed. 207. 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 K. & J. 603, stated *post* ch. L.]

12. Owing, perhaps, to the unsettled and discordant state of the American authorities and statutes as to the force and effect of the statute 43 Elizabeth, ch. 4, in this country, much attention has been paid to the question whether the original jurisdiction of the English Court of Chancery was prior to and independent of the statute. Much light has been thrown upon this matter by the recent publication in England, in 1827, of the report of the commissioners on the public records. By aid of this light it is now well established that equity had an inherent original jurisdiction over charitable uses, as trusts, prior to the statute of Elizabeth. A great number of the early English cases making this appear are to be found collected in Mr. Theo. W. Dwight's argument in the Rose Will case. See, too, Perry on Trusts, §§ 693, 694; Wms. Ex'rs (6th Am. ed.) 1132, n. i[2]; 2 Redfield on Wills 529, n. The history of the change and final settling of opinion on this important question is nowhere better told than by Judge Story in his work on Equity Jurisprudence, §§ 1142–1154, d., inclusive. He says: "The history of the law of charities, prior to the statute of 43rd Eliz. ch. 4, which is emphatically called the statute of charitable uses, is extremely obscure. It may, nevertheless, be useful to endeavor to

trace the general outline of that history, since it may materially assist us in ascertaining how far the present authority and doctrines of the Court of Chancery in regard to charitable uses, depend upon that statute; and how far they arise from its general jurisdiction, as a court of equity, to enforce trusts, and especially to enforce trusts to pious uses. It is not easy to arrive at any satisfactory conclusion on this head. Until a comparatively recent period, and indeed, until the report of the Commissioners of the Public Records, published by Parliament in 1827 (to which our attention will be more directly drawn hereafter), few traces could be found in the volumes of printed reports, or otherwise, of the exercise of this jurisdiction, in any shape, prior to the statute of Elizabeth. The principal, if not the only cases then to be found, were decided in the courts of common law, and generally turned upon the question, whether the uses were void, or not, within the statutes against superstitious uses. One of the earliest cases is Porter's Case, (1 Co. 226, in 34 & 35 Eliz.); which was a devise of lands, devisable by custom, to the testator's wife in fee, upon condition that she should assure the lands, devised for the maintenance and continuance of a free school, and certain almsmen and almswomen; and it appeared that the heir had entered for a condition broken, and conveyed the same lands to the queen. It was held, that the use, being for charity, was a good and lawful use, and not void by the statutes against superstitious uses; and that the queen might well hold the land for the charitable uses. Lord Loughborough, in commenting upon this case, observed: 'It does not appear that this court at that period had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (that is, an information to establish a charity); but they made out their case, as well as they could, by law.' (Atty. Genl. *v.* Bowyer, 3 Ves. 714, 726.) So that the result of Lord Loughborough's researches upon this point was that, until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities. It is remarkable, that Sir Thomas Egerton and Lord Coke, who argued Porter's case for the queen, although they cited many antecedent cases, refer to none, which were not decided at law. And the doctrine established by Porter's case is, that if a feoffment is made to a general legal use, not superstitious, though indefinite, although no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good; and if the use is bad, the heir of the feoffer will be entitled to enter, the legal estate remaining in him. The absence, therefore, of all authority derived from any known antecedent equity decisions upon an occasion when they would probably have been used, if any existed, did certainly seem very much to favor the conclusion of Lord Loughborough. And in the absence of any such known antecedent decisions, it was not a rash conjecture, for it would be but a conjecture, that Potter's case, having established that charitable uses, not superstitious, were good at law, the Court of Chancery, in analogy to the other cases of trusts, immediately held the feoffees to such uses accountable in equity for the due execution of them; and that the inconvenience felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise, within a few years, to the statute of 43 Elizabeth, ch. 4. This view might also have some tendency to reconcile the language of Lord Loughborough with that of an opposite character, used upon other occasions by other chancellors and judges, in reference to the jurisdiction of chancery over charities, as it would show, that

in cases of feoffments to charitable uses, bills to establish those uses might in fact have been introduced, or brought into familiar practice by Lord Ellesmere, about five years before the statute of Elizabeth. This would be quite consistent with the fact, that such bills were not sustained when the donation was to charity generally, and no trust estate was interposed, and no legal estate was devised, to support the uses. It is very certain, that, at law, devises to charitable uses generally, without interposing a trustee, and devises to a non-existing corporation, or to an unincorporated society, would have been, and in fact were, held utterly void for want of a person having sufficient capacity to take as devisee. The statute of Elizabeth, in favor of charitable uses, cured this defect, and provided (as we shall hereafter have occasion more fully to consider,) a new mode of enforcing such uses by a commission under direction of the Court of Chancery. Shortly after this statute, it became a matter of doubt, whether the Court of Chancery could grant relief by original bill in cases within that statute, or whether the remedy was not confined to the proceeding by commission under the statute. That doubt remained until the reign of Charles II., when it was settled in favor of the jurisdiction of the court by original bill. On one occasion, when this very question was argued before him, Lord Keeper Bridgman declared: 'That the king as *pater patriæ*, may inform for any public benefit for charitable uses, before the statute of 30 [43] of Elizabeth, for charitable uses. But it was doubted, the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill.' On another occasion soon afterwards, where the devise was to a college, and was held void at law by the judges, for a misnomer, on a bill to establish the devise as a charity, the same question was argued; Lord Keeper Finch (afterwards Lord Nottingham) held the devise good, as an appointment under the statute of Elizabeth; and he 'decreed the charity, though before the statute no such decree could have been made,' (Anon. 1 Ch. Cas. 267). It would seem, therefore, to have been the opinion of Lord Nottingham, that an original bill would not before the statute of Elizabeth lie to establish a charity, where the estate did not pass at law, to which the charitable uses attached. On the other hand, the language of other judges leads to the conclusion that, antecedent to the statute of Elizabeth, the Court of Chancery did, in virtue of its inherent authority, exercise a large jurisdiction in cases of charities. In Eyre *v.* Shaftshury, (2 P. Will. 103, 118), Sir Joseph Jekyll said, in the course of his reasoning on another point: 'In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day practice to file informations in chancery, in the attorney-general's name, for the establishment of charities.' In the Bailiffs, &c., of Burford *v.* Lanthall, (Atk. 550), Lord Hardwicke is reported to have said: 'The courts have mixed the jurisdiction of bringing informations in the name of the attorney-general with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion.' In a subsequent case, which was an information filed by the attorney-general against the masters and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of the Court of Chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitorial powers, said: 'Consider the nature

of the foundation. It is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the peculiar purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity; because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate. But where there is a charter with proper powers, there is no ground to come into this court to establish that charity; and it must he left to be regulated in the manner the charter has put it or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief; yet that information is not to be dismissed, but there must be a decree for the establishment. That is always with this distinction, where it is a charity at large or in its nature, before the statute of charitable uses; hut not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed.' And again: 'It is true that an information in the name of the attorney-general, as an officer of the crown, was not ahead of the statute of charitable uses, because that original jurisdiction was exercised in this court before. But that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown.' It was manifestly, therefore, the opinion of Lord Hardwicke, that, independent of the statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter. But it does not appear that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee, capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect. The same remark applied to the dictum by Sir Joseph Jekyll. In a still later case, which was an information to establish a charity, and aid a conveyance in remainder to certain officers of Christ College to certain charitable uses, Lord Keeper Henley (afterwards Lord Northington) is reported to have said: 'The conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body, and therefore there is a want of proper persons to take in perpetual succession. The only doubt is whether the court shall supply this defect for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court, before, at, and after the statute of Elizabeth, to have been, that, where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute of Henry VIII., yet they were always considered as good in equity, if given to charitable uses.' And he then proceeded to declare, that he was obliged, by the uniform course of precedents to assist the conveyance; and, therefore, he established the conveyance expressly under the statute of Elizabeth. There is some reason to question, whether the language here imputed to Lord Northington is minutely accurate. His Lordship manifestly aided the conveyance as a charity, in virtue of the statute of Eliza-

beth. And there is no doubt, that it has been the constant practice of the court, since that statute, to aid defects in conveyances to charitable uses. But it is by no means clear that such defects were aided, before that statute. The old cases, although arising before that statute, were deemed to be within the reach of that statute by its retrospective language; and were expressly decided on that ground. The very case put of devises to corporations, which are void under the statute of Henry VIII., and are held good solely by the statute of Elizabeth, shows that his Lordship was looking to that statute; for it is plain, that a devise, void by statute, cannot be made good upon any principles of general law. What, therefore is supposed to have been stated by him, as being the practice before the statute, is probably, if not founded in a mistake of the reporter, an inadvertent statement of the learned chancellor. The same case is reported in another book, where the language reported to have been used by him is: 'The constant rule of the court has always been, when a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment; as in Jesus College, Collison's Case in Hobart, 136' (Ambler, R. 351). Now, Collison's case was expressly held to be sustainable, only as an appointment under the statute of Elizabeth; and this shows that the language of his Lordship was probably meant to be limited to cases governed by that statute. In a more recent charity case, Sir Authur Piggot in argument said: 'The difference between the case of individuals and that of charities is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present.' Lord Eldon adopted the remark and said: 'I am fully satisfied as to all the principles laid down in the course of this argument, and to accede to them all.' His Lordship then proceeded to discuss the most material of the principles and cases from the time of Elizabeth, and built his reasoning, as indeed he had built it before, upon the supposition, that the doctrine, as now established, rested mainly on that statute. Such were the principal cases, or at least the principal cases which my own researches have brought to my notice at the time when the present work was first published, wherein the jurisdiction of chancery over charities, antecedent to the statute of Elizabeth, had been directly or incidentally discussed. The circumstance that no cases, prior to that time, could then be found in equity jurisprudence; the tradition that had passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; the fact, that the cases immediately succeeding that statute, in which devises, void at law, were held good in equity as charities, might have been argued and sustained upon the general jurisdiction of the court, if it then existed, and were yet expressly argued and decreed upon the footing of that statute. These facts and circumstances did certainly seem to afford a strong presumption that the jurisdiction of the court to enforce charities, where no trust is interposed, and where no devisee is *in esse*, and where the charity is general and indefinite, both as to persons and objects, mainly rests upon the constructions (whether ill or well founded is now of no consequence) of the statute of Elizabeth. And accordingly that conclusion was arrived at and sustained on a very important occasion by the Supreme Court of the United States." "The elements of the doctrine of the English chancery in relation to charitable uses are to be found in the civil law—and it is questionable whether the English system of charities is to be referred exclusively to the statute of Elizabeth. The statute has been resorted to as a

guide because it furnished the largest enumeration of just and meritorious charitable uses; and it may perhaps be rather considered as a declaratory law, or specification of previously recognized charities, than as creating, as some cases have intimated, the objects of chancery jurisdiction over charities. If the whole jurisdiction of equity over charitable uses and devises was grounded on the statute of Elizabeth, then we are driven to the conclusion that, as the statute has never been re-enacted, our courts of equity in this country are cut off from a large field of jurisdiction over some of the most interesting and meritorious trusts that can possibly be created and confided to the integrity of men. It would appear from the preamble to the statute of Elizabeth that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effective remedy for the breaches of those trusts." 2 Kent Com. 287.

The following important citations from leading cases on this subject, arranged in order of their dates, show pretty fully the whole discussion of this question, and in their review of the cases referred to in them, leave little more necessary to a full view of American opinion and authority.—In 1827, in Witman *v.* Lex, 17 Serg. & R. 88–92, Chief Justice Gibson says: "At the common law of England these bequests could not be sustained even where there is no uncertainty as to the person; if the bequest be on a trust not defined with reasonable certainty, it will fail; for it is clear the testator did not intend the trustee should have the beneficial interest. Such a bequest however would take effect under the 43rd Elizabeth chap. 4: and this has drawn the counsel to argue against the extension of that statute to this country, a point that must be conceded. But we consider the principles which chancery has adopted in the application of its principles to particular cases as obtaining here, not indeed by force of the statute, but as part of our own common law; and where the object is defined and we are not restrained by the inadequacy of the instrument which we are compelled to employ, nearly, if not altogether, we give relief to that extent that chancery does in England and this part of our system has been produced by causes which work as powerfully here as did those which produced the system of relief that sprung from the statute of charitable uses. The simplicity which marked the lives of our forefathers enabled them to do without many institutions that in the present state of society, are absolutely indispensable. Incorporations were almost unknown." * * * "It is not intended to attempt an outline of this branch of our equity jurisdiction or to point out those particulars in which it differs from that which has been assumed in England. This must be a matter of gradual development according to the exigency of the cases that may arise. It may safely be suggested however that in many particulars the relief which we should be able to afford through the medium of common law forms, will necessarily fall short of that which would be administered by a Chancellor. Indeed no one would desire to see the doctrine of *cy pres* carried to the extravagant length that it was formerly, or witness the exercise of an arbitrary discretion in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter, by disposing it to such charities as the court chooses to direct. No such discretion would be exercised by this court. On the other hand, not professing to found our jurisdiction on the statute, we are not bound like the English courts to restrict it to two cases specifically enumerated in the preamble: and there is therefore little hazard in affirming that a bequest such as in Maurice *v.* The Bishop of Durham, 9 Ves. 399, in trust to pay debts

and legacies and to dispose of the residue to such objects of benevolence and liberality as the legatee may approve, would be sustained here. For the present, it is sufficient to say that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest, a corporation capable of taking or not, or how uncertain the objects may be provided there be discretionary power vested any where over the application of the testator's bounty to those objects; or whether the corporate designation has been mistaken. If the intention sufficiently appears on the bequest, it would be valid." In 1833, Mr. Justice Baldwin says in the case of Magill *v.* Brown, Brightly 346, on the will of Sarah Zane: "If any statutes were suited to the policy of this state they are the 43rd Elizabeth and the 7 and 8 William 3rd chapter 37, an act for the encouragement of charitable gifts and dispositions, which, in favor of learning, charity and other good and public uses, authorized the king to grant licenses to any person or persons, bodies politic or corporate, their heirs and successors to purchase and alien land in mortmain, perpetuity or otherwise within being duly to forfeiture, 3 Ruff. 636. It may well be presumed that the emigrants from England brought with them these principles for adoption and engrafted them into their system of religious toleration and charities; but that they ever adopted any law which created a forfeiture for an alienation of property to any religious, literary or charitable society or corporation or prohibited donations for the use of worship according to the ritual of the Catholic Church is utterly inconsistent with the established usage and every law of the state or colony from the earliest to the present time. The law must be settled beyond all doubt before we can feel justified in deciding that the rights of religious societies and of charitable and literary institutions in Pennsylvania are less firmly established than they were in the mother country." And further on page 389: "The spirit of equity which pervaded the law of charities progressed having been extended so as to bring within its protection not only the specific bequests of a testator but the entire fund on which they were charged, it was not necessary for courts of equity to usurp any of the powers of a court of law in order to effectuate a charitable donation, or to establish any rules or principles different from those on which the common law courts had acted with the sanction of Parliament. Chancery had its appropriate jurisdiction over cases of fraud, accident and breach of trust arising out of dispositions of property to purposes unconnected with charity; if the party had a right known to the law but had no legal remedy, he could resort to the extraordinary powers of the Court of Chancery for relief, according to the usage and settled principles which applied to charities as well as other subject matters of its cognizance. To have refused the same relief in the one case as in the other would have placed charities under the ban of the law of equity, though they were the favorites of the statute and common law: if there was anything in the nature of charities which would call for or justify the witholding equitable relief for matters not cognizable at law without special authority by statute, it would have appeared in the course of the law for more than 300 years before the 43rd Elizabeth. Its history exhibits no feature of the kind; on the contrary, it exhibits the most convincing evidence that it was peculiarly the duty of courts of equity to obey the injunctions of the statutes to execute the intention of donors and founders of charities and not to suffer the donations to fail of effect or to be abused when their intentions could be ascertained." And on page 391: "It has never been pretended that the course of equity on these subjects was regulated or

in any way affected by the 43rd Elizabeth; it was founded on principles which were the origin and foundation of its equity jurisdiction, and became gradually developed according to the exigency of the times. There is no reason which would prevent their application to charities in all cases, between subjects before the 43rd Elizabeth in the same manner as after, nor is there to be found in any decision or authority other than the late *dicta* denying it. So far as any traces of its jurisdiction over charities are to be found in the books, it seems to have been under the three heads of fraud, trust and accident, and exercised without any doubt of the power in all cases where either circumstance existed." And on page 395: "That branch of the personal or prerogative jurisdiction of the Chancellor which is exercised on the information of the Attorney-General by appointing a charitable donation to new objects on the extinction of those to which it was originally devoted will be found to be derived from the law of charities established by the statute of templars 17 Edward 2nd. The altering and disposing to good and pious uses donations originally made for purposes of superstition is a provision of the 1 Edward 6th. The appointment of general and vague charities to definite objects results from the general direction of the statutes prior to the 43rd Elizabeth to make such appointments—'so that the will of the giver shall in all things always be faithfully observed and religiously executed,' (17 Edward 2nd) and that the decrees 'shall be most beneficial in favor of the charities specified' (1 Edward 6th) so that the said charitable uses may be observed in the most liberal and ample sort (39 Elizabeth)—so that in all these cases the 43rd Elizabeth has no direct or indirect effect in giving any jurisdiction to the Chancellor." In 1836, in Moore *v.* Moore, 4 Dana 360, Chief Justice Robertson speaks of the same subject in these words: "It seems clear, however, that prior to the 43rd Elizabeth, though the Chancellor had assumed to some extent equitable jurisdiction in cases of charity, it was not on account of the charity but only because there was a trust, which, being valid according to the common law, might be protected and enforced by a court of equity. The Chancellor in his extraordinary character as a judge in equity had no peculiar jurisdiction over charities and the more probable and prevalent judicial deduction is that the Chancellor, when prior to the 43rd Elizabeth he exercised equitable power over charities, did not do so according to the doctrines of the civil law peculiar to charities but only according to the principles of the common law adopted by the civil code respecting trusts: and of course he could not enforce a charitable trust, if according to the doctrines of the common law it was either illegal or void for indefiniteness or vague generality, nor could he apply the charity to any other purpose than that designated by the donor. We are satisfied that the *cy pres* doctrine of England is not and should not be a judicial doctrine except in one kind of case, and that is, where there is an available charity to an identified or ascertainable object and a particular mode, inadequate, illegal or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable and will effectuate the declared intention of the donor and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intent of the donor. But it does not act judicially, when it applies his bounty to a specific object of charity selected by itself, merely: because he had dedicated it to charity generally or to a specific purpose which cannot be effectuated; for the court cannot

know or decide, that he would have been willing that it should be applied to the object, to which the judge in the plenitude of his unregulated discretion and peculiar benevolence has seen fit to decree its appropriation, whereby he and not the donor in effect and at last creates the charity." Attention is also called to the following opinion of the master, Murray Hoffman, in Wright *v.* Trustees Meth. Epis. Church, 1 Hoffm. Ch. 263, in 1839: "It strikes my mind as demonstrable, that the statute of Elizabeth did not establish a single new principle in the law of charities, although it obviated the effects of some prior statutes. Did it sanction a gift or devise for the benefit of unincorporated companies for pious purposes? The statute of 23 Hen. VIII. recognizes the existence of the same to such, as well as to superstitious purposes, and saved the former. Did it repeal by force of the words *limit and appoint*, the exception in the statute of wills? That exception was a branch of the acts of mortmain. Before the statute a corporation might take by devise against every one, except the king, and against him by his license. After the act, a devise was put upon the same footing as a conveyance. For that, a license was necessary; and the only change wrought in the law was, that between the statute of wills, and the statute of Elizabeth, a devise even to a corporation licensed generally to hold in mortmain, was not valid. Did it, or the decisions under it, sanction a devise or gift to the most vague purposes of charity without a trustee, and remit the matter to the crown to distribute? The same is declared to have been done before the statute; but further, such bequest was sustained in this court upon the bill of overseers of the poor merely, or of any persons whom the court would deem proper distributers of the bounty. Again, before the statute, devises to charity were upheld through the doctrine of a feoffment to the use of a will and the devisability of a use; and as to a defective surrender of a copyhold, Lord Northington says: 'All defective conveyances to charitable purposes were aided before the act.' With respect to the great body of decisions upon the statute, it appears to me that there is a principle to be found in them all, entirely consistent with a jurisdiction in this court independent of it. It has been adopted as defining what are to be regarded as charitable objects which this court will protect. It is an enumeration of those objects which are to be deemed charities. It has been taken as a specification of what are charitable uses; but it leaves the point of jurisdiction, the origin of that jurisdiction and the mode of exercising it wholly untouched." So in 1844, in Green *v.* Allen, 5 Humph. 188, Turley, J., says: "It is certain that few traces remain of the exercise of the jurisdiction of a Court of Chancery upon the subject (charitable uses) in any shape prior to the statute of Elizabeth. As it is probable, however—nay almost certain—from the wording of the statute that the practice of executing such conveyances originated at a period antecedent to its passage, it is also probable that they were sustained by the Court of Chancery in some form or other before that time, most likely by bill to enforce the performance of the trust, as we have seen that the clerical chancellors of that period had assumed a power of compelling feoffees to uses to perform the trust which had been reposed in them." * *

* "The charitable use under the statute being in existence and the power of the chancellor in England to protect and enforce it being granted, the next subject of inquiry is, how this power is exercised. His jurisdiction upon the subject seems to be derived from three sources—1st. As a representative of the crown. 2d. Under the statute of Elizabeth which is personal and not exercised in virtue of his ordinary or extraordinary jurisdiction. 3d. As a judge exercising inherent power in

the execution and administration of uses and trusts under the extraordinary jurisdiction of the court." Page 210. "Lord Chancellor Parker says (Monill *v.* Lawson, 5 Vin. Abr. 500,) that when a bill is brought to establish a charity given by will to persons uncertain and incapable of suing or being sued the suit must be brought in the name of the Att.-Gen. *ex necessitate rei*, because there are no certain persons entitled to it who can sue in their own names." But the master, in 1 Hoff. Rep. 265, continues: "There is ample authority in our own country to establish that the states now represent that particular branch of the royal power as *parens patriæ*. To this portion of the opinion I have not been able to yield my assent. That is, the American states do not represent that branch of royal prerogative. I admit there are American decisions sustaining charities which could only have been decreed in England under the prerogative. To which all I have to say is, that if the courts that made them felt satisfied that they had the jurisdiction and the necessary machinery for a correct exercise of it I do not object to them but cannot hold them obligatory on us: because I am satisfied that no such jurisdiction has been entrusted to us and that we have no system by means of which a proper exercise of it could be ensured if it had." This subject is discussed very fully by Judge Duer, in 1849, in Ayres *v.* Meth. Epis. Church, 3 Sandf. 363, in these words: "The counsel for the executors contend, that the trust is valid as a charitable use, and that according to the established doctrine of equity, the disability of the trustee forms no impediment to its execution by the court, while on the other hand, the counsel for the heirs at law not only deny that the trust is valid as a charitable or public use, but insist that the illegality of the devise, draws after it, as a necessary consequence, the invalidity of the trust, even were it true that if created in a different mode, its execution might be decreed. In our judgment, exactly the same questions arose in the case of McCartee *v.* The Orphan Asylum, and their decision was of necessity involved in the decree, which the Court of Errors then pronounced. It may be thought very difficult to reconcile that decree, not only with the English cases, but with prior decisions in this state; but till an opposite doctrine shall have been established by the Court of Appeals, we are bound to say that it has settled the law, that a devise to a corporation not authorized by law to take by devise, if directly made, although clothed with a trust, is absolutely void, so that the property descends to the heir, not charged with the trust, but as in a case of entire intestacy. The testator is judged to have died intestate as to all the property that the devise embraces. That such is the necessary effect of the decision of the Court of Errors, a few observations will render apparent. The devise of the Orphan Asylum Society, which the court, in opposition to the opinion of the chancellor, held to be direct, and therefore void, was not general, so as to give to the society an unlimited power of disposition or application, but the will expressly directed that the property should be applied to the charitable purposes of the institution, that is, to the support and education of orphans. The devise, therefore, plainly and unequivocally created a trust; and as this trust was for purposes which the legislature, by incorporating the society, had expressly authorized, no doubt could be raised, or indeed was suggested, as to its validity; hence the question, whether, although the devise was void, and the legal estate had descended to the heir, it was not the duty of a court of equity to effectuate the intention of the testator, by decreeing the execution of the trust, necessarily and distinctly arose; nor is it possible that it could have escaped the attention of counsel or the observation of the court. We have the most abundant evidence that it

did not escape such observation, but was thoroughly investigated and maturely considered. Chancellor Jones, in his elaborate opinion, (an opinion which there is no exaggeration in saying, displays almost unequaled powers of reasoning and research,) after endeavoring to sustain the validity of the devise to the society, states the next question to be, whether upon the supposition 'that the devise was void in law, as being in effect a devise of land to a corporate body, it was not in the power of the court, as a court of equity, to effectuate the intention of the testator,' (9 Cowen 469), evidently meaning to effectuate his intention by sustaining the trust and decreeing its execution. He devotes nearly twenty pages of his opinion to the examination of this question, and after a full review and careful analysis of the authorities, arrives at the conclusion, that the use to which the testator had devoted his estate, was valid as a charitable use, and the estate chargeable with it as a subsisting trust, and that, as chancellor, he had power to establish the trust, and to decree the estate to be settled and conveyed to the uses of the will, (9 Cowen 483); and, let it be remarked, that if he were justified in these conclusions, his decree, which directed a conveyance to the society to the uses of the will, ought never to have been reversed. It is true, that the learned judge who delivered the opinion which prevailed in the court of errors, takes no notice of these positions of the chancellor, or of the arguments and authorities upon which they were rested; but as he could not have been ignorant that these positions had been taken, it is certain that he and the majority who concurred with him, meant deliberately to reject them; otherwise the decree of the chancellor, although it might have been modified, could not have been wholly reversed, and the property have been permitted to descend to the heirs, discharged from the trust. It is impossible to explain the actual decision upon any other ground than that, in the judgment of the court, the devise was absolutely void, in relation to the trust as well as the legal estate. Were it possible for us, however, to evade this conclusion, and escape by any means from the authority of this decision, we should still be compelled to say, that we have no power as a court of equity, to decree the execution of the particular trust which this will creates; we fully admit the general rule, that a trust is not to be defeated merely from the disability or failure of a trustee; but the rule is not to be applied, unless the court, in the exercise of its proper jurisdiction, may decree the execution of the trust. The trust that we are now required to execute, is a general indefinite charity, the persons to whose use and benefit the rents and profits are to be applied, not being designated with certainty in the will, but the selection being left to depend upon a future exercise of discretion. Hence, as from the illegality of the devise there is no trustee, so from the nature of the use there is no *cestui que trust*, and in England the rule is fully settled, that in such cases the disposition of the charity belongs to the king as *parens patriæ*, and must be carried into execution under his sign-manual, and not by the court of chancery, in the exercise of its ordinary and proper jurisdiction. It would be easy to cite numerous cases as proving the existence of the rule, but as all the preceding cases are reviewed and weighed by Lord Eldon in his elaborate opinion in the case of Moggridge *v.* Thackwell, it is needless to refer to any other authority. In that case his Lordship states, as the result of a most diligent and searching examination, that the general principle most reconcilable to the cases, is, that where the purpose of the charity is general and indefinite, not fixing itself with certainty upon any object, the disposition is in the king by sign manual, and that the court will only take the administration of

the trust where the execution is to be by a trustee. (7 Vesey, jr. 63 and 86; Carey *v.* Abbott, Ibid. 490.) Even in England, therefore, the present trust would be void in equity as well as at law, and could only be rendered effectual by the direct exercise of the royal prerogative. It is possible that the courts of equity in this state have succeeded to the powers and jurisdiction of the court of chancery in England, in regard to the execution and administration of charities, but we have yet to learn that they have also succeeded to the prerogatives of the crown, or that there is any sovereign, whose directions, as given by his sign manual, they are bound to follow. It must also be remembered, that where the disposition of a charity belongs to the king, his majesty is not bound to follow the intentions of the testator, but that his discretion, in regard to the disposition of the property or fund, is unlimited and absolute. That courts of equity in this country have ever possessed or claimed a similar discretion, will not be pretended. Hence, even upon the supposition that we possess the same power as a court of chancery in England, to decree the execution of a charitable use, violating in its terms and in its duration, the general rules of law in relation to other trusts, we should still be bound to declare that the present trust, as well as the devise to which it is annexed is illegal and void. The observations that we have made are not, however, to be construed as implying our assent to the positions that were so learnedly and ably maintained by the counsel for the executors and the church, namely: that the law of charitable and pious uses as it prevailed in England anterior to the statute of Elizabeth, or independent of its provisions, (43 Eliz. c. 4,) was in force in this state, as a part of our common law, previous to the adoption of the revised statutes, and remains in force, notwithstanding its entire inconsistency with the statutory provisions in relation to trusts and perpetuities. The authorities to which the counsel referred in support of his argument deserve great consideration and respect; but we cannot think them so conclusive as to preclude us from free examination of the same questions, if hereafter it shall become our duty to consider and decide them. We shall not decide them in this case, since upon other grounds we are compelled to decide in favor of the heirs, and as a court, we decline to express or intimate any opinion in relation to them. Hence, although the form of this opinion will not be changed, the judge who delivers it is alone responsible for the observations that follow; they are to be considered as an explanation, which for special reasons it is deemed expedient to make, of the difficulties he will have to overcome before he can give his assent to a doctrine, which, in this and in a previous case, with much ability and an unusual display of learning, was pressed upon our adoption. We strongly incline to think that the only law of charitable uses, which was in force in this state, on the 19th of April, 1775, as a part of that common law, which the constitution alone recognizes and adopts, was derived exclusively from the provisions of the statute of Elizabeth, and consequently when in 1788, that statute together with all other English statutes, was repealed, the law was meant and understood to be wholly abrogated. Although we cannot refer to any positive evidence of the fact, we do not at all doubt that the statute of charitable uses as the statute of Elizabeth is termed, was in force in this state when a colony, as a part of its common law, in the same manner and for the same reasons as the statute *de donis*, the statute of wills, the statute of frauds, the statute of limitations, and many others, and indeed so far as the provisions of this statute were applicable to our condition as a colony, it is not merely a reasonable but a legal presumption that they were in

fact adopted. (Dutton *v.* Howell, Show. P. C. 32; Atty. Genl. *v.* Stewart, 2 Mer. 159; Rex *v.* Vaughan, 4 Burr. 2500; Boehm *v.* Eagle, 1 Dallas 15; Bogardus *v.* Trinity Church, 4 Paige 193.) Reasoning upon this fact, we find it very difficult to believe that the legislature in repealing the statute of Elizabeth, and in repealing at the same time the statutes of mortmain, (which there is certain evidence were also in force, Sec. 4, Act of 1784, Greenleaf, page 72,) meant to revive the equitable, or more properly, the clerical doctrine of pious and charitable uses, as it prevailed in England before the reformation, and during the prevalence of which, Lord Hardwicke says, (1 Vesey 224,) the clergy and religious houses had contrived to possess themselves of nearly one-half of the whole real property of the kingdom. It is indeed difficult to believe that the legislature meant to revive and establish this doctrine, not in the modified and regulated form in which it now exists in England, but wholly freed from the numerous and salutary restrictions which the statutes of mortmain impose, and which the experience of every christian nation, from the earliest ages of christianity, had shown to be demanded by imperative reasons of public policy; yet it is to this conclusion that the arguments of counsel, and the authorities to which we have been referred, if we adopt and follow them, must of necessity lead us. It is certain, indeed, that such could not have been the intention of the legislature, if when the statute of Elizabeth was repealed, it was understood to be the true and only source of the law of charitable uses, and of the power of the court of chancery to compel their execution, and that at this time such was the actual belief of the legislature, and of its legal advisers, we think, for many reasons, it is hardly possible to doubt. All doubts upon this point, seem to be excluded when we remember that the belief which we attribute to the legislature was until a very recent period, the general, if not universal opinion of the members of our profession, including the most eminent of our judges and jurists throughout the Union, and that this opinion was apparently justified by many decisions in the English courts, and by the positive *dicta* of several Lord Chancellors. (Gallego's Executors *v.* The Atty. Genl., 3 Leigh 450; 2 Story Eq. Jur. 1154, 1158, 1162; 1 Ch. Ca. 134, 269; 6 Dow. P. R. 136; Baptist Association *v.* Hart's Executors, opinion Ch. J. Marshall, 4 Wheat. 30 and 39; Baptist Association *v.* Smith, 3 Peters, App. 403, Mr. J. Story; Atty. Genl. *v.* Bowyer, 3 Vesey 744, Lord Loughborough; Mills *v.* Farmer, 1 Meriv. 551, Lord Eldon; 4 Kent's Comm. 508, n.) Upon the supposition that charitable uses, as a distinct and peculiar class of trusts, were meant to be abolished, the conduct of the legislature in repealing and not re-enacting the statutes of mortmain, is readily explained, nor, as it appears to us, can it he explained in any way. We cannot suppose that the legislature meant to condemn and reject the policy upon which the statutes of mortmain are founded, a policy which the most enlightened statesmen and jurists have constantly approved, and the observance of which, the very nature of our institutions seems to demand. This policy, so far from having been abandoned, had been strictly adhered to and followed, in retaining the prohibition to corporations to take by devise, and in limiting the amount of the property that religious corporations are permitted to hold. The object of these provisions is exactly the same as that of the statutes of mortmain, namely to prevent real property from being locked up in perpetuity, and to save persons *in extremis*, from being led by false notions of merit or duty, so to dispose of their estates as to impoverish, perhaps leave in actual destitution, their families or dependent relatives, (4 Kent's Com. 507.) Nor for the attainment of

these objects were any further restrictions necessary, if charitable uses when inconsistent with the general rules of law, were meant to be abolished; but if such uses were meant to be continued, the legislature could not have failed to see that the restrictions we have mentioned, were wholly insufficient to prevent the mischiefs they were designed to exclude. It could not have failed to see that in order to carry out and render effectual the policy it had adopted, devises to individual trustees for charitable uses and creating perpetuities, were just as necessary to be prohibited as devises to corporations, nor could its members and legal advisers have been ignorant that this necessary prohibition, was found in one of the statutes, (19 Geo. II., c. 36,) which they were repealing. It is indeed evident, that the restraints laid upon corporations are practically of very little value, if every individual, by the creation of a trust, may devote his whole estate, however large its amount, in perpetuity to any use or purpose that he may deem, or in the confusion and terror of a death-bed repentance, may be led to believe, is pious and charitable. A perpetual trust requires and implies a perpetual succession of trustees, and if we attend to things and not to words, we shall be forced to admit, that to create such a trust, is, in effect, to found a corporation, unlimited in its duration, and incapable of dissolution, having no power to alienate its property, yet unrestrained as to the amount it may hold. Hence it is scarcely possible to state or imagine a more strange and glaring inconsistency, than to prohibit corporations created by the legislature, from taking property by devise at all, and to restrict, within jealous and narrow limits, the amount of the property that, by any means, they are permitted to acquire, yet, at the same time, to permit individuals in the unfettered exercise of their discretion, to devise all the property they may possess, whatever its amount, to corporations, which by the act of devising they create. Can we believe that the legislature, in repealing the statutes of mortmain, was intentionally guilty of this inconsistency? Is it credible that it meant to counteract and defeat its own policy, and the long settled policy of our ancestors? That it meant to take away a restriction plainly necessary, which then existed, and for more than half a century, had been the law of the state, and hy so doing, enlarge to a most impolitic extent, the discretionary power of individuals in the creation of charitable uses? The inference, it seems to us, is far more probable, that by the repeal of the statute of Elizabeth this discretionary power, when exercised in hostility to the general rules of law, was meant to be wholly abolished. The legislature could not surely have meant, by an extension of the power to create perpetuities, to increase indefinitely, the evils that are confessed to flow from them; its object, we are persuaded, was by an absolute denial of the power, to suppress those evils in their source. If, however, the opinion that we have now intimated, as to the intent and effect of the repeal of the statute of Elizabeth, shall hereafter appear to be erroneous, and we shall be ultimately persuaded that pious and charitable uses, indefinite in their nature, unlimited in their amount, locking up forever the property which they embrace, and in other respects, wholly irreconcilable to the general rules by which other trusts are governed, were sanctioned by the law of this state, previous to the adoption of the revised statutes; yet as such uses are most plainly and directly repugnant to the statutory provisions in relation to trusts and perpetuities, we confess our present inability to understand or conceive, why they are not now to be considered as positively forbidden, and therefore abolished. That they are embraced within the terms of these statutory provisions, terms as explicit, as strong, and as comprehensive as the language can furnish,

it is impossible to deny, and we yet remain to be convinced, that they are not just as certainly embraced within their spirit and policy. At any rate, to declare that they are not, and upon that ground to introduce an exception, which there is not the slightest evidence, was ever contemplated by the revisers or by the legislature, would seem to us, as at present advised, an unjustifiable, if not unexampled, stretch of judicial power. It is said that the revisers, in their notes, make no reference or allusion to charitable uses; and it is assumed that they would not have been silent, had they meant to abolish them; but it seems far more reasonable to say, that had they meant to except them from the universal terms of the enactments which they proposed, they would certainly have said so, since, had such been their intention, the necessity of a positive exception, in order to prevent misconstruction, could not possibly have escaped them; on the other hand, if they meant not to except, but to include charitable uses, the explanation of their silence is easy and obvious. They may have deemed it unnecessary to speak; they may have thought that the provisions which they recommended spoke for themselves, in a language that neither the legislature nor judges could fail to understand. The article in relation to uses and trusts commences with this declaration: 'Uses and trusts, except as authorized and modified in this article, are abolished,' (1 R. S. 727, § 45,) and the addition of a note, telling the legislature that all uses and trusts not excepted, were meant to be included, would have been an idle repetition of a text, which if words have a meaning, could bear no other interpretation. Not only are uses and trusts abolished, but to exclude the supposition that any, previously existing, were meant to be preserved, it is declared, that none are to be excepted but those which the article itself authorizes and modifies; and that by any comment upon such a text, the meaning of the revisers and the duty of judges could have been rendered more plain and evident, we exceedingly doubt. Of this we feel assured, that had the revisers intended to revive or continue in force the ancient doctrine of pious and charitable uses, as it practically existed in England during the ages of darkness and superstition, and subject to none of the restraints that constant evasion and successive abuses had shown to be necessary, and successive statutes of mortmain had imposed, they would not have been silent. Their views would not have been concealed from the legislature; but upon this, as upon all other occasions of importance, if not fully vindicated, would have been fully explained. Comparing their notes with the actual provisions in their text, the just inference seems to be, that they believed that charitable uses, as they then existed, were subject to the general rules of the common law, and, consequently, would be subject to the statutory rules which they desired to substitute. Whether this inference be just or not, our conviction remains, that charitable uses may possibly have been overlooked or forgotten, but certainly not meant to be excepted. It was urged upon the argument as a conclusive reason for excepting charitable uses from the general provisions of the revised statutes, that in England they are held not to be embraced within the general words of an act of parliament, but however broad and unlimited the terms of the statutes, are uniformly treated as an exception which the law implies. In proof of this assertion, we were told that the exception in the statute of wills, (34 and 35 H. VIII., c. 5,) by its terms, renders every devise to a corporation void, whatever its intent or object; and yet a devise to a corporation for a charitable use, it has been frequently decided, as not within the statute is valid. So, also, that the terms of the statute of uses (27 Hen. VIII., c. 10) are general, comprehending all uses; and yet

it has never been held nor supposed that, under the statute, a charitable use is or can be executed. Such uses are an admitted exception. To the argument drawn from the construction of the statute of wills, Ch. J. Marshall has replied and we shall give the reply, without the addition of a word, in his own clear and forcible language. In the case of the Baptist Association *v.* Hart's Executors, (4 Wheat. 1,) it was alleged by the counsel for the plaintiffs, as a proof that charitable uses were not derived from the statute of Elizabeth, that before the passage of this act it was held that a devise to a corporation for a charitable use, notwithstanding the exception in the statute of wills, was good in equity. It was in reply to this allegation that the chief justice, in delivering the judgment of the court, said, 'We think we cannot be mistaken when we say that no case was decided between the statute of Hen. VIII. (the statute of wills) and the statute of Elizabeth in which a devise to a corporation was held good in equity. Such a decision would have overturned principles uniformly acknowledged in that court. The cases of devises that have been held good, were decided since the statute of Elizabeth on the principle *that the latter statute, so far as relates to charities, repeals the former.*' (4 Wheat. 40.) The language of Mr. J. Story, in the most instructive of his works, upon the same point, is just as explicit. 'Devises to corporations,' he says, 'which are void under the statute of Henry VIII., are made good solely by the statute of Elizabeth; for it is plain that a devise, void by statute, cannot be made good upon any principle of general law' (2 Story's Eq. Jur. 1152); a remark which, considering the subject to which it was applied, is equivalent to saying that where the words of a statute are general, there is no principle of law that can justify a court of justice in creating an exception that is not created by the statute itself. We cannot here forbear from an observation that seems hitherto to have escaped the attention it deserves. If devises to a corporation for charitable uses, or in trust for a corporation for a similar use, (for it is only upon the same principle that even these have been held to be good, Attorney-General *v.* Downing, Ambl. 550; Adlington *v.* Andrews, 3 Atk. 141,) are rendered valid in England solely by force of the statute of Elizabeth, it inevitably follows that with us all such devises, since the repeal of that statute, must be void, even upon the supposition that a charity not inconsistent with the general rules of law, may still be created. The plain, unequivocal meaning of the decisions is, that it was competent to the legislature alone to except any class of devises from the operation and effect of the general words in the statute of wills; and as the exception thus created no longer exists, it follows that those general words must now be understood in the full extent of their meaning, that but for the statute of Elizabeth would always have been given to them, that is as rendering void every devise to a corporation, or in trust for a corporation, whatever may be its intent and purpose. As to the argument drawn from the statute of uses, exactly the same reply, were it necessary, might be given, that if charitable uses are an exception from the general words of the statute, they are so only by force of the statute of Elizabeth. But, in truth, no such exception exists. Charitable uses are neither within the scope nor the words of the statute of uses. The only design of that statute was to convert equitable into legal estates by annexing the legal title to the equitable right of possession, but the persons, for whose benefit a charity is created have no estate or interest in the lands upon which the statute could possibly operate. They are mere beneficiaries, having the right, and nothing more than the right, to compel the performance of the trust, according to its terms, and the intentions of their bene-

factor. A valid charitable use, must always remain, and can only be enforced, as a trust, unaffected by the provisions of the statute; since, considering it simply as a use, there is not, and never can be, any person in whom it can be executed. As the rents and profits are to be applied to the benefit of a succession of persons in perpetuity, there is not, and never can be, a *cestui que trust* to whom the legal estate, if that of the trustees is divested, can be given, without destroying the charity and defeating forever the intentions of its founder. As those that have now been stated were only instances that were cited to prove that in England, it is an established rule of construction that charitable uses are not covered by the general words of a statute, we must be permitted to doubt, until more pertinent and conclusive evidence shall have been given, whether in the English courts the supposed rule has ever been admitted, or even suspected, to exist. We have ourselves been unable to discover the faintest trace of its existence, and until otherwise convinced, must continue to think, with Ch. J. Marshall, that a decision such as the rule would require to be made, would overturn principles that courts of equity as well as of law have uniformly acknowledged. We do not at all share the apprehensions that have been expressed as to the consequences that may ensue, if that construction of the revised statutes shall be adopted, which our remarks have implied to be necessary. The benevolence of Christian and other philanthropists will not be unduly restrained; an ample scope will still be left for its beneficent action. Charitable and public uses are not abolished by subjecting them to the provisions of the revised statutes. For these purposes, if the alienation of the capital is not improperly restricted, donations and bequests of money may still be made to any amount, and the proceeds of real estate, directed to be sold, may be similarly applied. Practically, the principal effect will be found to be, that lands cannot be granted or devised so as to render them thereafter forever inalienable, without the assent of the legislature, unless they are granted or devised to a corporation, that by law is authorized to take, and bound to retain them. The necessity of an appeal to the legislature, in other cases where perpetuities are sought to be created, we cannot regard as an evil. When a new and plainly meritorious charity is meant to be founded, such as an hospital, an asylum, a library, a college, or a school, none of us can fear that the sanction of the legislature will ever be withheld; nor will it be deemed a subject of just regret that when the aid of the legislature is required, it will have the opportunity of considering, whether the claims or fair expectations of wives, children, or relatives, have been overlooked and sacrificed. Under our present system, such as we suppose it to exist, and considering the restraints that are now laid upon corporations, their incapacity to take by devise, and the limited amount of property which they are permitted to hold, we need not the English statutes of mortmain; but revive the English doctrine of pious and charitable uses in its original extent, and the necessity of such statutes will soon be apparent. In this, as in every other country, where such uses have been suffered for a time to prevail, without restriction, there will be an inundation of abuses, which the utmost power of the legislature will be required to stem, repel, and overcome. There are some other considerations to which, as suggesting topics of useful reflection, it may be expedient to advert. If charitable and pious uses, without limitation or restraint, notwithstanding the repeal of the statute of Elizabeth and notwithstanding the express provisions of the revised statutes, now constitute a part of our unwritten law, where shall we find, who shall declare to us, the rules by which they are to be

governed? How are they to be classed, limited and defined? What is a charitable? what a pious use? In England, charitable uses are enumerated and defined in the statute of Elizabeth, and it is settled, that none can be sustained as such, that the provisions of the statute may not be construed to embrace. (Brown *v.* Yeates, 7 Vesey 50 n.; Morrice *v.* Bishop of Durham, 9 Vesey 30, S. C. 10 Ves. 523; Ommany *v.* Butcher, 1 Turn. & Russ. 260; Vesey *v.* Sampson, 1 Sim. & S. 69; 2 Story Eq. Jur. § 1155, 56, 57.) Hence, when the question arises, whether a particular use is valid as charitable, it is readily solved by a reference to the statute, and the decision under it. But to us as the statute is repealed, neither its terms, nor the decisions under it, can any longer furnish a guide, and either the whole subject must be committed to the uncontrolled and arbitrary discretion of judges, or every trust, that assumes the name and wears the form and face of charity, without discrimination, must be sustained. Benevolence is the most amiable of virtues, and more than any other commands our sympathy and applause; but more than any other it needs the aid of enlightened reflection, and the direction and control of a sound judgment; and, if the execution of every trust that a mistaken philanthropy may create, must be decreed, courts of equity will frequently discover that instead of relieving distress, promoting industry, or assisting virtue, they are efficient agents in supporting the idle, encouraging the dissolute, and protecting the criminal. As to pious uses, if any are to be sanctioned other than those which are included within the general object of religious corporations, the difficulties are still greater. In England, while pious uses are retained, those which have been branded as superstitious have been abolished, and none are deemed pious but such as are strictly consistent with the orthodox faith of Protestant Christians. But with us, it is plain, that no such distinction can be admitted. With us, as all religions are tolerated, and none is established, each has an equal right to the protection of the law; and, consequently, all uses directed to a religious object must be equally proscribed, or all must be upheld as pious, which are consecrated by the faith of any description or class, not merely of Christians, but believers. Hence, if the Presbyterian and the Baptist, the Methodist and the Protestant Episcopalian, must each be allowed to devote the entire income of his real and personal estate, forever, to the support of missions, or the spreading of the Bible, so must the Roman Catholic his, to the endowment of a monastery, or the founding of a perpetual mass for the safety of his soul; the Jew his, to the translation and publication of the Mishna or the Talmud, and the Mohammedan, (if in that *colluvies gentium* to which this city, like ancient Rome, seems to be doomed, such shall be among us) the Mohammedan his, to the assistance or relief of the annual pilgrims to Mecca. Upon the whole, we are certainly inclined to think that it is better that judges shall say, as it seems to us the legislature has said, that no use or trust can be valid that the revised statutes have not authorized, and that the absolute power of alienation, in respect both to real and personal estate, shall not be suspended for a longer period than the statutes allow, 'by *any limitation or condition whatever.*' (1 R. S. § 15, p. 723; § 1, p. 773.) These rules, as general, we believe are safe and salutary, and when in special cases they need to be relaxed, the legislature has the power to relax them. That power has already, in many cases, been wisely and beneficially exercised. (Laws 1840, ch. 318, § 1, 2, 3, 4; Laws 1841, ch. 261; Laws 1839, ch. 174, § 1, 2, 3; Laws 1839, ch. 184, 2 R. S. 3d ed. pp. 23, 24, 25.) And let it be remembered, that by its exercise, the legislature has virtually adopted that construction of the

statutes which we have supposed that their terms necessarily import. And that the revisers, by incorporating the provisions of the acts to which we refer, in a separate article, in the title relative to the nature and qualities of estates in real property, have clearly shown that they regarded them as exceptions to the general rules which that title was meant to establish. (2 R. S. 3d ed. p. 23.) We shall not pursue remarks which, although they are far from having exhausted a subject of wide extent and deep interest, have led us further than we intended, but shall proceed to state briefly the result of our opinion. As we have declared that the devise to the trustees of the Methodist Church, and the trust annexed to it, are illegal and void, it is a necessary consequence that the direction to the executors to accumulate the residue of the personal, and the rents and profits of the real estate, for the purpose of building a house on the lot in Brooklyn, cannot be supported. That direction could only have been sustained as ancillary to the principal trust, and therefore a constituent part of a valid charitable use. Separated from the trust, it is clearly void, not only from the failure of its object, but as directing an accumulation for a purpose not authorized by law, and as involving an indefinite suspense of the power of alienation." And again in 1850, in Andrew *v.* Bible Society, 4 Sandf. 178: "As a general rule chancery has no power to compel the performance or decree the execution of a trust where there is neither a trustee nor a *cestui que trust*. The trust is then wholly void in equity as well as at law and this is emphatically true when the trust involves a perpetuity; when, as in the present case, it locks up forever the capital of the property or fund which it embraces and calls for a perpetual succession of trustees to administer the income. Let it be admitted that pious and charitable uses are an exception from these general rules, it by no means follows that we are bound, or have the power, to execute the present trust. We have recently held, in the case of Ayres *v.* The M. E. Church, that where a charitable use is general and indefinite, no persons being certainly designated as objects of the intended bounty, the administration of the trust, if there is no trustee, belongs in England, not to the Court of Chancery, but to the crown, so that the Chancellor, in decreeing the execution of the trust, is acting not in the exercise of the rightful and proper jurisdiction of his court but as a delegated minister of a royal prerogative. * * When the will took effect (1822), the Court of Chancery in this state could not rightfully compel the performance or in any mode decree the execution of a charitable use creating or involving a perpetuity, unless where the property was given to a corporation which by the terms of its charter was enabled to accept and execute the trust. * * It appears to us quite incredible that an enlightened legislature, when it repealed the statute of Elizabeth and the statutes of mortmain, meant to disregard and overrule the soundest measures of public policy and established a system which the wisdom and experience of ages have condemned and rejected. It is therefore incredible, that it meant to give to every individual the power of rendering his whole estate real and personal forever inalienable by devoting its income forever to any use or purpose that he might deem, or others persuade him to believe, was pious or charitable. In other words, it is incredible that the legislature meant to enable every individual under the form of a trust to found a corporation unlimited in its duration and incapable of dissolution, having no power to dispose of its property, yet unrestricted as to the amount it may hold. In the present case we go still further and shall refer our denial of the power of our Chancellor to sustain and execute a trust similar to that which the legacy

creates, to a much earlier period than the repeal of the statute of Elizabeth. The use attached to this legacy is not a charitable use, in the usual and legal sense of the term. It is strictly a *pious* use, not otherwise charitable than as the noblest office of charity is the dissemination of religious truth, but it is impossible for a court of justice to sustain a use upon this ground, unless in a country where the truths of religion have been settled and defined by law, or judges have a discretionary power to determine and declare them. If, at any period in the juridical history of this state, it has been within the power of our court of chancery to decree the execution of a pious use violating the general rules of law, this branch of its jurisdiction was in our judgment wholly abolished long before the statute of Elizabeth was repealed. It was wholly abolished when the constitution of 1777 was adopted." (Rev'd on this point, 8 N. Y. 559.) So, in 1851, in the language of Green, J., in Dickson *v.* Montgomery, 1 Swan 248: "The following propositions may be stated as being established: 1st. The duties and powers which in England belong to the prerogatives of the crown in reference to idiots, lunatics, and charities, and which are vested in the Lord Chancellor by the king's warrant, under his signs manual do not exist in our chancery courts. 2nd. No powers other than those which in England were exercised by the Chancellor by virtue of his extraordinary jurisdiction exist in our chancery court. 3rd. Trusts for charitable uses are favored by courts of equity and will be supported in the exercise of the extraordinary jurisdiction of the chancellor in cases where the trust would fail for uncertainty were it not a charity. 4th. If the fund be vested in a trustee and be managed and controlled by him for a lawful definite, charitable use the gift will be valid though there is no person in being capable of suing for the enforcement of the trust. 5th. Such provisions of the Stat. 43 Eliz. chap. 4 as were the law before the enactment of that statute, and which are applicable to our institutions are in force here as part of our common law notwithstanding the statute is not in force." In 1853, in the case of Williams *v.* Williams, 8 N. Y. 541, Mr. Justice Denio, in an opinion since criticised and overruled in part, says: "It has always been strenuously maintained by those who have resisted an alleged charitable donation, that the law of charitable uses originated in, and was created by, the statute of 43d Elizabeth, chapter 4; and that statute having been repealed in 1788, among the mass of English statutes which were not revised or re-enacted, it is plausibly, if not conclusively argued from these premises, that the doctrine referred to has no existence in this state. (Stat. 1788, ch. 46, § 37). This argument is usually answered by a reference to cases adjudged in the English courts prior to the 43d of Elizabeth, showing that the peculiar law of charities was known and recognized before the statute, and to the opinion of distinguished judges in equity, who have affirmed that grants and devises to charities, which would be void for this doctrine, were sustained in England as well before as since the statute. These adjudications and dicta, have been so often cited and commented upon, that it is unnecessary to do more than, to refer to the books where they may be found collected. (McCartee *v.* The Orphan Asylum, 9 Cow. 437, per Jones, Chancellor; Executors of Burr *v.* Smith, 7 Vermont, 241; Vidal *v.* Girard's Executors, 2 Howard, 127; Story's Commentaries on Eq., ch. 31, § 1136 et seq.) From a careful examination of these authorities, I have come to the conclusion that the law of charities was at an indefinite but early period in English judicial history, engrafted upon the common law: that its general maxims were derived from the civil law, as modified in the latter periods of the Empire by the eccle-

siastical element introduced with Christianity; and that the statute of charitable uses was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force. The provisions of the statute itself afford irresistible evidence to my mind, that such was its design and effect. It recites that whereas lands, &c., (enumerating almost every species of property, including goods and stocks,) have been given, limited, appointed and assigned for relief of aged, impotent and poor people, &c., (enumerating the several descriptions of charity, including gifts for education,) '*which lands, &c., have not been employed according to the charitable intent of the giver;* for remedy whereof,' the lord chancellor and chancellor of the Duchy of Lancaster, are authorized to issue commissions into the several dioceses, directed to the bishop and his chancellor and others, to inquire by a jury, as to such gifts as are before enumerated, and the abuses of them, and to make orders, decrees and judgments for the employment of the property for the purposes for which it was given; which orders are to be certified unto the Court of Chancery, there to be executed, until altered by the lord chancellor upon complaint of the party grieved. This is the substance of the first section. The second and third sections except the colleges within the universities, and certain municipal corporations, and corporations having visitors appointed by the founders, from the operation of the act. The fourth section preserves the jurisdiction of the ordinary. The fifth forbids any party interested from being named as commissioner. The sixth saves the rights of purchasers for a valuable consideration, without notice or fraud, of property given to a charity, from the jurisdiction of the commissioners; but authorizes orders for recompense to be made against those who are guilty of a breach of trust. The seventh exempts from the jurisdiction of the commissioners, grants made to the sovereign during the last three preceding reigns. The eighth and ninth sections provide for certifying the acts of the commissioners into the Court of Chancery, and for their execution by the orders of the lord chancellor. The tenth and last section allows parties aggrieved by the orders of the commissioners to complain to the lord chancellor, who is authorized to annul, alter, or enlarge the decrees of the commissioners, 'according to the intent of the donors,' and to tax costs against such as shall complain without cause. (See the statute at length in Viner's Ab., tit. Charitable Uses, (a) and 2 Stat. at Large, 708.) That the proceedings authorized by this statute were exceptional in their character, and not the exercise of the general jurisdiction of the court is apparent, not only from the scope of the enactment, but from several cases adjudged soon after it was passed. In Windsor *v.* The Inhabitants of Farnham, (Cro. Car., 40,) exceptions against a decree of the commissioners had been put in and the decree was confirmed in part and altered in part; and the question was whether the order of the lord chancellor could be examined upon a bill of review; and it was resolved by the chief justice and the chief baron, and two justices of the king's bench, to whom the question was referred, that the bill of review was not allowable; 'but the decree in chancery,' says the report, 'is conclusive and not to be further examined, because it takes its authority by act of parliament, and the act doth mention but one examination, and it is not to be resembled to a case, where a decree is made by the chancellor by his ordinary authority.' See also Duke on Charitable Uses, (p. 79, pl. 20,) where it is said that a decree of the chancellor under the statute can only be altered by act of parliament: also Saul *v.* Wilson, (2 Vernon,

118,) where it is held that in these cases an appeal does not lie to the house of lords. It has been held that in the cases except from the jurisdiction of the commissioners by the second section, a bill or information must be filed. (Shelford, 295; Duke on Charitable Uses, 93; 15 Ves. 305). In The King *v.* Newman, (1 Lev. 284, anno 1670,) we find the Court of Chancery proceeding to establish a charitable devise, which, but for the charitable feature would have been void by the statute of mortmain, upon an information filed by the attorney-general in the name of the king. The devise was to Trinity College, Cambridge, which was a case expressly excepted from the operation of the statute of Elizabeth. The proceedings by commission under this statute being thus special, it is difficult to perceive how the general jurisdiction over charitable gifts which the Court of Chancery had confessedly exercised upon bill and information for more than a century before the Revolution, can be said to be based on this statute. That the two modes of proceeding are entirely distinct, is further apparent, from a late case, where the question was very much discussed whether the facts were such as made it proper for a commission, or whether it should be proceeded in under the general jurisdiction of the court. (Ex parte Kirkby, Ravensworth Hospital, 15 Ves. 305). These references lead us to receive with confidence the following remarks of the able writer on the law of mortmain and charitable uses: 'Commissioners under this statute (43 Eliz.) have long fallen into disuse, partly by their abuse, and partly because they were found insufficient for prosecuting the claims in many instances; and in others because they were extremely unjust toward the persons who were called upon to account for property, and sought to be charged, and because they generally ended in the court of chancery. The general proceeding, therefore, in the case of charities, has been for many years past, by the *old mode of information* in the name of the attorney general, who brings the matter in question formally upon record, stating the claims that were made upon the individuals charged with a breach of trust, calling upon them to make a defence, and putting their defence upon record, and then having a complete issue upon the record, upon which the judgment of the court of chancery can be founded.' (Shelford, 278.) The whole object of the statute of Elizabeth, seems to have been to provide the form of a remedy against the abuse of charities. That form has been long since abandoned, and relief in that class of cases is now sought under the ordinary forms of justice in use in the court of chancery. The present English doctrine of charities, does not therefore, depend upon the statute, so far as the course of proceeding is concerned; for nothing could well be more dissimilar than the two modes. It cannot be said that the existence of charitable gifts originated in the statute, for the preamble shows that the object in passing it was to reach gifts already in existence; to redress breaches of trust which had been committed by trustees under donations theretofore made. If we suppose charitable donations to have been void before this statute, then the proceedings which it authorizes were intended to strip heirs and next of kin of their property, and to set on foot a class of eleemosynary establishments in violation of vested legal rights. It would have been an act of power which would not have failed to excite the attention of the historians and judges of that age, or of succeeding times; but I have not been able to find that such a view has ever been hinted at. Much significance has been attributed to the repeal of this statute by the legislature of this state; especially as the act of 9 Geo. II ch. 36, restraining gifts to charitable uses under certain circumstances, was not re-enacted, but was also repealed. The

truth is, the statute of charitable uses was wholly inapplicable to the circumstances of this country, and could never have been executed in a single instance if it had been expressly re-enacted. Our political system knows no ecclesiastical divisions, no dioceses, and no bishops. No commission could therefore have ever been issued. This was a sufficient reason for repealing the statute; but besides the English court of chancery had long been accustomed to exercise a jurisdiction over charities quite independent of the statutory proceeding, which had become practically obsolete. No inference can therefore be drawn from its repeal, hostile to the legal existence and validity of charitable gifts. The most which can be said is, that we repealed an obsolete statute providing one mode of enforcing them, which was inapplicable to the situation of the country. The repeal of the statute of mortmain, if it was ever considered in force here, was a more significant act, but of a different tendency, I think from that suggested. We may reasonably infer from it, an intention to give the greatest scope to the founding and endowing of institutions and trusts for promoting education and religion, and for the amelioration of those evils from which society, under the happiest conditions is never exempt. We were in the main destitute of such establishments, while the mother country, from which we had just separated, so abounded with them that it had become necessary to restrain gifts in their favor by public authority. The manner in which the two statutes are dealt with by the legislature of 1788, in my judgment, affords no ground for holding that the peculiar doctrines of charitable uses, and the jurisdiction which the court of chancery exercised over them, were intended to be abrogated, but leads to directly contrary inference. But it is said in cases of charitable trusts, the English court of chancery continually refers to the statute of Elizabeth, to ascertain whether the trust was such a one as it ought to execute. This by no means proves that the jurisdiction was conferred by the statute. There were no reports of cases in chancery prior to the 43d of Elizabeth; but the parliament must be supposed to have been acquainted with the class of cases which had been antecedently held, and which the judges and the legal profession had considered good charitable gifts; and when a question subsequently arose, it was most natural for the court to refer to the legislative definition. The argument was this: At an early day before the practice of reporting, we find that the legislature, when providing a summary process for abuses of charitable trusts, enumerated their various kinds. We take this enumeration as a safe general guide, and such gifts as fall within the description, and such others as bear an analogy to them, we will hold to be valid. Such uses are daily made of ancient statutes, in settling the principles of the common law; and had the statute been repealed in England, instead of becoming obsolete, as was actually the case, it would still be referred to in ascertaining what should be allowed as a valid charitable gift. It was in this sense that Sir William Grant, master of the rolls, referred to the statute, when he said, 'The signification of charity is derived *chiefly* from the statute of Elizabeth. Those purposes are considered charitable, which the statute enumerates, or which by analogies are deemed within its spirit and intendment; and to such purpose every bequest to charity generally shall be applied.' (Morice *v.* The Bishop of Durham, 9 Ves. 405.) So Lord Chancellor Eldon, in the same case upon appeal, declared that 'where the gift was to *charity generally*, it was the duty of the court to decree it to be applied to charity in the sense which the determinations have affixed to that word in this court, viz: either such charitable purposes as

are expressed in the statute, or to purposes having analogy to these.' (10 Ves. 541.) In this country, the question whether a gift to a particular purpose is a valid charitable gift, is to be resolved by a reference to the determinations of the English Court of Chancery, whether that court reposed itself upon the parliamentary definition, or arrived at its judgment in any other manner. I do not think it was ever said by any English judge, that the proceeding in charity cases by information, was authorized by, or founded upon the statute. I concede that the English doctrine is in force here, only so far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court, and where the purpose is illegal or impossible, the claim of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with the prerogative of the crown, and our courts of justice are entrusted only with judicial authority. Where the gift is capable of being executed by a judicial decree, I know of no reason why the court should refuse to execute it. It is unnecessary to decide in this case whether we could proceed upon the notion of approximation, where it is impossible to execute the gift, substantially according to the terms of the grant or devise. My own opinion is, that the distribution of powers among the great departments of the government, which is a fundamental doctrine of the American system, would prohibit the courts from exercising a jurisdiction so purely discretionary. But in this case, there is no occasion for an executive sign manual, or for the application of what is called the *cy pres* doctrine. There is here a good trustee to take the funds in the first instance; and a succession of trustees may be provided by the court by new appointment, as often as circumstances may require. The trust is for the education of the children of the poor, at a particular institution of learning, which I presume to be an incorporated academy; and a rule of ready application is given for selecting the objects of the testator's bounty. It is true that no locality from which the poor children are to come, is prescribed, but practically, they will be chosen from families residing in the vicinity of the academy. If there should be an excess of beneficiaries, it will become the duty of the trustees to select such as are to enjoy the benefit of the legacy. The cases in which the intervention of the king is required are very different. The rule upon this subject is laid down with precision by Sir William Grant, in Ommanney *v.* Butcher. (1 Turner & Russell 260.) 'The law upon cases of this sort,' he says, 'is now reduced to very clear and distinct principles. Where there is *a general, indefinite charitable purpose*, not fixing itself upon any particular object, the disposition is in the king, by the sign manual; but where the gift is to trustees, with *general*, or some objects pointed out, the court will take upon itself the execution of the trust.' 'If he (the executor) is not to take for his own benefit, the consequence is, that if a particular object, as the erection of a school, or even a general object, providing it can be seen what the purpose is, is pointed out, the court will execute the trust; but if there is an absence of discretion in individuals, and the object to which the fund is to be applied is of a general indefinite nature, the law casts the application of the fund upon the king as *parens patriæ*.' The gift in that case was of a residue, 'to be given in private charity.' In Moggridge *v.* Thackwell, (7 Ves. 36,) the same doctrine is laid down by Lord Eldon. The will in that case gave the residue to an individual, 'desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters.' Lord Thurlow had decided that this was suffi-

ciently definite to be executed by the court; and Lord Eldon affirmed the decree on a rehearing. In Cary *v.* Abbott, (Id. 490,) the bequest was for the education of poor children in the Roman Catholic faith, which by the law of England was illegal, and the master of the rolls decreed that the fund should not go to the next of kin, but to such charitable purpose as the king under his sign manual should appoint. (See also Reeve *v.* Attorney Gen., 3 Hare, 191; 2 Story's Eq. Juris. § 1190.) It is only where the purpose is indefinite, as in the case of a gift for charity generally, or has become impracticable on account of the death of a party who was to select the object, or is illegal, as in the case last referred to, that the aid of the crown is required. I have not thus far taken notice of the cases upon this branch of the law in the courts of this state. In Coggeshall *v.* Pelton, (7 John. Ch. R. 292,) decided in 1823, Chancellor Kent decreed the payment of a legacy of personal property, bequeathed to a town for the purpose of erecting a town house, the town not being a corporation; putting the case expressly on the ground of a charitable bequest, and referring to some of the English cases. Clearly it could not have been supported on any other ground than the one on which the chancellor relies. McCartee *v.* The Orphan Asylum Society, (9 Cow. 437,) is streuuously relied on by the respondent's counsel, as a judgment on the precise question, favorable to his position in a court of last resort. The Orphan Asylum Society was a charitable corporation, not authorized to take by devise, and corporations not so authorized, it is well known were excepted from the statute of wills. One Jacobs devised the residue of his real and personal estate for the charitable purposes for which the corporation was created; but the provisions of the will being obscure, it was a question whether the devise was direct to the corporation, or to the executors, in trust for its use. The corporation filed its bill to establish the gift, and Chancellor Jones, before whom the cause was primarily heard, held, that the devise of the legal estate was to the executors, the corporation taking only in trust; or if it was a use executed by the statute of uses, or if the devise was direct to the corporation, it was a devise in trust for the charitable purposes referred to, and that by the law of charitable uses which he held to be in force in this state, the devise could be sustained, notwithstanding the inability of the corporation to take by devise; and in an opinion showing great research and ability, he determined the case in favor of the complainants, both as to the real and personal estate. This decree was reversed as to the real estate by the court for the correction of errors, the only opinion for reversal being given by Mr. Justice Woodworth, in which, as the report states, all the other members of the court who voted for reversal, concurred. The opinion is wholly devoted to the construction of the will and the act incorporating the complainants, upon the questions whether the devise was directly to the corporation, and whether it was authorized to take by devise, notwithstanding the exception in the statute of wills: both of which points he determined against the corporation. Nothing was said respecting the doctrine of charitable uses. The case unquestionably proves, that a corporation not authorized to take by devise, cannot become a devisee of land though it was created for the dispensing of charity, and although the devise was for the charitable purposes which it was formed to administer: further than this it does not go. But this does not call in question any doctrine which has ever been held in England. The chancellor's opinion (admitting that the devise was direct,) can not be sustained without striking out the exception in the statute of wills. The case of Yates *v.* Yates, (9 Barb. S. C. R.

324;) Ayres *v.* The Trustees of the M. E. Church, (3 Sandf. S. C. R. 351;) Andrew *v.* The New York Bible and Common Prayer Book Society, (4 Id. 156;) Kneiskern *v.* The Lutheran Churches, (1 Sandf. Ch. R. 439;) and Shotwell *v.* Mott, (2 Id. 46,) being recent adjudications in courts of original jurisdiction, could not be properly availed of as precedents, if they were in harmony with each other; but moreover, the first three of them question or repudiate the existence of the law of charitable uses in this state; while the other two affirm it to be in force here, and base relief upon it. Several of the most prominent of the cases in the Supreme Court of the United States, and of the sister states, have been referred to; but among these again, there is not entire harmony, though the weight of judicial opinion is greatly in favor of the existence of the doctrine in this country. I refer particularly to the cases of Vidal *v.* Gerard's Executors; and Inglis *v.* The Trustees of the Sailors' Snug Harbor, in the Federal court; The Executors of Burr *v.* Smith, in Vermont, and Going *v.* Emery, in Massachusetts, for elaborate examinations of the subject, and precedents for the conclusion at which I have arrived. On a question where learned courts and judges have differed so widely, it is not becoming to dogmatize; but I feel bound, nevertheless, to express a firm conviction that the bequest under consideration is valid as a charitable gift; and that the repeal of the English statute of charitable uses has no just influence upon the question. There is nothing in the situation or circumstances of this country, or in our form of government, which renders the general principles of the law of charity, as understood in England, inapplicable to us. The duty of providing for the poor and necessitous, in respect to their physical wants, as well as in regard to their religious, moral and intellectual well being, does not depend upon the form of government, but is equally binding, whether the people are governed by representative institutions, or by hereditary rulers. Nor does the consideration that a religious establishment is forbidden, and that all preferences among religious denominations are prohibited, require the abolition of the law of charity. Should it be conceded that the practice of systematic charity, and the legal sanctions by which it is regulated and sustained, were introduced into civilized society along with Christianity, this would not prove them to be inconsistent with our institutions. Waiving the examination of the question how far or whether to any extent, Christianity in this state is a part of law of the land, it may be safely affirmed that there is nothing in our institutions hostile to the general doctrines of the Christian religion. Although Christianity is not the religion of the state, considered as a political corporation, it is, nevertheless, closely interwoven into the texture of society, and is intimately connected with all our social habits, customs, and modes of life. The provision for creating religious corporations, recognizes the duty of the government to provide facilities for voluntary establishment for public worship. A legally organized system for protecting and preserving gifts and donations in aid of Christian charity, would fall within the same principles, and would be equally unobjectionable. When, therefore, we find in the common law of England, which, so far as it is consistent with our political condition we have adopted, certain principles already established respecting voluntary conveyances to charity, I can see no reason growing out of our rejection of the principle of a state religion, for holding that they are inapplicable to our situation. The research of another member of the court has brought to light an authentic piece of evidence to prove that the English doctrine of charities was considered in force in this colony prior to the revolution.

In a manuscript volume of the orders of the court of chancery, under the colonial government, which is preserved in the office of the clerk of the court of appeals, there is found a record of the proceedings in a case determined in that court, held before the governor and council, in the year 1708, which bears directly upon the question. The attorney general filed an information against William Cullin, to compel the payment of seventy-five pounds, bequeathed by one Nicholas Cullin for the benefit of the poor of New York and Albany, which was directed to be distributed by certain trustees named in the will,—fifty pounds among the poor people in New York, and twenty-five pounds to those in Albany. The bill of complaint alleged that the defendant, under a power of attorney from the executor in England, had possessed himself of the testator's estate in the colony, 'out of which, according to equity, he ought to have paid the legacies aforesaid, *forasmuch as the said legacies were given to pious and charitable uses.*' 'And as the preservation of charitable uses is of great public benefit, and great concern to our Lady the Queen, and the poor aforesaid, in consideration whereof,' &c., the attorney general prayed that the defendant might answer, and be decreed to pay the amount, &c. The defendant answered, and the cause being heard upon the pleadings, a decree was made that he should pay to the trustees the amount of the legacies to be distributed to the poor according to the will of the testator." In 1857 followed the Dublin case, 38 N. H. 510, where it is said by Perley, C. J.: "When the terms used in the instrument creating the trust are broad enough in the most extended sense that can be given to them upon the common principles of interpretation to include the religious opinions in question, it will be inferred that the intention was to have it in the discretion of the trustee to apply the fund for the support of those opinions. If the donor intended to insist on a more limited application of his charity, it will be supposed that he would not have left his intention to be gathered by a narrowed construction of general and doubtful terms on an appeal to courts of law: especially if there were other appropriate terms in common use by which his intention might have been placed beyond doubt or cavil. This rule for construing the language used by the founder of a religious charity to designate the doctrines to be supported is recognized in numerous cases and so far as I am informed, denied in none. It was laid down by Walworth Chancellor in Miller *v.* Gable 10 Paige 62, and Gardner Pres. says in the same case, 2 Denio 548: 'I cordially agree with the Chancellor in opinion that it must be a plain and palpable abuse of a trust which would induce a court of equity to interfere respecting a controversy growing out of a difference in religious and sectarian tenets.' In the Attorney General *v.* The Meeting house in Federal Street, 3 Gray 58, the rule is thus stated by Shaw C. J.: 'An owner of property may dispose of it in trust to maintain and inculcate any doctrines of Christianity clearly and specifically designated; but he must do it in terms so clear as to leave no doubt of his intentions. The remarks of Walworth C. in the Baptist church *v.* Witherell, 3 Paige 296, and of Lord Eldon in Attorney General *v.* Pearson 3 Meriv. 402 and of Maule J. in his opinion given to the Lords in Shore *v.* Wilson, 9 Cl. & F. 499, bear upon the same point.' * * * 'When a fund is given to a voluntary society which is afterwards incorporated, the fund vests in the corporation; so if a fund is given in trust for a voluntary society afterwards incorporated, the fund would be held in trust for the corporation. Kniskern *v.* the Luth. Charities, 1 Sandf. Chancery 142; Presbyterian church *v.* Executors of Daimon, 1 Dessau. 154.' * * 'Witnesses have been examined who say that they have made the doctrines and

history of the Congregational denomination, a particular study and the opinions derived from the study of books and treatises on the subject would be offered to show the general meaning of the term, minister of the Congregational persuasion. I think such evidence is not competent. * * * The authorities appear to be quite decisive against the admissibility of such evidence. We are of opinion that the general meaning of the terms used in this will, whether it depends on existing or former usage, must be determined by the court as matter of law without aid from the testimony of witnesses to their opinions; and that to ascertain the meaning we may resort to history and works and treatises of acknowledged authority which have been brought to our notice in the arguments of counsel and by the testimony of witnesses or what we have met with in the course of our own inquiries." And see the opinion in 1860 in Chambers *v.* St. Louis, 29 Mo. 543: "In maintaining the proposition that the charity created by the will of Mullanphy can be enforced in our courts, we meet with no difficulty in finding cases in support of it. We are not of the opinion that charities derive their existence from the 43 Eliz. That statute was passed to provide remedies for abuses in the management of charities and not for the purpose of giving validity to them by new force. It referred to them as existing things and gave an additional remedy to prevent them from being diverted from the objects for which they were created. If the whole jurisdiction of equity over charitable uses and devises was grounded on the statute of Eliz. then we are driven to the conclusion that as the statute has never been re-enacted our courts of equity in this country are cut off from a large field of jurisdiction over some of the most interesting and meritorious trusts that can possibly be created and confided to the authority of men." And in 1867, Gray, J., says in Jackson *v.* Phillips, 14 Allen 574: "Much confusion of ideas has arisen from the use of the term *cy pres* in the books to describe two distinct powers exercised by the English Chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objection of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, 'The doctrine of *cy pres* goes to the utmost verge of the law, and we must take care that it does not run wild;' and Lord Eldon, 'It is not proper to go one step farther.' Brudenell *v.* Elwes, 1 East 451; S. C. 7 Ves. 390. 1 Jarman on Wills, 261–263. Sugden on Powers, c. 9, sect. 9. Coster *v.* Lorillard, 14 Wend. 309, 348. The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it. It is by the sign manual and in cases of the first class, that the arbitrary dispositions have been made, which were so justly condemned by Lord Thurlow in Moggridge *v.* Thackwell, 1 Ves. Jr. 469, and Sir William Grant in Cary *v.* Abbot, 7 Ves. 494, 495; and which, through want of due discrimination, have brought so much discredit upon the whole doctrine of *cy pres*. Such was the case of Attorney-General *v.* Baxter, in which a bequest to Mr. Baxter to be distributed by him among sixty pious ejected ministers, (not, as the testator declared, for the sake of their nonconformity, but because he knew many of them to be pious and

good men and in great want,) was held to be void, and given under the sign manual to Chelsea College; but the decree was afterwards reversed, upon the ground that this was really a legacy to sixty individuals to be named. 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; 7 Ves. 76. Such also was the case of Da Costa *v.* De Pas, in which a gift for establishing a jesuba or assembly for reading the Jewish law was applied to the support of a Christian chapel at a foundling hospital. Ambl. 228; 2 Swanst. 489 note; 1 Dick. 258; 7 Ves. 76, 81. This power of disposal by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, 'intrusted and empowered to see that nothing be done to the dishersion of the crown or the propagation of a false religion;' Rex *v.* Portington, 1 Salk. 162; S. C. 1 Eq. Cas. Ab. 96; or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws; Dig. 33, 2, 17; 50, 8, 4; Code, lib. 1, tit. 2, c. 19; tit. 14 c. 12; is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal. 4 Dane Ab. 239. Gass *v.* Wilhite, 2 Dana, 176. Methodist Church *v.* Remington, 1 Watts, 226. The second class of bequests which are disposed of by the king's sign manual is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it. Boyle on Charities, 238, 239. Attorney-General *v.* Syderfen, 1 Vern. 224; S. C. 1 Eq. Cas. Ab. 96. Attorney-General *v.* Fletcher, 5 Law Journal (N. S.) Ch. 75. This too is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. Moggridge *v.* Thackwell, 7 Ves. 69-81. Dwight's Argument in the Rose Will Case, 272. It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the Commonwealth as succeeding to the powers of the king as *parens patriæ*. 4 Kent Com. 508, note. Fontain *v.* Ravenel, 17 How. 369, 384. Moore *v.* Moore, 4 Dana, 365, 366. Whitman *v.* Lex, 17 S. & R. 93. Attorney-General *v.* Jolly, 1 Rich. Eq. 108. Dickson *v.* Montgomery, 1 Swan, 348. Lepage *v.* Macnamara, 5 Iowa, 146. Bartlet *v.* King, 12 Mass. 545. Sohier *v.* Massachusetts General Hospital, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that 'the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.' Declaration of Rights, Art. 30. The jurisdiction of the Court of Chancery to superintend the administration and decree the performance of gifts to trustees for charitable uses of a kind stated in the gift stands upon different grounds; and is part of its equity jurisdiction over trusts, which is shown by abundant evidence to have existed before the passage of the Statute of Charitable Uses. Sir Francis Moore records a case in which a man sold land to another upon confidence to perform a charitable use, which the grantor declared by his last will that the grantee should perform; 'the bargain was never enrolled, and yet the lord chancellor decreed that the heir should sell

the land to be disposed according to the limitation of the use; and this decree was made the 24th of Queen Elizabeth, before the Statute of Charitable Uses, and this decree was made upon ordinary and judicial equity in chancery.' Symons' Case, Duke, 163. About the same time the Court of Chancery entertained a suit between two parties, each claiming to be trustee, to determine how bequests for the weekly relief of the poor of certain towns, for the yearly preferment of poor children to be apprentices, and for the curing of divers diseased people lying by the highway's side, should be 'employed and bestowed according to the said will.' Reade *v.* Silles, (27 Eliz). Acta Canc. 559. A decree in 16 Eliz., confirming a report of the master of the rolls and others to whom a suit for enforcing a charitable trust founded by will had been referred, is cited in 1 Spence on Eq. 588, note. For years before the St. of 43 Eliz., or the similar act of 39 Eliz., suits in equity by some in behalf of all the inhabitants of a parish were maintained to establish and enforce bequests for schools, alms or other charitable purposes for the benefit of the parish, which would have been too indefinite to be enforced as private trusts. Parker *v.* Browne (12 Eliz.) 1 Cal. Pro. Ch. 81; S. C. 1 Myl. & K. 389, 390; Dwight's Charity Cases, 33, 34; in which the devise was in trust to a corporation incapable at law of taking. Parrot *v.* Pawlet, (21 Eliz.) Carey 47, Elmer *v.* Scot, (24 Eliz.) Choice Cas. Ch. 155. Mathew *v.* Marow, (32-34 Eliz.) and Hensman *v.* Hackney, (38 Eliz.) Dwight's Charity Cases, 65, 77; in which the decrees approved schemes settled by masters in chancery. Many other examples are collected in the able and learned arguments, as separately printed in full, of Mr. Binney in the case of Girard's Will, and of Mr. Dwight in the Rose Will Case. And the existence of such a jurisdiction anterior to and independent of the statute is now generally admitted. Vidal *v.* Girard, 2 How. 194–196, and cases cited. Perin *v.* Carey, 24 How. 501. Magill *v.* Brown, Brightly, 346. 2 Kent Com. 286–288, and note. Burbank *v.* Whitney, 24 Pick. 152, 153. Preachers Aid Society *v.* Rich, 45 Maine, 559. Derby *v.* Derby, 4 R. I. 436. Urmey *v.* Wooden, 1 Ohio State R. 160. Chambers *v.* St. Louis, 29 Missouri, 543. 1 Spence on Eq. 588. Tudor, 102, 103." * * * "It is accordingly well settled by decisions of the highest authority that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery." Our last citation of judicial opinion is that of Judge Buskirk, in 1871, in Grimes *v.* Harmon, 35 Ind. 249: "We lay down the following principles of law as applicable to the case under consideration, and which are clearly deducible from the foregoing authorities. 1. The jurisdiction of the English Court of Chancery has several branches, and is derived from various sources. The most important branch of its power is that general one

which exercises, under and in virtue of its judicial capacity, as a court of equity, in common with the court of exchequer; but besides this extensive equity jurisdiction, it has other powers which are peculiar to itself. Of these powers, the most important and extensive are the prerogative powers, which are not judicial, but are exercised by the lord chancellor merely as the representative of the sovereign, and by virtue of the King's prerogative as *parens patriæ*. The third and remaining branch of its jurisdiction was created and conferred upon the lord chancellor as the keeper of the great seal and of the King's conscience, by the statute of 43 Elizabeth, known as the statute of Charitable Uses, which created a new and ancillary jurisdiction by commission to be issued out of the high court of chancery, to inquire whether the funds given for charitable use had or had not been misapplied, and to see to their proper application. 2. That this prerogative power is derived directly from the king and under his sign-manual, and was not conferred by the statute of forty-third Elizabeth, known as the statute of charitable uses. 3. That the statute of 43 Elizabeth created no new law upon the subject of charitable uses, but simply defined what objects are included in the term charities, and only created a new and ancillary jurisdiction, a jurisdiction created by a commission to be issued out of the Court of Chancery, to enquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that statute; that the persons selected and the machinery provided for the enforcement of the new remedy were local to the kingdom of Great Britain, and have no existence in this State, and are wholly unsuited to our laws, institutions, and modes of administering justice; that the General Assembly having failed to provide any mode or machinery for the exercise of the new jurisdiction created by the said statute, the courts of this state possess no power or means of executing or enforcing the remedy provided by such statute; and that as the said statute created no new law, nor conferred new rights, and as the remedy provided was local to the kingdom of Great Britain, and is wholly unsuited and inapplicable to our laws and institutions, the power and jurisdiction of our courts over charitable uses have not been increased or enlarged by the said statute. 4. That the prerogative power exercised by the Court of Chancery in England was conferred on such court by the king, who claimed to be the father of all his subjects, and as such had the power and right to direct and control the lord chancellor, who was the keeper of the great seal and of the king's conscience, in the protection and enforcement of the rights of such of his subjects as were unable to protect themselves. 5. That in this country the people are the true and legitimate possessors of all power; that when they created the federal government they did not confer on such government any prerogative power; that if such power exists in the people, it was retained by them in their sovereign capacity; that the people of this State retain all the power that was not delegated to the federal or state governments; that it is expressly declared in our State constitution that the judicial power of the State shall be vested in a Supreme Court, in Circuit Courts, and in such inferior courts as the General Assembly may establish, and that such courts shall have such civil and criminal jurisdiction as may be prescribed by law; that the General Assembly has only conferred upon the courts of this State judicial power and functions; that the courts of this State having no prerog-

ative power, and being incapable of administering and enforcing the remedy provided by the statute of charitable uses, they only possess judicial power, and can only exercise, in reference to charitable uses and trusts, such power and jurisdiction as was and is possessed and exercised by the Court of Chancery in England acting as a court of equity. 6. That a devise or grant to a corporation capable of holding, or to a person or persons, either by name or so described that they can be readily ascertained, for a definite and specific use, is good at law; and the powers of a Court of Chancery are confined to the mere execution of the trust, to secure the faithful application of the fund or property to the use and object indicated in the deed or will; in other words, to carry out the intention of the grantor or testator, as thus expressed. 7. To constitute a charitable use, there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. In case of a grant or demise, where there is no party or parties designated who can take the property, or where they are so uncertain that the court cannot direct intelligently the execution of the trust, the property remains undisposed of, and falls to the heir or next of kin. A Court of Chancery, always acting for the beneficiaries, stops the instant it ascertains that there are none, or that they are so uncertain that it will have to act in the dark when it sets about the application of the trust. 8. That the jurisdiction of the Court of Chancery is not to create a trust. Its powers in this country are merely to direct the execution of the donor's intention, and to prevent the object from being deprived of the benefit intended. The court in all its doings represents the persons, institutions and classes who are to be benefited. It is for the beneficiaries alone that the court interposes; and when invoked by the trustees, it is only that they require the interposition of the court to effect the purpose, and to secure to the beneficiaries the charity of which they should be the just recipients. 9. That the *cy pres* power, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this State on this subject. 10. That a gift to charity is maintainable in this State, if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree, although the beneficiaries are not designated by name or specifically pointed out, if the trustee is invested with full and ample discretion to select the beneficiaries of such charity from the class of persons named; but where the beneficiaries are described, as in this case, as the children both male and female, of the African race in the United States, and where such race consists of about four millions, it will be impracticable to ascertain the beneficiaries, and distribute the proportionate share of such fund to each of such beneficiaries; and where, as in this case, the trustees have no discretionary power to select the beneficiaries from the class named, the devise and bequest are void for vagueness and uncertainty. 11. That there is no difference whether a devise or bequest be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, it is void; and if it be a trust for an indefinite object, the property that is the subject of the trust is not disposed of, and the trust results to the benefit of those to whom the law gives the property in the absence of any other disposition of it by the testator or donor. 12. If the charity does not fix itself upon any particular object, but is general and indefinite, such as the promotion of the

moral and intellectual condition of a race, or the relief of the poor, and no plan or scheme is prescribed, and no discretion is lodged by the testator in certain and ascertainable individuals, it does not admit of judicial administration. In such a case in England the administration of the charity is cast upon the king, to be executed *cy pres*, while in this country the property devised lapses to the next of kin. If, however, in such a case, certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity. 13. That where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the Court of Chancery, that court would supply any defect which might arise in consequence of the death or disability or refusal of the trustees to act, by appointing new trustees in their place; but when no competent trustees were in the first instance appointed, so that no legal estate ever vested, of course no use was raised, and the Court of Chancery acquired no jurisdiction of the case. 14. That it is a well settled rule of construction, that all the parts of a will are to be construed together and in relation to each other, and so as, if possible, to form one consistent whole; and that words and limitations may be transposed, supplied, or rejected where warranted by the immediate context or the general scheme of the will, but not merely on conjectural hypotheses of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument; and that we should place such a construction upon the will as will sustain and uphold it in all its parts, if it can be done consistent with the established rules of law and construction. 15. That over the church, as such, the legal tribunals do not have, or profess to have, any jurisdiction whatever, except to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatures to which they have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church when rights of property and civil rights are involved. 16. The general rule is, that parol evidence of the intention of the testator is inadmissible for the purpose of explaining, contradicting, or adding to the contents of a will; but that its language must be interpreted according to its proper signification, or with as near an approach thereto as the body of the instrument and the state of circumstances existing at the time of its execution will admit of. The doctrine in reference to mistakes in wills is, that courts of equity have jurisdiction to correct them when they are apparent on the face of the will. But the mistake must be apparent on the face of the will, and must be such as may be made by a proper construction of its terms; otherwise, there can be no relief. Parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. 17. In so far as the cases of M'Cord *v.* Ochiltree, 8 Blackf. 15; Sweeney *v.* Sampson, 5 Ind. 465; and The Common Council of Richmond *v.* The State, 5 Ind. 334, decide that the power and jurisdiction of the courts of this state have been increased and enlarged by the statute of 43 Elizabeth, and that such statute can be executed in this state, they are in conflict with this opinion, and to such extent they are overruled." In concluding this review of authorities, we beg leave to call the reader's attention to two remarkable arguments on the American law of chari-

table uses and its history: the one, that of Mr. Horace Binney, in the Girard will case, reported as Vidal *v.* Girard, in 2 How.; the other, that of Prof. Theo. W. Dwight, in the Rose will case, reported in 4 Abb. App., N. Y. Each of these is published at length, separate from the reported case. In the former, on page 206, *et seq.*, Mr. Binney says: "It results from what has been said under my last point, that it is of but little importance whether the 43 Eliz. in all its enactmants, extends or does not extend to Pennsylvania. As a *remedial* act, an act providing a new remedy by commission from the Lord Chancellor, it does not extend. It has never been used in this form. As a *declaration* of certain good and charitable uses it does. Its virtue has sunk into the law of charitable uses, and has come to us with that code. As an elevation of all such uses from the cold protection of the common law, to the warm and genial arms of equity, the nursing mother of trusts, if the statute did this, as some have asserted, and if the statute alone did it, still it did it for England, while the colonies were yet in her womb, and we were cradled in these arms at the first moment of our birth. * * * Lessee of Ex'rs of Brower *v.* Fromme, Addison 365, decided in 1798. In this case where counsel on neither side raised a question about the validity of a charitable use, it being assumed to be valid by both, Judge Addison permitted the executors of a will—the testator's heir being unknown, and there being no chancery powers in the court adequate to the case—to recover in ejectment an estate devised to charitable uses, which the defendant held in violation of the trust. Gregg *v.* Irish, 9 S. & R. 211 in 1820. The Supreme Court sustained the dedication of a lot of ground to 'public uses for the benefit of the present and succeeding inhabitants of the town of Bridgeport to be applied and improved as the proprietors of lots, their delegates, or trustees, or a majority of inhabitants might from time to time order.' Witman *v.* Lex, 17 S. & R. 89. This case, which was decided in 1827, was no doubt occasioned by the decision in the Baptist Association *v.* Hart's Ex'rs, and the Maryland decisions which followed on the same side. The object of one of the charitable uses in question, was the 'education of young students in the ministry of the German Lutheran Church, of which the testator was a member—under the direction of the vestrymen of St. Michael's and Zion's Churches in Philadelphia.' The trustees were two of the testator's friends. The other charitable use was a bequest to the same St. Michael's and Zion's Church Corporation, the interest to be laid out in bread for the use of the poor of the congregation. The cause was argued when Chief Justice Tilghman and Judge Duncan were on the bench, and was decided unanimously by the court, after the death of both those eminent men, but in conformity with the opinion they had declared to the present Chief Justice. The propositions of the court, bearing directly on the decisions they pronounced, were these—that the principles which Chancery has adopted in England, obtain in Pennsylvania, not indeed by force of 43 Eliz., but as part of its own common law; and where the courts of that state are not restrained by the inadequacy of the instrument they are compelled to employ, (since that day made altogether adequate,) they give nearly, if not altogether, the same extent of relief that Chancery does in England. 'It is immaterial whether the person to take be *in esse* or not, or whether the legatee, at the time of the bequest, were a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be held

valid.' p. 93. On the same day the same court gave judgment in the case of The Baptist Church against Shewell's Ex'rs, for a bequest by the testator for the use of that church, which was then unincorporated, and so remained until 1829. So that the case of The Baptist Association *v.* Hart's Ex'rs, was rejected, as the law of Pennsylvania, in a case precisely parallel. McGirr *v.* Aaron, 1 Penrs. Rep. 49, in 1829, was a decision incidentally in favor of a charitable use, to say a perpetual anniversary mass for the testator's soul. The judgment was directly upon the legal title only. The Mayor, &c., of Philadelphia *v.* Ex'rs of James Wills, 3 Rawle 170, in 1831. The devise was of the residue of the testator's estate to the corporation of the city of Philadelphia, in trust to purchase a lot and build an asylum thereon, to be called 'The Wills Hospital for the relief of the Indigent, Blind and Lame;' and to apply the income to the comfort and accommodation of as many 'indigent blind and lame as it would admit of, giving a preference to those of Philadelphia and its neighborhood.' The action was brought to recover from the executors a large residue in money, amounting to 100,000 dollars; and the objection was made that the city was not competent to take such a trust. The court decided unanimously to the contrary, affirming the power of the corporation to take in trust for the charity, and holding that the validity of the charity had been decided in Witman *v.* Lex. The Methodist Church *v.* Remington, 1 Watts, 218, in 1832. The main point in this case was decided adversely to the charity, on the ground that the religious body for whose use the charitable trust was created, were not altogether residents of Pennsylvania. But in delivering the judgment of a divided court, the Chief Justice says, 'The decision in Witman *v.* Lex, is full to the point, that a trust in favor of an unincorporated religious or charitable society is an available one; and were the Methodist society constituted entirely of members resident within the state, would probably rule the case.' It is not improbable that the decision on the main point may hereafter be reviewed by the same court. Ex parte Cassel, 3 Watts, 440, in 1834. This was a devise establishing an Orphan home for the maintenance and education of poor orphan children. The case came before the court upon exceptions to a report of auditors on the account of the trustees, by whom the trust had been abused. The abuses were such as to induce the learned Chief Justice to say, that the case was 'an additional instance of the futility of private charities;' and that 'even when established by law, and provided with the conservative apparatus of visitation, inspection and whatever ingenuity could contrive, these misdirected efforts of benevolence had conduced but to the emoluments of the agents entrusted with their care. So it would ever be, where the vision of the visitor was not sharpened by individual interest.' But notwithstanding these discouraging remarks, the Chief Justice added, that the trust was one 'which the founder had an *undoubted right to create*,' and that it was the business of the court to do what they could for the execution of it. In Martin *v.* McCord, 5 Watts, 494, decided in 1836, Judge Sergeant, who delivered the court's opinion, states the law of Pennsylvania, in terms at once precise and comprehensive; and there is no probability that they will be either controverted or assailed by criticism in that state. It was trespass *quare clausum fregit* by the residuary devisee of a testator who by parol had given or dedicated the *locus in quo* to build a school house 'for the benefit of the neighborhood.' The neighbors, to the number of eleven or more having subscribed and built the school house, the defendants as trustees of the subscribers, entered it according to the trust. The plea was *liberum tenementum*. The judge

below was requested to charge that the trust was vague, uncertain, and void; but on the contrary he charged that the plaintiff could not recover. The language of the judgment is this: 'It is said that this trust is vague and uncertain, that it cannot be ascertained who are the neighborhood'—'But it is not true that the trust is so vague as to be incapable of execution. It is the neighborhood that is to enjoy the benefits of the school, and the extent of the charity must be governed by circumstances. The subscribers were neighbors and they at least would be entitled to the benefit of it; and afterwards, such others, as in the exercise of a just discretion by those who had its management, could be conveniently received and educated there.' 'Charity schools have been favorites in Pennsylvania. They were introduced shortly after the arrival of William Penn, in the parts of the state first settled, and have since been common. No question, till of late years, was ever made of the legal validity of such trusts, and the integrity and benevolence of the founders and managers have, with few exceptions, rendered any aid from the laws unnecessary. Where, however, such establishments were questioned, as in Witman *v.* Lex, they were supported under a common law of our own, which had grown up by general consent and usage, by which, without the direct force of the statute of 43 Eliz. all its beneficent provisions were recognized, so far as they applied to the charitable institutions subsisting among us.' The latest Pennsylvania adjudication is in Zimmerman *v.* Anders, decided by the Supreme Court, in January, 1844. It was an ejectment by Anders and Shultz, poor officers of the Schwenkfelder Society, to recover a messuage and fourteen acres of land, included in the residue of the real estate of Edward Flinn, who had devised the same to 'The Schwenkfelder Society's poor officers' hands, to be for the poor of their Society.' At the testator's death he was a member of this society, which had been for a long time associated for religious purposes; but the society was not incorporated at the time of the death of the testator, or at the time of bringing the suit, but was incorporated afterwards. The main point in the cause was the validity of this charitable use, and the judgment of the court delivered by Sergeant, J., disposes of that point in the following manner: 'That such a devise is good, and that a religious society may take and hold a bequest or devise for charitable purposes, has been too solemnly and repeatedly adjudicated, to be now called in question. No judge of this state has in any case doubted it, and every decision has sanctioned it. And it must needs be so, whether we consider either the uniform understanding and usage of the province and state from its first settlement or the repeated recognitions of these rights and privileges by distinct and peculiar clauses in our constitutions, or the well-known and long-settled principle of our courts, that equity forms a part of the law of Pennsylvania, and that the doctrines of the English Court of Chancery will be enforced in our decisions, so far as they are applicable to our situation, and capable of being administered by the forms of our judicial tribunals, either in a common law proceeding, or in such branches of equity jurisdiction as are expressly given. And though the statute of 43 Eliz. is not in force in Pennsylvania, it would seem it is so considered, rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions. These I conceive have been in force here by common usage and constitutional recognition, and not only these, but the more extensive range of charitable uses which chancery supported before that statute, and beyond it. Of such recognitions of parts of a statute, though the statute itself be not in force, we are not without other examples. It

is unnecessary however to enlarge on a point so often considered, and so fully and ably examined in the various decisions. We think the devise to the plaintiffs clearly good, and that by the settled law of this state they are capable of taking and holding the lots in question, for the purposes expressed in the will.'" Prof. Dwight, on page 308 of his argument, says: "The statutes of 39 and 43 Elizabeth, which established a board of commissioners to enforce charities, subject to an appeal to the Court of Chancery, only created an ancillary jurisdiction. The court, as such, entertained jurisdiction in charity cases contemporaneously with the commissioners. In the reign of Queen Elizabeth the subject of charities attracted more fully than before the attention of the legislature. It was thought expedient to establish a board of commissioners for charitable uses. The first statute regulating the subject is the 39 Elizabeth, ch. 6, (Appendix No. 1, p. 116); the second was passed in the 43d year of the same reign, ch. 4, (Appendix No. 2, p. 120). The true office and functions of these statutes were, not to create a new authority, but to exercise an already existing jurisdiction in a new manner. This is shown:—(1.) *From their Terms and Phraseology.* The first one shows most clearly the intention of parliament. The preamble recites that charitable gifts, which are enumerated, had been and are still like to be *most unlawfully* and uncharitably converted to the lucre and gain of some few greedy and covetous persons, contrary to the true intent and meaning of the givers and disposers thereof; the end of the act being, that the uses may from henceforth be observed and continued according to their true intent and meaning. It is then provided, that the Lord Chancellor, or the Chancellor of the Duchy of Lancaster, (as the case may be), may award commissions to the bishop of the diocese and other persons, with a jury, to inquire of such gifts and of the abuses, misdemeanors, and frauds which have arisen, &c., so that the intent of the donor cannot be performed. The statute 43 Elizabeth is nearly like the first in its phraseology, although the reasons for enacting it are not so distinctly stated. This language is so clear in its meaning that Mr. Boyle says, that the statute *professes* to be a measure purely remedial, and that it leaves the original jurisdiction of the Court of Chancery as before. (Boyle on Charities, p. 12):—(2.) *The Subjects Embraced Within The Statute* lead to the same conclusion. Corporate foundations, as well as those which are unincorporated, legal gifts, as well as those which are equitable, are provided for. Thus a statute passed in the eighteenth year of Queen Elizabeth's reign (18 Elizabeth, ch. 3, p. 9, A. D. 1576,) had exempted all manner of conveyances to the use of the poor from the statutes of mortmain, and had expressly enacted that it should be lawful to give to any person or corporation for their benefit, and yet the poor are mentioned in these acts in the same connection with other gifts and appointments of a charitable nature. These statutes apparently establish a power of visitation. There is no word or line in them which purports to create a *new capacity* to take property. When Parliament intended to give capacity they knew how to express themselves, as will be seen in the 18th Elizabeth just cited, explained by an act passed in the 39th Elizabeth, c. 5, (Appendix No. 1, p. 1,) immediately preceding one of those in question:—(3.) The Decisions of The Courts sustain this view. 'Thus,' says Duke, 'the Commissioners cannot by their decree make a corporation, not before incorporated, and enable them to take charitable uses as a corporation.' They may, however, cause trustees to convey from time to time, so as to keep up the number originally appointed. This, as has been seen could have been done by the Court of Chancery without reference to the statute. (Arnold *v.* Bar-

ker, *supra*, p. 339.) It is true, that some have supposed that an unwarrantable extent was given to uses defectively created *in point of form*, and that this result was arrived at through a forced construction of the words, 'given, limited, appointed, and assigned,' employed in the statute in respect to the methods in which charities were created, and especially of the word 'limited.' The word 'limited' enlarged the power of disposition. (Boyle on Charities, p. 18.) This idea must now give way to the conclusions derived from the Charity cases already cited, which clearly show that the Court of Chancery, in cases of charitable uses, disregard both the Statutes of Wills and the Statutes of Mortmain, (Charity Cases, Appendix, No. 2.) No decision, it is believed, can be found where the Commissioners were held to have acquired a power to establish a use which, before the Statute of Charities, by the general rules of equity jurisprudence, would have been intrinsically void, nor does any case adjudged by the Commissioners go further than the equity cases already cited. A similar result may be derived from: (4.) The Nature of The Commissioners' Authority. Matters appear to have come before the Chancellor, to have been in part disposed of by him and then to have been referred to the Commissioners. (Duke on Charitable Uses, p. 50.) He would also hear, on original bill, a case, and give general direction as to the charity, and then refer the settlement of the details to the Commissioners, who would assume the place of a Master in Chancery, and make a decree which was substantially in the nature of a Report (Case of the Parish of Gillingham, Charity Cases, Appendix, No. 2, pp. 87-92.) They were not an independent tribunal. It is true, they could make a decree, but could not enforce it if it were disobeyed. They must call on the Chancellor to imprison the recusant party. (Duke on Charitable Uses, p. 158.) If they issued a summons to a party, and he refused to attend, they certified the fact to the Lord Chancellor. This functionary expressly declared in one case, as a reason why the party should appear before them, that otherwise the breach of trust would go unpunished, unless in *Chancery*, which were a *tedious and chargeable suit for poor persons*. (Duke, 69, 5 Charles I. A. D. 1630.) The object of the commission, probably, was to save expense by causing a summary inquiry to be made with a jury in the counties where the property given to charities was situated. It proved to be a piece of cumbrous machinery, and soon fell into disuse. It was wholly in the discretion of the Chancellor to do what he saw fit with their decrees. 'Thus,' says Moore, 'it is in *the breast of the Chancellor* to award the commissions, or to confirm or annul the decrees, by which he can prevent or avoid their multiplicity perfectly well.' It will be remembered that Moore penned the statute of charities. (Rivett's Case, Moore's R., 890.) Shortly before the time of Queen Elizabeth, it had been customary for the Crown to issue special commissions to hear equity causes. This practice, originating in the reign of Henry VIII., was greatly resorted to, at the close of the Queen's reign, on account of the illness of the Master of the Rolls, and the pressing nature of the Lord Chancellor's engagements. The publications of the Record Commissioners have shown the immense amount of business pressing upon the attention of the Chancellor during the reign of Queen Elizabeth. Their list contains titles of eighteen thousand cases, which were commenced during that reign of forty-three years, which confirms Lord Coke's statement that the Chancery causes averaged 400 per year. Many of these cases were closely litigated. The Chancellor only delegated cases which he could have heard if he had seen fit. (Hargrave, Law Tracts, 310.) The Statute Commission of 43 Elizabeth

is thus readily accounted for. It would have been simply impossible for the Chancellor to have heard the cases in the respective counties, and on so important a subject, it was desirable that a commission should have the sanction of a statute. Besides, as the inquiry was to be by jury, legislation was absolutely essential. It will be remembered that charity cases often involved a long and minute inquiry, depending upon ancient documents, and the memory of aged men. It would have been difficult to examine the subject at Westminster, where the Chancellor held his Courts. It was, therefore, very common for the Chancellors to appoint referees living near the county where the property was, as we have seen, selecting, in a number of instances the Justices of Assize who rode that Circuit, and in other cases making the statement that 'the cause was fit to receive an end by gentlemen living near where the lands lie.' It was necessary, in the great modern Commission of Charities, created A. D. 1818, that its members should go from place to place, examining each charity at its particular locality. The proceedings of the Commissioners, under the statute of 43 Elizabeth, were very informal. A case, in one instance, was brought before them while they were making inquiry upon another subject, because they happened to be in the vicinity, and it was convenient to make the inquiry. It is clear that Parliament attached no importance to the act of 43 Elizabeth. It was passed at the close of the session. The bill had its final reading in the House of Lords, Dec. 15th, 1601; it was read the second and third times on the next day. (Journals of the House of Lords, A. D. 1601, pp. 253, 254, 255.) This precipitancy would have been impossible if the effect of the bill was to deprive heirs of their estates.' * * * And further on page 394: 'It only remains for us, now, to review the later decisions in the State of New York, and to examine whether they conflict with the views which have already been expressed. The principal case upon this branch of the law is that of Williams *v.* Williams, decided in this Court A. D. 1853. (4 Selden 525.) The bearing which that case has upon this branch of the argument is, that it admits and directly upholds a charitable trust in personal property given to trustees. The testator appointed three persons a Board of Trustees of a fund which he constituted for the exclusive education of certain children of the poor; and these trustees were authorized to fill up vacancies as they occurred. The sum of $6,000 was given in trust for a perpetual fund for the education of such children. There was also a direct provision for the accumulation of interest until the whole fund amounted to $10,000. There was also a clause that if the powers of the trustees were insufficient, they should make application for a special act of incorporation. The Court held that though, by the general rules of law, the bequest would be defective and void as a conveyance in trust, yet, by the peculiar system known as the Law of Charitable Uses, the gift was valid. The Court, in giving its opinion, states that from a careful examination of certain authorities enumerated, it 'had come to the conclusion that the law of charities was, at an indefinite, but early period in English judicial history, engrafted upon the common law; that its general maxims were derived from the civil law, as modified at the later periods of the Empire, by the ecclesiastical elements introduced with Christianity, and that the statute of charitable uses was not introductory of any new principle, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently enforced.' On page 552, the Court, per Denio, J., says: 'I feel bound, nevertheless, to express a firm conviction that the bequest under consideration is valid

as a charitable gift, and that the repeal of the English statute of charitable uses has no just influence upon that question. There is nothing in the situation or circumstances of this country or in the form of Government, which renders the general principles of the law of charity, as understood in England, inapplicable to us. The duty of providing for the poor and the necessitous, in respect to their physical wants, as well as in regard to their religious, moral and intellectual well-being, does not depend upon the form of government, but is equally binding whether the people are governed by representative institutions, or by hereditary rulers; nor does the consideration that a religious establishment is forbidden, and that all preferences among religious denominations are prohibited, require the abolition of the law of charity. Should it be conceded that the practice of systematic charity and legal sanctions by which it is regulated and sustained were introduced into civilized society along with Christianity, this would not prove them to be inconsistent with our own institutions. Waiving an examination of the question how far, or whether to any extent, Christianity, in this state, is a part of the law of the land, it may be safely affirmed that there is nothing in our institutions hostile to the general doctrines of the Christian religion. Although Christianity is not the religion of the state, considered as a political corporation, it is, nevertheless, closely interwoven into the texture of society, and is intimately connected with all our social habits, customs and modes of life. The provision for creating religious corporations recognizes the duty of the government to provide facilities for the voluntary establishment of public worship. A legally organized system for protecting and preserving gifts and donations in aid of Christian charity would fall within the same principles, and would be equally unobjectionable. When, therefore, we find in the common law of England, which, so far as it is consistent with our political condition, we have adopted, certain principles already established respecting voluntary conveyances to charity, I can see no reason growing out of our rejection of the principles of a State religion for holding that they are inapplicable to our institutions.' This case was followed by Tuckerman *v.* The Rector, Churchwardens and Vestrymen of St. Clement's Church (4 Selden 558). The decree in the Superior Court of the City of New York, which was the court below (3 Sand. S. C. R., 242), was affirmed. No case has been before this court since that period, in which these principles have been shaken. We confidently claim they establish the validity of the trust of this will. The case of Owens *v.* The Missionary Society of the Methodist Episcopal Church, decided three years later (4 Kernan, 380), was the next charity case before this court. In that case certain legacies were bequeathed to a voluntary association then existing, and which, subsequently to the death of the testator, merged in and became incorporated as a Missionary Society. The language of Judge Selden, who gave the opinion of the Court in that case, may be inconsistent with the language used by Judge Denio, in Williams *vs.* Williams; but the case of Owens does not decide any point which conflicts with the judgment in that case. The difficulty in Owens' case was, that there was a direct bequest to an unincorporated body, which had no legal capacity to take property, and that the language of the testator was so indefinite that the trust could not be carried into effect. The Court expressly distinguished that case from Williams *vs.* Williams, because in the latter case the fund was bequeathed to trustees competent to take it. It is not necessary for us at this time to attack what was decided in the Owens case, although *one* of the objections to the validity of that charity is clearly without foundation. Another case very

recently decided in this Court, and to which attention will be next called, is that of Beekman *vs.* Bonsor, (9 Smith, 298; 23 N. Y. Reports). No point was decided in that case adverse to the decision in Williams *vs.* Williams. This, Judge Comstock, who wrote the opinion, expressly holds. He states that the joint authority of both decisions establishes that a gift of charity is maintainable in this state, if made to a competent trustee, and if so defined that it can be executed as made by the donor, by judicial decree, although it may be void according to general rules of law, for want of ascertained beneficiaries (p. 310). It is evident it was not intended by the court to overrule the case of Williams *v.* Williams. There were many *dicta* in that case, but the only point bearing upon the subject now before the court which it was then necessary to decide was, that if a charitable gift is uncertain and indefinite, or can be reduced to a certainty only by the discretion of executors, who renounce the executorship, the trust is void, and the next of kin are entitled to the fund. This of course, does not affect a case where there is no uncertainty,—where positive directions are given to the trustees, and where they do not renounce the trust. The case of Beekman *v.* Bonsor, therefore, may be dismissed from consideration. The elaborate argument of counsel in that case as reported in the appendix to 23 New York Reports (9 Smith 575), was not necessary to the adjudication of the actual points which were presented for decision. A person might admit the main portions of the law of charitable uses, and still agree with the decision in Beekman *v.* Bonsor; though, if all the *dicta* in that case were true, many of the important powers of the court would be so curtailed as to make it well nigh impossible to administer a charity. We think that the plain distinction was overlooked in that case between the validity and the *administration* of a charitable trust. There is nothing in the case of Downing *v.* Marshall, decided by this court last year (23 New York Reports, 9 Smith, 366), which interferes with the trusts of this will. It is true that the court decided that no charitable bequest can be made to an unincorporated association, for religious or charitable purposes, and that no power in trust can operate to give the rents and profits of land to a corporation which is not authorized to take land by will. Neither of these points, however, are applicable, because the true construction of our will requires that the property shall be given to a corporation, and, as we have already shown, to such a corporation as possesses all the powers necessary to carry the charity into effect. Ours, being in the main a gift of personal property, would, so far as that is concerned, also be governed by the general rule that corporations are free to take money or personal property by testamentary gift (same case, p. 73). There is, therefore, no case in the Court of Appeals which interferes with Williams *v.* Williams. It is evident, however, that all these cases, since Williams *v.* Williams, must be again submitted to the court, under the light of the cases in chancery which have been extracted from the reports of the commissioners of charities. It is proper for us to say, with all respect, that this court must recede from some of its positions in these last two cases, in 23 New York Reports, and abandon the *dicta* found in the opinion of individual judges. No case for many years has been of sufficient importance in the amount of property involved to warrant the extended and minute investigation necessary to solve an obscure historical question like this. The judges who have given able opinions upon these questions have not had *our* side of the question presented in all its fullness. The opponents of charities have had their views presented before this court in the ingenious argument in the case of Beekman *v.* Bonsor, above

referred to (9 Smith, p. 575). At that time, those views were not answered by anyone who had given the subject thorough historical investigation." To the foregoing reviews of cases the following synopsis of other leading cases is added in the order of the dates. In 1819 the case of the Baptist Association *v.* Hart, 4 Wheat., (U. S.,) was decided, since dissented from in many cases. In this case Marshall, C. J., says: "There seem to have been two motives and they were adequate motives for enacting this Statute (43 Eliz.)—the first and greatest was to give a direct remedy to the party aggrieved who where the trust was vague had no certain and safe remedy for the injury sustained; who might have been completely defeated by any compromise between the heir of the feoffor and the trustee, and who had no means of compelling the heir to perform the Trust, should he enter for the condition broken. The second to remove the doubts which existed where these charitable donations were included within the previous prohibitory statutes. We have no trace in any book of an attempt in the Court of Chancery at any time anterior to this Statute to enforce one of these vague bequests to charitable uses." See also Wheaton's note on Charities, 4 Wheaton App. Note 1. "The History of the Law of charitable bequests previous to the Statute 43 Elizabeth which is emphatically called the Statute of charitable uses is extremely obscure. Few traces remain of the exercise of jurisdiction over charities in any shape by any Courts previous to that period. Of the jurisdiction of Chancery nothing is ascertained with precision, and the few cases to be found at law turned mainly upon the question whether the uses were charitable or whether they were superstitious within the statute against superstitious uses." In 1820 followed the case of Griffin *v.* Graham, 1 Hawks (N. C.) 96, upholding the jurisdiction of Chancery where there was a trust or trustee with general or specific objects of charity. In 1822, Dashiell *v.* Atty.-Gen., 5 H. & J. (Md.) 392, followed the authority of the Bapt. Assoc. *v.* Hart, Buchanan, J., saying: "The peculiar law of charities originated in the Statute 43 Elizabeth for regulating charitable uses, and independent of that Statute a Court of Chancery cannot in the exercise of its ordinary jurisdiction sustain and enforce a bequest to charitable uses which if not a charity would on general principles be void; and in this we are supported by the decision of the Supreme Court of the United States in Bapt. Assoc. *v.* Hart, 4 Wheat. 1." In 1832, Gallego *v.* Atty.-Gen., 3 Leigh (Va.) 450, was decided to the effect that prior to the Statute of Elizabeth charitable trusts were valid where there was a definite trust—but not otherwise. In 1835, in Burr's Ex'rs *v.* Smith, 7 Vt. 241, Ch. Williams says: "The idea that the jurisdiction of the Court of Chancery upon informations for establishing charities arose since the statute of Elizabeth, and that prior to the time of Lord Ellesmere who was made Lord Keeper in 1596 and Chancellor in 1603 there were no such informations was first suggested by the Earl of Roslyn then Lord Loughborough and I am not aware it has been suggested by any other Chancellor in England." In 1838, in the Dutch Ch. *v.* Mott, 7 Paige (N. Y.) 77, the jurisdiction of chancery over charitable trusts prior to the statute of Elizabeth was upheld; and, to the same effect in 1843, Att.-Gen. *v.* Jolly, 1 Rich. Eq. (S. C.) 99. In 1844, in the case of Vidal *v.* Girard's Ex'rs, 2 How. (U. S.) 127, Story, J., says of the publications of the English Commissioners of Records: "They establish in the most satisfactory and couclusive manner that cases of charities, where there were trustees appointed for general and indefinite charities, were familiarly known to and acted upon and enforced in the Court of Chancery. In some of these cases the charities were not

only of an uncertain and indefinite nature but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take." And following that case in the same year are Kniskern *v.* Lutheran Ch., 1 Sandf. Ch. (N. Y.) 439; Green *v.* Allen, 5 Humph. (Tenn.) 170. In 1846, in McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15, Dewey, J., says: "It is now well established (contrary to the opinions of distinguished Chancellors and writers heretofore entertained) that the English Court of Chancery possesses an inherent jurisdiction which it has always exercised to enforce and effectuate charities which at law were illegal or informal gifts." In 1850, in Yates *v.* Yates, 9 Barb. (N. Y.) 345, the same jurisdiction is admitted to a limited extent; so in 1851, in Dickson *v.* Montgomery, 1 Swan (Tenn.) 348; and in 1853, in Williams *v.* Williams, 8 N. Y. 525; and in 1856, in Carter *v.* Wolf, 13 Gratt. (Va.) 301, and Brooke *v.* Shacklett, 13 Gratt. (Va.) 301; and in 1857, in Hopkins *v.* Upshur, 20 Tex. 89. In 1858, in Tappan *v.* Deblois, 45 Me. 122, it is said by Davis, J.: "In cases of bequests for charitable and other purposes we are satisfied upon a careful examination of all the authorities that our jurisdiction is not exclusively derived from, nor restricted by, the statute of 43 Elizabeth. Burbank *v.* Whitney, 24 Pick. 146. Before that statute courts of chancery may not have had power to enforce trusts for indefinite charities, especially if no trustees capable of taking were interposed, and even since that time if the bequest is so imperfect and vague that the intention of the testator cannot be ascertained it will be declared void. Thus a bequest to A. B. in trust without any designation of the trust would be held to be void or a trust for the heirs-at-law. But if the trust is expressed and is sufficiently definite to be understood and is consistent with the rules of law, it will be enforced either under the statute of Elizabeth or independent of it, and though the bequest is for charitable purposes, if the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees, who are especially appointed for the purpose, a Court of Chancery has jurisdiction over it, independent of the statute, derived from its general authority over trusts. 2 Story Eq., § 1187." In 1860, in the case of Perin *v.* Carey, 24 How. (U. S.) 465, the chancery jurisdiction prior to the statute of Elizabeth was maintained. In 1866 came the case of Bascom *v.* Albertson, 34 N. Y. 584, criticising Williams *v.* Williams, 8 N. Y. 525, Porter, J., saying: "It is conceded on all hands that the theory of the Williams case ought not to be extended. The better opinion seems to have been that such jurisdiction, as chancery exercised prior to the statute of Elizabeth in cases of charity, was deduced from the royal prerogative; and such as it exercised afterwards was in effectuating gifts which in that statute received the specific sanction of the legislative department of the government." In 1867, Robertson, J., says in Cromie *v.* Louisville Orph. Home, 3 Bush (Ky.) 371: "The judicial legislation or rather royal usurpation of the prerogative of changing or making Wills was repudiated by this Court while the statute of Elizabeth was itself recognized as the law of this State. It has also been renounced in some other States." And in the same year, in Heuser *v.* Allen, 42 Ill. 425, says Breese, J.. "These principles of pious legacies under the high authority of the civil law were readily introduced into the Common Law of England anterior to the enacting of 43 Elizabeth ch. 4 known as the Statute of Charitable Uses, and have been known there and recognized for ages. Prior to this Statute however devises to charitable uses generally without imposing a trustee and devises to a non-

existing corporation or to an unincorporated society were held utterly void for want of a person capable of taking as devisee. It was to remedy this defect that this Statute was enacted, providing a mode of enforcing such uses by a Commission under the direction of the Court of Chancery." In 1868, in Norris *v.* Thomson, 4 C. E. Gr. (N. J.) 307, Chancellor Zabriskie says that the statute of 43 Elizabeth was used in England to enlarge the chancery authority previously existing. In 1872, in Newson *v.* Starke, 46 Ga. 88, McCay, J., says: "It has been sometimes supposed that the whole jurisdiction of Chancery in England over this subject was only a branch of the King's prerogative and not a judicial function at all and again it has been thought that the jurisdiction was wholly derived from the 43 Elizabeth. But it is now well settled that it is only that branch of the jurisdiction, which undertakes to carry into effect charities generally where there are no trustees, which is prerogative, and that when trustees are appointed, or when the objects of the charity are pointed out even generally, then the Court acts by its inherent power over trusts: but from the nature of the subject matter it does not require the same degree of definiteness and certainty as it would if the bequest were not charitable." In 1877, in Ould *v.* Washington Hosp., 5 Otto (U. S.) 303, Swayne, J., says: "The opinion prevailed extensively in this country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. These views were assailed with very great learning and ability in 1833 by Mr. Justice Baldwin in McGill *v.* Brown, Bright. (Pa.) 346. An eminent counsel of N. Y. was the pioneer of the bar in 1835 in a like attack. His argument in Burr's Ex'rs *v.* Smith, 7 Vt. 241, was elaborate and brilliant, and, as the authorities then were, exhaustive. He was followed in support of the same view in 1844 by another counsel no less eminent in Vidal *v.* Philadelphia, 2 How. 128. The publication, then recent, of the Reports of the British Records Commissioners, enabled the latter gentleman to throw much additional and valuable light into the discussion. The argument was conclusive. In delivering the opinion of the court Mr. Justice Story, referring to the doctrine thus combated, said: 'Whatever doubts might therefore properly be entertained upon this subject when the case of the Trustees of the Phila. Baptist Assoc. was before the Court (1819), those doubts are entirely removed by the later and more satisfactory sources of information to which we have alluded. The former idea was exploded and has since nearly disappeared from the jurisprudence of the country. Upon reading the statute carefully one cannot but feel surprised that the doubts thus indicated ever existed.'"

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, (*g*) 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 introduction 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.

Policy of rule against perpetuities.

Origin of the rule.

The early judges had an extreme repugnance to every disposition of property that savored 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.*

Perpetuities, how regarded by the early judges.

(*g*) 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.

to the allowance of a life or any number of lives in being, and twenty-one years afterwards. (*h*)[13]

Period for which the vesting of estates may be suspended.

But though the new modifications of estate consequent 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

(*h*) In the writer's edition of Powell on Devises (vol. I., p. 389, n.,) the progress of this rule is fully traced.

13. The rule of the common law as to perpetuities has been re-inforced or modified in some states by constitutional or statutory provisions. In most, if not all of the other states, the common law rule prevails.

In *Alabama* it is provided by statute that "lands may be conveyed within the limits fixed by law so as to avoid perpetuities," but conveyances to other than a wife and children, or children only, "cannot extend beyond three lives in being at the date of the conveyance and ten years thereafter." (Code, 1876, §§ 2187, 2188).

In *Florida* perpetuities are forbidden by statute, but not defined. (Const., Art. I., §§ 16, 27; Thompson's Dig., p. 3, § 24.) And see McLeod *v.* Dell, 9 Fla. 427.

In *Georgia* "limitations of estates may extend through any number of lives in being at the time when the limitations commence and twenty-one years and the usual period of gestation added thereafter. A limitation beyond that period the law terms a perpetuity and forbids its creation. When an attempt is made to create a perpetuity, the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the legal limitations." (Code, 1873, § 2267).

In *Iowa* the statute permits limitations for any number of lives in being and twenty-one years. (Code, 1873, § 1920).

In *Maryland* it is expressly provided that a perpetuity may not be created by will. (Code, § 299, 1 Pub. Gen. Laws, 1860, p. 684).

In *New York* the power to suspend alienation is limited to two lives in being at the creation of the estate. (2 Rev. St. 1101, § 15). In *Texas* there is a constitutional prohibition of perpetuities. (Art. I., § 18).

It may not be out of place here to call the reader's attention to a view frequently expressed, if not always maintained, by the courts, that the law of perpetuities does not extend to charitable uses. See Grissom *v.* Hill, 17 Ark. 483; White *v.* Fisk, 22 Conn. 31; State *v.* Griffith, 2 Del. Ch. 392; Dexter *v.* Gardner, 7 Allen 243; Williams *v.* Williams, 8 N. Y. 525; Trustees *v.* Kellogg, 16 N. Y. 83; Levy *v.* Levy, 33 N. Y. 97; Bascom *v.* Albertson, 34 N. Y. 584; Adams *v.* Perry, 43 N. Y. 487; Holmes *v.* Mead, 52 N. Y. 332; Rose *v.* Rose, 4 Abb. App. 108; Banks *v.* Phelan, 4 Barb. 80; King *v.* Rundle, 15 Barb. 139; Wilson *v.* Lynt, 30 Barb. 124; Andrew *v.* New York Bib. Soc., 4 Sandf. 156; State *v.* Gerard, 2 Ired. Eq. 210; Hillyard *v.* Miller, 10 Penna. St. 326; Philadelphia *v.* Girard, 45 Penna. St. 26; Yard's Appeal, 64 Penna. St. 95; White *v.* Hale, 2 Cold. 77; Franklin *v.* Armfield, 2 Sneed 305; Paschal *v.* Acklin, 27 Tex. 173; Wood *v.* Humphreys, 12 Gratt. 333; Perin *v.* Carey, 24 How. 465; Chamberlayne *v.* Brockett, 8 L. R., Ch. App. 206; Attorney-General *v.* Greenhill, 9 Jur. (N. S.) 1307; Clark's Trusts, 24 W. R. 233. In the case of Levy *v.* Levy, (above cited) it is said by Justice Wright: "Charitable donations form no exception to the statute against perpetuities, at least if contingent and

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

executory. * * * I am of the opinion that what are 'charitable trusts' in English jurisprudence are not excepted from the operation of our statute against perpetuities and that the restrictions upon the suspension of the absolute power of alienation of real estate and of absolute ownership of personalty apply equally to 'charitable' as to all other trusts and limitations." In Odell *v.* Odell, 10 Allen 6, Justice Gray has considered this question very carefully and ably in his opinion. We take from it the following conclusions, best expressed in his own words: "The rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals does not apply to charities. These, being established for objects of public, general and lasting benefit, are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual. 1 Spence on Eq. 588. Mayor &c. of Bristol *v.* Whitson, Dwight's Charity Cases, 171. Magdalen College *v.* Atty. Genl. 6 H. L. Cas. 205. Perin *v.* Carey, 24 How. 465. King *v.* Parker, 9 Cush. 82. Dexter *v.* Gardner, 7 Allen 246. If an alienation of the estate becomes essential to the beneficial administration of the charity it may be authorized by a court of chancery. Tudor on Charitable Trusts, 298 and cases cited. Shotwell *v.* Mott, 2 Sandf. Ch. 255. Wells *v.* Heath, 10 Gray 27. * * * If a devise in fee for the benefit of a charity is accompanied by an executory devise over to individuals upon the happening of a contingency which may possibly not occur within the time prescribed by the rules against perpetuities, the devise over is void, for the reason that until the contingency happens it cannot be ascertained in whom the title will be. Wells *v.* Heath, 10 Gray 25, 26. And if a gift is made in the first instance to an individual, and then over, upon a contingency which may not happen within the prescribed limit, to a charity, the gift to the charity is void, not because the charity could not take at the remote period, but because it tends to create a perpetuity in the individual who is the first taker, by making the estate inalienable by him beyond the period allowed by law. Company of Pewterers *v.* Christ's Hospital, 1 Vern. 161; Commissioners of Donations *v.* DeClifford, 1 Drury & Warren, 254. Within the same class fall cases of gifts of an annuity to A. and his heirs, or of personal property to A. and the heirs of his body, and then over to a charity, in which the gifts over have been held void as too remote. Atty. Genl. *v.* Gill, 2 P.W. 369; Atty. Genl. *v.* Hall, W. Kel. 13. The decision in Atty. Genl. *v.* Gill indeed can hardly be maintained upon the facts stated in the report, inasmuch as in that case A. died before the testator, so that the estate, according to modern decisions, would seem to have vested immediately in the charity. Burbank *v.* Whitney, 24 Pick. 146. 1 Jarman on Wills (4th Amer. Ed.) 256, 257. But a gift may be made in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards, provided there is no gift of the property meanwhile to or for the benefit of any individual or any private corporation. In the case of Downing College, a gift to trustees to buy ground, obtain a royal charter, and found a college was established twenty years after the testator's death by Lord Northington and Lord Camden, after taking the opinion of Lord

to an unborn person an estate for life, with remainder *to his issue, (*h*) or, as it was rather quaintly expressed, the creating of a possibility upon a possibility.

Chief Justice Wilmot and Sir Thomas Sewell, M. R.; followed up by decrees of Lord Loughborough thirty years later, after five unsuccessful applications to the crown for a charter; and a charter was not in fact obtained until more than fifty years after the death of the testator, after which further directions in the cause were made by Lord Eldon. Atty. Genl. *v.* Downing, Wilmot 1; S. C. Dick. 414. Ambl. 550, 571. Atty. Genl. *v.* Boyer, 3 Ves. 714; S. C. 5 Ves. 300; 8 Ves. 256. So Lord Thurlow held that a legacy for the purpose of establishing a bishop in America was good, although none had yet been appointed. Atty. Genl. *v.* Bishop of Chester, 1 Bro. C. C. 444. In Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99, a devise and bequest in trust out of the rents and profits to build a sailors' hospital as soon as the trustees could judge that the proceeds of the estate would support fifty or more sailors, (first obtaining an act of incorporation, if necessary,) and to use the income of the property forever for supporting the hospital and maintaining the sailors therein, was sustained by the supreme court of the United States; and although there was some difference of opinion among the judges upon other points none of them expressed any doubt of the validity of the disposition upon the ground of remoteness. And in Sanderson *v.* White, 18 Pick. 336, Chief Justice Shaw said: 'When a gift is made with a view to found a hospital or college, not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the law will sustain it and carry it into effect.' Upon this principle it has been held in England that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may not take place within the limit of the rule against perpetuities, the limitation over to the second charity is good because no individual is concerned, and no private use involved; the estate is no more perpetual in two successive charities than in one charity; and so the law against perpetuities and remoteness has no application, and there is nothing to restrain the donor from affixing such limitations and contingencies, in point of time, to his charitable gift, as he pleases. Society for Propagation of the Gospel *v.* Atty. Genl., 3 Russ. 142. Christ's Hospital *v.* Grainger, 16 Sim. 100; S. C. Macn. & Gord. 464; 1 Hall & Twells 539. A similar decision has been made by the supreme court of the United States under the civil law as established in Louisiana. McDonough *v.* Murdock, 15 How. 367. We are thus brought to the question, how far the rule of law limiting the period of accumulation applies to charitable gifts. Any directions for accumulation for the benefit of individuals until the happening of a contingency which by possibility may not take place within the period prescribed by the rule against perpetuities are void. But there are many cases in which the law has been assumed to be different as applied to charities. In 1788 Ralph Bradley, an eminent lawyer, made his will by which he gave his personal property in trust to pay £500 a year for twenty years from the end of three years after his death and then £1000 a year until the fifth of January 1860, or seventy years after his death, and then the whole income of the accumulated fund, to pur-

(*h*) 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 life or lives in being, and twenty-one years.

It was long (*i*) 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

chase such books, to be disposed of in Great Britain or the British Dominions, as might have a tendency to promote the interests of virtue and religion and the happiness of mankind. Lord Thurlow held this too indefinite in its objects to be established as a charity. But neither he nor Sir William Grant nor Lord Eldon, when expressing grave doubts of the correctness of that decision, ever doubted the lawfulness of the direction for accumulation, although the time of accumulation was mentioned in the argument before Sir William Grant, and Lord Eldon expressly referred to the fact that Mr. Bradley's intention was that the fund should be accumulated for many years. Brown *v.* Yeall, 7 Ves. 50 n.; S. C. cited in 9 Ves. 403, 406, and 10 Ves. 27, 534, 539. In one case indeed the House of Lords, upon the advice of Lord Wynford, held that a gift of property to accumulate until it should amount to the sum of —— pounds sterling, and then to be employed in erecting and maintaining a hospital for the support, clothing and education of — boys, was void. Ewen *v.* Bannerman, 2 Dow & Clark, 74; S. C. *nom.* Ewen *v.* Magistrates of Montrose, 4 Wilson & Shaw, 346. But that case, according to the opinions of Lords Chelmsford and Wensleydale, is to be supported (if it can be supported at all) upon the ground that the blanks left the gift too incomplete and uncertain to be carried into execution. Magistrates of Dundee *v.* Morris, 3 Macqueen, 154, 155, 174. See also Henshaw *v.* Atkinson, 3 Madd. 310, 313; Philpot *v.* St. George's Hospital, 6 H. L. Cas. 359, 360, 369. Inglis *v.* Sailors' Snug Harbor, above cited; District Atty. *v.* Cushing, 2 Cush. 519. Count Rumford in 1796 gave the sum of five thousand dollars to the American Academy of Arts and Sciences in trust to pay the interest biennially as a premium to the author of the discovery or improvement on heat or light, most beneficial to mankind, which should be published in America during the two years next preceding, and directed that, as often as there should be no such discovery or improvement deserving the premium in the opinion of the trustees, the amount should be added to the principal, and the subsequent premiums proportionally augmented, without restriction. No discoveries or improvements within the terms of the gift were made for more than forty years, the fund increased to fourfold the original amount, and the donor's residuary legatees claimed the whole fund, or at least the surplus accumulation. But Chief Justice Shaw held that the American Academy was entitled to the whole fund and its accumulations, and adopted a scheme for promoting the general intent of the donor. American Academy *v.* Harvard College, 12 Gray, 582. John Hawes, who died in 1829, by his will devised real estate in trust to apply to income forever to the support of public schools and of a congregational religious society in South Boston, and directed that when the income should have so increased and accumulated as in the opinion of the trustees to answer these purposes, the surplus should be appropriated to the establishment of a second congregational society, the settlement and support of a minister, and the erection and maintenance of a house of public worship for that society, and to the support and encouragement of such other seminaries of learning, and in such way

(*i*) See Beard *v.* Westcott, 5 Taunt. 395, 5 B. & Ald. 801, T. & R. 25.

the interest of an unborn object of gift until his or her majority. This question was finally set at rest in Cadell *v.* Palmer, (*k*) in which

as the trustees should think most for the honor of God and the good and happiness of the inhabitants of South Boston and their posterity. The probate of the will was opposed, among other grounds, because the will was void as creating perpetuities and indefinite and useless accumulations. But this court in an opinion delivered by Mr. Justice Wilde, held that it could not, sitting as the supreme court of probate, examine that question. Twenty years later, upon a bill in equity by the First Congregational Society claiming more than the trustees had seen fit to allow to that society out of the accumulations in their hands, this court, speaking through the same judge, without doubting the validity of the devise, said that the surplus income amounted only to $650, 'which must be allowed to accumulate for a long time before it will be sufficient to support a minister in a second Congregational society, and to erect a house of public worship, and to fulfill the intention of the testator as to the other uses and purposes provided for in the said clause of the will.' Hawes *v.* Humphrey, 9 Pick. 350, 355, 362. Hawes Place Congregational Society *v.* Trustees of Hawes Fund, 5 Cush. 454. Oliver Smith bequeathed money to trustees to be managed as an accumulating fund for the term of sixty years, and then to be paid over to the town of Northampton to establish agricultural institutions for the instruction of farmers. And this court held that that town, by virtue of its right to receive this charitable gift at the end of sixty years, had an interest in the estate, and could appeal from a decree of the judge of probate respecting the probate of the will. Northampton *v.* Smith 11 Met. 390. In a very recent case, a testator gave a piece of land and one thousand dollars, after the death of his wife, in trust to maintain a school-house and school, and added: 'In order to accomplish said object, said trustee and his heirs shall have reasonable time to bring the same about with the funds left for that purpose.' Twenty years after the death of the testator, and eight after the death of his widow, the school not having been established, the residuary devisees and legatees brought a bill in equity against the trustee to recover the land and money; but it appearing that the trustee was diligently endeavoring to increase the fund in his hands by causing it to accumulate until it should be sufficient to effect the purpose of the testator, the court dismissed the bill. Tainter *v.* Clark, 5 Allen 66. Dr. Franklin who died in 1790, left legacies of £1000 sterling to each of the cities of Boston and Philadelphia to be lent to young married artificers, with sureties, and to be repaid by yearly installments of one-tenth, with interest, and directed that this should go on for one century, and with a part of the fund for another century, at the expiration of which he gave the principal to the city and the commonwealth. In 1827 Chief Justice Gibson spoke of this bequest of money to the city of Philadelphia, to be lent to young mechanics, as belonging to a class of charities, the validity of which had never been questioned. Witman *v.* Lex, 17 S. & R. 91. Many years afterwards the same learned judge expressed an opinion that a similar bequest was void upon the ground that charities were subject to the ordinary rule limiting accumulations. Hillyard *v.* Miller, 10 Penn. State R. 326. This opinion excited surprise in Pennsylvania; and

(*k*) 7 Bli. 202, [1 Cl. & Fin. 372, 10 Bing. 140, 1 Sim. 173, *nom.* Bengough *v.* Edridge.]

the House of Lords decided in favor of an executory limitation in a will to take effect at the period of twenty years after lives in being. (*l*)

it has since been overruled in the same court, and the decision of the case in which it was delivered sustained upon the ground that such loans constituted no charity. Hill on Trustees, 3rd Amer. ed. 455 n. Philadelphia *v.* Girard, 45 Pa. 1. It is not within the scope of our present inquiry to consider whether this last position can be maintained. See St. 43 Eliz. c. 4 § 1; Duke, (Bridgman's Ed.) 131; Atty. Genl. *v.* Ironmongers' Co. Coop. Pract. Cas. 283; Zimmerman *v.* Anders, 6 Watts & S. 220, 221. In this state of the authorities, and in the absence of any legislation upon the subject, we are not prepared to say that accumulation for a charitable purpose can in no case be allowed for a fixed period of more than twenty-one years, or for a contingent period beyond a life or lives in being and twenty-one years afterward. In principle, the uncertain duration of a life or lives in being would seem to have no natural relation to a permanent charity. And the justice or policy of a rule is not apparent, which would prevent a person charitably disposed, but whose property is not large enough to carry out his charitable intent by an accumulation of twenty-one years from founding a charity, except through the indirect measure of a life or lives in being; especially when the period of accumulation which he needs or selects is one much within the average duration of accumulation under the common rule. The objection that accumulations for a charitable purpose, unless governed by the common rule, might go on indefinitely, would certainly be entitled to grave consideration before finally determining what the limit is. It is possible that the power of a court of chancery over charities might enable it to so modify the donor's particular directions as to carry out his general charitable intent without violating any rule of public policy, if a case should arise in which those directions and that policy were in danger of coming into conflict. But it is not necessary for the decision of this cause to define the limit of lawful accumulation for charitable purposes. The duties imposed by the testator upon his executors in this regard are to pay annually out of the income of the real estate two hundred dollars to the widow of his deceased brother for life, and one hundred dollars to the trustees of the Salem Savings Bank for fifty years, and after deducting these payments annually to divide the remaining income among his brother's children, and at the expiration of the fifty years to divide the remainder of the estate among his brother's grandchildren. The annuity of one hundred dollars yearly for fifty years is payable at fixed times, subject to no contingency, and, independently of the direction for accumulation would be open to no legal objection if the annuitant were an individual. The intention to devote these sums to the charitable purpose of supporting aged and destitute persons is manifest. Each sum paid is separated

[(*l*) See as to this case Sugd. Law of Prop. 314. It will be observed that the term of twenty years only was taken in this case. It may have been thought 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.]

Term of twenty-one years allowed absolutely, not merely in reference to infancy;

Bayley, B., 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.*" [14] This important case,

from the hulk of the estate, and vested in the trustees appointed to receive it, as soon as the payment is made, and before the intended accumulation of the interest upon it begins. Even a gift to an individual, which on a fair construction vests within the period allowed by law, is held valid, although accompanied by a void direction for accumulation. Josselyn *v.* Josselyn, 9 Sim. 63. Blease *v.* Burgh, 2 Beav. 221. Saunders *v.* Vautier, 4 Beav. 115; S. C. Craig & Phillips, 248. Peard *v.* Kekewich, 15 Beav. 166. Lane *v.* Lane, 8 Allen, 350. The reasons are much stronger for not allowing illegal directions for the accumulation or management of a fund, devoted to charitable purposes, to defeat the gift, and for carrying out the scheme of the testator as far as the law will allow, if it cannot be followed to its full extent. Atty. Genl. *v.* Caius College, 2 Keen, 163. Martin *v.* Margham, 14 Sim. 230. Thompson *v.* Thompson, 1 Colly. R. 388, 400. Atty. Genl. *v.* Greenhill, 33 Beav. 193. Atty. Genl. *v.* Pyle, 1 Atk. 435. Atty. Genl. *v.* Catharine Hall, Jacob, 395. Magistrates of Dundee *v.* Morris, 3 Macq. 134. Baker *v.* Smith, 13 Met. 41. Drury *v.* Natick, *post*, 169. It is generally stated in the English books that a direction to accumulate income for a period beyond that allowed by the common law is wholly void. 2 Spence on Eq. 181, 182. Lewin on Trusts (3d ed.) 111, and cases cited. But perhaps, in the case of property set apart in the hands of trustees for a charitable purpose, each annual addition of the income to the principal might be treated as distinct, and the accumulation held good for twenty-one years at least, if not beyond that time. And see Phipps *v.* Kelynge, 2 Ves. & B. 57 n., 62, 63 n." See, too, Hornberger *v.* Hornberger, 12 Heisk. 635, where a devise was made in trust to keep up a flower garden and burying ground, to be kept up out of the fund, and never sold, and this was held to be a valid charity, but the proviso was held to be void as a perpetuity.

14. The reader will have observed that the time, beyond which a limitation becomes a perpetuity, is fixed by the New York statute at two lives in being—differing from the common law and perhaps from the statute law of all the other states in this, that no term of years is to be super-added to the two lives for a minority or otherwise. Under this statute it is held in New York that every suspension of the power of alienation for a gross term of years, however short, irrespective of lives in being, is void as a perpetuity. See Tucker *v.* Tucker, 5 N. Y. 408, where the suspension was to be but one year after the death of testator's widow; Converse *v.* Kellogg, 7 Barb. 590, where the will provided for sale and division of the property ten years after testator's death; DeKay *v.* Irving, 5 Denio 646, affirming 9 Paige 521. In this case the income was to be paid to the testator's widow for the maintenance of testator's family until February, 1840, and in case of her death before that time to be applied by the executor until that date for the same purpose, and the limitation beyond the widow's death was held to be void. See also Morgan *v.* Masterton, 4 Sandf. 442; Hawley *v.* James, 16 Wend. 61, reversing 5 Paige 318; Hone *v.* Van Schaick, 20 Wend. 564, affirming 7 Paige 221; Burrill *v.* Boardman, 43 N. Y. 254;

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,

Phelps *v.* Pond, 23 N. Y. 69, where the gift was to found a charity when certain other funds should be subscribed. And in the Rose Will Case—Rose *v.* Rose, 4 Abb. App. 108—the gift of moneys to be expended in a certain charity contingent upon the subscription of further funds thereto, within five years, was held to be void as a perpetuity. In the words of Wright, J.: "Estates, though given to charitable uses must vest within the term prescribed by law. * * * This is no vested gift but on the contrary a perpetuity, because the vesting of the gift is not made to depend on a life or two lives in being, but on an uncertain event which may not happen within five years—a period which cannot be substituted for lives." The language of Bronson, J., in Hone *v.* Van Schaick, *ubi supra*, is to the same effect: "No absolute term however short, can be maintained. Every estate is void in its creation, which is so limited that the absolute power of alienation may be suspended for more than two lives in being at the creation of the estate. The lives must be designated and *life* must in some form enter into the limitation." In the cases of Burrill *v.* Boardman, Phelps *v.* Pond and Rose *v.* Rose, above cited, the gift was not to take effect until certain subscriptions should be made and the donees be incorporated, the time remaining in these cases wholly uncertain or being restricted to some absolute period other than lives in being. Where, however, the incorporation on which the gift takes effect is to take place, if at all, within two lives in being, there is no such objection to the gift, Literary Fund *v.* Dawson, 10 Leigh 147, 1 Rob. (Va.) 402; Kinnaird *v.* Kinnaird, 25 Gratt. 107. And it was held in Chamberlayne *v.* Brockett, 8 L. R., Ch. App. 206, (1872,) that a money legacy for the erection of almshouses, when land should be given for the purpose, was not too remote. On the other hand the following gifts have all been held to be too remote: a devise to trustees to convey to a church, if any congregation should desire to erect a church and be able in the judgment of the trustee to do it, Jocelyn *v.* Nott, 44 Conn. 55; to trustees to be appointed by the Supreme Court to found an institution, Bascom *v.* Albertson, 34 N. Y. 584, affirming 5 Redf. 340; to trustees for village library when village incorporated, Leonard *v.* Burr, 18 N. Y. 96; for a seminary to be incorporated, Leonard *v.* Bell, 1 T. & C. (N. Y. Sup. Ct.) 608. But where the power to alienate is not suspended during the term of years there is no perpetuity. Thus in Persons *v.* Snooks, 40 Barb. 44, where there was a term for three years given to A in certain real estate, with a remainder over, and power to executors meanwhile to make sale. So, where the gift is one of income merely, there is no suspension nor perpetuity, although the income was given to the legatee for fifty years, Matteson *v.* Matteson, 51 How. Pr. 276. See also Clason *v.* Clason, 18 Wend. 369. And in New York a suspension of alienation, until A's youngest child attain a certain age, has been held to indicate a gross term—until a fixed time, that is, irrespective of the life of A—and therefore to be void, Butler *v.* Butler, 1 Hoffm. Ch. 344; Boynton *v.* Hoyt, 1 Denio 53. The latter case, however, really turned on the fact that there were several children during whose minorities the suspension must continue. In the former case a gift of income was made in trust for A until his eldest child should attain the age of twenty-one, and then to be divided among his children, and this was held to involve a suspen-

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,

sion for the absolute term of twelve years at least—until the eldest child at testator's death should become twenty-one. In many similar cases, however, the courts have held that there was neither suspension nor perpetuity. Thus in Everitt *v.* Everitt, 29 N. Y. 39, reversing 29 Barb. 112, a gift to be accumulated until the youngest of three children named attain twenty-one, and then to those children, was held to vest separate shares in them at testator's death as tenants in common, and therefore to constitute no suspension, as a joint estate would have done. In Emmons *v.* Cairns, 3 Barb. 243, reversing 2 Sandf. Ch. 369, a legacy to A on her arriving at the age of twenty-one, was held to be contingent on her arriving at that age, and alienable, and therefore valid. In Burrill *v.* Shiel, 2 Barb. 457, a devise in trust for A for her lifetime—then for B for her lifetime, and then for B's surviving issue, "to be at their own disposal as soon as they arrive at 25 years," and if B should die before A, to B's issue in the same manner, was held to *vest* in B's issue at the death of the survivor of A and B, and therefore to require no suspension beyond their two lives. So in Morton *v.* Morton, 8 Barb. 18, A's children took a vested and valid interest at his death in a gift made to A for his life, then to A's widow until A's children should attain the age of twenty-one, and then to A's children, to be paid them at the age of twenty-one. In Titus *v.* Weeks, 37 Barb. 136, where the trust was to pay the income to designated persons during the minority of A, then to B for life, with remainder to B's children, A's minority was held to be an absolute term, (until he *should have* become twenty-one,) and though he died under age, the first donees took for the full term intended, and the last remainder was upheld as *vested* at the testator's death, and therefore involving no suspension. In Burke *v.* Valentine, 52 Barb. 412, an estate was to remain in the hands of the executors for the use of testator's wife and children, while under age, and to be divided after the youngest child attain twenty-one. This was held to vest in the children as tenants in common as each attained twenty-one, and therefore to be valid and not a perpetuity. In Levy *v.* Hart, 54 Barb. 248, where the trustee was to hold for testator's widow and five minor children, and to convey to the children, when the youngest attains the age of twenty-one, or on the death of A and B, (the youngest children,) if they die before attaining twenty-one, the last clause was held to reduce the limitation to one for two lives in being. In Butler *v.* Butler, 2 Barb. Ch. 304, a trust to pay the income to A until her oldest child attain the age of twenty-one, and then to divide among her children, was held to mean the oldest at the date of testator's will, and not to require a suspension beyond one life in being. In Eells *v.* Lynch, 8 Bosw. 465, the gift was to children, to be divided when the youngest attain twenty-one, and this was held to be a vested gift, with no suspension of alienation. In McGowan *v.* McGowan, 2 Duer 57, the property was to be divided among seven children by name, when the oldest attains twenty-one, which was held to be at most a suspension for one life. In Am. Bible Soc. *v.* Stark, 45 How. Pr. 160, the property was given to the widow for life, the principal to remain entire until testator's oldest son attain the age of forty years, or, if both sons die before the widow, to be sold and divided at her death. Here the suspen-

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

sion depended on the son's living so long, and was held not to be a perpetuity. In Stevenson *v.* Lesley, 49 How. Pr. 229, where there was a trust for the children of A and the survivors of them, and the children of B and the survivors of them, to be paid to each at the age of twenty-one, in equal shares, the income to be applied in the meantime to their maintenance, the children took *per capita* as tenants in common, and there was held to be no perpetuity. In Scott *v.* Monell, 1 Redf. 431, a trust for the maintenance of testator's widow for life, and her two children until they attain the age of twenty-one, the property to fall into the residue at the widow's death, was held to be a perpetuity, as it might possibly extend over more than two lives (if the children died first). In Thompson *v.* Clendening, 1 Sandf. 387, a trust for the maintenance of four children during their minority, with power to trustee to sell, after the oldest child attain the age of twenty-one, and duty laid on him to do so, at latest, when the youngest child attain that age, was held to be a suspension for more than two lives, and void. In Field *v.* Field, 4 Sandf. Ch. 528, a trust to pay annuity to testator's widow, and for the maintenance of testator's children until they attain the age of twenty-two, and then to divide part and pay the income of the remainder to them until the sons respectively attain the age of thirty, and then divide the balance, to each his separate share, was held to be an undue suspension and void. So in Jennings *v.* Jennings, 5 Sandf. 174, a trust for the maintenance of three children until they attain the age of twenty-one, and then to divide—or until the youngest attain the age of twenty-one, and then divide, Lang *v.* Ropke, 5 Sandf. 363; see also Ruppert's Estate, 1 Tucker 480. But a gift to A and B provided they attain twenty-one, and if both die without issue, over, is valid. Maurice *v.* Graham, 8 Paige 483. In Tucker *v.* Bishop, 16 N. Y. 402, a gift to testator's grandchildren—the income to be applied to their maintenance during their minority, and the principal to be paid them in equal shares at the age of twenty-one—was held to vest at testator's death, and not to be too remote; so, too, Savage *v.* Burnham, 17 N. Y. 561, but in this case a limitation over on their death before twenty-one, was held too remote; and see, too, Ludwig *v.* Combe, 1 Metc. (Ky.) 128, where a deed of emancipation of a five-year-old slave, to take effect at the age of twenty-five, both as to her and such children as she might have, was held to be too remote as to children, since she *might have* died more than twenty-one years before such child became twenty-five, although in fact she lived after her child was nineteen years of age. See, too, Dyson *v.* Ropp, 29 Ind. 482, where the will directed that the property be sold and the interest accumulated and paid to the heirs of the testator's children at the age of twenty-one years, and this was held to be a *vested* gift at the testator's death, and valid. But in Sears *v.* Putnam, 102 Mass. 5, a gift to A for twenty-five years, and then to his children, was held void as a perpetuity. In Fosdick *v.* Fosdick, 6 Allen 41, a trust to invest and accumulate until testator's youngest grandchild should attain the age of twenty-one, then to pay the income to them for the life of the longest liver of them, with remainder to their heirs, was held to be a perpetuity. In Thorndike *v.* Loring, 15 Gray 391, an accumulation for fifty years was held void as a perpetuity. In Davenport *v.* Harris, 3 Grant 164,

a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*. 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

—but not the period of gestation.

a gift for maintenance of testator's children until the youngest attain the age of twenty-one, was held to be void as a perpetuity. And in Taylor *v.* Mason, 9 Wheat. 325, where there was a gift to A on condition that he change his name to B within twelve months after attaining the age of twenty-one, and a limitation over on breach of condition, the limitation failed for remoteness. In Wilkinson *v.* Duncan, 30 Beav. 111, a trust to pay to testator's sons and daughters, each as he or she attains the age of twenty-four years, is valid as to those only who are three years of age at testator's death. In Smith *v.* Smith, 5 L. R., Ch. App. 342, a gift to testator's children and grandchildren living at the death of his widow, as they shall attain the age of twenty-three, was held too remote, because some members of the class might not be *in esse* within the legal period of lives in being and twenty-one years; so, too, Hale *v.* Hale, 3 L. R., Ch. Div. 643, disapproving of Mosley's Trusts, 11 L. R., Eq. 499. In Edmonson's Estate, 5 L. R., Eq. 389, a remainder to children of the life tenant, "not to be vested in them until they attain the age of 25," was held to vest in such children as were living at testator's death, defeasible as to those who died under twenty-five, and subject to open for children born after testator's death, and was not within the rule against perpetuities. In Ashmore's Trusts, 9 L. R., Eq. 99, where a life estate was given to A, with remainder to be paid to such of her children as should be living at her death, and should have then attained, or should afterwards live to attain, the age of twenty-one, with provision for their maintenance out of the income in the meantime, it was held that the gift of the fund vested as the children attained the required age, with a gift of income only in the meantime. But this case was not followed in Fox *v.* Fox, 19 L. R., Eq. 286 (1875), where the age fixed for payment was twenty-five, and would have been too remote. See also Peek's Trusts, 16 L. R., Eq. 221 (1873). Attention is called to the following remarks of Judge Duer, in Andrew *v.* Bible Soc., 4 Sandf. 156: "The distinction between a bequest of a sum of money at a particular specified time and a similar bequest payable or to be paid at the same time is somewhat refined and, it is probable, seldom exists in the mind of a testator; but it is established by so long a series of decisions that it must now be regarded as a constituent part of the law, which it is our province and duty to administer. In the second case the gift is reserved and only its payment postponed. In the first the gift itself is postponed. In the language of the books, the time in the second case is annexed to the *payment*, in the first to the *substance*, of the gift. The first is a contingent, the second, a vested, legacy. A vested legacy, where the legatee dies before the time fixed for its payment, passes to his personal representatives, or if it has been previously assigned by him, to his assignee. A contingent, upon the happening of the same event, is wholly extinguished and sinks into the residuum for the benefit of the residuary legatees or next of kin and a previous assignment is necessarily defeated, since every such assignment, if otherwise valid, is subject to the same contingency as the gift itself. There is however an exception from the general rule that a gift to take effect at the decease of a particular person is contingent during his life. If during his life a beneficial interest is given to him or to any

years as the limit, and the period of gestation *to be allowed in those cases only in which the gestation exists.*

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

other person in the capital sum bequeathed, the legacy is construed as a vested remainder and is not defeated by the antecedent death of the legatee. But it is manifest that this exception is not applicable to the present case, since under the provisions of the will neither the annuitants nor any other person during their lifetime had any beneficial interest either in the capital sum bequeathed or in its income." It remains to be noted, that in the construction of the New York law of perpetuities, a *minority* is equivalent to a *life*, and a suspension for more than two minorities is a suspension for more than two lives. Jennings *v.* Jennings, 7 N. Y. 547; Vail *v.* Vail, 7 Barb. 226; Tayloe *v.* Gould, 10 Barb. 388; Scott *v.* Monell, 1 Redf. 431; McSorley *v.* Leary, 4 Sandf. Ch. 414; Thomas' Estate, 1 Tuck. 367. The peculiarity of the New York statute of perpetuities (like that of Alabama,) in limiting the number of lives in being, within which an estate must vest, has given rise to many cases in that state to determine what limitations exceed this allowance of two lives. The following limitations have been held to be for more than two lives in being, and therefore *void:* to A and B for life, and if B die without children to C on his attaining the age of twenty-one years, Harris *v.* Clark, 7 N. Y. 242; in trust for testator's widow for life—then for as many children as testator may leave for their lives—with remainder in fee to their children, and power of sale to trustees limited to cases where it may be necessary for payment of taxes or improvements on the property, Amory *v.* Lord, 9 N. Y. 403; to three grandchildren, to take at the age of twenty-one years, and trustee to take charge of the property in the meantime, Post *v.* Hover, 33 N. Y. 593; in trust for testator's widow for life, then to his children for their lives, and on their death leaving issue to pay the income to such issue during their minority and the principal at the age of twenty-one, and on their death without issue, over—in this case the last limitation was held void, but the previous limitation to the children's issue was valid as vesting in several shares at the end of two lives, the life of the widow and of the child leaving issue, Harrison *v.* Harrison, 36 N. Y. 543, affirming 42 Barb. 162; in trust to pay income to A for life, and at his death to B and C for their lives, and the survivor of them for his life, and at his death to the children of C, or if B and C die without issue, over—this being clearly a suspension for three lives, Knox *v.* James, 47 N. Y. 389; income of fund to testator's widow for life, then to her two daughters for their lives, and then to their issue—the limitation to the daughters being good and that to their issue bad, Van Schuyver *v.* Mulford, 59 N. Y. 426; to A, B and C, and the survivor of them for their lives, and the life of the survivor, and on his death, over, Banks *v.* Phelan, 4 Barb. 80; to testator's widow for life, then to A and B for life, and at their death to their children, Arnold *v.* Gilbert, 5 Barb. 190, 3 Sandf. Ch. 531; to A for life, at her death to her two daughters for life, and for the life of the survivor, and then to their children, De Barante *v.* Gott, 6 Barb. 492; this will has also been construed in Kane *v.* Gott, 24 Wend. 641, and Gott *v.* Cook, 7 Paige 534; to A for life, and such children as shall at her death be living, and have attained, or shall attain the age of twenty-one years, (five children in all,)—this being construed to be an estate to A

male,) 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

for life, with remainders to the five children contingent on their attaining the age of twenty-one years, and involving a suspension during the life of A and the minorities of the five children, Tayloe *v.* Gould, 10 Barb. 388; to three children—the income to be applied for their education, &c., during their minority, and the principal to *vest* (*i. e.*, in possession,) at the age of twenty-one—if all three die without issue to A, if living—if A not living, to B, if then living—and if B not living, to B's heirs, Thompson *v.* Thompson, 28 Barb. 432; to testator's widow for life, then to her daughter A for her life, and if she die without children, and before her husband, to him for his life, Woodruff *v.* Cooke, 47 Barb. 304; to executors to pay income in their discretion to A and B for life, and on the death of the survivor, to C for life, with remainder to C's children, Westerfield *v.* Westerfield, 1 Bradf. 137; to testator's widow for maintenance of her family (consisting of more than two children,) and after her death, executors to apply the income for the maintenance of the family until February, 1840, De Kay *v.* Irving, 5 Denio 646, affirming 9 Paige 521; in trust to pay the income to A for life, then an annuity to B for life, and residue of the income to C for life, and the whole income after B's death to C for life—after death of A, B and C to C's three children, as soon as the youngest attain the age of twenty-one years, for life, with remainder to their children, O'Brien *v.* Mooney, 5 Duer 51; in trust to divide the income equally among testator's heirs, (and the widow of any son,) and to divide the principal after twenty-one years in the trustee's discretion among the testator's heirs and the issue of deceased heirs, Craig *v.* Hone, 2 Edw. Ch. 554; in trust to invest and divide income among eight children for life, then to their issue, Thoms *v.* Coles, 3 Edw. Ch. 330; to pay income to four brothers for their joint lives, and on the death of each, among the survivors and the children of the deceased brother, Colton *v.* Fox, 6 Hun 49; to testator's widow for life, and at her death to sell, convert into cash, pay certain legacies and divide the surplus among testator's children—this was held void on account of the time that must intervene between the widow's death and the division of the property and the consequent suspension, Manice *v.* Manice, 1 Lans. 348; to pay annuities to all the grandchildren of A, B and C until the death of their parents—more than two—Lorillard *v.* Coster, 5 Paige Ch. 172; affirmed, 14 Wend. 265; in trust until the youngest of testator's children and grandchildren attaining the age of twenty-one years shall have attained that age—there being more than two of them—Hawley *v.* James, 16 Wend. 61, reversing 5 Paige 318; in trust to receive income for four daughters for life, Van Vechten *v.* Van Vechten, 8 Paige Ch. 104; for maintenance of testator's widow for life, and of her two children until they attain the age of twenty-one years, Scott *v.* Monell, 1 Redf. 431; for four minor children, not to be sold until the youngest survivor attain the age of twenty-one, McSorley *v.* Learly, 4 Sandf. Ch. 414; to A, B and C severally, and if they die childless, to the survivor—C's share to be paid on the death of testator's widow, and the other shares on the sale of the property in the discretion of the executors, McSorley *v.* Wilson, 4 Sandf. Ch. 515; in trust to pay life annuity to A and to his wife, if she survive him—remainder to A's children as A may ap-

majority, though not preceded by a life interest; in either case A may survive the testator, and 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 mere* 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

point—and by his will A gave the fund to trustees until his eldest son should attain the age of forty-five or die (if that happen sooner), and then to pay over, Thompson *v.* Livingston, 4 Sandf. 539; to testator's widow and three children until the youngest attain the age of twenty-one, or, if he die before that, until either child attain that age, Thomas' Estate, 1 Tuck. 367; in trust for testator's three children, the trustee to take the income until they arrive at the age of twenty-one, with cross-remainders on their death without issue before coming into possession, and on the like death of all, to their heirs, Wood *v.* Wood, 5 Paige Ch. 596; to A in fee, and if he have no children who attain the age of twenty-one, over, Brown *v.* Evans, 34 Barb. 594; to five children for life, remainder to their respective children and if they have none, to the survivors, Persons *v.* Snook, 40 Barb. 144; Monarque *v.* Requa, 53 How. Pr. 438; but *contra*, Bulkley *v.* De Peyster, 26 Wend. 21, affirming 8 Paige 295, where the first limitation was for the life, not of the children, but their mother. **Within two lives, valid.**—The following have been held to vest within the prescribed term of two lives in being, and to be valid: In trust for the maintenance of the issue of testator's infant children during the life of the two youngest then in being, Gilman *v.* Reddington, 24 N. Y. 9; for a hospital to be incorporated within two years, provided two lives named in the will should last so long, Burrill *v.* Boardman, 43 N. Y. 254; a deed in trust for grantor's wife and children during grantor's life, with remainder at his death to his children then living, Rogers *v.* Tilley, 20 Barb. 639; in trust for testator's wife and minor children during her life, and remainder to such children at her death, Williams *v.* Conrad, 30 Barb. 524; in trust for maintenance of testator's widow for life, then for his three children for life, (only two of whom were living at the testator's death), Griffen *v.* Ford, 1 Bosw. 123; in trust for the support of A and B—on the death of either his (several) interest to go to C for life—and at C's death to C's children, Westerfield *v.* Westerfield, 1 Bradf. 137; in trust for testator's widow for life—remainder in several parts for A, B and C for life—and on their death, over, Parks *v.* Parks, 9 Paige Ch. 107; in trust for testator's widow and five minor children, to convey to the children when the youngest attains the age of twenty-one, or on the death of A and B, if that happen sooner, Levy *v.* Hart, 54 Barb. 248; income to children (more than two) in severalty, and on their death, over, Cromwell *v.* Cromwell, 2 Edw. Ch. 495

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 mere* 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 Palmer *v.* Holford, (*m*) 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 J. 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 effect until after the same period, which is too remote, are necessarily void also. (*n*)

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.

(*m*) 4 Russ. 403; [and see Speakman *v.* Speakman, 8 Hare 180.

(*n*) 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.

[In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A for life, and after his death for such of his children as shall attain the age of twenty-five, which latter trust would be void if the testator were to die before A; yet if A should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, viz. the lives of the children.] (*o*)

Period to be computed from the testator's death.

To the test of the rule settled by 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 to arise on an indefinite failure of issue of any person living or dead, is void for remoteness; (*p*)[15] though

An executory devise to arise on an indefinite failure of issue, void.

(*o*) Vanderplank *v.* King, 3 Hare 17; Faulkner *v.* Daniel, Id. 216; Williams *v.* Teale, 6 Hare 251; Peard *v.* Kekewich, 15 Beav. 173; Southern *v.* Wollaston, 16 Beav. 166, 276; Cattlin *v.* Brown, 11 Hare 382. The point is now never contested; see *e. g.* 3 Ch. D. 645. The doubts once entertained (10 Hare 112) in consequence of what appeared to be a contrary decision in Harris *v.* Davis, 1 Coll. 416 (where however the question was not presented in this view), must be considered as removed.]

(*p*) Badger *v.* Lloyd, 1 Salk. 232; Moore *v.* Parker, 1 Ld. Raym. 37; Lady Lanesborough *v.* Fox, Cas. t. Talb. 262; [Lepine *v.* Ferrard, 2 R. & My. 378; Carter *v.* Bentall, 2 Beav. 551; Harding *v.* Nott, 7 E. & B. 650.] But remember stat. 1 Vict., c. 26, § 29, as to wills made since 1837.

15. The old rule of the common law that a limitation over on failure of issue meant upon indefinite failure of issue, has been changed by statute in many states. (See chapter 41, *post.*) But prior to such change, and in states where no such change has been made, limitations over on indefinite failure of issue have been held to be within the rule against perpetuities, and void. See Morgan *v.* Morgan, 5 Day 517; Fisk *v.* Keene, 35 Me. 349; Malcolm *v.* Malcolm, 3 Cush. 472; Nightingale *v.* Burrell, 15 Pick. 154; Condict *v.* King, 2 Beas. 375; Ackerman *v.* Vreeland, 1 McCart. 23; Tator *v.* Tator, 4 Barb. 431; Hunter *v.* Hunter, 17 Barb. 25; Ferris *v.* Gibson, 4 Edw. Ch. 707; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Patterson *v.* Ellis, 11 Wend. 259; Miller *v.* Macomb, 26 Wend. 229; Rice *v.* Satterwhite, 1 Dev. & Bat. Eq. 69; Toman *v.* Dunlop, 18 Penna. St. 72; Vaughan *v.* Dickes, 20 Penna. St. 509; Haines *v.* Witmer, 2 Yeag. 400; Mazyck *v.* Vanderhorst, 1 Bailey Eq. 48; Postell *v.* Postell, 1 Bailey Eq. 390; Cruger *v.* Heyward, 2 Desaus. 94; Presley *v.* Davis, 7 Rich. L. 105; McCorkle *v.* Black, 7 Rich. L. 407; Lyon *v.* Walker, 8 Rich. L. 307; Curry *v.* Sims, 11 Rich. L. 489; Hamner *v.* Hamner, 3 Head 398; Brattleboro' *v.* Mead, 43 Vt. 556; Webster *v.* Parr, 26 Beav. 236; Fisher *v.* Webster, 14 L. R., Eq. 283. But the rule does not apply to a failure of "children," McLeod *v.* Dell, 9 Fla. 427—nor where there is anything in the context to make it appear that the testa-

it is to be observed, that in this and all other cases, if the executory devise is [in defeasance of 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, takes the case out of the mischief of, and consequently out of the rule against, perpetui*ties. (*q*) Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favor of another in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and bear 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. (*r*)

—unless engrafted on an estate tail.

[But to bring the case within this saving the event must be one which will necessarily happen, if at all, at or before the determination of the previous estate tail; otherwise there will or may be an interval during which the executory devise will be indestructible, and the limitation will consequently be void *ab initio*. (*s*)

But the remoteness of the event upon which a remainder after an estate tail is to vest is immaterial, since it is always barrable as long as the estate tail continues; and if, being unbarred, it is not vested when the latter determines, it fails for want of a particular estate. Thus, in Jack *v.* Fetherston, (*t*) estates were limited by settlement to T. S. W. for life, with remainder to his first and other sons in tail male,

Difference between an executory devise and a remainder.

Jack v. Fetherston.

tor intended a definite failure of issue on the death of the first taker: issue spoken of as children, McLeod *v.* Dell, 9 Fla. 427; Matthis *v.* Hammond, 6 Rich. L. 399; death without issue *under age or before marriage*, Jones *v.* Sothoron, 10 Gill & J. 187; Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265; limitation over to *survivor* on death of first taker without issue, Moffat *v.* Strong, 10 Johns. 12; Carson *v.* Kennerly, 8 Rich. L. 259. See, also, Brashear *v.* Macey, 3 J. J. Marsh. 91; Armstrong *v.* Armstrong, 14 B. Mon. 333; Simmonds *v.* Simmonds, 112 Mass. 157; Stevenson *v.* Evans, 10 Ohio St. 307; Berg *v.* Anderson, 72 Penna. St. 87; Zimmerman *v.* Wolfe, 4 Rich. L. 329; Badger *v.* Hardin, 6 Rich. L. 149.

(*q*) Gulliver *v.* Ashby, 4 Burr. 1929; [Att.-Gen. *v.* Miller, 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.]

(*r*) Nicolls *v.* Sheffield, 2 B. C. C. 215; Carr *v.* Earl of Erroll, 6 East 58; Earl of Scarborough *v.* Doe d. Saville, 3 Ad. & Ell. 897.

[(*s*) Banks *v.* Holme, stated below.

(*t*) 2 Huds. & Br. 320.

A remainder may be good though limited upon an event too remote.

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 previous estates were limited to his issue male only, 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. So that the remoteness of the event is immaterial, if the estate is not too remote.

Cole v. Sewell.

In Cole *v.* Sewell (*u*) 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 limited to some only of such issue. Lord St. Leonards (then L. C. Ir.) 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 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 endeavored 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

(*u*) 4 D. & War. 1, corrected by the judge himself, and differing in some material passages from 2 Con. & L. 344.

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." In a subsequent part of his judgment, after citing a passage from Coke Litt. 378, which speaks of a remainder depending on the contingency of one man dying before another as being "a common possibility," he continued: "The concluding words show that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern rule against perpetuities has been to render this doctrine obsolete, although it has rendered void successive life estates to successive unborn classes of issue. In Nicolls *v.* Sheffield (*x*) the court held that a proviso for shifting an estate after an estate tail was valid; and Lord Kenyon would not listen to an argument founded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail." He therefore held the remainder good. This decision was affirmed in D. P. (*y*) 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 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, (*z*) and the objection there-

(*x*) 2 B. C. C. 215.

(*y*) 2 H. L. Cas. 186.

(*z*) This must be taken to mean "always barrable," which would not *always* have been the case with an executory limitation, *e. g.* when the estates tail had determined, see Banks *v.* Holme, *infra*, p. *261.

fore would not arise." He then went on to show that the limitation in question was a remainder limited on a contingency, and *therefore* good.

So in Doe d. Winter *v.* Perratt, (*a*) where 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., the branch of R. C.'s family who lived at H. might have consisted for an indefinite time of females only: so that the gift to the first male heir who should come into existence was too remote, had it not been limited by way of contingent remainder; but being so limited, no doubt of its validity was expressed on this ground; the only question was, who was meant by "first male heir." Doe *v.* Perratt.

The judgment of Lord St. Leonards in Cole *v.* Sewell has *been criticised, (*b*) as if it had asserted that contingent remainders were in no case subject to the rule against perpetuities, being sufficiently restricted by the rule which requires them to vest, if at all, at or before the determination of the particular estate. But this does not appear to have been his real meaning. He nowhere says that the event upon which the preceding particular estate (upon which the contingent remainder is to depend) is limited to *determine* need not be within the limits allowed by the rule. On the contrary, he says, "The modern rule against perpetuities has rendered void successive life estates to successive unborn classes of issue," (*c*) and (as he has since remarked) (*d*) he relied on the previous estate tail. The rule here referred to prevents the existence of a particular estate which, by enduring to a too remote period, might support a too remote contingent remainder; while in the case before him the estate tail removed all question of perpetuity. The event upon which the particular estate is to determine need not be, and in Cole *v.* Sewell was not, the same as the event upon which the contingent remainder is to arise: and the L. C.'s judgment is directed only to show that where the former event is not obnoxious to the rule against perpetuity, the remoteness of the latter event is immaterial. It is quite consistent with the very words of his judgment, and is required indeed by the general tenor of it, to hold with Sir W. P. Wood (*e*) that "a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed Remarks on Cole *v.* Sewell.

(*a*) 9 Cl. & Fin. 606.

[(*b*) See Appendix A.

(*c*) See above, p. *257, and 2 D., M. & G. 170.

(*d*) Law of Prop., p. 120.

(*e*) 11 Hare 374, 375.

by law;" and that "a perfectly accurate statement of the law is made in the able argument of Mr. Preston in Mogg *v.* Mogg, (*f*) where he says 'a gift to an unborn child for life is good if it stops there, but if a remainder is added to his children or issue as purchasers it is not good, unless there be a limitation of the time within which it is to take effect:'" thus connecting, if not identifying, the rule against perpetuities with the rule which prohibits the limitation of successive estates to successive unborn classes of issue.] (*g*)

Term of years, whether ulterior or precedent to estate tail.

*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: (*h*) 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, (*i*) 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 granddaughters, 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," he observed, "on a term, and that term is precedent to the estates tail, so that after a

(*f*) 1 Mer. 664.

(*g*) See Gilbert Uses, n. by Sugd., p. 260. Mr. Joshua Williams treats the two rules as independent, and denies the validity of such successive limitations, although restricted as suggested by Mr. Preston. He gives a specimen of such limitations which he considers to be unprecedented, and therefore invalid, Law of R. P. 264; Appendix F, 9th ed. But see Cadell *v.* Palmer, stated on this point, *post* p. *279.

(*h*) Eales *v.* Conn, 4 Sim. 65.

(*i*) 2 Kee. 764, [affirmed by Lord Cottenham, 5 My. & Cr. 246. See Sykes *v.* Sykes, L. R., 13 Eq. 56, acc.]; and see Hayes' Introd. vol. 1, p. 135, vol. 2, p. 170, n., 5th ed.

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."

[Of course it is not the mere limitation of an estate tail—as, to the first son of A, who never has a son,—but the vesting of it in the devisee, which protects the trusts of the subsequent term. On the death of A without having had a son the trusts will be good or bad, or, (if severable) some good and some bad, according as they are within or without the limits set by the rule against perpetuity.] (*k*)

The question, whether an executory limitation was precedent *or subsequent to an estate tail, was much discussed in Doe d. Lumley *v.* Earl of Scarborough, (*l*) 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 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 (*m*) (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 in B. R. 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.

Executory limitation, whether precedent or subsequent.

(*k*) Tregonwell *v.* Sydenham, 3 Dow 194, where all the trusts were held void except the trust to raise the money, and the money was held to result to the heir. See as to the last point, ch. XVIII., § 2.

(*l*) 3 Ad. & Ell. 2, 4 Nev. & M. 724.

(*m*) 3 Ad. & Ell. 897.

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. If therefore freehold lands, of which the legal inheritance was in the testator, were 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: although 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, such ultimate remainder would, nevertheless, have *been void for remoteness (*n*) on the ground that the destruction in these cases was effected by what the law called a tortious or wrongful act, (though it was wrong without a remedy,) the perpetration of which was not to be presumed. [And now the statute 8 and 9 Vict., c. 106, § 8, which has deprived the owner of the previous estate of freehold of the power of destroying the contingent remainders depending on it, has also deprived those remainders of any validity they might have derived from their destructibility.

Effect of 8 and 9 Vict., c. 106.

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 service and rent (if any) during the subsistence of the particular estate; (*o*) 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, (*p*) where a settlor, having the reversion in fee expectant on a failure of issue male of his sons and issue general of his daughters, devised it on the contingency of

[(*n*) Or by the rule already noticed which forbids the giving of an estate for life to an unborn person, with remainder by purchase to his issue.]

(*o*) Preston on Merger, 246; Badger *v.* Lloyd, 1 Ld. Raym. 523; Bac. Uses 45, 46, cited Saud. Uses, ch. II., v. 2.

(*p*) 1 Russ. 394, n.; Sugd. Law of Prop. 351; and see Doe *v.* Fonnereau, Dougl. 486.

there being no child or children of his wife by him begotten, or (as eventually happened) of there being such, but all of them dying without issue; it was held, that the devise was too remote and void. (*q*) 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 simultaneously with the determination of the estates tail to the sons and daughters, (*r*) 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 the determination of the estates tail and the failure of issue general, 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. (*s*)

How far same rule applicable to copyholds.

Contingent remainders of copyholds 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. (*t*) The statute 8 and 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. (*u*)

A different rule applies to contingent limitations by way of remainder in equitable interests.

Contingent remainders (or, more properly, executory interests) of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited, (*x*) and are therefore invalid if that contingency be too remote. (*y*) But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily

(*q*) But the devise might have been supported on a distinct ground; the testator referred to the settlement, and, though he mis-recited it, he manifestly intended to devise his reversion, whatever it was. See ch. XL., § III., 5.

(*r*) The case would then have been similar to Cole *v.* Sewell.

[(*s*) Bristow *v.* Boothby, 2 S. & St. 465; and see Morse *v.* Ormonde, 1 Russ. 382.

(*t*) Pickersgill *v.* Grey, 30 Beav. 352; so of estates *pur autre vie*, Ib.

(*u*) Fearne, C. R. 320.

(*x*) Hopkins *v.* Hopkins, Cas. t. Talb. 44, 1 Atk. 581; Chapman *v.* Blisset, Cas. t. Talb. 150.

(*y*) Moneypenny *v.* Dering, 8 Hare 568, 590.

happen at or before the determination of that estate, *e. g.*, a trust for a class to be ascertained at or before such determination. (*z*)

What is the ground of the decision in Cole *v.* Sewell.

These considerations bear upon an observation which has been made (*a*) on the doctrine advanced in Cole *v.* Sewell (and the same would apply to Doe *v.* Perratt,) to the effect that a contingent remainder limited after an estate tail is not void on account of the remoteness of the contingency on which it is to arise. 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 estate 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 waited for the happening of the event upon which it was limited (a period 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.

The question whether a contingent remainder is void is not affected by 8 and 9 Vict., c. 106,

The validity of remainders limited on a remote contingency does not appear to be affected by the act 8 and 9 Vict., c. 106, § 8. Under that act contingent remainders which would previously 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 will still fail 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

(*z*) Heasman *v.* Pearse, L. R., 7 Ch. 275.

(*a*) See Appendix A.

in any other manner, and the contingent remainder must then take effect or fail. Neither is a remainder limited on a remote contingency affected by the statute 40 and 41 Vict., c. 33, which enacts that every contingent remainder thereafter created, which would have been valid as a springing use or executory devise, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect as if the remainder had originally been created as an executory devise: for if the remainder had been originally limited as an executory devise, to take effect on the remote contingency, it would not have been valid.]

—nor by 40 and 41 Vict., c. 33.

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 Dodd *v.* Wake, (*b*) *where a testator bequeathed a sum of £3000 unto and amongst the children of his daughter M. M., "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*. 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.

(*b*) 8 Sim. 616; [and see Boughton *v.* James, 1 Coll. 26, 1 H. L. Cas. 406; Griffith *v.* Blunt, 4 Beav. 264. But a gift to a class at a prescribed age includes none born after the eldest has attained the age; if, therefore, he does so in testator's lifetime, the gift is good, whatever the age prescribed, Picken *v.* Matthews, 10 Ch. D. 264.]

Distinction in regard to remainders.

It is proper to remark that, in the class of cases under consideration, 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 for life. Such an estate, therefore, if limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper bounds. Thus if lands of which the testator had the legal inheritance 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, because if at the death of A no child has attained the vesting age, the remainder will fail under the doctrine in question; (c) and if any child has attained that age the devise will take effect in favor of such child to the exclusion of any child or children afterwards attaining the prescribed age. (*d*)

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, (*e*) a different rule prevails; as already stated, they await the happening of the event upon which they are limited, notwithstanding the determination of the particular *estate. They are therefore void when that event is too remote; and]

Gift of personal estate to a *class* which *may* comprise objects too remote, void as to all.

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 Leake *v.* Robinson, (*f*) where certain stock and moneys 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

(*c*) Fearne, C. R. 4. [Festing *v.* Allen, 12 M. & Wels. 279; Alexander *v.* Alexander, 16 C. B. 59.

(*d*) Brackenbury *v.* Gibbons, 2 Ch. D. 417. See further as to contingent remainders of this kind since 40 and 41 Vict., c. 33, *post* ch. XXVI.

(*e*) See Blagrove *v.* Hancock, 16 Sim. 371; Walker *v.* Mower, 16 Beav. 365, where, however, the trust was executory.]

(*f*) 2 Mer. 363.

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 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 favor 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." (*g*)

*And even if all the members of the class had happened to be born during the life of the tenant for life, or even in the lifetime of the testator himself, the gift would nevertheless have been absolutely void, as it is an invariable rule that regard is had to possible not actual events, and the fact that the gift *might* have included objects too remote is fatal to its validity, irrespectively of the event.

Gift to a class including a named person.

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 therefore shares the fate of, the gift to the other intended objects with which it stands blended and associated. (*h*) [This conclusion was

[(*g*) The books abound with cases in which the decision in Leake *v.* Robinson has been followed; it will be sufficient to refer to some of them, Judd *v.* Judd, 3 Sim. 525; Newman *v.* Newman, 10 Id. 51; Comport *v.* Austen, 12 Id. 218; Ring *v.* Hardwick, 2 Beav. 352; Bull *v.* Pritchard, 1 Russ. 213, 5 Hare 567; Vawdry *v.* Geddes, 1 R. & My. 203; Southern *v.* Wollaston, 16 Beav. 166; Merlin *v.* Blagrave, 25 Beav. 125; Pickford *v.* Brown, 2 K. & J. 426; Read *v.* Gooding, 21 Beav. 478, 4 D., M. & G. 510; Rowland *v.* Tawney, 26 Beav. 67; Smith *v.* Smith, L. R., 5 Ch. 342, referred to below.]

(*h*) Porter *v.* Fox, 6 Sim. 485.

questioned by a learned judge, (*i*) who thought the gift to the living person, when associated with a gift to a "class" (all to take as tenants in common,) ought not to fail any more than it would if it had been associated with a gift to other named individuals to take with him as tenants in common. But the conclusion seems inevitable: for in the former case the share of the living person could not be ascertained but by reference to the number of members ultimately included in the class; and this could not be known within due limits. This it was that made the living person one of the class, subject to all the conditions that appertained to that character. Leake *v.* Robinson shows that it is not the description of the legatees as children or grandchildren that constitutes them a class, but the mode and conditions of the gift. Sir W. Grant there observed, (*j*) that supposing the distinction made (as was there attempted) between persons capable and persons incapable, there was still the difficulty of adjusting the proportions in which the capable children were to take, and in determining the manner and the period of ascertaining those proportions.

Void as to some only, where the amount of each share is ascertained within legal limits. Storrs *v.* Benbow.

Where this difficulty does not exist, the rule in Leake *v.* Robinson does not generally apply. Thus, in Storrs *v.* Benbow, (*k*) where the testator bequeathed £500 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 as to the children 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 with Leake *v.* Robinson. The legacy given to one of the former set of children could not be bad because there was a legacy given under a similar description to a person who would not be able to take because the gift was too remote.

Void in part only where shares ascertainable within the period.

Griffith *v.* Pownall.

Again, in Griffith *v.* Pownall, (*l*) 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

[(*i*) Per Stuart, V. C., James *v.* Lord Wynford, 1 Sm. & Gif. 58, 59. If the gift were in joint tenancy, would the whole fund accrue to the individual?

(*j*) 2 Mer. 390.

(*k*) 3 D., M. & G. 390. See also Wilkinson *v.* Duncan, 30 Beav. 111, as to the legacies of £2000; as to the residue the case was like Leake *v.* Robinson.

(*l*) 13 Sim. 393.

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 each 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.

The distinction was disregarded in Greenwood *v.* Roberts, (*m*) where the testator bequeathed personal property upon trust, among other things, to pay his brother Thomas an annuity of £200 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; he gave them vested interests therein; and further directed that if any of the children of his brother Thomas should at his (Thomas') death be dead and have left issue, such issue should be entitled among them to the same sum as they would eventually have been entitled to had their parents survived Thomas. 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. He 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

Greenwood *v.* Roberts, *contra.*

(*m*) 15 Beav. 92.

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,) (*m*) 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, some of whom are precluded from taking, and consequently that the gift over after his decease is void."

Remarks on Greenwood *v.* Roberts.

But Leake *v.* Robinson appears not to justify the use here made of the word "class." The grandchildren were not all of one class; there were as many separate classes of grandchildren as there were children of Thomas, and although to save repetition the gifts to all these classes were included in one set of words, the gift to each of them was wholly independent of the gifts to the others, its amount having been finally ascertained at the death of Thomas, when the number of his children who survived him or predeceased him leaving issue was known. A number of persons are popularly said to form a class when they can be designated by some general name, as "children," "grandchildren," "nephews;" but in legal lan*guage 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 in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. Thus a bequest of £1000 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 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,

What constitutes a gift to a class.

[(*m*) 2 Phill. 534.]

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, (*n*) 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 part of the fund, while another part would have been undisposed of if another child of Thomas had no children.

The principle of Griffiths *v.* Pownall prevailed in Cattlin *v.* Brown,(*o*) where a testator entitled to the equity of redemption in lands, subject to a mortgage in fee, devised them 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 was given to his, her or their child or children lawfully begotten, or to be begotten, and to his, her or their heirs as tenants in common. T. B. C. left several children, some born in the testator's lifetime, some after his death; and it was held by Sir W. P. Wood, V. C., that the shares of the children born in the lifetime of the testator were well given to their children though the gift to the other grand*children failed. He thought Greenwood *v.* Roberts was distinguishable because "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, and the case therefore fell within the rule in 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." And he intimated that the

Cattlin *v.* Brown.

Gift held void in part only.

Explanation of Greenwood *v.* Roberts by Wood, V. C.

[(*n*) Porter *v.* Fox, 6 Sim. 485; see also Clark *v.* Phillips, 17 Jur. 886; In re Stanhope's Trusts, 27 Beav. 201; Knapping *v.* Tomlinson, 34 L. J., Ch. 7; Aspinall *v.* Duckworth, 35 Beav. 307. In re Ann Wood's Will, 31 Beav. 323 (as to the lapsed share), and Drakeford *v.* Drakeford, 33 Beav. 46 are *contra: sed qu.*, and as to the last-named case see 9 Jur. (N.S.), pt. 2, 301. In In re Chaplin's Trusts, 33 L. J., Ch. 184, it was admitted by Wood, V. C., that naming some of a class did not make it less a class; yet he held that the named person having died before the testator, his share lapsed; which seems contradictory.

(*o*) 11 Hare 372. See also Vanderplank *v.* King, 3 Hare 1.]

case before him might have been similar if the devise had been to the sons of T. B. C. living at his decease, with remainder to their sons in fee.

Remarks thereon by Kindersley, V. C.

Sir R. Kindersley said (*p*) he was unable to see the distinction here referred to: it appeared to him that in Cattlin *v.* Brown precisely the same observation would arise, and that it would be equally true that all the children of T. B. C. that were born and *in esse* at the death of the testator might die in the lifetime of T. B. C. He did not see how the observation or the ground of distinction applied; and it struck him that the same reason which was given in support of Greenwood *v.* Roberts would have required Cattlin *v.* Brown to be decided in the same way. It must also be observed that the M. R. himself declared (*q*) that the gift to grandchildren in the latter case would undoubtedly have been good if the class was to be ascertained at the death of Thomas; and he referred his decision to the clause which substituted the issue of any child of Thomas who should die before Thomas, in the place and to take the share of their parent, and to the fact that such issue 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 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 divisible, and this would be too remote. This was a new ground. It was not taken in the case itself; doubtless because the substitution clause said nothing about the age of twenty-one. But if this clause is to be understood as so referring to the previous gift to grandchildren in remainder, as to import into itself the mention of that age, so also must it be deemed to import the declaration that the *interests given were "vested." Besides, the intermediate interest was given for the benefit of the grandchildren during minority.

Explanation of Greenwood *v.* Roberts by Romilly, M. R.

Remarks thereon.

The distinction already noticed as having been taken by Sir W. Wood regarding Greenwood *v.* Roberts, was disregarded by him in Wilson *v.* Wilson. (*r*) The bequest there was of a sum of money upon trust to pay the income to the

Wilson *v.* Wilson.

Gift held void in part only.

(*p*) Knapping *v.* Tomlinson, 34 L. J., Ch. 3.

(*q*) See Webster *v.* Boddington, 26 Beav. 136.

(*r*) 4 Jur. (N. S.) 1076, 28 L. J., Ch. 95.

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. Wood, decided that the trust in favor 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 (*s*) 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."

Cattlin *v.* Brown was followed by Sir R. Kindersley in Knapping *v.* Tomlinson, (*t*) where the devise was identical in its terms with that in the former case. The V. C. reviewed all the cases, and expressed his entire concurrence with Sir W. Wood's decision. Sir J. Romilly, having also declared (*u*) his approval of that decision, and having referred his own decision in Greenwood *v.* Roberts to grounds which, at all events, remove it from apparent opposition to the other authorities, (*x*) it must be taken as settled that where the shares of all the separate stocks can be ascertained within legal limits, as in those authorities, the rule in Leake *v.* Robinson is not applicable so as to defeat limitations, otherwise valid, of the separate shares.

Knapping *v.* Tomlinson.

Gift held void in part only.

Neither does the rule extend to cases where, in the event of the death of any of the original class, another class is substituted in his place. Thus, if a fund is bequeathed to the children of A (a person living at the testator's death,) and if any of them *should die before the period of distribution (*e. g.* before attaining the age of twenty-one) his share is given to his issue, to vest in them at twenty-one; here the substituted gift to issue of a child born after the testator's death is obviously too remote, and the child's share

Where the remote gift is substitutional that alone fails.

(*s*) 6 Sim. 485.

(*t*) 34 L. J., Ch. 3, 10 Jur. (N. S.) 626.

(*u*) In Webster *v.* Boddington, 26 Beav. 137, 138.

(*x*) Arnold *v.* Congreve, 1 R. & My. 205 (where the point was not taken) is overruled.]

remains undisturbed; but the substituted gift to issue of a child born in the testator's lifetime is valid, for the fund is, in any event, to be divided into as many shares as there are members of the original class, *i. e.* children of A; as in Wilson *v.* Wilson, the issue of each child of A forms a separate class, whose share is separately ascertainable. (*y*)

Otherwise, where it is concurrent.

On the other hand, if the gift to the issue is not substitutional but original and concurrent with that to children, as, if the bequest be to such of the children of A as attain twenty-one, and the issue who attain twenty-one of such of the children of A as die under twenty-one, *per stirpes*. Here they all form but one class, the share of no one of whom can be finally ascertained without reference to the shares of all the others. And as some of this class may obviously not be ascertained within a life in being and twenty-one years, the whole gift fails. (*z*) It is true that, according to the terms of the gift, the minimum share of each would be ascertained within a life in being (*i. e.* the life of A) and twenty-one years after. But the maximum would remain uncertain until it was seen whether the issue of any child dying under age and leaving issue did or did not attain twenty-one, which would clearly be beyond the legal period.]

The doctrine that the validity of a gift is to be tried by possible not actual events is, of course, applicable no less to gifts to individuals than to gifts to classes. If, therefore, the devise *or bequest be in

[(*y*) Packer *v.* Scott, 33 Beav. 511, appears to be a case of this kind; but the report is very imperfect. The question whether a gift is original or substitutional is not peculiar to the subject of remoteness. It is dealt with *post* ch. XXX., § 3. See also ch. XLIX., § 1. One example will here be useful. In Stuart *v.* Cockerell, L. R., 5 Ch. 713, the bequest was to S. for life, remainder to his eldest son for life, remainder to E. for life, and after the death of the survivor of the tenants for life "to the children of S. share and share alike if more than one, and if but one then to such one child and the child or children of such of the children of S. as shall be then dead, according to the statute of distribution; but in case there shall be no child or grandchild of S. then living, then" over. At the death of the testatrix S. had no child. Without the gift over this would have been a vested gift to the children of S., with a substitutional gift to grandchildren (In re Bennett's Trusts, 3 K. & J. 280; Baldwin *v.* Rogers, 3 D., M. & G. 649); but the gift over was held to show that no children of S., except such as were living at the period of distribution, were objects of the gift, and that the children then living and the children of such of the children as were then dead formed one class.

(*z*) Smith *v.* Smith, L. R., 5 Ch. 342; Stuart *v.* Cockerell, *sup.*; Seaman *v.* Wood, 22 Beav. 591; Webster *v.* Boddington, 26 Beav. 128; Hale *v.* Hale, 3 Ch. D. 643; Bentinck *v.* Duke of Portland, 7 Ch. D. 693. In In re Moseley's Trusts, L. R., 11 Eq., 499, 502, it was overlooked that issue as well as children were required to attain twenty-one: this made the whole gift void.

favor of an unborn person, who may not answer the required description within a life and twenty-one years, it will be void, although a person should happen to answer the description within such period. Thus, if a testator give real or personal estate to an unborn person, who shall thereafter happen to acquire some personal qualification, which is attainable at any period of life, and is not *necessarily* confined to minority, as in the case of a gift to the first son of A who shall obtain a commission in the army, take a degree at the university, or marry, (*a*) it is conceived that the gift would be void, even though A should happen to have a son who should answer the required qualification before the age of twenty-one.

[Thus, in Lord Dungannon *v.* Smith, (*b*) where a testator devised leaseholds in trust for his grandson A 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. The eldest son of A attained twenty-one in his father's lifetime, and claimed the property as having, in event, vested within legal limits. He contended that the devise might be read as containing separate gifts, to the eldest son, if he attained twenty-one, if not, to the first other heir male who should attain that age; but it was held otherwise, for there was no gift to the eldest son, except as one of a set or series of persons, any one of whom might come within the description, whether he was within the limit or not, and there was no authority for moulding or splitting the bequest in the manner proposed. The case was considered to be analogous to Leake *v.* Robinson. Lord Dungannon *v.* Smith.

Again, in Hodson *v.* Ball, (*c*) 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

[(*a*) To these may be added the case of a gift to the first son of A who shall be in holy orders (as in Proctor *v.* Bishop of Bath and Wells, 2 H. Bl. 358), for although such orders are never conferred on any one under the age of twenty-three, yet A may have a son who is qualified and takes orders in his lifetime.

(*b*) 12 Cl. & Fin. 546, 10 Jur. 721, Sug. Law of Prop. 342, and see Ibbetson *v.* Ibbetson, 10 Sim. 495, 5 My. & Cr. 26; Wainman *v.* Field, Kay 507; also Merlin *v.* Blagrave, 25 Beav. 125; and cf. Harvey *v.* Harvey, 5 Beav. 134.

(*c*) 14 Sim. 558. See also Lett *v.* Randall, 3 Sm. & G. 83; Buchanan *v.* Harrison, 1 J. & H. 665; In re Merricks' Trusts L. R., 1 Eq. 551.

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 freehold lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon corresponding trusts, but so as not to vest absolutely in *any* tenant in tail till he shall attain the age of twenty-one years, but on his death under age to devolve as the freeholds, this trust, so far as it is limited in favor 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. 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. (*d*) 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, (*e*) or to cut timber and sell it, (*f*) and invest the moneys 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 tail *by purchase*, else the powers will be altogether void. (*g*)

[(*d*) This is the common form, Davidson's Common Forms, p. 216. If the clause stops short with the proviso against absolute vesting, and omits the concluding gift over, remoteness is avoided without help of the words "by purchase." For then there is no gift of the personalty except in the primary trust, and under this trust it vests absolutely in the first tenant in tail by purchase: and the proviso, being but an accessory to that, must be construed also to relate only to tenant in tail by purchase, Christie *v.* Gosling, L. R., 1 H. L. 279; Martelli *v.* Holloway, L. R., 5 H L. 532. According to this construction, however, the intention to keep the two species of property together as long as possible, fails. The concluding gift over is required to effectuate this intention, and as this gift contains trusts for tenants in tail taking by descent, the rule of construction established in Christie *v.* Gosling is inapplicable, and the words "by purchase" are needed to obviate remoteness; see Gosling *v.* Gosling, 1 D., J. & S. 16. See further on this subject, *post* ch. XLIV., § 3.

(*e*) 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 K. & J. 16; Floyer *v.* Bankes, L. R., 8 Eq. 115 (where, however, the powers were annexed to an anterior term).

(*f*) Ferrand *v.* Wilson, 4 Hare 373.

(*g*) **Observations on Browne v. Stoughton.**—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

*The invalidity of such trusts admits, however, of one exception, namely, where the fund arising therefrom is to be applied in discharge of encumbrances affecting the estate, (*h*) for then they only prescribe a particular mode of paying the

Rule against perpetuities does not apply to accumulations for payment of debts.

on an estate tail, barrable along with the estate tail, and therefore not void for remotemess. 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 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. "The other was the better view, but the point is now well settled," Sug. Law of Prop. 349. 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. Browne *v.* Stoughton, cannot therefore be distinguished from Lord Southampton *v.* Marquis of Hertford, 2 Ves. & 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 went even further than Mr. Lewis; in an opinion—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." But Case *v.* Drosier (*ante* p. 259) shows that Mr. Sanders' opinion does not represent the accepted view of the law on this point. In Meller *v.* Stanley, 2 D., J. & S. 183, where one having freeholds for lives devised his real and personal estate to trustees, and directed them to keep up the policies on the existing lives (which he had insured), and from time to time to renew the lease and insure the new lives; and subject as

(*h*) Lord Southampton *v.* Marquis of Hertford, 2 Ves. & 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.

encumbrances, which in case of a mortgage, the encumbrancer 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 encumbrance, or the encumbrancer 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.] (*i*)

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 postponing 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

aforesaid he gave the property to A for life, remainder to his first and other sons in tail, &c.: Turner, L. J., said he was not satisfied that the trust could (as was contended) be held valid as to renewal on the dropping of existing lives, and invalid (for remoteness) as to others; he thought, however, it was valid as to all, since there must necessarily be a person who within the lawful period would have absolute command over the estate and consequently over the trust.

(*i*) Tewart *v.* Lawson, L. R., 18 Eq. 490.]

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, (*k*) *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 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

Tollemache *v.* Earl of Coventry.

Devise to a person who *might* not answer a certain qualification within allowed period, held void, irrespectively of event.

(*k*) 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, where a testator, after devising lands (subject to certain terms for years which he created for the purposes thereinafter mentioned) to A for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands under a term of sixty years,* the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitation in his will, with remainder (in effect) to his issue in strict settlement. When the time arrived for laying out the money, it happened that the person entitled in possession under the limitation in question was not *in esse* at the testator's death, and therefore could not be made tenant for life with remainder to his issue; but the grounds on which Lords Redesdale and Eldon rested the decision of the house show that if the person entitled in possession had happened to be a person *in esse* at the testator's death, the trust for laying out the money would in their opinion have been legal. See the will stated at length, *post* ch. XVIII., § 2.

* This was before the Tellusson act, *post* § 3.

the former was born in the testator's lifetime, it was clear, that he *might*[16] have been made legatee for life, with remainder absolutely to the person next in succession, and the question, therefore, was, whether

16. Mr. Lewis, in his work on perpetuities, (pp. 478–481,) says: "The rule requiring all future limitations to be such as, if they take effect at all, will necessarily operate within the period of lives in being and 21 years, obviously condemns as invalid every gift of a future interest in property made to depend on an event which, although it *may possibly* happen within the allowed period, may *possibly also not* happen until after the expiration of such period. * * * Let the event contemplated be what it may and the probability of its early occurrence as great as it may be, it will in every case be of too remote expectancy, and a limitation upon it will therefore always be void unless, either from the nature or internal quality of the contingency or from express provision and restriction, it be *certain* that the event, which is to give effect to the limitation, will happen if at all within the period of lives in being and 21 years." See, too, the remarks of Gray, J., in Jackson *v.* Phillips, 14 Allen (Mass.) 572: "The general rule is that if any estate, legal or equitable, is given by deed or will to any person in the first instance, and then over to another person, or even to a public charity, upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, the gift over is void, as tending to create a perpetuity by making the estate inalienable; for the title of those taking the previous interests would not be perfect, and until the happening of the contingency it could not be ascertained who were entitled. Brattle Square Church *v.* Grant, 3 Gray, 142. Odell *v.* Odell, 10 Allen, 5, 7. If therefore the gift over is limited upon a single event which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period." To make a gift valid as regards the laws of perpetuity it must be such that it not only *may* but *must* take effect within the prescribed period. Gifts, therefore, which seem to contemplate, and may involve, a longer suspension, are void. Thus in general gifts to a secular corporation not authorized by law to take property by devise—see Andrew *v.* New York Bible Soc., 4 Sandf. S. C. (N. Y.) 156; Theol. Sem. *v.* Childs, 4 Paige Ch. 419; King *v.* Rundle, 15 Barb. 139; Wetmore *v.* Parker, 52 N. Y. 450; Adams *v.* Perry, 43 N. Y. 487; Needles *v.* Martin, 33 Md. 609; Clark's Trust, 24 W. R. 233; 1 L. R., Ch. Div. 497; Cocks *v.* Manners, 12 L. R., Eq. 574. So, where the object of the gift involves a perpetuity, as a scheme for an agricultural school, Levy *v.* Levy, 33 N. Y. 97, reversing 40 Barb. 585; or for a village library, Leonard *v.* Burr, 18 N. Y. 96; or a subscription library, Caine *v.* Long, 2 De G., F. & J. 75; or for keeping up tombs and burying grounds, McLeod *v.* Dell, 9 Fla. 427; Richard *v.* Robson, 31 Beav. 244; Fowler *v.* Fowler, 10 Jur. (N. S.) 648; Neo *v.* Neo, 6 L. R., P. C. 381—in this case there was a house also to be kept up for a residence for testator's family, also a perpetuity; or to manage property until certain mortgages can be paid off out of the rents, Killam *v.* Allen, 52 Barb. 605; or a devise on condition that the minister reside on the property with executory devise over on breach—the devise over being held too remote, Church in Brattle Square *v.* Grant, 3 Gray (Mass.) 142; or a conveyance not to take effect "until the mill pond shall cease to be used for the purpose of carrying any two mill wheels," Welsh *v.* Fos-

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

ter, 12 Mass. 97. So, where the language of the will requires it expressly. Smith *v.* Dunwoody, 19 Ga. 237; Best *v.* Conn, 10 Bush (Ky.) 37; Att.-Gen. *v.* Greenhill, 9 Jur. (N. S.) 1307. But where the property is to be converted into a perpetual fund, the idea of perpetuity was held to be excluded, in Moore *v.* Moore, 4 Dana (Ky.) 354. In St. Armour *v.* Rivard, 2 Mich. 294, provision for a succession of life estates, the land never to be alienated, was held void; so, also, Allyn *v.* Mather, 9 Conn. 114; Parfitt *v.* Hember, 4 L. R., Eq. 443. The cases are numerous where the gift is void on account of a perpetuity being made possible, although not necessary or even probable, by the provisions of the will. Thus Schettler *v.* Smith, 41 N. Y. 328; but see Jemison *v.* Smith, 37 Ala. 185, where the gift was to testator's widow for life, with remainder to her children and the heirs of the body of those deceased, and was held not to be too remote; in Waldo *v.* Cummings, 45 Ill. 421, Judge Walker says: "A perpetuity is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years beyond; and in case of a posthumous child a few months more, allowing for the time of gestation. Bouv. Law Dict. Gilbert in his treatise on uses defines it to be such a limitation of property as renders it inalienable beyond the period allowed by law. Gilbert, Uses by Sugden 260 and note. Lewis, in his treatise on perpetuities, defines it to be 'a future limitation whether executory or by way of remainder and either of real or personal property which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests and which is not destructible by the persons for the time being entitled to the property, subject to future limitation, except with the concurrence of the individual interested under that limitation.' Lewis Perp. 164. And an examination of the authorities will verify the correctness of the definition as well as the period of limitation specified by Bouvier." In Loring *v.* Blake, 98 Mass. 253, there was a devise to trustees for the life of each child of testator, and of the surviving husband or wife of each, and on the death of the child without leaving husband or wife, or of such husband or wife, to the use of his or her children. In this case, Wells, J., says: "It was possible that a child of the testatrix might marry a person not in being at the time of her decease and that such person might be the survivor of the marriage. In that case a limitation of her estate not to take effect until after the decease of such unborn person would be in violation of the rule against perpetuities because it would not be supported by the definite measure of a life or lives in being and 21 years after. * * * The rule however regards not the possession but the title or absolute right. If that vests within the prescribed period, the rule is satisfied. * * * The enjoyment is postponed to enable the surviving husband or wife to receive the income during life, but the title, the absolute interest in remainder, is fixed at the decease of the child. * * * The limitation of a life interest to a surviving husband or wife, who may not have been born at the time of testatrix's decease, does not tend to make a perpetuity, because the interest, although contingent during the life of the child, becomes vested at the death of the child, and the limitation over, as we have already seen, is not at all dependent upon such life interest, but itself also becomes

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. (*l*) 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.' (*m*) 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. (*m*) The son and grandson of the testator were living at his death, and both, therefore, limited to the use and enjoyment only; (*m*) but the child who succeeded the grandson 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. (*m*) He took, therefore, an absolute interest, which is now vested in his personal representative."

vested absolutely at the same time." In like manner, in Otis *v.* McLellan, 13 Allen 339, a trust for seven children by name, to pay them the income for their lives, with remainder to their issue on death of the last surviving child, interposing a life estate to each child's wife or husband, if surviving, was held to vest in the issue of each child at their parents' (the child's) death, and therefore not to be too remote. See, too, Pennsylvania Ins. Co. *v.* Price, 7 Phila. (Pa.) 465; Lovett *v.* Lovett, 31 Leg. Int. (Pa.) 349; Stephens *v.* Evans, 30 Ind. 309. In Sykes *v.* Sykes, 13 L. R., Eq. 56, where an estate was given to testator's eldest son in tail, with remainder in tail to other sons, a trust to raise portions for the sons other than the one in possession, in case of any younger son of the testator becoming seized in possession, was held too remote, and void. So a limitation to A for life, and her "issue," has been held to be void as a perpetuity. Barnum *v.* Barnum, 26 Md. 119; Deford *v.* Deford, 36 Md. 168; Goldshoro' *v.* Martin, 41 Md. 488.

(*l*) 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. *279.

(*m*) See last note.

[This judgment was affirmed by Lord Lyndhurst, but was reversed in D. P. on the advice of Lord Brougham, C. He admitted that the testator might lawfully have limited the chattels to go according to the decree of the V. C. if he had used the proper words; but first he said there was no authority for putting that construction on the words used; and secondly he took a new objection, founded on the bequest being an attempted annexation of chattels to an honor; which he described as an attempt to create a new species of limitation in succession, unknown to the law, to spring up with the person, *i. e.* to the Lords Vere whoever they might be; and he mentioned certain contingencies, especially a possible abeyance of the honor, which, in his opinion, showed that there might be no one to answer that description within the allowed period: and although none of those contingencies had happened, the soundness of the limitations could not depend on the event.

Lord St. Leonards has criticised this judgment, (*n*) and has adduced authorities to show that chattels may be limited to go along with an honor; and with regard to the question of construction (which is of the greater interest here,) he distinguishes between a compendious limitation to several persons successively, where the legal limit can clearly be marked, as in Lord Vere's will, and a limitation like that in Lord Dungannon *v.* Smith, where only one person was to take, and it depended on the event whether the person who lived to answer the description would or would not come *in esse* within the legal period. He thought Tregonwell *v.* Sydenham a grave authority for giving effect to such a limitation as that in Lord Vere's will as far as the events would allow, keeping within the legal boundary.]

*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. (o) 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

Gift to unborn person for life valid.

[(*n*) Law of Prop. 336.]

(*o*) 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., Jr., 366; [Burley *v.* Evelyn, 16 Sim. 290; Hampton *v.* Holman, 5 Ch. D. 183; and see Fearne C. R. 503.]

interest, (for the larger includes the less,) and yet it would not be difficult to cite *dicta*, nay, even to adduce a decision, (*p*) propounding the doctrine, that a life interest cannot be given to an 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. (*q*) [Taken as containing two separate propositions, the rule is not true in either of its branches, for a *legal* remainder immediately expectant on a vested estate of freehold may be 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, (*r*) 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 Cadell *v.* Palmer (*s*) that even a long succession of estates for life to unborn persons and their issues 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 that case a direction to limit 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 was held valid. 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 remainders over. So where there was a gift to issue of A (a living person), to vest on a remote event, and a gift over

As to successive limitations to unborn persons who *must* come *in esse* within the allowed period.

(*p*) Hayes *v.* Hayes, 4 Russ. 311; [see as to this case, 6 Hare 250, 1 Coll. 37, 5 Ch. D. 188.

(*q*) See 11 Hare 375.

(*r*) See Doe d. Winter *v.* Perratt, 9 Cl. & Fin. 606, and *ante* p. *257; and remember the distinction there taken between legal and equitable limitations.

(*s*) *Ante* p. *252.

to B if there should be no issue of A who should survive the testator and A, the gift over was held valid, the word "survive" importing that the issue here spoken of were not all issue or all included in the previous gift, but such as should be born in the lifetime of the persons whom they were to survive, viz., the testator or A. (*t*)

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 devisee, 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 (*u*) seems to have been in favor 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, (*x*) 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 Ll. Kenyon, in Jee *v.* Audley, (*y*) expressly states such a limitation to be good.] Sir W. Grant, though at one time he expressed doubts on the subject, (*z*) [seems latterly to have been of the same opinion, (*a*) and the authority of Lord Brougham is on the same side.] (*b*) 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 it is still of some importance, because it may arise on a gift limited to take effect on any other event which, abstractedly considered, is too remote.]

[(*t*) Gee *v.* Liddell, L. R., 2 Eq. 341. See also Lachlan *v.* Reynolds, 9 Hare 796.]

(*u*) C. R. 488, 500, Butler's note.

(*x*) Pollex. 38.

[(*y*) 1 Cox 326.]

(*z*) Barlow *v.* Salter, 17 Ves. 483; see Sugd. Gilb. Uses, 277, n.

[(*a*) Massey *v.* Hudson, 2 Mer. 133.

(*b*) Campbell *v.* Harding, 2 R. & My. 406.

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 favor of persons who are competent objects of gift; (c) 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, (d) 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 distribution; 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.[17]

(c) Routledge *v.* Dorril, 2 Ves. Jr., 366; Evans *v.* Walker, 3 Ch. D. 211.]

(d) See Cooke *v.* Bowler, 2 Kee. 53.

17. It has been held that a limitation over on the death of unborn children is too remote and void in Hannan *v.* Osborn, 4 Paige 336; so, too, Loring *v.* Blake, 98 Mass. 253; Stephens *v.* Evans, 30 Ind. 39; *contra*, Roberts *v.* West, 15 Ga. 123. But a gift over on the death of A's widow and unborn children, if he leave any, was held not to be too remote where A died unmarried before the testator. Hosea *v.* Jacobs, 98 Mass. 65. In Stuart *v.* Cockerell, 7 L. R., Eq. 368, Vice Chancellor Malins says of Avern *v.* Lloyd: "The words *executors, administrators and assigns* following a gift of a life estate are words of limitation. If the Vice Chancellor construed it thus, that it was a gift to all the children for life with a limitation to one of them absolutely, it may possibly be reconciled. But if he intended to decide that the vesting of any gift whatever can be postponed till after the expiration of lives not yet in being, then with every respect for the Vice Chancellor, I must differ from his opinion because nothing can be more clearly settled and it was finally settled by Cadell *v.* Palmer, 1 Cl. & Fin. 372, that you may postpone the vesting of property during a life or lives in being and the period of 21 years in gross afterwards; but that every gift which must not necessarily vest within that period is void. The Vice Chancellor, I see, uses this expression: 'Considering that this limitation to the executors, administrators and assigns must take effect in the lifetime of one of the unborn issue to whom a good estate for life is given, so as to give him an absolute estate in possession, when he becomes the survivor, it is not easy to see on what ground it can be considered as too remote.' It is clearly too remote, if the persons who were to take were not to be ascertained until all the unborn persons were dead. 'The gift to the executors, administrators and assigns of the surviving tenant for life attaches to the life estate, so as to give a contingent absolute

[But the absolute interest, however parceled out, must be so limited as necessarily to *vest* (if at all) within the legal period. Thus, if a devise be made to an unborn person for life, and in case he should die without issue living at his death, or under the age of twenty-one years, then to B, this remainder is void, since it depends on the termination of a particular estate by an event which may not happen within a life in being and twenty-one years. It has been suggested that an interest to arise on such an event in an ascertained person is now good, because by a modern statute (*e*) contingent interests may be disposed of at law; (*f*) and the suggestion finds support in principle in a decision of Sir J. Stuart, who, in Avern *v.* Lloyd, (*g*)—where personalty was bequeathed to the issue of A, a living person, share and share alike, for their *lives, and for the survivors and survivor, and after the decease of the survivor, to the executors, administrators and assigns of the survivor,—held the ulterior limitation valid, on the ground that "each of the tenants for life had as much right to alien his contingent right to the absolute interest as to alien his life estate."

An interest which does not vest within the period is void, though alienable.

Now the rule against perpetuity has always in terms required the *vesting* of estates within the prescribed limit. The first instance of an executory gift void for remoteness given by Mr. Fearne (*h*) is a devise to A and his heirs, and if A die without heir, then to B; which, according to the suggestion, would now be good. The rule as it affected equitable interests, whether in real or personal estate, was in corresponding terms: yet these were always alienable. It is submitted that the statute referred to has not made any change in the rule, and

estate to each tenant for life.' That, I think, was the ground upon which the Vice Chancellor decided it and upon that ground it may be right; but if it was intended to say that you may postpone the gift until after the expiration of the lives of all those unborn persons, it is perfectly plain that that is in opposition to all the settled rules on the subject. But I do not think that Vice Chancellor Stuart intended to decide anything of the kind." It was held in this case of Stuart *v.* Cockerell, and affirmed 5 L. R., Ch. App. 713, that an ultimate remainder after a remainder for life to unborn children of A, was too remote. So, in Sayer's Trusts, 6 L. R., Eq. 319, where the gift was to a married woman, A, for life, with remainder to her children for life, and remainder over to her grandchildren, the last remainder was held too remote, and parol evidence was not admitted to show that unborn children of A were not intended, because she was past child-bearing age. To the same effect, see Heasman *v.* Pearse, 11 L. R., Eq. 522.

[(*e*) 8 and 9 Vict., c. 106, § 6.

(*f*) Gilbertson *v.* Richards, 4 H. & N. 277, 5 Id. 453.

(*g*) L. R., 5 Eq. 383.

(*h*) C. R., p. 445.

that the law is as laid down by Sir R. Malins, V. C., in a case (*i*) where a testator having under his ante-nuptial settlement an exclusive power of appointing land to his issue, appointed it by his will to his son A in fee, but if the son should have no child who should attain twenty-one, then to the testator's grandson B in fee. The V. C. held that the gift over was void for remoteness.

That the old rule is unchanged also as regards remainders is shown by the *dictum* already cited of Sir W. Wood, who long after the passing of the statute said that "a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed by law." (*k*)

Curtis v. Lukin.

That the right of alienation is not sufficient of itself to exclude the rule is further shown by Curtis *v.* Lukin, (*l*) where certain property was bequeathed in trust to accumulate the income for sixty years, and to apply part of the fund so formed for the benefit of class A and pay the rest to class B; both classes would be ascertained within lawful limits, but the proportions in which the fund would be divisible between them depended on contingencies which could not be ascertained until the end of the term of sixty years. It was contended that, inasmuch as the beneficiaries as soon as ascertained had full power to dispose of the fund and stop further accumulation, the case was not ob*noxious to the rule against perpetuity; but Lord Langdale held that, although among themselves they might make a title to the fund, yet each of them would be uncertain as to the amount of his share, and therefore that the trust could not be sustained. And it was not suggested that the power which each undoubtedly possessed to alien his contingent share protected the case from the rule.]

Limitations ulterior to a remote devise, void;

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, (*m*) where there was a devise to the first or other son of T. P. that should be bred a clergyman *and be in holy orders*,

(*i*) In re Brown & Sibly, 3 Ch. D. 156; see also observations by the same judge (L. R., 7 Eq. 369) on Avern *v.* Lloyd, *sup.*, and on Ashley *v.* Ashley, 6 Sim. 358, where the question of remoteness was not mooted.

(*k*) 11 Hare 374.

(*l*) 5 Beav. 147.]

(*m*) 2 H. Bl. 358; see also Palmer *v.* Holford, *ante* p. *253.

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.

—ulterior remainder not accelerated.

So, in Robinson *v.* Hardcastle, (*n*) where, on the marriage of James Dunn with Dorothy Wright, lands were limited to himself 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 ac*celerated: 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, (*o*) 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,

(*n*) 2 B. C. C. 22, 2 T. R. 241, 380, 781.

(*o*) 8 Ves. 12. The case is here stated without the alternative bequest.

M. R., held the trust for the children to be too remote, and that the limitation over, therefore, was also void.

[Again, in Beard *v.* Westcott, (*p*) 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 (in effect) 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. On a case from chancery the court of C. P. held that the several gifts after the gift to the unborn son of J. J. B. were void. They also held, that if the event mentioned (*q*) arose, the gift over would take effect, the event in question being (as it clearly was) within the legal limits of perpetuity. The decision on the latter point 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, (*r*) "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," he continued, "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."]

Beard *v.* Westcott.

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

Distinction where the gift over is to arise on a *double* contingency.

[(*p*) 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25.

(*q*) 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 K. B. seems to have altogether ignored it.

(*r*) In Monypenny *v.* Dering, 2 D., M. & G. 182. And see Sug. Gil. Uses 270.]

gift over will be valid, or not, according to the event. (*s*)[18] [Thus, in Longhead *v.* Phelps, (*t*) 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 Leake *v.* Robinson, (*u*) too, certain stock and moneys 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 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

(*s*) See same principle applied to a different species of case, Tregonwell *v.* Sydenham, 3 Dow 194; *ante* p. *276, n.

18. Thus, too, in Jackson *v.* Phillips, 14 Allen 572, Judge Gray says: "But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness. The authorities upon this point are conclusive. Longhead *v.* Phelps, 2 W. Bl. 704; Sugden and Preston, *arguendo,* in Beard *v.* Westcott, 5 B. & Ald. 809, 813, 814; Minter *v.* Wraith, 13 Sim. 52; Evers *v.* Challis, 7 H. L. Cas. 531, Armstrong *v.* Armstrong, 14 B. Mon. 333; 1 Jarman on Wills 244; Lewis on Perp., c. 21; 2 Spence on Eq. 125, 126." So, too, Simpson, J., in Armstrong *v.* Armstrong, 14 B. Mon. 333, says, "where a limitation is made to take effect on two alternative events or contingencies with a double aspect one of which is too remote and the other valid as being within the prescribed limits, although it is void, so far as it depends upon the remote event, it will be allowed to take effect on the alternative one;" and to the same effect see Att.-Gen. *v.* Wallace, 7 B. Mon. 616; Schettler *v.* Smith, 41 N. Y. 328.

[(*t*) 2 W. Bl. 704. Crompe *v.* Barrow, 4 Ves. 681, is commonly cited to the same point. But in that case there was no question of remoteness, the appointor's son C. B. being the child of a former marriage, *i. e.* born before the creation of the power. If otherwise, the alternative gift over, if C. B. should die and leave no child surviving him (which was held good), would in fact have been too remote; for the vesting would have been suspended until the death of an unborn person. It is probable that a similar explanation may be given of In re Lord Sondes' Will, 2 Sm. & Gif. 290, sc. that Charlotte Palmer was living at the creation of the powers.]

(*u*) 2 Mer. 363.

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., (*x*) 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 Goring *v.* Howard, (*y*) 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.

So in Monypenny *v.* Dering, (*z*) where there was a devise in trust for P. M. for life, and after his decease in 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 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; but that the remainder to T. M., and the subsequent remain-

(*x*) *Vide ante* p. *265.

[(*y*) 16 Sim. 395; and see Minter *v.* Wraith, 13 Id. 52.

(*z*) 2 D., M. & G. 145. See also Cambridge *v.* Rous, 25 Beav. 409.

ders, 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 was decided in Doe *v.* Challis, (*a*) where J. D. *devised four houses in trust for his daughter Elizabeth for 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 the property 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. Elizabeth died in 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; and, secondly, whether the gift over on the death of Anne was good. The Court of Q. B. decided both questions in the affirmative. As to the first, they held (in accordance with the authorities before stated,) that if Elizabeth had had a child, although he did not attain 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. As to the second, the court decided that here also the gift over took effect, although the event of *her never having had any children* was not actually expressed, being of opinion, upon the authority of Jones *v.* Westcomb (*b*) 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. In the

(*a*) 18 Q. B. 224, 231.

(*b*) Eq. Cas. Abr. 245. See ch. L.

Exchequer Chamber 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 W. 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."

Apart from the question of perpetuity, it was admitted that Jones *v.* Westcomb was full and sufficient authority for construing the will as was done in the Court of Q. B.; so that the sound rule which requires a will to be construed without reference to the consequences as regards remoteness was actually transgressed in order to defeat the intention. On appeal to D. P., the case of Leake *v.* Robinson was declared to be inapplicable, and the decision of the Exchequer Chamber was reversed. (c) "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 postpone 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

[(c) *Nom.* Evers *v.* Challis, 7 H. L. Cas. 531. In re Thatcher's Trusts, 26 Beav. 365, appears to be contrary: but it was before the decision of D. P., in Doe *v.* Challis, and was decided on the authority of Beard *v.* Wescott.]

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.* (*d*)

It has been already observed, that, in the case of appoint*ments, testamentary or otherwise, under powers of selection or distribution in favor of *defined* classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power. (*e*) The test, therefore, by 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. (*f*) In order to bring the appointment within the pre-

Appointee under a *special* power must be competent to have taken immediately from the donor.

(*d*) 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.

(*e*) Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781.

(*f*) Bristow *v.* Warde, 2 Ves., Jr. 336; see also Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781; [In re Brown and Sibly, 3 Ch. D. 156.] 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 favor 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 favor 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. Suggestion as to settlement of

scribed 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 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 postponed beyond the decease of the surviving parent, and the 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 to take as tenants in common, for the shares of the issue who are within the line could not be ascertained. (*g*) 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. (*h*) 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 to members of the class who are within, as to those who are not within, the line. (*i*)

shares appointed under power of selection.—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 favor of any other child, being adult, who would then make the intended settlement. Where the power in question is exercisable 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.

[(*g*) Where there is no question of remoteness, and the shares of objects can be ascertained, the appointment is good *pro tanto*, see Sugd. Pow. 507, 8th. ed.; In re Farncombe's Trusts, 9 Ch. D. 652.

(*h*) Attenborough *v.* Attenborough, 1 K. & J. 296.]

(*i*) Routledge *v.* Dorril, 2 Ves., Jr., 357; [Thomas *v.* Thomas, 14 Sim. 234.

[Again, although under a special power a life estate may (as we have seen) be limited to a child unborn at the time of the creation of the power, the limitation to such child of a power to appoint by will would be void, since it would tie up the property until the death of the unborn child. (*k*) But a power so limited to appoint by deed or will would be valid, since it confers an absolute and immediate power of disposition. (*l*)

Appointment giving testamentary power to an unborn child is void.

The reason why the test above alluded to is not applicable to appointments under general powers is, that such powers are in point of alienation equivalent to absolute ownership: the donee can at any moment dispose of the property as he pleases. But this reason fails where the power, though general in its objects, is to be exercised by will only. In such a case the power of disposition is suspended during the life of the donee, and appointments made by virtue of it are therefore to be tested in the same way as appointments under a special power.] (*m*)

Under *general* powers time is computed from the appointment.

Unless the power is testamentary only.

*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; (*n*) and in Boyce *v.* Hanning, (o) 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; (*p*) 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

As to validity of indefinite powers of sale.

(*k*) Wollaston *v.* King, L. R., 8 Eq. 165; Morgan *v.* Gronow, L. R., 16 Eq. 1. Apart from remoteness, such a limitation would be within the original power, Slark *v.* Dakyns, L. R., 10 Ch. 35.

(*l*) In re Meredith's Trusts, 3 Ch. D. 759.

(*m*) In re Powell's Trust, 39 L. J., Ch. 188.]

(*n*) Biddle *v.* Perkins, 4 Sim. 135; Powis *v.* Capron, Id. 138, n.; [Wallis *v.* Freestone, 10 Id. 225;] Waring *v.* Coventry, 1 My. & K. 249, stated 9 Jarm. Conv. 458; and see 1 Hayes' Introd. (5th. ed.) 497; [Cole *v.* Sewell, 4 D. & War. 32; Lantsbery *v.* Collier, 2 K. & J. 709.]

(*o*) 2 Cr. & J. 334; [see also Wood *v.* White, 4 My. & Cr. 482; Nelson *v.* Callow, 15 Sim. 353.]

(*p*) 11 Ves. 257; as to which, see some observations, 1 Jarm. Pow. 248, n.

it often occurs that a sale is made under a will, which empowers the testator's trustees and the survivor and the heirs 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, (*q*) the Court of K. B. 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.

[In fact, such a power does not prevent alienation, but facilitates it; and when, by the coming of age of a tenant in fee or in tail, it is no longer needed, it naturally ceases. The principle that the rule against perpetuities does not apply where the reason of the rule is wanting is further exemplified by Christ's Hospital *v.* Grainger, (*r*) where money was in 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 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.] (*s*)

The rule against perpetuities does not hold where the grounds of the rule do not apply.

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 (*t*) lands were devised to trustees and their heirs, in trust for A for life,

Effect of possession only being too remote.

(*q*) 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.

[(*r*) 16 Sim. 83, 1 M. & Gord. 460.

(*s*) Charitable trusts are the only perpetuities which an individual is permitted to create, Carne *v.* Long, 2 D., F. & J. 75; Att.-Gen. *v.* Webster, L. R., 20 Eq. 483; In re Dutton, 4 Ex. D. 54.]

(*t*) 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 Id. 38; Greet *v.* Greet, 5 Beav. 123; Harrison *v.* Grimwood, 12 Id. 192; Gosling *v.* Gosling, Johns. 265.]

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 survivors 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 C. P., 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, (*u*) is most important in *reference to the application of the rule against perpetuities, for if the shares are immediately vested, and the remoteness affects 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 interest of its objects.

(*u*) 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, it is obvious that the cases referred to in the text have no peculiar connection 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; Blease *v.* Burgh, 2 Beav. 221.

Rules of construction not to be strained to render gift valid.

It is clear that in order to render a gift to a class of persons valid the court will not depart from the established rule of construction which fixes its range of objects; for though it is probable that the testator, if interrogated on the point, would have consented to restrict the class for the purpose of bringing it within due limits, yet, as the will intimates no such intention, its judicial expositor is not warranted in so dealing with its contents.

Jee v. Audley.

As in Jee *v.* Audley, (*v*) where a testator bequeathed £1000 to be placed out at interest, which interest he gave to his wife during her life; and at her death he gave the £1000 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 *testator; that the cases 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," he continued, "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

(*v*) 1 Cox 324. [See also Sayer's Trusts, L. R., 6 Eq. 319.

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 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 *Mary Hill might die without issue, fifty years afterwards; in which case it would transgress the rule prescribed."

But though the courts will not violate the established rules of construction for the sake of bringing a gift within legal limits; (*x*) yet an anxiety to prevent a testator's dispositive scheme from proving abortive, on account of its remoteness, is plainly discoverable throughout the cases. (*y*) 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 favor of unborn persons, and has afterwards by a codicil revoked such bequest, and in lieu thereof given to the

(*x*) L. R., 7 Ch. 283, 11 Hare 375, 376.

(*y*) *E. g.*, *post* ch. XL., § 1. And as to cases of *ambiguity*, where one construction will produce remoteness and the other not, see L. R., 5 H. L. 548.]

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. (z)

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. (a) As in Carver *v.* Bowles, (b) where a testatrix, having under her marriage settlement a power of selection in favor 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 J. Leach, M. R., held, that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to re*strict their interest by limitations to their issue, being inoperative, 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. (c)

So, in Kampf *v.* Jones, (d) where a testatrix having under a settlement a power of selection over a fund in favor of her children or

(z) Arnold *v.* Congreve, 1 R. & My. 209.

[(a) On the question whether the prior gift is absolute or not see Whittel *v.* Dudin, 2 J. & W. 279, and other cases cited *post* ch. XXVI. And see and consider Doe d. Blomfield *v.* Eyre, 5 C. B. 713, cited in that ch.]

(b) 2 R. & My. 306; see also Church *v.* Kemble, 5 Sim. 525.

(c) The M. R. therefore thought that this restriction took effect; [but it is now settled that it is void as tending to a perpetuity and will be rejected, Fry *v.* Capper, Kay 163; Armitage *v.* Coates, 35 Beav. 1; In re Teague's Settlement, L. R., 10 Eq. 564; In re Cunynghame's Settlement, L. R., 11 Eq. 324.]

(d) 2 Kee. 756.

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.

Again, in Ring *v.* Hardwick, (*e*) 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 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 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

Gift absolute, notwithstanding subsequent modifying clause.

(*e*) 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, Id. 541; Courtier *v.* Oram, 21 Beav. 91; In re Lord Sondes' Will, 2 Sm. & Gif. 416.]

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. (*f*) 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. He 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 favor 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. (*g*)

Doctrine of *cy pres*.

The most striking illustration, however, of the anxiety of the courts to prevent the total disappointment of the testator's intention by the operation of the rule against perpetuities, is afforded by the doctrine of *cy pres* 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 barred by the parent or his issue being tenant in tail for the time

(*f*) As to this, *vide* p. *292.

(*g*) Chapman *v.* Brown, 3 Burr. 1626, *post* note (*i*).

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. (*h*) The first clear (*i*) authority for the doctrine is Nicholl *v.* Nicholl, (*k*) 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 elder brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, according to priority of birth, in tail male, remainder over." The C. P., on a case sent from chancery, certified that the estate would vest in the second son (when born) of W. Nicholl *by executory devise; and that 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. [19]

Unborn tenant for life made tenant in tail under the *cy pres* doctrine.

[(*h*) See acc. per Jessel, M. R., Hampton *v.* Holman, 5 Ch. D. 190.]

(*i*) 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 Mortimer *v.* West, 2 Sim. 282. [So in Lyddon *v.* Ellison, 19 Beav. 565, where the property was personal, and the *cy pres* doctrine therefore inapplicable.] 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. [In Mortimer *v.* West, *sup.*, the first takers (who were born in testator's lifetime) were held entitled to estates tail by force of the gift over on failure of their issue, (construed to mean a general failure): the *cy pres* doctrine was not applied; and (it may be added) it never has been applied so as to give an *immediate* estate tail to a person, born in the testator's lifetime, who by the will is expressly made devisee for life, with remainder to his (unborn) son for life. There is no reason why the unborn son should not take the estate for life as it is given to him. If the ulterior gifts require an estate tail in the parent, it may be by way of remainder after the son's life estate, as suggested by Rolt, L. J., Forsbrook *v.* Forsbrook, L. R., 3 Ch. 99.]

(*k*) 2 W. Bl. 1159. [See *post* p. *300, n. (*r*)].

19. See, *contra*, St. Armour *v.* Rivard, 2 Mich. 294.

So, in Robinson *v.* Hardcastle, (*l*) 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 default, 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. Buller, J., expressed an opinion that the son, by the application of the *cy pres* doctrine, took an estate tail; but the court was not called upon to decide the point.

Pitt *v.* Jackson.

The case, however, which has carried this doctrine farther than any other is Pitt *v.* Jackson, (*m*) where, by a settlement on the marriage of P. W., certain moneys 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 provisos as P. W. by deed or will should appoint, with remainders over. By will P. W. appointed trust moneys 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 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.*

Doubted,

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 construc-

—but confirmed.

tion, adding, however, that still he did not think it was wrong. (*n*) Lord Eldon, in quoting this observation, (*o*)

(*l*) 2 T. R. 241, 380, 781. [See also Parfitt *v.* Hember, L. R., 4 Eq. 443.]

(*m*) 2 B. C. C. 51, cited 2 Ves., Jr., 349; see also Smith *v.* Lord Camelford, 2 Ves., Jr., 698; [and Stackpoole *v.* Stackpoole, 4 D. & War. 320, where (as in Pitt *v.* Jackson) the doctrine was held applicable to a testamentary appointment.]

(*n*) 1 East 451.

(*o*) 7 Ves. 390.

intimated that it was not proper to go one step further; for those cases, in order to serve the general intent and the particular intent, destroyed both. [However, Pitt *v.* Jackson was approved by Lord St. Leonards, (*p*) and was followed by Sir J. Wigram, V. C., under precisely similar circumstances in Vanderplank *v.* King. (*q*)

The *mode* of provision may be changed, but no new persons provided for.

But although the mode and form of the provision intended by the will may be altered by the application of this rule of construction, no person or line of persons may be introduced for whom no provision whatever was intended. Therefore, in Monypenny *v.* Dering, already stated, (*r*) it was held by Lord St. Leonards that the first son of P. M. could not be held to take an estate tail, because such an estate would in regular succession, and after failure of the eldest son and his issue, descend to the second and other sons of such first son, for whom the will made no provision.

The *cy pres* doctrine may be applied to some only of a class.

In Vanderplank *v.* King, (*s*) the question arose, whether the *cy pres* 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 testator's decease, the remainder to whose issue was void for remoteness, and Sir J. Wigram, V. C., decided that the *cy pres* 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.

[(*p*) 4 D. & War. 320, 2 D., M. & G. 173.

(*q*) 3 Hare 1.

(*r*) 2 D., M. & G. 145, and in Ex. 16 M. & W. 418; *ante* p. *286. In Nicholl *v.* Nicholl, *ante* p. *298, the will included none of the descendants of the second son of W. N., except the second son of that second son and the heirs male of his body: whereas the decision included them all, and among them of course the first son of the second son of W. N., whose exclusion from the will appears to have been designed. The case is therefore overruled, so far at least as it favors a doctrine contrary to Monypenny *v.* Dering.

(*s*) 3 Hare 1. See also Peyton *v.* Lambert, 8 Ir. Com. Law Rep. 485.

Doctrine of *cy pres* 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 Hopkins *v.* Hopkins, (*t*) 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 male, 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 pres* 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.]

Limits imposed on the doctrine.

It has been decided in relation to the doctrine in question, first, That it does not apply to limitations of personal estate, (*u*) [nor of a mixed fund;] (*x*) 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; (*y*) and, thirdly, That the doctrine is not applicable where the limitation to the children of the unborn persons gives them an estate in fee-*simple*. The last point was decided in Bristow *v.* Warde, (*z*) 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 favor of the *children of the marriage; and he appointed portions

(*t*) Co. Lit. 272, a, Butler's note 1, VII. 2, 1 Atk. 581.]

(*u*) Routledge *v.* Dorril, 2 Ves., Jr., 365. [But see Mackworth *v.* Hinxman, 2 Kee. 658, where the general intent was to limit personalty so that it should go along with an honor, the successive life estates being only the mode: and see In re Johnson's Trusts, L. R., 2 Eq. 716.

(*x*) Boughton *v.* James, 1 Coll. 44, 1 H. L. Cas. 406.]

(*y*) Somerville *v.* Lethbridge, 6 T. R. 213; Seaward *v.* Willock, 5 East 198; Beard *v.* Westcott, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25. [See however per Rolt, L. J., Forsbrook *v.* Forsbrook, L. R., 3 Ch. 99.]

(*z*) 2 Ves., Jr., 336; [and see Hale *v.* Pew, 25 Beav. 335; and it is not admitted in construing a deed, Brudenell *v.* Elwes, 7 Ves. 390.

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 pres*. (*a*)

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 postponed, and whether it was or was not so postponed. 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, (*b*) 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, the fortune of some remote and unascertained scions of the stock. The necessity then became apparent of preventing by legislation the repetition of a scheme fraught with so much mischief and hardship. This led to the stat. 39 and 40 Geo. III., c. 98,[20] which, after reciting that it was expedi-

Stat. 39 and 40 Geo. III., c. 98.

(*a*) See further, as to the doctrine of *cy pres*, Sugd. on Powers; Fearne C. R. by Butl.

(*b*) 4 Ves. 227.

20. In some of the states statutory provision is made as to a term beyond which accumulations may not extend, while other states still leave the common law unaltered.

In *Alabama* it is provided (Code, 1876, § 2189,) that "no trust for the purpose of accumulation only can have any force or effect for a longer term than 10 years unless when for the benefit of a minor in

ent 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 being at the date of the conveyance or, if by will, at the death of the testator, in which case it may extend to the term of such minority."

In *Pennsylvania* the statute of 1853 (Rev. Stat., 1871, p. 193, § 1,) provides that "no settlement or appointment by any device whatever for the accumulation of the proceeds of real or personal property except for literary, scientific, charitable or religious purposes shall be allowed for a longer period than the life or lives of the one or more making it and 21 years from their respective deaths with allowance in cases of minors for the period of gestation." See, too, Brown *v.* Williamson, 36 Penna. St. 338.

In *Illinois*, in the absence of statute, a trust to accumulate income for fifteen years, and then divide, was held valid in Rhoades *v.* Rhoades, 43 Ill. 239; and so in *Indiana*, an accumulation for grandchildren until the youngest attain the age of twenty-one years, notwithstanding the birth of a grandchild after testator's death, Dyson *v.* Repp, 29 Ind. 482; but see, *contra*, Fosdick *v.* Fosdick, 6 Allen 41; see also Odell *v.* Odell, 10 Allen 1, and American Academy *v.* Harvard College, 12 Gray 582, where accumulation for a long term was allowed for charitable purposes.

In *New York* the statute provides (2 Rev. Stat., p. 1103, § 37,) that accumulations, if to commence at the creation of the estate, must be for one or more minors then in being, and terminate at the expiration of their minority; if to commence subsequent to the creation of the estate, they must commence within the time fixed by law for the vesting of future estates (two lives), and during the minority of the beneficiaries, and must terminate with such minority. The accumulation of personal property may not exceed ten years.

Under the New York statute an accumulation for an absolute term, however short, has been held void. Tucker *v.* Tucker, 5 N. Y. 408. So an accumulation directed to be made without reference to the minority of the beneficiaries: as a surplus over annuity to B, to accumulate for B's children, Harris *v.* Clark, 7 N. Y. 242; Manice *v.* Manice, 1 Lans. 348, 43 N. Y. 303; Depard *v.* Churchill, 53 N. Y. 192; Mason *v.* Mason, 2 Sandf. Ch. 432, affirmed as Mason *v.* Jones, 2 Barb. 229; Bean *v.* Hockman, 31 Barb. 78; Bryan *v.* Knickerbocker, 1 Barb. Ch. 407; Hawley *v.* James, 5 Paige 318; Ruppert's Estate, 1 Tuck. 480; or for a lunatic who is not a minor, Craig *v.* Craig, 3 Barb. Ch. 76. And an accumulation for persons not *in esse* is void, as, during A's life for A's children. Kilpatrick *v.* Johnson, 15 N. Y. 322; Haxton *v.* Corse, 2 Barb. Ch. 506. But see, *contra*, Manice *v.* Manice, 43 N. Y. 303, provided it commence within two lives; so, too, Gott *v.* Cook, 7 Paige 521. And an accumulation for minors in being, beyond their minority, is void for the excess beyond minority. Gilman *v.* Reddington, 24 N. Y. 9; Hull *v.* Hull, 24 N. Y. 647; Simpson *v.* English, 1 Hun 559. And an accumulation for the joint minority of two or more, for their joint benefit and the benefit of the survivor, is void, Scott *v.* Monell, 1 Redf. 431; Thompson *v.* Clendening, 1 Sandf. Ch. 387. But an accumulation for the minority of more than two minors is valid where their interests are several, Everitt *v.* Everitt, 29 N. Y. 39, reversing 29 Barb. 112; Ruppert's Estate, 1 Tuck. 480. And an accumulation during minority, to be then added to the principal, and the income only of

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 mere* 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." Section 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 had not passed." By section 3 [since repealed (c)] the act is not —nor to Scotland;

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;

the accumulated fund paid to the beneficiary, is valid, Meserole *v.* Meserole, 1 Hun 66. But not to be payable on the death of the minor to some other person, Bolton *v.* Jacks, 6 Rob. (N. Y.) 166. But accumulation for a charity has been allowed in Williams *v.* Williams, 8 N. Y. 525; Wilson *v.* Lynt, 30 Barb. 124, *contra;* and also Holmes *v.* Mead, 52 N. Y. 332. "As there is no statute upon the subject in Massachusetts accumulations are here still governed by the rules of the common law," Gray, J., in Odell *v.* Odell, 10 Allen 4.

[(c) 11 and 12 Vict., c. 36, § 41.

—nor to prior wills, unless, &c.

to extend to heritable property in Scotland, (*d*) nor, by section 4, to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing.

[This statute, having been passed just before the Irish act of union came into operation, does not extend to Ireland. (*e*)

—nor to Ireland.

*The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death, (*f*) 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. (*g*) 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.] (*h*)

How the period of twenty-one years is to be calculated;

—one of the periods only can be taken.

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 Haley *v.* Bannister, (*i*) where the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated

As to accumulation during the minority of an unborn person entitled under the trusts.

Haley *v.* Bannister.

(*d*) But a direction to invest accumulations in lands in Scotland did not bring the case within § 3. Macpherson *v.* Stewart, 28 L. J., Ch. 177.

(*e*) Ellis *v.* Maxwell, 12 Beav. 104; Heywood *v.* Heywood, 29 Beav. 9. English leaseholds, though personal estate, are governed by the *lex loci*, and though belonging to a domiciled Irishman are subject to the act, Freke *v.* Lord Carbery, L. R., 16 Eq. 461; *vide ante* p. *4, n.

(*f*) Gorst *v.* Lowndes, 11 Sim. 434; Lester *v.* Garland, 15 Ves. 248.

(*g*) 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.

(*h*) Wilson *v.* Wilson, 1 Sim. (N. S.) 288; Rosslyn's Trust, 16 Sim. 391; Ellis *v.* Maxwell, 3 Beav. 595.]

(*i*) 4 Mad. 275.

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. 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 V. C. 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 the part commencing with the birth of the child could not be taken alone. However, Lord Langdale, M. R., *in Ellis *v.* Maxwell (*k*) 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 anything 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 Longdon *v.* Simson, and Haley *v.* Bannister, he 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 said, (*l*) 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

Observations of Lord Langdale on Haley *v.* Bannister.

Observations of Sir J. Romilly.

[(*k*) 3 Beav. 596.

(*l*) Bryan *v.* Collins, 16 Beav. 17.

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 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, (*m*) 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 apply*ing 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.* Baunister, if [the doctrine sometimes deduced from] that case cau be supported. Indeed, considering the extreme inconvenience of holding the ordinary accumulating maiutenance trusts in favor of unborn persons to be invalid, the courts would no doubt struggle to avoid such a conclusion.

Its effect upon trusts which, after providing for maintenance, direct accumulation of surplus income.

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. (*n*)

Trusts embracing too wide an accumulation good *pro tanto*.

[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 opera-

The act does not impliedly make valid trusts for accumulation previously bad.

(*m*) But the act expressly includes partial accumulations.]

(*n*) Longdon *v.* Simson, 12 Ves. 395; see also Griffiths *v.* Vere, 9 Ves. 127;

tion of the act; for the act does not by the exceptions contained in it impliedly make valid what was previously invalid. (*o*) But, as before noticed, (*p*) accumulation for payment of the debts of the testator does not contravene the rule against perpetuities, and is therefore good, though its duration be unlimited. (*q*) 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. (*r*) But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which pro*tects 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 act leaves this rule untouched, section 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.*" (*s*) 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. (*t*) But the accumulation must be designed and intended *bona fide* as a provision for payment of debts. Where a testator directed the income of residue or a sufficient part of it to be applied for the benefit of his son, and the surplus to be accumulated and added to capital, and after the son's death the whole to be divided among the son's children; but if the son should die without issue, the testator bequeathed a moiety of the fund to B; B afterwards became indebted to the testator, who then by codicil declared that B should not be obliged to pay the debt unless

Accumulation for payment of testator's debts valid, though 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 act.

Palmer *v.* Holford, 4 Russ. 403; [In re Rosslyn's Trust, 16 Sim. 391, and cases in this section, *passim.*

(*o*) 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. *274); Scarisbrick *v.* Skelmersdale, 17 Sim. 187; Boughton *v.* James, 1 Coll. 26, 1 H. L. Cas. 406; Turvin *v.* Newcome, 3 K. & J. 16.

(*p*) *Ante* p. *275.

(*q*) 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.

(*r*) Oddie *v.* Brown, 4 De G. & J. 179. And see Williams *v.* Lewis, 6 H. L. Cas. 1013.

(*s*) 2 D., M. & G. 498.

(*t*) Varlo *v.* Faden, 27 Beav. 255, 1 D., F. & J. 211.]

and until he became possessed of the moiety, which, in that case, was to be set off against the debt. B eventually became entitled to the moiety, but it was held that the testator was not thinking of the debt when he directed the accumulation, and that it was not protected by section 2. (*u*) And if creditors avail themselves of their legal rights, and get their debts paid in a different way, as by resorting to the *corpus*, the accumulation cannot, even if the will so direct, be continued beyond the period allowed by section 1 of the act, in order to recoup the persons to whom, subject to the trust for accumulation, the estate is devised. (*x*)

Construction of the exception as to accumulation for children's portions.

The exception in the act respecting accumulations for the purpose "of raising portions for any child or children (*y*) 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. And first, what is a portion within this exception?

In Beech *v.* Lord St. Vincent, (*z*) lands were devised to A for life, with remainder to his first and other sons in tail, with remainders over, and £2000 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 Barrington *v.* Liddell, (*a*) 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 for younger children's portions; and afterwards a testator bequeathed a sum of £15,000 in trust to be accumulated during the life of A, until it reached the sum of £40,000, 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. A provision for raising or satisfying portions charged or created by a previous instrument is, therefore, within the exception in the statute. (*b*)

Barrington *v.* Liddell.

(*u*) Mathews *v.* Keble, L. R., 3 Ch. 691.

(*x*) Tewart *v.* Lawson, L. R., 18 Eq. 490.

(*y*) This means legitimate children, Shaw *v.* Rhodes, 1 M. & Cr. 159.

(*z*) 3 De G. & S. 678, 3 Jur. (N. S.) 762.

(*a*) 2 D., M. & G. 480.

(*b*) But (as appears by Beech *v.* Lord St. Vincent and other cases, and notwithstanding Halford *v.* Stains, 16 Sim. 496,) not exclusively so.

On the other hand, it has been decided that an accumulation of the whole of a testator's estate, (*c*) or of the residue, comprising the bulk, of it, (*d*) and a gift of the augmented fund, comprising both capital and accumulations, is not protected by the exception. "A direction to accumulate all a person's property," said Lord Cranworth, (*e*) "to be handed over to some child or children when they attain twenty-one can never be said to be a direction for raising portions for the child or children: it is not raising a portion at all; it is giving everything. 'Portion' ordinarily means a part or share, and though I do not know that a gift of the whole might not in some circumstances come under the term of a gift of a portion, yet I do not think it comes within the meaning of a portion in this clause of the act, which points to the raising of something out of something else for the benefit of some children or class of children. * * * * If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated." Gift of general estate augmented by accumulation is not a portion.

Again, in Burt *v.* Sturt, (*f*) where legacies were given to all *the 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, not to any given child or children, but to two or three or possibly one favored 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 Jones *v.* Maggs, (*g*) where a legacy of £200 was directed to be

(*c*) Wildes *v.* Davies, 1 Sm. & Gif. 475.

(*d*) Eyre *v.* Marsden, 2 Kee. 573; Bourne *v.* Buckton, 2 Sim. (N. S.) 91; Edwards *v.* Tuck, 3 D., M. & G. 40; Mathews *v.* Keble, L. R., 3 Ch. 691.

(*e*) Edwards *v.* Tuck, 3 D., M. & G. 58.

(*f*) 10 Hare 415. See also Drewett *v.* Pollard, 27 Beav. 196.

(*g*) 9 Hare 605.

Whether same rule applies to pecuniary legacy so augmented, Jones v. Maggs.

accumulated until the child of A (who then had one child) should attain twenty-one, and on that event to be divided, with its accumulations, among the children of A who should be then living, and the residue of the personal estate was given to the parent, Sir G. Turner, V. C., held that the legacy was not a portion, though in a certain sense it was raisable 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 wholly defeated. This decision was much influenced by the V. C.'s opinion, now exploded, that to bring the case within the exception, the parent must take an interest in the very fund directed to be accumulated; and no distinction was noticed between the accumulation of the entirety or bulk of an estate and of a mere pecuniary legacy. The effect upon the act of a contrary decision was certainly overstated.

On the other hand, Sir J. Stuart, V. C., distinguished between a gift of the whole of a testator's estate, augmented by accumulation, and a gift of a pecuniary legacy so augmented. (*h*) And in Middleton *v.* Losh, (*i*) where a testatrix bequeathed £50,000 to trustees upon trust to invest, 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 the death of W. without issue the *capital and accumulations to sink into the residue of her personal estate; he decided that the accumulation was valid as a provision for portions, relying mainly on "the just principles of construction" adopted by Lord St. Leonards in Barrington *v.* Liddell.

Middleton v. Losh.

The question chiefly discussed in that case was not what is a portion, but what interest must be given to the parent. (*k*) And although the subject of gift was, as in Middleton *v.* Losh, a pecuniary legacy augmented by accumulation, and although it must be admitted that whether the testator has or has not directed the legacy to be taken in satisfaction of portions already charged on the estate of another person, the result *quoad* the testator's own estate is the same, yet the presence of such a direction brings the case literally within the words of the act, and distinguishes it too widely from Middleton *v.* Losh to permit its being regarded as an authority for the decision in the latter case.

(*h*) Wildes *v.* Davies, 1 Sm. & Gif. 475.

(*i*) 1 Sm. & Gif. 61. See also St. Paul *v.* Heath, 13 L. T. (N. S.) 270; and the observations on Middleton *v.* Losh, in 10 Hare 426.

(*k*) See this insisted on, 2 Dr. & Sm. 61.

A similar direction would equally bring within the letter of the act a case where (as in Edwards *v.* Tuck) the subject of gift was not a pecuniary legacy only but the bulk of the testator's estate. But there is no actual decision to that effect.

Legacy to accumulate in trust for one for life, and afterwards for his children, not a portion.

A trust to accumulate a legacy during a stated period, and at the expiration of it to pay the income to A for life, and afterwards to divide the capital among the children of A, is plainly not a provision for raising portions for children, but only a legacy in trust for a parent for life, and after his death for his children. (*l*) And it cannot be material to the construction of the statute that the testator has or has not called the children's shares of an accumulated fund their "portions." (*m*)

Accumulation valid or not according to the purpose whereto *in event* it is applicable.

It will have been seen that, in Middleton *v.* Losh, 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 events a fund for portions. But the validity of the accumulation may well depend on the event: as in In re Clulow's Trusts, (*n*) 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: Sir W. P. Wood, V. C., said that if there had been children, this might have been upheld as a provision for their portions; but as there were and could be none, and the testamentary power *of appointment was clearly no "portion" for the parent, the V. C. held that the direction to accumulate was within section 1 of the act, and invalid after the lapse of twenty-one years from the testator's death.

What interest the parent must take under the devise.

The next question is, what is the interest which a parent, not being the grantor, settlor or devisor, must 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, or must it be an interest in the *identical* property from which the income directed to be accumulated arises? and must it be a substantial interest, or will a merely nominal interest suffice? In Barrington *v.* Liddell, (*o*) Lord St. Leonards read the word

(*l*) Watt *v.* Wood, 2 Dr. & Sm. 56.

(*m*) See per Kindersley, V. C., Bourne *v.* Buckton, 2 Sim. (N. S.) 96.

(*n*) 1 J. & H. 639.

(*o*) 2 D., M. & G. 480, stated above. Morgan *v.* Morgan, 15 Jur. 319, 20 L. J., Ch. 109, appears to decide that a specific legacy to the parent will not render valid an accumulation of a general legacy to the child. But the case is obscure.

"devise" in the act as meaning "will," and held, that the interest need not be one in the very fund to be accumulated, and that the legacy for building a mansion-house on the estate of which the parent was tenant for life, gave him a sufficient interest within the act. And as to *quantum*, the L. C. cited, with apparent approbation, the opinion expressed by Lords Lyndhurst and Brougham, (*p*) and approved by Lord Cranworth, (*q*) that any interest, however minute, was sufficient. But, according to Lord Langdale, (*r*) it would seem that, where accumulation is directed for the benefit of children of several parents, if any one parent takes no interest, the whole direction fails.

Destination of the income released from accumulation.

The destination of the income which the statute releases from accumulation has occasioned much debate. The law on this point, however, may now it is conceived be stated as follows:—

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. (*s*)

2. Where the vesting of a contingent interest, (*t*) or the pos*session of a vested interest (*u*) 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; (*x*) and in the case of real property, to the residuary devisee, or heir, according as the will

(*p*) Evans *v.* Hellier, 5 Cl. & Fin. 126.

(*q*) Edwards *v.* Tuck, 3 D., M. & G. 40. Wood, V. C., appears to have been of the same opinion, Burt *v.* Sturt, 10 Hare 423.

(*r*) Eyre *v.* Marsden, 2 Kee. 573.

(*s*) Trickey *v.* Trickey, 3 My. & K. 560; Combe *v.* Hughes, 34 Beav. 127, 2 D., J. & S. 657. An absolute donee may, at majority, stop accumulation directed for his *sole* benefit and require immediate payment, Gosling *v.* Gosling, Johns. 265. *Secus*, if any other person may by possibility be interested, Gott *v.* Nairne, 3 Ch. D. 278; Harbin *v.* Masterman, L. R., 12 Eq. 559.

(*t*) Jones *v.* Maggs, 10 Hare 605.

(*u*) Macdonald *v.* Bryce, 2 Kee. 276; Eyre *v.* Marsden, Id. 574; Ellis *v.* Maxwell, 3 Beav. 597; Nettleton *v.* Stephenson, 3 De G. & S. 366; Lord Barrington *v.* Liddell, 10 Hare 429; Weatherall *v.* Thornburgh, 8 Ch. D. 261. Where accumulation is directed for a stated period, "or so much of it as the law will allow," and the gift is to take effect at the expiration of the stated period (without more) acceleration is excluded by the will itself, Talbot *v.* Jevers, L. R., 20 Eq. 255.

(*x*) Ellis *v.* Maxwell, 3 Beav. 587; Att.-Gen. *v.* Poulden, 3 Hare 555; Jones *v.* Maggs, 9 Id. 605.

does or does not come within the statute 1 Vict., c. 26. (*y*) 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. (*z*)

Where it is residue that is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle, (*a*) devolve in the case of personal property to the next of kin, (*b*) in the case of real property to the heir, (*c*) and in the case of a mixed fund to the next of kin and heir respectively. (*d*)

3. 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, (*e*) 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; (*f*) 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, be entitled. In Ellis *v.* Maxwell, (*g*) where the rents of the testator's real estate were directed to *form part of his personal*

(*y*) Nettleton *v.* Stephenson, 3 De G. & S. 366; Smith *v.* Lomas, 33 L. J., Ch. 578; Green *v.* Gascoyne, 4 D., J. & S. 565. See also In re Clulow's Trust, 1 J. & H. 639, where the accumulation being in the nature of a charge on real estate sank for the benefit of the estate. Cf. Simmons *v.* Pitt, L. R., 8 Ch. 978, where *a previously existing* charge was directed to be accumulated and the next of kin took the excess.

(*z*) Crawley *v.* Crawley, 7 Sim. 427; Morgan *v.* Morgan, 4 De G. & S. 175, 176, 20 L. J., Ch. 441.

(*a*) Skrymsher *v.* Northcote, 1 Sw. 566.

(*b*) Macdonald *v.* Bryce, 2 Kee. 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 Id. 91; Oddie *v.* Brown, 4 De G. & J. 179; Weatherall *v.* Thornburgh, 8 Ch. D. 261, (crown entitled in default of next of kin).

(*c*) Halford *v.* Stains, 16 Sim. 488; Wildes *v.* Davies, 1 Sm. & Gif. 475; Weatherall *v.* Thornburgh, *sup.*, (crown in default of heir).

(*d*) Eyre *v.* Marsden, 2 Kee. 564, 4 My. & Cr. 431; Edwards *v.* Tuck, 3 D., M. & G. 40; Burt *v.* Sturt, 10 Hare 415.

(*e*) Crawley *v.* Crawley, 7 Sim. 427; O'Neil *v.* Lucas, 2 Kee. 316; Morgan *v.* Morgan, 4 De G. & S. 175, 20 L. J. Ch. 441.

(*f*) Eyre *v.* Marsden, 2 Kee. 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.*

(*g*) 12 Beav. 104.

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, (*h*) or an estate of freehold; in the latter case it will devolve upon his heir, if he died before 1838; (*i*) if after 1837, upon his personal representatives.] (*k*)

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 [either in all events, or on a contingency which happens] (*l*) 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 favor 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 accumulation 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; (*m*) his opinion, however, is clearly opposed to the other authorities upon this question, including one of the highest court of appeal. (*n*) There is a plain distinction

(*h*) Sewell *v.* Denny, 10 Beav. 315.

(*i*) 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.

(*k*) 1 Vict., c. 26, § 6.

(*l*) Mathews *v.* Keble, L. R., 3 Ch. 691.

(*m*) Elborne *v.* Goode, 14 Sim. 165; Corporation of Bridgnorth *v.* Collins, 15 Id. 538.

(*n*) Evans *v.* Hellier, 5 Cl. & Fin. 114; S. C., *nom.* Shaw *v.* Rhodes, 1 My. & Cr. 135; Macdonald *v.* Bryce, 2 Kee. 276;

between such a case and the cases where the property being *vested* in an infant the accumulation is to be assumed to be the act of the court. (*o*)

Where there is a contingent legacy to A to vest upon a certain event, and an accumulation is directed in the meantime, 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., (*p*) 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, (*q*) 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 Bassil *v.* Lister, (*r*) Sir G. 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. He observed, "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 I do not see how the payment of the *premiums to the insurance company out of the income is an accumulation of the income. The premiums, when paid to the insurance company, become part of their general funds, subject to all their expenses; and although it is true that the

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; and see Bective *v.* Hodgson, 10 H. L. Cas. 664, 668.

(*o*) See per Wood, L. J., Mathews *v.* Keble, L. R., 3 Ch. 696; per Lord Cranworth, V. C., Wilson *v.* Wilson, 1 Sim. (N. S.) 297.

(*p*) Morgan *v.* Morgan, 20 L. J., Ch. 111, 441, 15 Jur. 319.

(*q*) Bryan *v.* Collins, 16 Beav. 14.

(*r*) 9 Hare 177. And see Meller *v.* Stanley, 2 D., J. & S. 183.

funds in the hands of the companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium. It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to show that it is not, and I think the language of the enactment confirms that view. The enactment is, that no person shall settle or dispose of real or personal estate, so and in such manner that the rents, profits, income or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common sense interpretation, as referring to the accumulation of rents, profits and income, *qua* rents, profits and income. Why is 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, imports? It is said that 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 appears to me to beg the question; for it assumes that what the petitioner here calls 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 I entertain no apprehension of any such mischief; I think that settlors and testators, who contemplate accumulations, are far too keen-sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand I see enormous mischiefs which would arise from the construction for which the petitioner contends. The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported what is 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 is to be done with policies of insurance on the lives of debtors? (*s*) And

s) The statute expressly excepts provisions for the payment of debts of *any* person, see 2 D., M. & G. 498.

how is 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 V. C. seems here 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 *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. (*t*) 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 may be. This sum is not less the result of an accumulation because it is of certain amount.

The decision was also rested on the ground that the sum paid back was in pursuance of a *contract*, and therefore not within the statute; this seems to beg the question, since, if there be an accumulation, the statute must reach it, whether it arise under a contract or by will: for 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 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, 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 V. C. must have meant, more than twenty-one years,) would be void altogether as

(*t*) And see the observations of Lord Cranworth, 6 D., M. & G. 462.

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transgressing the rule against perpetuities; (*u*) 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 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, (*x*) before noticed, that an accumulation which is capable at any moment of being put an end to, (*y*) 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.]

[(*u*) Palmer *v.* Holford, *ante* p. *253.
(*x*) *Ante* p. *275.
(*y*) See Downs *v.* Collins, 6 Hare 418.]

*CHAPTER X.

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 act 1 Vict., c. 26, and those which are regulated by the pre-existing law.

From what period a will speaks.

First, with regard to wills made before the act.

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.

Expressions of present time refer to date of will.

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

"Now," how construed.

(*a*) Date and execution relatively considered.—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 1st January, 1830, and executed it on the 1st June in the same year, a bequest in such will of "all the consols now standing in my name," possibly might be held to pass the consols only of which he was possessed on 1st January, and not what he had acquired between the date and execution, and which he held on 1st June. [See Randfield *v.* Randfield, 8 H. L. Cas. 225.]

(*b*) Crossley *v.* Clare, Amb. 397, 3 Sw.

restrictive addition, have been let in; (c) and the same construc*tion has obtained, even where the word "now" is combined with 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*)[1]

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.

320, n. See also Att.-Gen. *v.* Bury, 1 Eq. Cas. 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* ch. XI. on Lapse, ch. XXX. on Devises to Children, [and *ante* p. *268.]

(*d*) James *v.* Richardson, T. Jon. 99, 1 Eq. Cas. 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.]

1. See also 1 Roper on Leg. 248; Wms. Ex'rs (6th Am. ed.) 1544. So a legacy to "my *present* attendant physician," refers to the time of making the will, Everett *v.* Carr, 59 Me. 325. And, in like manner, a gift of property *now* owned or possessed by the testator, Ross *v.* Ross, 12 B. Mon. 438; Quinn *v.* Hardenbrook, 54 N. Y. 83; Board of Education *v.* Ladd, 26 Ohio St. 210; 1 Redf. on Wills 380. Hutchinson *v.* Barrow, 6 Hurlst. & Norm. 583, gives like effect to a devise of a messuage at W., containing about twenty acres, "*now* occupied by me," and excludes from such devise adjoining property afterwards acquired by testator, and occupied by him at the time of his death. And, in Ex parte Champion, 1 Busb. Eq. (N. C.) 246, "all my real estate," was held to include all at his death. As to the effect of *present* words as modified by the English act of 1838, or its American equivalents, see *post*. In Lorieux *v.* Keller, 5 Iowa 196, it is said that a will, whenever dated and published, will take effect only at the death of the testator; and in Thorndike *v.* Reynolds, 22 Gratt. 21, 32, it is said by Anderson, J.: "The statute provides that it shall be construed 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. Code of 1860, chap. 122, § 11, p. 573." In this case it was held that if a husband gives, by will, to his wife, power to dispose in his lifetime, by will, of property devised to her in his will, his will must be intended to take effect from its date, and so must her will in execution of the power, though not to divest and pass title in the lifetime of her husband or herself.

Thus, in 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 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 Ringrose *v.* Bramham, (*h*) Sir L. Kenyon, M. R., held that a bequest of £50 "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 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*)

Gifts to children

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 (*j*)

Doctrine as to specific bequests.

(*e*) 5 Ves. 816.

(*f*) 3 Atk. 201.

[(*g*) 2 J. & W. 399.]

(*h*) 2 Cox 384.

(*i*) Co. Litt. 20 b; [see as to this, *post* ch. XXX.

(*j*) Unless he expressly refer to the state of facts at his death; as, by bequeathing all his horses, or all his stock, belonging to him at his death: this would be a specific bequest, though not liable to ademption, Bothamley *v.* Sherson, L. R., 20 Eq. 304. A gift of property "to which I am entitled under the will of A" was held to pass money afterwards received by the testator under that will and invested in his own name, it being still traceable, Morgan *v.* Thomas, 6 Ch. D. 176.

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 consols, bequeathed "all that my messuage in A," or "all that sum of £1000 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. (*k*) [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.] (*l*)

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* 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. forever, 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

(*k*) Pattison *v.* Pattison, 1 My. & K. 12.

(*l*) Cockran *v.* Cockran, 14 Sim. 248. See also per Wood, V. C., Goodlad *v.* Burnett, 1 K. & J. 347.

(*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.

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 well as the term which then subsisted. From the judgment of the V. C., 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 the decree, lent no countenance to any such doctrine; which, indeed, is directly encountered by 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

(*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. *157.]

(*q*) Colgrave *v.* Manby, 2 Russ. 238; see also 6 Mad. 72.

(*r*) 3 Atk. 174.

(*s*) 16 Ves. 197.

years subsequently acquired by the renewal of the lease. It has been decided, however, by Lord Eldon, (*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 seized, 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 seizin. (*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 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

Difference between freeholds and leaseholds in regard to revoking effect of conveyances.

[(*t*) James *v.* Dean, 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; [and Hance *v.* Truwhitt, 2 J. & H. 216, where the words were "whereof I am or shall or may be seized."]

(*y*) *Vide ante* p. *147.

(*z*) See Woodhouse *v.* Okill, 8 Sim. 115.

(*a*) Clough *v.* Clough, 3 My. & K. 296.

(*b*) *Ante* p. *155.

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 gifts.[2] Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favor 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 favor 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

[(c) Marwood *v.* Turner, 3 P. W. 163.]

2. And a gift to A's *oldest* or *youngest* child refers to the one answering that description at the date of the will, Butler *v.* Butler, 3 Barb. Ch. 304; Eells *v.* Lynch, 8 Bosw. 465; Everett *v.* Carr, 59 Me. 325; so, to the surviving children of A, they living in Maine, Morse *v.* Mason, 11 Allen 36; Simms *v.* Garrot, 1 Dev. & Bat. Eq. 393; 1 Rop. on Leg. 149; Wms. Ex'rs (6 Am. ed.) 1169. See, too, Quinn *v.* Hardenbrook, 54 N. Y. 83; Gold *v.* Judson, 21 Conn. 616. Ellsworth, J., says in this case: "Whenever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construc- of the word '*now*.'" So, a gift to A for life, with remainder to his *widow*, has been referred to A's wife living at the date of the will, Anshutz *v.* Miller, 81 Penna. St. 212. So, a release of a legatee "from any charge I *have made* against him" relates to charges at and prior to the making of the will, Van Alstyne *v.* Van Alstyne, 28 N. Y. 375; Coale *v.* Smith, 4 Penna. St. 376. But the rule that a gift to survivors shall be construed to refer to objects living at the death of the testator, is confined to cases where such survivorship can be referred to no other period. Therefore, if such gift be preceded by a life interest, or any other prior interest, it will take effect in favor of those who are living at the period of distribution, and of those only, Ridgway *v.* Underwood, 67 Ill. 419.

[(d) Foster *v.* Cook, 3 B. C. C. 346.]

(e) This position, however, is advanced with some diffidence, seeing the strong

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, 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 has 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

anxiety of the courts to extend, as much as possible, gifts to children; [see Perkins *v.* Micklethwaite, *ante* p. *200; and Thompson *v.* Thompson, and King *v.* Bennett, *post* ch. XXX., § 7.

(*f*) Under 1 Vict., c. 26, § 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 analogous cases, ch. XXX., *ad fin.*]

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 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 Peppin *v.* Bickford, (*l*) where a testator gave to his nephew A £6000 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 £6000, except

[(*k*) Radford *v.* Willis, L. R., 7 Ch. 7, and see Boreham *v.* Bignall, 8 Hare 131, where however the words were special.]

See also Driver d. Frank *v.* Frank, 3 M. & Sel. 25, 8 Taunt. 468.

(*l*) 3 Ves. 570.

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 favor 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. (*n*)

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 favor 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 the 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. [3] And the

(*m*) See also Allanson *v.* Clitheroe, 1 Ves. 24, Belt's Sup. 24.

[(*n*) In re Lyne's Trust, L. R., 8 Eq. 65; Longworth *v.* Bellamy, 40 L. J., Ch. 513.

(*o*) Parker *v.* Marchant, 1 Y. & C. C. C. 290. If the condition be added it must be strictly complied with. Previous dismissal, though wrongful, intercepts the gift, Darlow *v.* Edwards, 1 H. & C. 547. See also In re Hartley's Trust, W. N., 4 May, 1878, where on the master's illness his establishment was broken up.]

3. The old rule of the common law is that a will speaks from its date only as to real estate devised, but from the testator's death as to personal property. Delacherois *v.* Delacherois, 11 H. L. Cas. 62; Trinder *v.* Trinder, 1 L. R., Eq. 695; Wagstaff *v.* Wagstaff, 8 L. R., Eq. 229, although in this case the gift was of personal property "that I may *now* possess;" and In the Matter of Swartwout, 10 C. E. Gr. (N. J.) 369, a gift of all property "to which I may become entitled" will include a war prize captured by testator but not condemned until after his death; Attwood *v.* Beck, 21 Ala. 590; Gilmer *v.* Gilmer, 42 Ala. 9, where a legacy to be paid in confederate bonds failed because at testator's death such bonds had become worthless; Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, 21 Conn. 616; Jones *v.* Shewmake, 35 Ga. 151; Curling *v.* Curling, 8 Dana 38; Walton *v.* Walton, 7 J. J. Marsh. 59; Halloway *v.* Buck, 4 Litt. 294; Marshall *v.* Porter, 10 B. Mon. 2; Blaney *v.* Blaney, 1 Cush. 107; Hays *v.* Jackson, 6 Mass. 149; Haven *v.* Foster, 14 Pick. 534; Kuhn *v.* Webster, 12 Gray

reluctance of the courts to confine a general bequest of personalty to what the testator possessed at 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*)

3; George *v.* Green, 13 N. H. 521; Lanning *v.* Cole, 2 Halst. Ch. 102; Den, Van Wagenen *v.* Brown, 2 Dutch. 196; Thornal *v.* Force, 2 Stew. (N. J.) 220; Douglass *v.* Sherman, 2 Paige Ch. 358; Van Vechten *v.* Van Vechten, 8 Paige 104, where there was a bequest of all debts due to the testator from the legatee named, and it was held that all debts due at testator's death passed. In the language of Chancellor Walworth, in this case, it is said: "To take the case out of the general rule, that in a will of personal estate the testator is presumed to speak with reference to the time of his death, there must be something in the nature of the property or thing bequeathed or in the language used by the testator in making the bequest thereof to show that he intended to confine the gift to the property or subject of the bequest, as it existed at the time of the making of the will." See, too, Newcomb *v.* St. Peter's, 2 Sandf. Ch. 636; Parker *v.* Bogardus, 5 N. Y. 309; Jiggitts *v.* Maney, 1 Murph. 265; Girard's Heirs *v.* Philadelphia, 4 Rawle 323; Philadelphia *v.* Davis, 1 Whart. 490; Donaugher's Estate, 2 Pars. C. 164; Gibson *v.* Carrell, 13 Gratt. 136; Raines *v.* Barker, 13 Gratt. 128; Smith *v.* Edrington, 8 Cranch 66; McNaughten *v.* McNaughten, 34 N. Y. 201; Clements *v.* Kyles, 13 Gratt. 468. The above rule has found its expression chiefly in establishing that real estate acquired after the date of the will, in the absence of statute to the contrary, or of a subsequent republication of the will, does not pass by devise. Jones *v.* Shewmake, 35 Ga. 151; Bowen *v.* Johnson, 6 Ind. 110; Halloway *v.* Buck, 4 Litt. 294; McElfresh *v.* Schley, 2 Gill 181; Blaney *v.* Blaney, 1 Cush. 107; Wait *v.* Belding, 24 Pick. 129; Ballard *v.* Carter, 5 Pick. 112; Brigham *v.* Winchester, 1 Metc. 390; Lanning *v.* Cole, 2 Halst. Ch. 102; Den, Van Wagenen *v.* Brown, 2 Dutch. 196, in which last four cases a devise of testator's interest (he being a mortgagee at the date of the will) was held not to pass a subsequently acquired equity of redemption; Bruen *v.* Bragaw, 3 Green Ch. (N. J.) 261; Shreve *v.* Shreve, 2 Stockt. 385; Philadelphia *v.* Davis, 1 Whart. 490; Girard's Heirs *v.* Philadelphia, 4 Rawle 323; Gibson *v.* Carrell, 13 Gratt. 136; Raines *v.* Barker, 13 Gratt. 128; Smith *v.* Edrington, 8 Cranch 66; Ross *v.* Ross, 12 B. Mon. 438; Livingston *v.* Newkirk, 3 Johns. Ch. 312; McGavock *v.* Pugsley, 12 Heisk. 689. See, too, 1 Redf. on Wills 387; Hawkins on Wills 14, *et seq.*; Theobald on Wills 43. In Clapper *v.* House, 6 Paige 149, prior to the statute, a devise after part payment upon agreement of purchase, passed the land, which was afterwards conveyed to the testator under the agreement. To the same effect see Castle *v.* Fox, 11 L. R., Eq. 542; and where the testator has, at the time of making his

(*p*) *Vide ante* p. *319.

(*q*) 1 Eq. Cas. 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.]

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 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, § 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 act 1 Vict., c. 26, which provides (§ 24,) "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." [4]

Will in reference to the estate to speak from the death.

will, a leasehold which merges into the fee by a subsequent purchase, the fee will pass, Miles *v.* Miles, 1 L. R., Eq. 462; Cox *v.* Bennett, 6 L. R., Eq. 422; Wedgwood *v.* Denton, 12 L. R. 290. But the rule that after-acquired land will not pass by the will, is not construed to prevent the application of the doctrine of election. McElfresh *v.* Schley, 2 Gill 181, 198. With the exception above stated as to after-acquired real estate, now very generally removed by statute, the rule is that a will speaks from the testator's death, Gold *v.* Judson, 21 Conn. 616; Canfield *v.* Bostwick, 21 Conn. 550; Hosea *v.* Jacobs, 98 Mass. 65; Board of Education *v.* Ladd, 26 Ohio St. 210; O'Brien *v.* Heeney, 2 Edw. Ch. 242; Collin *v.* Collin, 1 Barb. Ch. 630; Clarke's Estate, 82 Penna. St. 528; Cresson's Appeal, 76 Penna. St. 19; Thorndike *v.* Reynolds, 22 Gratt. 21. But the time of making the will is referred to where the testator makes a provision in his gifts for *equality* among a class of beneficiaries, Boone *v.* Dyke, 3 Mon. 529. And a legacy made payable out of a particular debt due to testator at the making of his will, does not fail by its payment before his death, Stewart *v.* Gallagher, 6 Watts 473. As to the time when a class of donees shall be ascertained, see chapters XXVIII., XXIX. and XXX., *post.*

4. Scott, J., said, in Applegate *v.* Smith, 31 Mo. 166, 169: "With respect to after-acquired lands, when the question arises whether they have passed by the will, it is just the same and to be determined on the same considerations as would determine the question whether lands owned by the testator at the date of his will passed by it, or, in other words, that after-acquired lands, as to the power of disposition, rest on the same ground as the lands owned by the testator at the date of his will and the personal estate." In most of the states there has been enacted some statute more or less perfectly equivalent to that of 1 Vict., c. 26, referred to in the text.

Alabama—(1853, Code, 1876, § 2277.)

California—(Act of April 10th, 1850, § 22.)

Colorado—(Gen. Laws, 1877, § 2788.)

Connecticut—(Laws, 1838, p. 245.)

Delaware—(1853, Rev. Stat., ch. 84, § 25.)

Georgia—(Code, 1860, § 2363.)

Illinois—(Rev. Laws, 611, § 1; Gale's Stat. 686.)

This enactment must be viewed in connection with section 3, 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

General devise of real estate now extends to property at death.

Indiana—(Rev. Stat., 1843, p. 485, § 3.)
Iowa—(Code, 1873, § 2323.)
Kansas—(Gen. Stat., 1877, § 5734.)
Kentucky—(1797, Gen. Stat., 1877, p. 831, ch. 113, § 2.)
Maine—(Rev. Stat., 1871, p. 564, § 5.)
Maryland—(1849, ch. 229.)
Massachusetts—(1836, Gen. Stat., 1860, p. 476, § 4.)
Michigan—(1 Comp. Law, 1872, p. 1372, § 4325.)
Minnesota—(1 Stats. at Large, 1873, p. 646, § 3.)
Mississippi—(1821, Code, § 2388.)
Missouri—(Rev. Code, 1835 and 1845.)
Nebraska—(Rev. Stat., 1866, p. 82, § 125.)
New Hampshire—(Rev. Stat., 1842, ch. 156, § 2.)
New Jersey—(1851, 2 Rev. Stat., 1877, p. 1248, § 24.)
New York—(1830, 3 Rev. Stat. 58, § 7.)
North Carolina—(1844, Battle's Rev., 1873, p. 847, §§ 5, 6.)
Ohio—(6 Ohio Laws, p. 64; 2 S. & C., p. 1626, § 54.)
Pennsylvania—(1833, Rev. Stat., 1871, p. 189, § 4.)
Rhode Island—(1857, Rev. Stat., ch. 154, § 1.)
South Carolina—(1858, Gen. Stats., No. 4395, p. 597.)
Tennessee—(1852, Comp. Laws, § 2195.)
Texas—(Const., art. 5361, p. 913.)
Vermont—(Gen. Stats., 1870, p. 377, ch. 49, § 2.)
Virginia—(1787, Code, 1873, p. 911, ch. 118, § 11.)
West Virginia—(Code, 1868, p. 480, ch. 77, § 10.)
Wisconsin—(Rev. Stat., 1858, p. 577, ch. 97, § 3.)

The statute of Maryland above referred to, extends, by its terms, only to wills taking effect after June 1st, 1850. Carroll *v.* Carroll, 16 How. 275; Johns *v.* Hodges, 33 Md. 515. That of New Jersey to wills of persons who die after July 4th, 1850. The absence of this provision in most of the statutes referred to in other states, has given rise to the question whether such statute is applicable only to wills made after its passage, or to all wills taking effect by the death of the testator after the passage of the act. It has been held that such statute applies to all wills, whether made before or after its passage, provided the testator's death occur after its passage. See Meserve *v.* Meserve, 63 Me. 518; Magruder *v.* Carroll, 4 Md. 335; Alexander *v.* Worthington, 5 Md. 471; Wilson *v.* Wilson, 6 Md. 487; but see, also, as to the Maryland statute, Carroll *v.* Carroll, 16 How. 275; Cushing *v.* Alwyn, 12 Metc. 169; Winchester *v.* Forster, 3 Cush. 366; Loveren *v.* Lamprey, 22 N. H. 434; Condict *v.* King, 2 Beas. 375; Van Tilburgh *v.* Hollinshead, 1 McCart. 36, n.; De Peyster *v.* Clendining, 8 Paige 295; Smith *v.* Jones, 4 Ohio 115; Hamilton *v.* Flinn, 21 Tex. 713. See, to like effect as to other statutes, Wakefield *v.* Phelps, 37 N. H. 295; Perkins *v.* George, 45 N. H. 453; Donaugher's Estate, 2 Pars. C. 164. The contrary (owing, in some instances, to the prospective phraseology of the statute) has been held in Brewster *v.* McCall, 15 Conn. 289; Gibbon *v.* Gibbon, 40 Ga. 562; Ellison *v.* Miller, 11 Barb. 332; Green *v.* Dikeman,

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

18 Barb. 535; Parker *v.* Bogardus, 5 N. Y. 309 (which holds the New York statute to be one of construction merely, "shall be *construed* to pass," &c.); Battle *v.* Speight, 9 Ired. L. 288; Mullock *v.* Souder, 5 Watts & Serg. 198; Gable *v.* Daub, 40 Penna. St. 217; Roberts *v.* Elliot, 3 Mon. 396. And by similar reasoning as to a different statute, in Means *v.* Evans, 4 Desaus. 242, a will made in 1805 by a testator who died in 1811, was held not to be governed by an act of 1791, (against the passing by will of after-acquired personal property,) repealed in 1808, but to be governed by the law as it was at the time of testator's death. Where the statute requires the intention of the testator to pass such after-acquired property to appear, the question often arises whether the requirement of the statute is satisfied. Thus, in Bowen *v.* Johnson, 6 Ind. 110, Perkins, J., says: "We think it applies only to cases where the will purports to devise all the property, * * * and not to cases where particular pieces of property are devised to particular devisees with a residuary clause." An expressed intention is also required, in Mason *v.* Mason, 3 Bibb 448; Walton *v.* Walton, 7 J. J. Marsh. 58; and in Dennis *v.* Warder, 3 B. Mon. 174, the words, "such estate as it hath pleased God to bless me with," were held insufficient. See, too, the remark of Peters, C. J., in Flournoy *v.* Flournoy, 1 Bush 523: "If from the will itself it shall appear more reasonable to infer an intention that after-acquired land should pass by it than that it should remain undevised, then it would pass by the will; otherwise, if the contrary intention shall seem more reasonable, the land will descend. And if there be nothing in the will to lead to the one deduction rather than the other, land acquired by the testator after its publication should descend as estate undevised." In this case, the words "whole estate" were held to be sufficient indication of such intent. So, too, "all the residue," "all my estate," Winchester *v.* Forster, 3 Cush. 366; Cushing *v.* Alwyn, 12 Metc. 169; Pray *v.* Watterson, 12 Metc. 262; but the intention must appear, Brimmer *v.* Sohier, 1 Cush. 118; Haven *v.* Foster, 14 Pick. 534; "all my real and personal property" is sufficient, Liggat *v.* Hart, 23 Mo. 127; or "all the residue," Fluke *v.* Fluke, 1 C. E. Gr. (N. J.) 478. Denio, J., in Lynes *v.* Townsend, 33 N. Y. 558, says: "No doubt a devise of real estate, universal in its terms, would carry after-acquired lands without any language pointing to the period of the testator's death. But where such unlimited terms are not used, there must be words in the will which will enable us to see that he intended it to operate upon real estate which he should afterwards purchase;" and in this case the appointment of executors "for the full and final settlement of my estate whether real or personal," was held insufficient. See, too, Quinn *v.* Hardenbrook, 54 N. Y. 83; so, in Havens *v.* Havens, 1 Sandf. Ch. 324, and Youngs *v.* Youngs, 45 N. Y. 254, the words, "all the rest and residue of my estate;" so, in Pond *v.* Bergh, 10 Paige 140, all my land at A. See, too, Pruden *v.* Pruden, 14 Ohio St. 251; Allen *v.* Harrison, 3 Call 289; Raines *v.* Barker, 13 Gratt. 128. And speaking of the Virginia statute, Washington, J., says, in Smith *v.* Edrington, 8 Cranch 66: "The presumption is that the testator means to confine his bequests to land, to which he is then entitled; and this presumption can only be overruled by words clearly showing a contrary intention." See, too, Smith *v.* Hutchinson, 61 Mo. 83. The following cases also may be referred to as giving effect to the stat-

less than the principle which forbade 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 3d and 24th sections of the statute, it is evident that a general devise of real estate, (*r*) [or of the testator's real estates in a given county or parish, (*s*)] 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 purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the act is then clearly shown. (*t*)]

General devise of lands in particular place.

The application of the new principle of construction to specific bequests, however, is attended with more difficulty. [It has given rise to much litigation, and will probably give rise to more] before its precise limits and effects are fully established. The cases immediately in the contemplation of the legislature, probably, were (1) that of a specific bequest of a renewed leasehold property, (*u*) which, we have seen, under the old law, did not apply to the

Application of section 24 to specific gifts;

utes above mentioned: Willis *v.* Watson, 4 Scam. 64; Peters *v.* Spillman, 18 Ill. 370; Alexander *v.* Waller, 6 Bush 341; Warner *v.* Swearingen, 6 Dana 195; Van Cortland *v.* Kip, 1 Hill (N. Y.) 590; Henderson *v.* Ryan, 27 Tex. 673; Turpin *v.* Turpin, 1 Wash. C. C. 75, as to Virginia statute; Liggat *v.* Hart, 23 Mo. 127; Applegate *v.* Smith, 31 Mo. 166. See also, as to the American statutes, a very full note in Hawkins on Wills, p. 18 (last Am. ed.) But if a codicil be added, which contains no words showing intent to pass after-acquired land, it will not operate as a devise of lands purchased by the testator between the date of the will and that of the codicil, the statute requiring the will to show the intent to pass after-acquired lands. Kendall *v.* Kendall, 5 Munf. 272. See also Hyer *v.* Shobe, 2 Munf. 200; Drayton *v.* Rose, 7 Rich. Eq. 328.

[(*r*) O'Toole *v.* Brown, 3 Ell. & Bl. 572; Jepson *v.* Key, 2 H. & C. 873.

(*s*) Doe d. York *v.* Walker, 12 M. & Wels. 591.

(*t*) In re Farrer, 8 Ir. Com. L. Rep. 370.

(*u*) See 4th report of the R. P. C., pp. 23, 24, where this is the only case of

new estate acquired by a renewal of the lease subsequently to the will; (2) 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 (3) 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.

—to renewed lease;

—to after-purchased reversion in fee;

The applicability of the new enactment to the first case cannot be questioned [and its application has been extended to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee: the newly-acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to the term for which the property is at the time held; this being considered only a mode of describing the property, and not as equivalent to saying, "I give my present interest and nothing else." (*x*) The latter meaning would equally exclude a renewed term. (*y*)

—to specific gift of stock, of undefined amount;

It is also clear that the second case is within the rule. Thus, in Goodlad *v.* Burnett, (*z*) 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 that stock 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. He thought the wills act must have some sense given to

specific bequest adverted to in connection with this subject; all the other cases there contemplated being devises expressed in general terms.

(*x*) Struthers *v.* Struthers, 5 W. R. 809; Miles *v.* Miles, L. R., 1 Eq. 462; Cox *v.* Bennett, L. R., 6 Eq. 422. Sect. 23 of the act was also relied on, as to which *vide ante* p. *164, n. In Emuss *v.* Smith, 2 De G. & S. 722, it was held that a devise of "all my freehold estate at Brickhouse Lane which I purchased of B" by a testator who had before making his will purchased of B an estate in that lane, partly freehold and partly leasehold, did not pass the reversion in fee afterwards purchased of C of the part theretofore leasehold. As to the bequest of the garden, formerly leasehold, at Falsam Pits, this is not referred to either in the argument or the judgment. Only, according to the note of the decree, p. 738, it was declared to have been adeemed by the subsequent conveyance of the fee. But the later decisions make this questionable.

(*y*) See Wedgwood *v.* Denton, L. R., 12 Eq. 290, 295, 296.

(*z*) 1 K. & J. 341. See also Drake *v.* Martin, 23 Beav. 89; Trinder *v.* Trinder, L. R., 1 Eq. 695; and per Jessel, M. R., L. R., 20 Eq. 312.

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 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. (*a*) 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.

—to a devise of "lands of C" so as to include after-acquired lands of C;

The same principle has been applied to a devise of land. Thus in Strevens *v.* Bayley, (*b*) 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 seized at her death.

So in Castle *v.* Fox, (c) where a testator being entitled to the mansion-house of Cleeve Court and lands adjoining, devised "his mansion and estate called Cleeve Court" to certain persons, and the residue of his property to certain other persons; and afterwards, at different times, bought other pieces of land, which he added to Cleeve Court, and treated and spoke of them as part thereof; Sir R. Malins, V. C., said he was required by section 24 to ask the question what it was the testator called the Cleeve Court estate at the time of his death; and finding upon the evidence that these additions were then regarded and

(*a*) Compare Banks *v.* Thornton, 11 Hare 176.

(*b*) 8 Ir. Law Rep. (N. S.) 410.]

(*c*) L. R., 11 Eq. 542. See Webb *v.* Byng, 1 K. & J. 580, a very similar case, where the after-acquired property was held not to pass through insufficiency of evidence to prove that it was regarded by the testatrix as part of the estate devised. Citing this case, R. P. S., p. 372, Lord St. Leonards says, "Consider this case." As to the admissibility of such evidence, see S. C. and other cases *post* ch. XIII.

treated by the testator as part of the estate, he held that they passed as such under the specific devise.]

—to a gift of "my house in G. square,"

The new rule of construction, however, [would,] 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 Grosve-*nor-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 will comprise the new acquisition if the enactment which makes the will speak from the death [is literally construed.] So (to put a stronger case), suppose that a testator, having a small farm in the parish of A, devises "all that *his estate* in the parish of A," and that subsequently to the will he disposes of the farm in question, and purchases another in the same parish, but of ten times the value, which he continues to hold until his decease, or such larger farm may have devolved on the testator by descent or otherwise without any spontaneous act on his part, or even without his knowledge, or when incapable of altering his will; in either case the newly-acquired estate must, it is conceived [if the words of the act are taken as they are], be held to pass by the devise. (*e*)

—or "my estate in the parish of A."

Effect, where there is more than one subject of gift at the death of testator.

It may 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. (*f*) To avoid such a consequence, probably it would be held that the 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; and yet 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

(*e*) The terms of gift here supposed are more particular than those in Doe d. York *v.* Walker, 12 M. & Wel. 591.

(*f*) As to this, *vide post* ch. XIII.

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,) (*f*) the plurality would be fatal to the devise.[5]

*[But the courts have striven to find a reasonable meaning in the act. "Suppose," said Sir J. K. Bruce, (*g*) "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?" Or suppose a man to have a picture, say, of the Holy Family, by some inferior artist, and to bequeath it as "my Holy Family," then to sell it, and afterwards to acquire a far better one on the same subject painted by an eminent artist: Sir W. P. Wood thought it would be a monstrous construction to hold that the latter picture would pass; and he observed that where there was a distinct reference to a distinct and specific thing incapable of increase or diminution, and not to a genus, there was an indication of a contrary intention sufficient to exclude the rule which makes the will speak from the testator's death. (*h*) No such case as that of the house, the horse, or the picture has ever been brought into court. If the question should ever arise, it may be expected that the desire to avoid a "monstrous" result will exercise a preponderating influence on its determination. (*i*)

Contrary intention indicated by nature of a specific gift.

The third case mentioned above, namely, that of a specific bequest of a definite sum of stock, is somewhat different; for though incapable of increase or diminution, *i. e.* not generic, yet any other equal sum of the same stock is practically identical; and the question is whether the old rule, according to which such a bequest did not extend to the substituted stock, though

The act not applicable to specific bequest of stock of a definite amount.

(*f*) As to this, *vide post* ch. XIII.

5. In Garrison *v.* Garrison, 5 Dutch. 153, the words, "which I *now* own" are held since the statute to refer to the time of testator's death; and so in Roney *v.* Stiltz, 5 Whart. 381, the words, "whereof I *am* seized. To the same effect, see In re Midland Railway Co., 34 Beav. 525, the construction of the words, "the messuage wherein D. C. *now* resides;" but, *contra*, Hutchinson *v.* Barrow, 6 Hurlst. & N. 583.

[(*g*) Emuss *v.* Smith, 2 De G. & S. 722. But if a breeder of horses should bequeath "his yearlings," and survive into the next year, the yearlings of the latter year and not those of the former (now two-year-olds) would probably be held to pass.

(*h*) In re Gibson, L. R., 2 Eq. 669.

(*i*) But see per Malins, V. C., L. R., 11 Eq. 551, 552.

of precisely equal amount, (*k*) has been altered by the act. In In re Gibson, (*l*) where a testator, having £1000 N. B. railway stock bequeathed "my one thousand railway shares," and afterwards sold his £1000 stock, and at various times bought stock and shares of the N. B. railway exceeding the amount bequeathed, and was possessed of them at his death; it was contended that although the legacy was specific, and according to the old law *adeemed, yet under section 24 of the act the legatee was entitled to have his legacy satisfied out of the newly-purchased shares: but Sir W. P. Wood, V. C., said the testator had distinctly referred to one thing in his will which was no longer in existence at the time of his death: that thing and that only could be considered as the subject of the bequest. The claim therefore failed. This in principle covers a case where the substituted stock is exactly equal to the original subject of bequest.

—nor to release of a specific existing debt.

Again in Sidney *v.* Sidney, (*m*) where a testator recited, as the fact was, that his son owed him £1440 or thereabouts, secured by bills notes or otherwise, (the precise amount was £1400) and released him from the payment of interest up to the time of the testator's death; this debt was afterwards paid off, but another £1290 was incurred, which was partly secured by notes and partly unsecured, and which remained due at the testator's death. "The question is," said Sir G. Jessel, M. R., "how far the provisions of section 24 apply to gifts of legacies as distinguished from gifts of residue. *The first question to be considered in all these cases is what does the instrument mean?*" And he held that the will meant to describe a specific sum then existing, and that consequently it could not, under section 24, be read as speaking at the time of the testator's death, so as to include a new subject, viz., the interest on the new debt. The legacy was therefore adeemed.] (*n*)

(*k*) Pattison *v.* Pattison, 1 My. & K. 12. In In re Gibson, presently stated, Wood, V. C., referred to Lord Hardwicke's doctrine in Avelyn *v.* Ward, 1 Ves. 423, that the substitution of one entire fund (not purchased bit by bit) for another of equal amount was a revival of the bequest. But since 1 Vict., c. 26, a bequest of personalty once adeemed cannot be revived by parol, and the "continuing operation" of a will under § 24 extends only to uninterrupted gifts.

(*l*) L. R., 2 Eq. 669. A bequest of railway "shares" generally includes railway stock, Morrice *v.* Aylmer, L. R., 7 H. L. 717.

(*m*) L. R., 17 Eq. 65. A release by will of debts is clearly a gift of personal estate within § 24, Everett *v.* Everett, 7 Ch. D. 428; in this case a release of specified debts "now due and of all other moneys due from" the legatee, was held to include after-incurred debts.

(*n*) See also Maxwell *v.* Maxwell, L.

Another question is whether the enactment which makes the will speak from the death has the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath "all that messuage in which I *now* reside," and that after making his will he changes his residence to another house belonging to him, which he continues to occupy until his death, does the act make the word "now" apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which "a contrary intention appears by the will:" [for the reference is to a specific thing *then in existence, and the words "in which I now reside" are the only distinguishing terms of description.

Whether section 24 makes words of present time point to testator's death.

So where the words describing the subject of gift are far more general, yet if they expressly point to the present time, and are manifestly used with reference to the period when the will is made, (*o*) the operation of the act is excluded. Thus, in Cole *v.* Scott, (*p*) 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* seized 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, by Lord Cottenham, C., that the after-purchased property did not pass. Both judges, especially the former, relied on the contrasted use of words importing a distinction between the estates then vested in the testator and those he might thereafter acquire, and concluded that the word "now" must be referred to the date of the will. If the will had been undated, the L. C. thought (for reasons not expressed) that "now" must under the act be referred to the time of the death.

Cole *v.* Scott.

But whether the will is dated or not, Cole *v.* Scott is not an

R., 4 H. L. 506, as to expressions showing an intention to refer only to the state of circumstances existing at the date of the will. A bequest, if specific under the old law, is specific also under the new. The wills act, § 24, gives it an enlarged operation; but the nature of the bequest is not altered. See Bothamley *v.* Sherson, L. R., 20 Eq. 313.

(*o*) See Sugd. R. P. S., p. 372.

(*p*) 16 Sim. 259, 1 M. & Gord. 518. See also Douglas *v.* Douglas, Kay 400.

authority for giving to the word "now" the effect of excluding after-acquired property in every case in which the testator gives that of which he is "now seized" or "now possessed." Thus in Wagstaff *v.* Wagstaff, (*q*) a gift of "all my ready money, shares, freehold property, plate, pictures and any other property that I *may now* possess, except the house at P.," was held by Sir J. Romilly to include all the personal property of the testator at his death. He appears to have thought there was no difference between the words "I possess" and "I now possess." As a matter of grammar, both, it is true, express the present time; but upon the question of indicating a contrary intention within the act, the introduction of the word "now" seems to go much further towards indicating an intention to give only what the testator has at the time. (*r*) Something more than this single *word, however, will generally be wanted for that purpose: some more pointed distinction must be drawn (at least in the case of a general gift) between what belongs to the testator at one time and what belongs to him at the other. And "now" has never been so construed since the act as to produce intestacy. (*t*)

Again, in In re Midland Railway Company, (*u*) where a testator gave "all that my messuage situate in Bordgate in Otley, wherein my son D. now resides, with the stables and appurtenances thereto belonging and therewith occupied," and afterwards bought a piece of land adjoining the house, which he attached to it as a garden; it was held by Sir J. Romilly that the garden passed with the house. In his opinion it was as if the testator had said, "I give my farm Whiteacre, now in the occupation of J. S.:" but he added that if the devise had been of "the messuage as it now stands, and the lands now held therewith by D.," it would not have included the after-acquired garden. In the case first put by the M. R., the reference to occupation is not an essential part of the description: (*x*) in the second it is; the subject of gift cannot be identified without it, and the word "now" would confine the gift to land so occupied at the date of the will. (*y*)

(*q*) L. R., 8 Eq. 229.

(*r*) See per Turner, L. J., 8 D., M. & G. 437.

(*t*) See especially Hepburn *v.* Skirving, 4 Jur. (N. S.) 651, a strong decision, especially as to the bank shares.

(*u*) 34 Beav. 525. That a devise of a house will generally carry the garden, see *post* ch. XXIV.

(*x*) See Chamberlain *v.* Turner, Cro. Car. 129.

(*y*) Hutchinson *v.* Barrow, 6 H. & N. 583; Williams *v.* Owen, 2 N. R. 585.

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which "I am seized" or "am possessed," will generally include all or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will. (*z*) And the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation. (*a*) Thus in Lilford *v.* Keck, (*b*) where a testator devised all the freeholds "of which I am seized," and then devised to corresponding uses all the copyhold and leasehold property "of which I am or at the time of my death shall be possessed;" it was held by Sir J. Romilly that after-purchased freeholds passed by the former devise. So in In re Ord, (*c*) where a testator, possessed of leaseholds at C., part of which was charged *with a mortgage and the rest with an annuity, devised all his leasehold lands at C., charged with the mortgage debts charged thereon, "and also with the annuity now charged thereon," to his son; and afterwards bought other leasehold lands at C.; it was argued that the devise was confined to such leaseholds as were charged with the mortgage and annuity, a construction which of course excluded the after-bought lands; but Sir C. Hall, V. C., held that the reference to the charges (which was not quite accurate) was insufficient to deprive the words of gift of their proper interpretation under the act.]

Verbs in present tense.

In order to avoid all such questions, a testator should add to his description of property specifically disposed of expressions incapable of being applied or not likely to apply to any other. He should give "the house No. 23 in Grosvenor Square," or "his farm in the parish of A called B, now in the occupation of C" (all which particulars could hardly coincide in two instances), or "all lands in the county of C to which he is entitled at the date of his will." The last restriction seems in general the best, as it precludes the possibility of after-acquired property being let in.

Practical suggestion.

[It has hitherto been assumed, and the assumption pervades all the cases, that the words of the act "every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if," &c., are

Is section 24 applicable to property excepted from devise?

(*z*) Doe d. York *v.* Walker, 12 M. & Wel. 591; Lady Langdale *v.* Briggs, 3 Sm. & Gif. 246, 8 D., M. & G. 391.

(*a*) Per Cotton, L. J., Everett *v.* Everett, 7 Ch. D. 428.

(*b*) 30 Beav. 300.

(*c*) 9 Ch. D. 667.

not to be taken in their literal sense as meaning "real and personal estate then actually comprised therein" (*i. e.*, devised thereby). It is plain that this sense was not intended, for the context shows that the enactment has reference to property not then actually comprised in the will. (*d*) The true meaning appears to be "with reference to the question what estates are comprised in any disposition in the will." If this is so, it disposes of a point raised and left unsettled in Hughes *v.* Jones, (*e*) namely, whether the enactment is applicable to exceptions from a devise? To hold that it is, *would (it was argued) be to make the will speak from the death with reference to property excluded from it, whereas the act makes it so speak only with reference to property comprised in it. This argument proceeds upon a mistake. The whole question is, what is comprised *in the terms?* This cannot be answered without taking into consideration and construing all the terms of the description, as well those which exclude as those which include. And if a man devises all his real estate except his copyholds or except his estates in the county of B, or bequeaths all his stock except consols, good sense requires that both parts of the description, being equally general or generic, should be construed to speak as from the same time. If the exception, or exclusive portion, refers to an actually existing state of things, it must, of course, be construed to speak as from the date of the will, just as inclusive terms having a similar bearing must be construed. If the will goes on to make a distinct disposition of the excepted property, with the result that what is excluded from one devise is included in the other, the question (if question it is) can hardly be said to arise. (*f*)

(*d*) See per Turner, L. J., 8 D., M. & G. 436 (where the word "is" is misplaced, see 26 L. J., Ch. 49). The words of the act appear to have been hastily adopted from the "propositions" of the 4th R. P. Report, p. 80. They require to be read with the report, which says (p. 24) "We propose that a will shall pass property of any description comprised *in its terms* which a testator may be entitled to at the time of his death, unless a contrary intention shall appear by the will. If this recommendation be adopted the law respecting the time from which a devise of freehold or copyhold estate is to be considered to take effect will be precisely similar to that which is at present in force as to personal estate." And this recommendation is referred to as follows (p. 29):—"If *as we have proposed* wills be made to speak with reference to the property comprised in them as at the time of the testator's death," &c.

(*e*) 1 H. & M. 765.

(*f*) See Lysaght *v.* Edwards, 2 Ch. D. 521, 522; In re Scarth, 10 Ch. D. 499, better reported 40 L. T. Rep. 184.

A general power of appointment created after a will, but in the testator's lifetime, (*g*) 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 section 27 of the act 1 Vict., c. 26, a general residuary devise or bequest will, unless a contrary intention appears by the will, (*i*) 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 powers of *revocation*. Even where the will is made expressly in exercise of all powers of appointment, 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.] (*k*)

Powers of appointment created after date of will are exercised by a residuary gift:

—but not powers of revocation.

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 [affect the *question of testamentary capacity. Thus although the will of a woman under coverture at the time of making it may operate by force of the enactment to dispose of separate property afterwards acquired by her, (*l*) or as the execution of a general power afterwards conferred upon her, (*m*) it acquires no validity under this section by the mere fact of her having survived her husband and being *discoverte* at the time of her death. (*n*) The statute does not make an instrument valid which through the personal disability of the testator was invalid

Section 24 does not supply testamentary capacity:

(*g*) It need scarcely be observed that if the power is created by will and the donee dies before the donor the power lapses, Jones *v.* Southall, 32 Beav. 31.

(*h*) Sugd. R. P. Stat. 379; and see Carte *v.* Carte, 3 Atk. 174; Stillman *v.* Weedon, 16 Sim. 26; Cofield *v.* Pollard, 3 Jur. (N. S.) 1203; Patch *v.* Shore, 2 Dr. & Sm. 589; Hodsdon *v.* Dancer, 16 W. R. 1101, W. N. 1868, p. 222.

(*i*) See Pettinger *v.* Ambler, L. R., 1 Eq. 510; and further on this subject, *post* ch. XX., § 5.

(*k*) Pomfret *v.* Perring, 5 D., M. & G. 775; Palmer *v.* Newell, 20 Beav. 38; In re Merritt, 1 Sw. & Tr. 112, 4 Jur. (N. S.) 1192.

(*l*) Willock *v.* Noble, L. R., 7 H. L. 599, 8 Ch. 788.

(*m*) Thomas *v.* Jones, 2 J. & H. 475, 1 D., J. & S. 63. "The effect of the section in the case of a married woman is that she must be regarded *as a married woman* executing the instrument immediately before her death, and passing thereby everything of which at the time of her death she had acquired a power of disposing," per Wood, V. C., 2 J. & H. 484. A clear opinion was given by Lord Westbury in this case that a *general* power over an equitable estate given to the *survivor* of two persons, to be executed by *deed* or will was well executed by a will made during the life of both by the one who eventually survived.

(*n*) Willock *v.* Noble, L. R., 7 H. L. 580; In re Wollaston, 32 L. J., Prob. 171; Price *v.* Parker, 16 Sim. 198.

in its inception, but gives a new rule for the interpretation of instruments which are valid without the aid of the statute.

Neither does the enactment in any manner] interfere with the construction in regard to the objects of gift; (*o*) 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.

—nor relate to objects of gift.

[If, after the execution of a will, an alteration is made in the law which produces an alteration in the effect of the will, and the testator leaves the will unaltered, he will be presumed to intend that it shall take effect according to the altered law.] (*p*)

Effect of a change in the law between will and death.

(*o*) Bullock *v.* Bennett, 7 D., M. & G. 283; Violet *v.* Brookman, 26 L. J., Ch. 308.

(*p*) Hasluck *v.* Pedley, L. R., 19 Eq. 271 (Apportionment Act, 1870).

*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 favor of those who are dead at the time of its execution.[1] [Though the term "lapse" is

1. See also Wms. Ex'rs (6th Am. ed.) 1300; 2 Redf. on Wills 157; 1 Roper on Leg. 463; Theobald on Wills 442; 4 Kent 541; Gore *v.* Stevens, 1 Dana 205; Alexander *v.* Waller, 6 Bush 341; Ballard *v.* Ballard, 18 Pick. 41; Comfort *v.* Mather, 2 Watts & S. 450; Prescott *v.* Prescott, 7 Metc. 145; Birdsall *v.* Hewlett, 1 Paige 32; Trippe *v.* Frazier, 4 Har. & J. 446; Dunlap *v.* Dunlap, 4 Desaus. 314; Davis *v.* Taul, 6 Dana 52; Martin *v.* Lachasse, 47 Mo. 591; Glenn *v.* Belt, 7 Gill & J. 362; Torrance *v.* Torrance, 4 Md. 11; Lefler *v.* Rowland, Phill. Eq. 143; Tongue *v.* Nutwell, 13 Md. 415; Perry *v.* Logan, 5 Rich. Eq. 202. If, however, the gift once *vests* in the donee, no lapse is occasioned by his subsequent death before the time arrives for his enjoyment in possession. Thus, a remainder to B, after a life estate to A, vests at the testator's death, and is not to be disturbed by B's death afterwards, before A, Coleman *v.* Hutchinson, 3 Bibb 209; Yeaton *v.* Roberts, 28 N. H. 459; Thomas *v.* Anderson, 6 C. E. Gr. (N. J.) 22; Saxton's Estate, 1 Tuck. 32; O'Byrne *v.* O'Byrne, 9 Md. 512; Allen *v.* Mayfield, 20 Ind. 293. And that, notwithstanding the remainder is to B and C, with survivorship, if either die before A, Beatty *v.* Montgomery, 6 C. E. Gr. (N. J.) 324. Where, however, the legacy is made payable after a fixed interval of time, as after two years, or when the legatee arrives at a certain age, the testator's death is in general considered to be the time of vesting, after which time death will not occasion a lapse, Marsh *v.* Wheeler, 2 Edw. 156; Wheeler *v.* Lester, 1 Bradf. 213; Loder *v.* Hatfield, 6 Thomp. & C. 229, affirmed 4 Hun 36; Helms *v.* Franciscus, 2 Bland Ch. 544, 560; Snow *v.* Snow, 49 Me. 159; Martin *v.* Lachasse, 47 Mo. 591; O'Byrne *v.* O'Byrne, *ubi supra;* Ruffin *v.* Farmer, 72 Ill. 615. And in similar cases, where the legacy is a charge on the land, it may be added that "the true rule with respect to the vesting of legacies payable out of real estate is this: where the gift is immediate but the payment is postponed until the legatee, for instance, attains the age of 21 years or marries, there it is contingent and will fail, if the legatee dies before the time of payment arrives; but where the payment is postponed in regard to the convenience of the person and circumstances of the estate charged with the legacy and not on account of the age,

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 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*)

As to real estate;

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*)[2] for the circumstance

—personalty.

condition or circumstances of the legatee, in such a case it will be vested and must be paid, although the legatee should die before the time of payment," McConn, V. C., in Marsh *v.* Wheeler, 2 Edw. 156. And, to the same effect, see the remarks of Judge Huston, in Donner's Appeal, 2 Watts & S. 372, where he says: "If the time of payment is postponed not because of the minority of the legatees but for the benefit of the estate or of the devisee of the land, the legacy does not sink or merge in the land." See, too, Willis *v.* Roberts, 48 Me. 257. Where the legacy is to be paid out of the proceeds of certain real estate at the expiration of a certain lease, it will not lapse on account of the death of the legatee before the expiration of the lease, Selby *v.* Morgan, 6 Munf. 156. And where the legacy is merely in confirmation of a prior parol gift, it will not lapse, Woods *v.* Woods, 2 Jones Eq. 420.

[(*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 (or Moxom), 1 Ves. 49, 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 im-

2. See 2 Redf. on Wills 160–163; 1 Roper on Leg. 476; Wms. Ex'rs (6th Am. ed.) 1302, as to legacy of a debt, referred to in note *c*.

that, *in 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, consti-

ported 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 understand the distinction between giving and forgiving. **Effect of death of debtor upon clause forgiving debts.**—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 Sourby's Trust, 2 K. & J. 630; Turner *v.* Martin, 7 D., M. & G. 429, *cor.* L. C. on same will.]

(*d*) Maybank *v.* Brooks, 1 B. C. C. 84.

tutes the successor to the property, is to give it to some one else. (e)[3] A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating

[(e) Johnson *v.* Johnson, 4 Beav. 318; Pickering *v.* Stamford, 3 Ves. 493; Underwood *v.* Wing, 4 D., M. & G. 633, 8 H. L. Cas. 183. To enable a person to take under a will it must be proved affirmatively that he survived the testator, Barnett *v.* Tugwell, 31 Beav. 232.]

3. Mr. Williams, in his work on executors (6th Am. ed.) page 1306, declares it to be "settled that the testator may, if he thinks fit, prevent a legacy from lapsing; though, in order to effect this object, he must declare either expressly or in terms, from which his intention can be with sufficient clearness collected, what person or persons he intends to substitute for the legatee dying in his lifetime." See also Theobald on Wills 443; 2 Redf. on Wills 163. See also Hutchinson's Appeal, 34 Conn. 300; Herbert *v.* Smith, Saxt. 141; Craighead *v.* Given, 10 Serg. & R. 351, in which case Judge Duncan says: "Even the most explicit declaration that the devise shall not lapse is not sufficient to prevent it; there must be either survivorship as in a joint devise or limitation over." See also Aspinwall *v.* Duckworth, 35 Beav. 307. It is also to be noted that the use of such words of limitation as "heirs," "heirs and assigns," with or without the conjunction "and" or "or," will not prevent a lapse, unless it is clear from the context that the testator intended to provide for a substitution in case of the death of the first-named legatee or devisee. Thus, in Kimball *v.* Story, 108 Mass. 382, where the gift was "to A, his heirs and assigns," the words were held to be words of limitation, not preventive of a lapse by A's death before that of the testator. So, too, Armstrong *v.* Moran, 1 Bradf. 314, where the gift was to A and his children, and the children of B, to be equally divided "between them and their heirs and assigns." Stires *v.* Van Rensselaer, 2 Bradf. 172; Weishaupt *v.* Brehman, 5 Binn. 115, where the division was to be made among testator's six children "or their heirs;" Sword *v.* Adams, 3 Yea. 34, "to A, her heirs and assigns;" Comfort *v.* Mather, 2 Watts & S. 450, same words; Dickinson *v.* Purvis, 8 Serg. & R. 71, which was a devise "to A *and* her heirs;" Hand *v.* Marcy, 1 Stew. (N. J.) 59, "to A and B, their heirs and assigns." *Contra*, by reason of context, "to A and his heirs," Hawn *v.* Banks, 4 Edw. 664; Davis *v.* Taul, 6 Dana 52. Chancellor Runyon, in the very recent case of Hand *v.* Marcy, 1 Stew. (N. J.) 63, reviews some of the cases above referred to thus: "The cases in which it has been held that like words would not prevent a lapse, are numerous. In Sword *v.* Adams, 3 Yea. 34, there was a devise to a woman, 'her heirs and assigns.' She died in the testatrix's lifetime, leaving an infant son. It has been held that the devise lapsed, though the testatrix was assured by one interested in the estate that the son would take. In Sloan *v.* Hanse, 2 Rawle 28, the devise was of all the testator's estate, real and personal, to his two cousins, Richard and Joseph Hanse, to be equally divided between them, 'or to their heirs.' Richard Hanse was dead at the time of making the will, but this fact was not known to the testator. It was held that the devise to him lapsed. The court there said that the inference to be drawn from the use of 'or' instead of 'and,' was too feeble to disinherit the heir of the testator. In Comfort *v.* Mather, 2 W. & S. 450, the language of the bequest, which was of a sum of money, was 'to have and to hold to her, the said Sidney Eastburn, her heirs and assigns forever.' Sidney Eastburn was not a lineal descendant of the testator. She died in his lifetime and he

an intention to substitute the executors or adminis*trators, in the event of the gift to the original legatee failing by lapse. (*f*)

[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*)

Cases of substitution.

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*)

Lapse of gift on contingency.

knew of her death, and intended that her children should have the money, but it was held that the legacy lapsed. In Dickinson *v.* Purvis, 8 S. & R. 71, the bequest was of a sum of money to the testator's niece, 'and her heirs.' She died in the testator's lifetime. It was held that the legacy lapsed. In Armstrong *v.* Moran, 1 Brad. Surr. R. 314, the bequest was of the testator's personal estate, to his brother James, and his children, and the child of the testator's sister Catharine, to be equally divided between them, 'and their heirs and assigns forever.' The child of Catharine died in the lifetime of the testator, and it was held that its share lapsed. In Hawn *v.* Banks, 4 Edw. 664, the testatrix gave to her niece, 'and to her heirs,' a sum of money. The niece died in the lifetime of the testatrix. The court held that though, if the language of the bequest were regarded alone, the legacy would lapse, yet upon the evidence furnished by another clause of the will, of the testatrix's meaning in the use of that language, the word 'heirs' was used by way of substitution. Nor does the scheme of the will under consideration in the present case, afford any evidence of the testator's intention to prevent a lapse. It may be conjectured that if his attention had been directed to the subject, he would have used language to prevent the lapse, and it is quite probable that he would have done so. The question, however, is not what he probably would have said, but what did he mean by the language he has used."

(*f*) Sibley *v.* Cooke, 3 Atk. 572. [But a declaration that a legacy shall vest in the legatee immediately upon execution of the will, following a gift to one, his executors, administrators and assigns, will not prevent lapse, Brown *v.* Hope, L. R., 14 Eq. 343.

(*g*) Long *v.* Watkinson, 17 Beav. 471; Hinchliffe *v.* Westwood, 2 De G. & S. 216; Hewitson *v.* Todhunter, 22 L. J., Ch. 76. See ch. XXIX.

(*h*) Smith *v.* Oliver, 11 Beav. 494. But as to this case see ch. XLIX., § 1.

(*i*) Humberstone *v.* Stanton, 1 Ves. & B. 385; Doo *v.* Brabant, 3 B. C. C. 393, 4 T. R. 706; Williams *v.* Jones, 1 Russ. 517.

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. (*k*) And

Lapse of power.

a power created by will lapses by the death of the donee before the donor.] (*l*)

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,) (*m*) 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," (*n*) any one of them existing when the will takes effect will be entitled to the entire property.[4] 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. (*o*) And the same consequence would ensue if the gift failed from any other cause; (*p*)

(*k*) Culsha *v.* Cheese, 7 Hare 245.

(*l*) Jones *v.* Southall, 32 Beav. 31.

(*m*) See ch. XXXII.

(*n*) Cart. 4.

4. See 1 Roper on Leg. 482, *et seq.*; Wms. Ex'rs (6th Am. ed.) 1311; 2 Redf. on Wills 168; Theobald on Wills 445. To the effect that the gift will not lapse by reason of the death of one of several, to whom it is given jointly, see Bolles *v.* Smith, 39 Conn. 219; Luke *v.* Marshall, 5 J. J. Marsh. 357; Anderson *v.* Parsons, 4 Greenl. 486; Jackson *v.* Roberts, 14 Gray 550; Dow *v.* Doyle, 103 Mass. 489; Stephens *v.* Milnor, 9 C. E. Gr. (N. J.) 358; Gardner *v.* Printup, 2 Barb. 83; Putnam *v.* Putnam, 4 Bradf. 308; Gross' Estate, 10 Penna. St. 360; Gilbert *v.* Richards, 7 Vt. 203; De Camp *v.* Hall, 42 Vt. 483; Craycroft *v.* Craycroft, 6 Harr. & J. 54; Anderson *v.* Parsons, 4 Me. 486. But the rule is otherwise where the donees take as tenants in common. Gray *v.* Bailey, 42 Ind. 349; Upham *v.* Emerson, 119 Mass. 509; Cummings *v.* Bramhall, 120 Mass. 552; Workman *v.* Workman, 2 Allen 272; Lombard *v.* Boyden, 5 Allen 249; Mason *v.* Trustees of Meth. Ch., 12 C. E. Gr. (N. J.) 47; Hand *v.* Marcy, 1 Stew. (N. J.) 59; Floyd *v.* Barker, 1 Paige 480; Van Buren *v.* Dash, 30 N. Y. 393; Mebane *v.* Womack, 2 Jones Eq. 293; Coates Street, 2 Ashm. 12; Allison *v.* Kurtz, 2 Watts 185; Nelson *v.* Moore, 1 Ired. Eq. 31. See also Drakeford *v.* Drakeford, 33 Beav. 43. But by operation of the North Carolina act abolishing survivorship, the share of one of two to whom property is given as joint tenants, will, on his death, fall into the residue. Coley *v.* Ballance, 1 Wins. Eq., No. 2, 89.

(*o*) Davis *v.* Kemp, Cart. 4, 5, Eq. Cas. Ab. 216, pl. 7; Buffar *v.* Bradford, 2 Atk. 220; Morley *v.* Bird, 3 Ves. 628.

(*p*) Humphrey *v.* Tayleur, Amb. 136; Larkins *v.* Larkins, 3 B. & P. 16; Short d. Gastrell *v.* Smith, 4 East 419; [all cases of revocation: and Young *v.* Davies, 2 Dr. & Sm. 167, where one joint-tenant was an attesting witness. But in In re Kerr's Trusts, 4 Ch. D. 600, on an *appointment* to A, an object of the power, and B a stranger, Jessel, M. R., refused to apply "the rule of tenure applicable to real estate," and held that A took one-half only.]

*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. (q)

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained 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. [5] 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

Doctrine in reference to gifts to classes.

(q) Page *v.* Page, 2 P. W. 489; [Sykes *v.* Sykes, L. R., 4 Eq., 200; In re Wood's Will, 29 Beav. 236. But in Sanders *v.* Ashford, 28 Beav. 609, a devise to five persons named, "to be equally divided between them *if more than one*," was held to carry the whole to the survivors by implication from the last words. In Clarke *v.* Clemmans, 36 L. J., Ch. 171, where a testator bequeathed residue to A and others *nominatim* as tenants in common, but A was already dead (as the testator showed he knew), Malins, V. C., held that the others were entitled to the whole fund: *sed qu.*]

5. This rule is well established, that where the gift is to a class to be ascertained at testator's death, there is no lapse by reason of the death before the testator of any person, who would have constituted one of the class if living at his death. 1 Roper on Leg. 487, *et seq.*; Wms. Ex'rs (6th Am. ed.) 1312; Hawkins on Wills 68; Theobald on Wills 445; 2 Redf. on Wills 170; Yeates *v.* Gill, 9 B. Mon. 206; Schaffer *v.* Kettell, 14 Allen 528; Young *v.* Robinson, 11 Gill & J. 328; Stires *v.* Van Rensselaer, 2 Bradf. 172; Downing *v.* Marshall, 23 N. Y. 366; Fell *v.* Biddolph, 10 L. R., C. P. 701; Dimond *v.* Bostock, 10 L. R., Ch. App. 358. And this may be the case where the gift is to persons by name, who really constitute a class, as to *the sons*, D and E, *of my two deceased sisters*, Warner's Appeal, 39 Conn. 253; Spinger *v.* Congleton, 30 Ga. 977; to *my grandchildren*, A, B and C, Stedman *v.* Priest, 103 Mass. 293. But a gift to *my sons*, A, B and C, was held not to be a class in Williams *v.* Neff, 52 Penna. St. 333; so to B's *children*, naming four, Frazier *v.* Frazier, 2 Leigh 642; see also Todd *v.* Trott, 64 N. C. 280; Morse *v.* Mason, 11 Allen 36; Starling *v.* Price, 16 Ohio St. 32; Provenchere's Appeal, 67 Penna. St. 463. And a gift to my surviving children and A, is not a gift to a class, and A's share lapses by his death before the testator, Drakeford *v.* Drakeford, 33 Beav. 43. But a gift of residue to the children of two nieces and a nephew by name, is a gift to a class, and the share of one who died before the testator does not lapse, but survives to the others, Schaffer *v.* Kettell, 14 Allen 528. So, too, where the gift is to children, Magaw *v.* Field, 48 N. Y. 668; Hoppock *v.* Tucker, 59 N. Y. 202; Bolles *v.* Smith, 39 Conn. 217. But by statute in Kentucky the children of the deceased members of the class take their shares, Renaker *v.* Lemon, 1 Duv. 212.

these objects surviving the testator, without regard to previous deaths; (*r*) 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. (*s*) The rule is also the same if, in a gift to the children of a deceased person, the testator in terms includes any child who may die before him leaving issue, which of course is nugatory, (*t*) or if one who would otherwise be a member of the class is an attesting witness, (*u*) or if the gift to one is revoked:] (*x*)

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." (*y*) [The "recompense" was held to go with the

(*r*) Doe d. Stewart *v.* Sheffield, 13 East 526; [Shuttleworth *v.* Greaves, 4 My. & Cr. 35; and compare Cort *v.* Winder, 1 Coll. 320.]

(*s*) Viner *v.* Francis, 2 B. C. C. 658, 2 Cox 190; [Leigh *v.* Leigh, 17 Beav. 605; Dimond *v.* Bostock, L. R., 10 Ch. 358.

(*t*) In re Coleman and Jarrom, 4 Ch. D. 165. But by apt words issue (if any) may of course be substituted to take the share of a deceased parent without destroying the nature of the class-gift. See an instance, Aspinall *v.* Duckworth, 35 Beav. 307.

(*u*) Fell *v.* Biddolph, L. R., 10 C. P. 709.

(*x*) Shaw *v.* M'Mahon, 4 D. & War. 431; Clark *v.* Phillips, 17 Jur. 886. That under a gift "to A and the children of B," A is a member of the class, *vide ante* p. *269.

(*y*) Gift to executors nominatim, and not as a class.—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 forever;" and added, "which last-mentioned four persons I also appoint as my executors, to see that everything 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

"trouble" to the survivors. Besides, the survivors, of course, took the whole in trust to pay debts; and the same persons were, by the words of the will, entitled to keep for their own benefit what remained after such payment. The case turned on the special terms of the will.]

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 favor of the individuals answering the *description. Such certainly was the opinion of Sir R. P. Arden, M. R., in Allen *v.* Callow;(*z*) 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 Lee *v.* Pain, (*a*) where

No distinction where class is ascertainable by some event which occurs in testator's lifetime.

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 he considered it as analogous to a gift to B, C, and D, children of A, as tenants in common, which, of course, 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 generally a gift to the persons "hereinbefore (or hereinafter) named" as executors is a gift to the individuals named, not to a class, Hoare *v.* Osborne, 33 L. J., Ch. 586. So of a gift to "before-mentioned legatees," the words of reference are merely to save repetition, and the construction must be the same as if the repetition were actually made, In re Gibson, 2 J. & H. 656; Nicholson *v.* Patrickson, 3 Gif. 209.]

(*z*) 3 Ves. 289; see also Ackerman *v.* Burrows, 3 Ves. & 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 W. 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.

[(*a*) 4 Hare 250.

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. who survived the testatrix took as a class, and that there was no lapse; and his decision has been followed in other cases. (*b*) 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 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. (*c*) [In Ham's Trusts, (*d*) 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, appears to have been of opinion that without the latter words the gift would have been a gift to a class, and would have taken effect in favor of those only who survived the testator.]

(*b*) Leigh *v.* Leigh, 17 Beav. 605; Cruse *v.* Howell, 4 Drew. 215.]

(*c*) Bridge *v.* Abbott, 3 B. C. C. 224; Vaux *v.* Henderson, 1 J. & W. 388, n.

[(*d*) 2 Sim. N. S. 106; see this case stated *post* ch. XXIX.]

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 favor 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 Doe d. Shelley *v.* Edlin, (*e*) 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 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.

Devises of legal or beneficial ownership only.

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 favor 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 a year, or the sum of £500, 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. (*f*) This principle is strongly exemplified in Oke *v.* Heath, (*g*) 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 during her life for her separate

Lapse of devise of charged property.

(*e*) 4 Ad. & Ell. 582.

(*f*) Wigg *v.* Wigg, 1 Atk. 382; Hills *v.* Worley, 2 Atk. 605.

(*g*) 1 Ves. 135. [See also In re Arrowsmith's Trusts, 6 Jur. 1231, and on app. (where the point did not arise) 2 D., F. & J. 474.]

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.

Lapse of specific sum charged on real estate—its destination.

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. (*h*) As in the case of a devise of land to A, charged with a legacy to B, provided B attain the age of twenty-one, as to which Lord Eldon (*i*) 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

(*h*) Att.-Gen. *v.* Milner, 3 Atk. 112; Croft *v.* Slee, 4 Ves. 60; [In 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.

(*i*) In Tregonwell *v.* Sydenham, 3 Dow. 210.

the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

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.

Charges absolute in event.

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, little 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, (*k*) 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. (*l*) 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."

General doctrine as to the destination of sums payable out of land.

The following are the decisions in favor of the heir.

In Arnold *v.* Chapman (*m*) a testator devised a copyhold estate to Chapman, he causing to be paid to his executors the sum of £1000; 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 to the hospital was void, a question arose whether it should go to the heir, or sink for the benefit

Decisions in favor of the heir.

Arnold *v.* Chapman.

(*k*) *Vide* Sir J. Leach's judgment in Cooke *v.* Stationers' Company, 3 My. & K. 264.

[(*l*) As in cases where lands are directed to be sold, and the produce divided, Page *v.* Leapingwell, 18 Ves. 463; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Jones *v.* Mitchell, 1 S. & St. 290; see also Cruse *v.* Barley, 3 P. W. 20; and Collins *v.* Wakeman, 2 Ves., Jr., 683. As to Cooke *v.* Stationers' Company, 3 My. & K. 262, see judgment of Wood, V. C., in In re Cooper's Trusts, 23 L. J., Ch. 29, n.]

(*m*) 1 Ves. 108.

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."

Gravenor *v.* Hallum.

In the next case, of Gravenor *v.* Hallum, (*n*) a testator devised to his executors and their heirs a messuage in Ipswich, subject to the annual payments, making together £10, thereinafter given and forever charged thereon, and all other his real estate, in trust to be sold, directing the moneys arising from the sale, and his personal estate, to be distributed as therein mentioned. The testator then gave the £10 a year to charity. Lord Camden held that the heir was entitled. "The rule as to real estate is," he said, "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 forever from the devise, which he gives to the residuary legatees."

Bland *v.* Wilkins.

So in Bland *v.* Wilkins, (*o*) before Sir Thomas Sewell, where lands were given to E. N. in fee, upon condition that her executors or administrators should pay £10 to a charity. His Honor held that the £10 should go to the heir, as part of the produce of the land undisposed of.

Henchman *v.* Att.-Gen.

The authority of Arnold *v.* Chapman, and the consequent superiority of the heir's claim, was recognized by Sir J. Leach in Henchman *v.* Att.-Gen. (*p*) Though ultimately the L. C.

(*n*) Amb. 643, 1 B. C. C. 61, n.

(*o*) In 1782, cited 1 B. C. C. 61.

(*p*) 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, 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, in favor of charities. The testator died without customary heir or next of kin, and the question was, whether the £2000 belonged to the devisee, the lord of the manor, or the crown. Sir J. Leech, V. C., considered 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

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.

[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. (*q*) In Gravenor *v.* Hallum, the annual payments were expressly treated as exceptions, and not charges. In Bland *v.* Wilkins, the grounds of the determination are not known. None of these cases, therefore, are authorities that the benefit of a *charge*, the gift of which is void *ab initio*, falls to the heir.

Observations on Arnold *v.* Chapman and Gravenor *v.* Hallum.

We now come to the cases where the decision was in favor of the devisee of the land, all of which will, it is conceived, be found to be cases of mere charges.] [6]

£2000 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. On appeal [3 My. & K. 485], Lord Brougham 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. [As to which see above, p. *68, n. (*q*)

(*q*) But see Tucker *v.* Kayess, 4 K. & J. 339.]

6 See, also, 1 Roper on Leg. 500; 2 Redf. on Wills 172. See Macknet *v.* Macknet, 9 C. E. Gr. (N. J.) 277; Birdsall *v.* Hewlett, 1 Paige 32; Harris *v.* Fly, 7 Paige 421; Morris *v.* Jameson, 2 Penr. & W. 399; Spence *v.* Robins, 6 Gill & J. 507; Helms *v.* Franciscus, 2 Bland Ch. 544, 560. In Birdsall *v.* Hewlett, *ubi supra*, Chancellor Walworth says: "It is undoubtedly a general rule that legacies charged upon the real estate and payable at a future day are not vested and become lapsed, if the legatee dies before the time of payment arrives. This rule was at first adopted without any exceptions and in direct opposition to that which existed in relation to legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a particular favorite of the English courts. I am not aware that it has ever been extended to a case where the estate was given to a stranger upon

Decisions in favor of the devisee of the land charged.

Thus, in Jackson *v.* Hurlock, (*r*) A devised to B and her heirs certain manors, charged with the payment of any sum not exceeding £10,000 to such person 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.

Jackson *v.* Hurlock.

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 out of the estate; whereas he meant the reverse. A sum not exceeding £10,000 had put a charge upon the estate which could not take place.

Barrington *v.* Hereford.

So, in Barrington *v.* Hereford, decided by Lord Bathurst; which, according to a very short statement by a reporter of a subsequent period, (*s*) seems to have been a bequest of £1000 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 favor of the specific devisee, as arising out of the estate. Sir R. P. Arden, M. R., in Kennell *v.* Abbott, (*t*) said, "that Lord Bathurst first thought the heir entitled, upon the cases of Cruse *v.* Barley, (*u*) 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, (*x*) where the testator gave to the minister or clergyman of a certain parish, *forever*, an annuity or rent-charge of £35, 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 therein before disposed of, upon other trusts. The question was, whether the annuity, the devise of which was void, went to the residuary devisee, or to the specific devisee of the lands. Sir W. Grant said, that the testator appeared to

the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law."

(*r*) Amb. 487, better reported 2 Ed. 263.

(*s*) 1 B. C. C. 61.

(*t*) 4 Ves. 811.

(*u*) 3 P. W. 20, stated *post* ch. XIX., § 5.

(*x*) 12 Ves. 497.

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 (*y*) clearly show that a de*claration of trust in favor 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. (*z*)

In Cooke *v.* The Stationers' Company, (*a*) 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 Bland *v.* Wilkins (*b*) must be considered as overruled. Cooke *v.* Stationers' Company.

So, in Ridgway *v.* Woodhouse, (*c*) 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 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." Ridgway *v.* Woodhouse.

The point under consideration was much discussed in In re Cooper's Trusts, (*d*) in which there was a specific devise on trust in the first place to raise a sum of money by sale or In re Cooper's Trusts.

[(*y*) *Ante* p. *226.]

(*z*) 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.

(*a*) 3 My. & K. 262.

(*b*) *Ante* p. *347.

(*c*) 7 Beav. 437.

(*d*) 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 K. & J. 339; Sutcliffe *v.* Cole, 3 Drew. 135; Heptinstall *v.* Gott, 2 J. & H. 449; In re Clulow's Trusts, 1 J. & H. 667, where an accumulation of rents being stopped by statute, the excess was held to sink in the estate.

otherwise; and after raising as aforesaid, the estate was to be in trust for the testator's son and his issue; it was then directed that the money should go to the testator's daughter for life, and afterwards to her children. Then followed a residuary devise. The daughter survived the testator, but died without ever having had a child. Sir W. P. Wood, V. C., treated the distinction between an exception and a charge as settled; the question was to which head the case before him belonged. He said he "did not find a case deciding that a gift so circumstanced as that had been held to be an exception." (*e*)

Lapsed charge held to sink for the devisee.

*These principles were applied by Sir R. Kindersley, V. C., without hesitation to the case of failure by lapse.(*f*)

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.[7] If we consider that the gift to A, if he survive the

(*e*) In Tucker *v.* Kayess, *sup.*, the V. C. said he still adhered to this observation, which he cited as follows:—"I do not find a single case in the books *where a sum of money to be paid out of an estate* has ever been held to be an exception." The variation is not immaterial: for in the subsequent case of Heptinstall *v.* Gott, *sup.*, the V. C., referring to In re Cooper's Trusts, said, "If any child had ever been in existence, I apprehend that the principle of Arnold *v.* Chapman would have applied,"—*i. e.* that if the daughter and her child had afterwards died in the testator's lifetime, and the gift had thus failed *by lapse*, the case would have been one of exception, and that the charge would not have sunk for the benefit of the specific devisee. And it appears, in fact, from the V. C.'s judgment in In re Cooper's Trusts, that if a testator makes a disposition of the money, in terms complete, in favor of a person or persons *in esse* during his life, and legally competent to take, the V. C. would hold the case to be one of exception. *Sed qu.;* and Sutcliffe *v.* Cole, *inf.*, which was a case of lapse, is *contra.*

(*f*) Sutcliffe *v.* Cole, 3 Drew. 135.

7. And in general, a remainder over on the death of A, without issue, does not lapse by reason of A's dying without issue before the testator. See 2 Redf. on Wills 171; Theobald on Wills 444; Armstrong *v.* Armstrong, 14 B. Mon. 333; Brown *v.* Brown, 1 Dana 39; Goddard *v.* May, 109 Mass. 468; Norris *v.* Beyea, 13 N. Y. 273; Jackson *v.* Merrill, 6 Johns. 185; Mebane *v.* Womack, 2 Jones Eq. 293; Bujac's Appeal, 76 Penna. St. 27; Dunlap *v.* Dunlap, 4 Desaus. 314. So, too, a remainder over on A's death, where A dies before the testator. Wms. Ex'rs (6th Am. ed.) 1321; Billingsley *v.* Harris, 17 Ala. 214; West *v.* Williams, 15 Ark. 682; Prescott *v.* Prescott, 7 Metc. 141; Kuhn *v.* Webster, 12 Gray 3; Yeaton *v.* Roberts, 8 Foster 459; Macknet *v.* Macknet, 9 C. E. Gr. (N. J.) 277; Downing *v.* Marshall, 23 N. Y. 366; Lawrence *v.* Hebbard, 1 Bradf. 252; Goodall *v.* McLean, 2 Bradf. 306; Mowatt *v.* Carow, 7 Paige 328; Adams *v.* Gillespie, 2 Jones Eq. 244; Holderby *v.* Walker, 3 Jones Eq. 46;

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, (*g*) that the gift to B is not open to the objection of remoteness, and is therefore good. In Brown *v.* Higgs, (*h*) 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, (*i*) Sir J. K. Bruce, V. C., thought such a gift bad.]

The doctrine of lapse has been modified by the act 1 Vict., c. 26, in three important particulars. First, by section 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."[8]

Stat. 1 Vict., c. 26, § 25. Real estate comprised in lapsed or void devises included in residuary devise.

Ware *v.* Fisher, 2 Yea. 578; Colburn *v.* Hadley, 46 Vt. 71; Coates Street, 2 Ashm. 12. So, too, in In re Speakman, 4 L. R., Ch. D. 620. But where the original devise was void, because made to a slave, the limitation over on his death was held to be void also, Jackson *v.* Collins, 16 B. Mon. 221.

(*g*) *Ante* p. *254.

(*h*) 4 Ves. 717; and see Mackinnon *v.* Peach, 2 Kee. 555; Donn *v.* Penny, 1 Mer. 22, 23.

(*i*) 1 Coll. 416.

8. There is a statute in Virginia similar to section 25, above cited, (Code, 1873, ch. 118, § 14,) and perhaps in some other states. See Battle's Rev. (N. C., 1873,) p. 847, § 7; also in Kentucky, by Gen. Stats. 1877, p. 336, § 20, it is provided that void and lapsed legacies shall not fall into the residue. In the absence of all statutory provision the rule of the common law has been adopted in many states that void and lapsed *legacies* go to the residuary legatee, but void and lapsed *devises* to the heir. Roberson *v.* Roberson, 21 Ala. 273; Word *v.* Mitchell, 32 Ga. 623; Hughes *v.* Allen, 31 Ga. 489; Thweatt *v.* Redd, 50 Ga. 181; Gore *v.* Stevens, 1 Dana 206; Jones *v.* Letcher, 13 B. Mon. 373; Cunningham *v.* Cunningham, 18 B. Mon. 22; Trippe *v.* Frazier, 4 Harr. & J. 446; Hayden *v.* Stoughton, 5 Pick. 528; Lombard *v.* Boyden, 5 Allen 249; Thayer *v.* Wellington, 9 Allen 283; Prescott *v.* Prescott, 7 Metc. 141; Hamberlin *v.* Terry, 1 Smed. & M. Ch. 589; Tindall *v.* Tindall, 9 C. E. Gr. (N. J.) 512; Macknet *v.* Macknet, 9 C. E. Gr. (N. J.) 277; Tucker *v.* Tucker, 5 N. Y. 409; Banks *v.* Phelan, 4 Barb. 80; King *v.* Woodhull, 3 Edw. 79; King *v.* Strong, 9 Paige 94; Van Kleeck *v.* Dutch Church, 6 Paige 600; S. C., 20 Wend. 457; Taylor *v.* Lucas, 4 Hawkes 215; Powell *v.* Slocumb, 2 Murph. 326; Lovett *v.* Lovett, 31 Leg. Int. (Pa.) 349; Woolmer's Estate, 3 Whart. 477; Dom. & For. Miss. Appeal, 30 Penna. St. 425; Deford *v.* Deford, 36 Md. 168; Lea *v.* Brown, 3

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

Jones Eq. 141; Hays *v.* Wright, 43 Md. 122; Cox *v.* Harris, 17 Md. 23; Lindsay *v.* Pleasants, 4 Ired. Eq. 320; Hatcher *v.* Robertson, 4 Strobh. Eq. 179; Lingan *v.* Carroll, 3 Harr. & McH. 333; Fisk *v.* Att.-Gen., 4 L. R., Eq. 521; Hoare *v.* Osborne, 1 L. R., Eq. 585, as to personal property. See 4 Kent 541. And as to devises of real property see Greene *v.* Dennis, 6 Conn. 304, where Hosmer, C. J., says: "In relation to real estate it is an established principle that in case of a lapsed devise, the estate does not vest in the residuary devisee, but descends to the heir at law. * * * The case of Crane *v.* Crane, 2 Root 487, scarcely requires being mentioned by way of exception, as it was little discussed and without the citation of any authority." To the same effect see Brewster *v.* McCall, 15 Conn. 297; Remington *v.* American Bible Soc., 44 Conn. 672; Adams *v.* Bass, 18 Ga. 130; Starkweather *v.* American Bible Soc., 72 Ill. 50; Woods *v.* Woods, 1 Metc. (Ky.) 515; Lingan *v.* Carroll, 3 Harr. & McH. 333; Carpenter *v.* Heard, 14 Pick. 449; Thorn *v.* Coles, 3 Edw. 330; James *v.* James, 4 Paige 115; Hawley *v.* James, 5 Paige 318; Van Cortlandt *v.* Kip, 1 Hill (N. Y.) 590, affirmed 7 Hill 346; Gill *v.* Brouwer, 37 N. Y. 549; Coates Street, 2 Ashm. 12; Murray *v.* Yard, 34 Leg. Int. (Pa.) 13. The contrary of the above rule has been held, as to personal property, in Bendall *v.* Bendall, 24 Ala. 295; Silcox *v.* Nelson, 24 Ga. 84; and as to real property, in Crane *v.* Crane, 2 Root 487, overruled in Greene *v.* Dennis, 6 Conn. 304. In Ferguson *v.* Hedges, 1 Harring. (Del.) 524, a distinction, not supported by authority, was made between *lapsed* and *void* devises, the latter being held to go to the residuary devisee, the former to the heir, but see, *contra*, Greene *v.* Dennis, 6 Conn. 292; Lingan *v.* Carroll, 3 Harr. & McH. 333. Where one of five legatees died and three of the other legacies were adeemed, it was held that the fifth legatee took the residue of the personal estate, Gray *v.* Bailey, 42 Ind. 349. But if the residue is only partial in its nature, a lapsed legacy will not fall into it, Simms *v.* Garrot, 1 Dev. & Bat. Eq. 393. A lapsed legacy is more readily included in a residuary clause than one which is void for being against the policy of the law, Allison *v.* Allison, 3 Jones Eq. 236. The question has been frequently raised whether the statute enabling a testator to devise after-acquired lands has not done away with the distinction between legacies and devises, and whether gifts of both kinds do not now, on lapse or failure, go to the residuary legatee or devisee. This has been affirmed in Thayer *v.* Wellington, 9 Allen 283; Prescott *v.* Prescott, 7 Metc. 145; Shreve *v.* Shreve, 2 Stockt. 389, in the words of Williamson, C.: "Generally speaking where a specific devise fails on account of its being void *ab initio*, the property so devised will go to the heir at law. * * * As this principle, as the authorities state, follows from the fact that the devisor can only devise the land to which he is actually entitled at the time of making his will, a question might arise how far in New Jersey it should be considered applicable to after-acquired lands, since by the statute of 1851 the distinction between real and personal estate in this particular is abolished." So, too, in Smith *v.* Curtis, 5 Dutch. 345, Chief Justice Whelpley says: "The doctrine, that real estate, when lapsed as a devise, went to the heir at law and not to the residuary legatee, was founded on the doctrine that the will did not pass after-acquired property. * * * If the reason, on which the rule rested,

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 failure of the event, (whether it be the decease of the object before a certain age, or otherwise,) and not by lapse.

The next alteration in regard to lapse relates to devises in tail, as to which section 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

1 Vict., c. 26, § 32. Devises in tail not to lapse if devisee leaves issue.

has been removed by making the will speak as to after-acquired property, as if made at the death of the testator, the distinction between a lapsed devise and a lapsed legacy should not be kept up." So, too, Van Kleeck *v.* Dutch Church, 20 Wend. 457; Patterson *v.* Swallow, 44 Penna. St. 487. Strong, J., says, however, in Waring *v.* Waring, 17 Barb. 552: "It has been long and very properly settled that a lapsed devise does not enure to the benefit of a residuary devisee and the land of course descends to the heir at law. The rule is not changed or at all affected by the provision in our revised statutes that 'every will, which shall be made by a testator in express terms of all his real estate or in any other terms denoting his intention to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise at the time of his death.' (2 R. S. 57, § 5.) The revisers stated that their object was to pass subsequently acquired land. Both devise of real estate and bequest of personal property are now assimilated so far as they may include intermediate acquisitions. In this particular they effectuate the intentions of testators and are therefore reasonable. But I could never discover any substantial reason for the original establishment of the rule that a residuary bequest should include all other legacies which might fail by the death of the legatees or from inherent defects. The will undoubtedly becomes effective at the death of the testator and not before, but then it declares his intentions and they should prevail, if sufficiently indicated." The rule, however, is to be remembered, that when the gift that lapses is a gift of residue, it does not fall into the residue, but goes to the heirs, or next of kin, as the case may be, since the very nature of the gift excludes all idea of an intention on the part of the testator that it should pass to the remaining residuary legatees or devisees. See Hamlet *v.* Johnson, 26 Ala. 557; Sohier *v.* Inches, 12 Gray 385; Goldthwaite *v.* Lewis, 10 C. E. Gr. (N. J.) 353; Hand *v.* Marcy, 1 Stew. (N. J.) 59; Floyd *v.* Barker, 1 Paige 480; De Peyster *v.* Clendining, 8 Paige 295; Chapeau's Estate, 1 Tuck. 410; Craighead *v.* Given, 10 Serg. & R. 351; Williams *v.* Neff, 52 Penna. St. 326; Reed's Estate, 82 Penna. St. 428; Frazier *v.* Frazier, 2 Leigh 642; Wisner *v.* Barnet, 4 Wash. C. C. 631. But this exception as to residuary gifts does not apply if the gift is to a class as joint tenants, and in this case those surviving at the testator's death take the whole residue. See Smith *v.* Curtis, 5 Dutch. 345; Robinson *v.* Martin, 2 Yea. 525; Gross' Estate, 10 Penna. St. 360.

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."

Section 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 section 33 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." [9]

9. This 33d section of the act of 1 Vict., c. 26, has been re-enacted in many of the states:

Alabama—Code, § 1605; Jones *v.* Jones, 37 Ala. 646.

Connecticut—Laws of 1838, p. 245.

Illinois—Rev. Stat. 1874, p. 419, § 11.

Indiana—2 Rev. Stat. 1876, p. 573, § 13. See Clendining *v.* Clymer, 17 Ind. 155.

Kansas—Gen. Stats. 1877, § 5734: applies to child or other relative of testator.

Iowa—Code 1873, § 2337: applies to any legatee or devisee, whether child or not.

Kentucky—Gen. Stats. 1877, p. 336, ch. 113, § 18: general application to all legatees and devisees dying before or after the execution of the will. See, too, Carson *v.* Carson, 1 Metc. (Ky.) 300; Dazey *v.* Killam, 1 Duv. 403; Dunlap *v.* Shreve, 2 Duv. 335.

Maine—Rev. Stat. 1871, p. 564, § 10: applies to any "relative" of testator.

Maryland—1 Pub. Gen. Laws 1860, p. 686, § 304: applies to all legatees and devisees. It has been held in Billingsley *v.* Tongue, 9 Md. 575, above cited, that this statute (passed in 1810) applies only where legatee or devisee dies after the execution of the will, and not to void legacies, where he dies before the execution of the will. See, also, Yonng *v.* Robinson, 11 Gill & J. 328.

Massachusetts—Gen. Stats. 1860, p. 479, § 28: applies to child or other relative of the testator. See Fisher *v.* Hill, 7 Mass. 86; Warner *v.* Beach, 4 Gray 162; Esty *v.* Clark, 101 Mass. 36; and a step-son is not within the provisions of this act, Kimball *v.* Story, 108 Mass. 382.

Mississippi—Rev. Code 1871, § 2391: applies only to child or descendant of testator.

Missouri—Rev. Stat. 1856, p. 1569, § 12: applies to child or other relative. See Jamison *v.* Hay, 46 Mo. 546; Guitar *v.* Gordon, 17 Mo. 408.

New Hampshire—Rev. Stats. 1842, ch. 156, § 2.

New Jersey—Rev. Stat. 1874, p. 1246, § 20: applies to child or other descendant of testator, and a nephew or niece is not included, Van Gieson *v.* Howard, 3 Halst. Ch. 462.

New York—3 Rev. Stat., p. 65, § 50: applies to child or descendant of testator, and not to collaterals, Hamlin *v.* Osgood,

It will be observed that the words "such issue," occurring in section 32, 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 section 33, however, there is more difficulty in adopting a similar construction; for in this clause

Remarks upon 1 Vict., c. 26, §§ 32 and 33.

Whether same issue must be living at death of devisee and of testator.

1 Redf. 409; Van Buren *v.* Dash, 30 N. Y. 393. And this statute has been held to apply to wills executed before it, the testator's death taking place after it, Bishop *v.* Bishop, 4 Hill (N. Y.) 138. See, also, on this point, a note in the last preceding chapter.

Ohio—2 Stats. (Sayler's ed.) 946, § 1: applies to child or other relative of testator.

Oregon—Rev. Stats. 1874, p. 789, § 12: applies to child or other relative.

Pennsylvania—Rev. Stats. 1871, p. 189, § 5: applies to child or other relative. See Minter's Appeal, 40 Penna. St. 111. See, also, Schieffelin *v.* Kessler, 5 Rawle 115, where the statute was held to apply to a *cestui que trust* dying before testator. But in the absence of issue, the devisee or legatee cannot save the gift from lapse by making a will disposing of the same to a stranger, Newbold *v.* Prichett, 2 Whart. 46. This statute does not apply to a son-in-law, Commonwealth *v.* Nare, 1 Ashm. 242.

Rhode Island—Pub. Laws, p. 232, § 8: applies to all devisees and legatees leaving lineal descendants. See Moore *v.* Dimond, 5 R. I. 121. But the statute does not apply where the gift is expressly to such of a class as shall survive the testator, Daboll *v.* Field, 9 R. I. 266.

South Carolina—Rev. Stats., ch. 86, § 13: applies only to a child of the testator.

Tennessee—Comp. Stats. 1871, § 2196: applies to all devisees and legatees leaving issue. See Strong *v.* Ready, 9 Humph. 168; Rhodes *v.* Holland, 2 Yerg. 341; Allen *v.* Huff, 1 Yerg. 408; Ford *v.* Ford, 1 Swan 431; Morton *v.* Morton, 2 Swan 318.

Texas—Paschal's Dig. Laws 1873, art. 5365, p. 914: applies to child or other descendant of the testator.

Virginia—Code 1873, p. 911, § 13: applies to all devisees and legatees leaving issue. See Wood *v.* Sampson, 25 Gratt. 845.

Vermont—Gen. Stats. 1870, p. 380, § 28: applies to child or other relative of the testator.

West Virginia—Code 1868, p. 481, § 12.

Wisconsin—Rev. Stats. 1858, p. 581, § 29: applies to child or other relative of the testator. See Lefler *v.* Rowland, Phill. Eq. 143.

And these statutes, it is held, apply to the case of a devisee or legatee dead at the time the will was made, Nutter *v.* Vickery, 64 Me. 490; Barnes *v.* Huson, 60 Barb .598; Minter's Appeal, 40 Penna. St. 111.

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, (*k*) by considering the word "issue" to be used 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 these sections 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 section 32 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 section 33, 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. (*l*) 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 section 33, issue of child dying in testator's lifetime not substituted.

The reader will perceive that section 33 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

(*k*) In re Parker, 1 Sw. & Tr. 523, 6 Jur. (N. S.) 354. But see Sugd. R. P. S. 392.

(*l*) Olney *v.* Bates, 3 Drew. 319; Browne *v.* Hammond, Johns. 210.

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whether it happened be*fore (*m*) or after (*n*) the date of the will, though not if it happened before the act came into operation.] (*o*) The subject 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, (*p*) 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. (*q*) 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 effect of the section is to prolong the original testator's life by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of the deceased donee if he had actually survived; as, an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies. (*r*) But the fiction does not prolong the life generally for other purposes. Thus, an agreement to settle property which should come to the deceased donee (testator's daughter) "during coverture," was held not to include property which had so come to her only by this fiction. (*s*) And if the deceased donee was a married woman, whose husband also died before the testator, her will made during coverture would not, it should seem, by virtue of such fictitious prolongation of life, acquire any validity which did not otherwise belong to it. (*t*)

(*m*) 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.

(*n*) Johnson *v.* Johnson, 3 Hare 157; Skinner *v.* Ogle, 4 No. Cas. 74, 9 Jur. 432.

(*o*) Wild *v.* Reynolds, 5 No. Cas. 1; Winter *v.* Winter, 5 Hare 314.

(*p*) Winter *v.* Winter, Wisden *v.* Wisden, *supra.*

(*q*) Mower *v.* Orr, Johnson *v.* Johnson, *supra.*

(*r*) Pickersgill *v.* Rodger, 5 Ch. D. 163; see further as to this case, *post* ch. XIV.

(*s*) Pearce *v.* Graham, 32 L. J., Ch. 359. But the subject of bequest has been held liable to probate duty as part of the deceased donee's estate, Perry's Executors *v.* The Queen, L. R., 4 Ex. 27.

(*t*) See the doubt expressed, In re Mason's Will, 34 Beav. 497, 498.

Section 33 does not apply to appointments under a special power.

It has been decided that section 33 does not prevent the lapse of property appointed by will under a power to appoint in favor *of particular objects, where, by the instrument creating the power, the property is disposed of in default of any appointment being made; (*u*) but that it does prevent lapse where the power is general, although there may be a disposition in default of appointment.] (*x*)

(*u*) Griffiths *v.* Gale, 12 Sim. 327, 354. (*x*) Eccles *v.* Cheyne, 2 K. & J. 676.

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*CHAPTER XII.

GIFTS WHEN VOID FOR UNCERTAINTY.

I. *General Doctrine.*

II. *Uncertainty as to Subject of Disposition.*

III. *Uncertainty as to Objects of Gifts.*

IV. *Effect of Mistake in Locality or Occupancy of Lands, and of Misnomer generally as to Subjects or Objects.*

V. *What Words are sufficient to create a Trust.*

I.—In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskillfulness, 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 endeavor, 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.[1] Conjecture is not permitted to supply what the testator

Indulgence shown to testators in the construction of wills.

(*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.]

1. In the language of Lord Brougham, in Doe d. Winter *v.* Perratt, 6 Mann. & Gr. 359: "We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole. It is true, the heir-at-law shall only be disinherited by clear intention; but if there be ever so little reason in favor of one construction of a devise rather than any other, we are at least surer that this is nearer the intention of the testator, than that the whole should be void and the heir let in. The cases where courts have

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

refused to give a devise any effect on the ground of uncertainty, are those where it was quite impossible to say what was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested and seemed equally entitled to the preference. On this head it may further be observed, that the difficulty of arriving at a conclusion—even the grave doubt which may hang around it—certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great, that it amounts to an impossibility: the doubt so great, that there is not an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to regard the discrepancy of opinion as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to rather than hold the gift void for uncertainty." See, too, the language of Hornblower, C. J., in Den *v.* McMurtrie, 3 Green (N. J.) 276: "It must be an extreme case before we can relieve ourselves of the duty of giving a construction to the instrument by declaring it void for uncertainty." See also Kelly *v.* Kelly, 25 Penna. St. 460. And in Church Soc. *v.* Hatch, 48 N. H. 393, Bellows, J., says: "A devise is held to be void for uncertainty only when after a resort to oral proof it still remains matter of mere conjecture what was intended by the instrument." See also Townsend *v.* Downer, 23 Vt. 225. But where the will is so obscure that court cannot discern the intention of the testator, the legacy must fail, and the property pass under the residuary clause. Rothmalter *v.* Myers, 4 Desaus. 215; Wooten *v.* Redd, 12 Gratt. 196. The degree of certainty required in wills making devises is only so much that the court may be enabled, by fair and reasonable intendment, to ascertain the meaning, Swift *v.* Lee, 65 Ill. 336. And the intention of the testator is the first consideration, Johnson *v.* M. E. Church, 4 Iowa 180. Uncertainty is sometimes the result of the improper use of "or" for "and," or *vice versa*. The general rule in such cases is that the one word will be construed to have been used for the other, where the plain intent of the testator will be defeated without such substitution, but such construction is not admissible unless it be necessary to carry out the manifest design of the will. Harrison *v.* Bowe, 3 Jones Eq. 478; Dallam *v.* Dallam, 7 Harr. & J. 220; Sayward *v.* Sayward, 7 Greenl. 210; Janney *v.* Sprigg, 7 Gill 97; Neal *v.* Cosden, 34 Md. 421; Van Vechten *v.* Pearson, 5 Paige 512; Holcomb *v.* Lake, 1 Dutch. 605. Where the devise was to A, "but if he should die before he is of age *or* has lawful issue," then over, "*or*" was construed "*and*," and A took the fee upon attaining full age, and the limitation over was defeated, though he died subsequently without issue, Scanlan *v.* Porter 1 Bailey 427; so, too, in Sayward *v.* Sayward, *ubi supra;* Brewer *v.* Opie, 1 Call 212; Shands *v.* Rogers, 7 Rich. Eq. 422; Witsell *v.* Mitchell, 3 Rich. 289; Ward *v.* Waller, 2 Spears 786. Where the provision was, "but should my niece die unmarried *and* without leaving children, and should she die leaving children and such child or children die before twenty-one years *or* without having married previous to the attainment of such age," "*and*," between "unmarried" and "without leaving," &c., was construed "*or*," and "*or*," between "years" and "without," &c.,

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 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 favor towards the claims of the heir and next of kin.

Heir or next of kin not to be ousted on conjecture.

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 practiced 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 recognized 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.

II.—A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition,[2] is afforded by the early case of Bowman *v.* Milbanke, (*d*)

Uncertainty as to subject of gift.

construed "*and*," in order to effectuate the intention of the testator, Janney *v.* Sprigg, *ubi supra*. See also Beall *v.* Deale, 7 Gill & J. 216; Butterfield *v.* Haskins, 33 Me. 398; Bostick *v.* Lanton, 1 Spears 258; Kindig *v.* Smith, 39 Ill. 300; Turner *v.* Whitted, 2 Hawkes 613; Watkins *v.* Sears, 3 Gill 492; Raborg *v.* Hammond, 2 Harr. & G. 42.

(*c*) Pride *v.* Atwicke, 1 Keb. 692, 754, 773; Price *v.* Warren, Skinn. 266, 2 Eq. Cas. Ab. 356, pl. 2.

2. Cases of gifts held void for uncertainty in description of the subject mat-

(*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 testa-

Gift of "all" held too indefinite.

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.

ter, are of comparatively rare occurrence in the United States. In Whipple *v.* Adams, 1 Metc. 444, a desire expressed by the testator that A might provide a chaise, &c., for testator's widow for suitable compensation, if she should desire it, was held to be too uncertain and void. So in Kelly *v.* Kelly, 25 Penna. St. 460, a bequest "unto my all my just debts and demands all my funeral and burying cost first balance to S. K. brother my mother and J. M. to have their maintenance and burying charges out of it," was held to be void for uncertainty. So, in Armistead *v.* Armistead, 32 Ga. 597, a gift of "one *equal share* of whatever property real and personal remains," to one, and to another "a *full share* of whatever property remains," and to another a fourth of "*a share* of the property remaining after each child shall have received the amounts specified" above; and in Weatherhead *v.* Sewell, 9 Humph. (Tenn.) 272, a devise of "a *small tract* of land." See also Adams *v.* Chaplin, 1 Hill (S. C.) Ch. 265; Faribault *v.* Taylor, 5 Jones Eq. 219. In other cases the uncertainty has not been held sufficient to preclude full identification of the subject matter, and the gift has been upheld. Thus in Brown *v.* Brown, 1 Dana 39, "all that is *hereby* given" has been held to refer to and intend all that is given by the will, and not by the single clause in question; so, in Brown *v.* Dysinger, 1 Rawle 408, "any earthly property which God hath been pleased to give me," was shown by extrinsic evidence to include personal property only; in Carter *v.* Balfour, 19 Ala. 814, a "remainder" given was held to mean the *residue* after payment of debts and legacies; in Maeck *v.* Nason, 21 Vt. 115, a bequest of the right to live in testator's house and enjoy "the same privileges as *she now does*," was held to be capable of identification by parol evidence; so, too, in Willett *v.* Carroll, 13 Md. 459; in Rom. Cath. Orph. Asylum *v.* Emmons, 3 Bradf. 144, where the bequest was of shares in the Mechanics' Bank, "so usually called," in the city of New York, it was held to be a gift of shares in the City Bank, the testator having none in the Merchants' Bank; so, in Smith *v.* Wyckoff, 3 Sandf. Ch. 77, "my bond for $1500 given to A," was held to indicate a bond for that amount made by the testator to B and given to A as B's agent; so, in Elder *v.* Ogletree, 36 Ga. 64, a gift of a certain number of "dollars" was held to mean Confederate money; and in Swift *v.* Lee, 65 Ill. 336, "all my interest in a certain suit pending in DeKalb county in which I am plaintiff and one Lee is defendant," was held to mean a suit in the county of that name in the State of Illinois. The most frequently-occurring uncertainty is in misdescriptions of land devised. The general rule is that such misdescriptions are good and effective if there is enough in them to identify the land intended. See Kenny *v.* Kenny, 3 Litt. 302, in which case the uncertainty was caused by an omission apparent in

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tor 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. [As to which, see ch. XVIII., § 1, *in notis*.] 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. [See also Parker *v.* Nickson, 1 D., J. & S. 177, "I acknowledge A to be heir."]

In 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 T. 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 context. See, too, Bellows *v.* Copp, 20 N. H. 492; Winkley *v.* Kaime, 32 N. H. 268; Tilton *v.* Tilton, 32 N. H. 257; Bear *v.* Bear, 13 Penna. St. 529; Coleman *v.* Eberly, 76 Penna. St. 197; Douglass *v.* Blackford, 7 Md. 8. Thus in Woods *v.* Moore, 4 Sandf. 579, a devise of land, where the testator had no interest but that of a mortgagee, was held to pass that. In Best *v.* Hammond, 55 Penna. St. 409, a tract beginning "at a chestnut oak corner north west near Wolf's field, thence running *in a straight line* to the mountain," was held to be unequivocally described, and extrinsic evidence was not admitted to show how the testator intended the line to be drawn. In Otis *v.* Smith, 9 Pick. 293, a devise of three houses in S. street, "with all the appurtenances," was held not to embrace a small tenement adjoining the stable to one of the houses, and rented and occupied with part of the stable by a tenant of the testator; but a devise of a "grist mill and appurtenances" will carry all appurtenances at the time of testator's death, Blaine *v.* Chambers, 1 Serg. & R. 169. In Piper's Appeal, 73 Penna. St. 112, a devise of "all that certain grist mill in Springfield township, Montgomery county and all the real estate in the county of Montgomery, and lot of land in Philadelphia, now used with the mill property, and all the premises and appurtenances thereto belonging," was held to embrace a lot in Philadelphia, adjoining to and used with the mill property, but not a distinct tract in the same township, one mile distant from the mill and in no way connected with it. Neither will a devise of a farm or tract of land, "whereon I now live," carry with it a wood lot used with the farm, but distant from it a half mile or more, Allen *v.* Richards, 5 Pick. 512; Brendlinger *v.* Brendlinger, 26 Penna. St. 131. Nor will a devise of testator's "house lot" embrace adjoining premises let by the testator to a tenant, Perkins *v.* Jewett, 11 Allen 9. And "my homestead farm in B. that I now live on, it being the same land conveyed to me by C.," will not embrace adjoining farm property used with the homestead farm, but not so conveyed, Barnard *v.* Martin, 5 N. H. 536; Woodman *v.* Lane, 7 N. H. 241. But in Harris *v.* Harris, 1 Metc. 400, a devise of "all my real estate lying west of Shirley Road except what belongs to the B. place" was held not to embrace property on the west side of the road adjoining the B. place without any fence separation and used with it for many years, which property was held to be embraced in the exception. See, also, Winkley *v.* Kaime, 32 N. H. 268, in which case a devise of "36 acres in lot 37 in the division of B. * * * which I purchased of I. P.," was held to carry a lot in No. 97, answering the description otherwise, there being no such lot 37. So, in Coleman *v.* Eberley, 76 Penna. St. 197, "the part of the McKinstry farm at present occupied by B., containing 8 fields," was held to embrace the whole farm (9 fields) occupied by B. And a devise of a tract of land by name, described as lying in Baltimore county, will pass the whole tract, though a part of it

(*e*) 1 Sw. 201.

the word "all," which, in its present *situation, was without effect, the word "grandchildren" 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.

Remarks 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 has placed it, was not repugnant; and it is observable that the transposition of the word "all," even if justifiable, would not, according to Bowman *v.* Milbanke, have supplied a definite subject of disposition.

"After legacies, &c., are paid, I leave to A," residue held to pass.

[But were, after giving several legacies, the will proceeded, "after these legacies and my funeral expenses are paid, I leave to my sister A, without any power or control of her husband; in case of her death to be equally divided amongst her children or grandchildren:" this was held by Sir J. Bacon, V. C., to be a good gift of the residue to A.] (*g*)

lies in another county, Hammond *v.* Ridgely, 5 Harr. & J. 245. So, too, where the number of acres exceeds the number mentioned in the will, Woods *v.* Woods, 2 Jones Eq. 420; Dorsey *v.* Hammond, 1 Harr. & J. 190. But in Bishop *v.* Morgan, 82 Ill. 351, it is said that a devise of "the southeast quarter of section 10, containing forty acres, more or less," is too uncertain, and the court will not read it as the southeast quarter of the northwest quarter, although that was owned by the testator and contained forty acres. So, too, Fitzpatrick *v.* Fitzpatrick, 36 Iowa 674. But in Missouri, township 60 was held to signify township 59, under similar circumstances, Riggs *v.* Myers, 20 Mo. 239. In Jackson *v.* Sill, 11 Johns. 201, a devise of "the farm which I now occupy" was held to embrace another adjoining farm occupied by a tenant of the testator. And in Drew *v.* Drew, 28 N. H. 489, "all my homestead farm, being the same farm whereon I now live and the same which was devised to me by my father," was held to embrace a part of the farm which did not come from testator's father. See, too, Hall *v.* Hall, 27 N. H. 275, where a devise of "all lots south of Bridge street and west of Pleasant street except lot 17," (which lot 17 lay south of Bridge street, but east of Pleasant street,) was held to embrace all lots which were south of Bridge street, whether east or west of Pleasant street, and all lots west of Pleasant street, whether north or south of Bridge street. So, "all my land on the north side of Plain street consisting of ahout 60 acres," will embrace a sixty-acre tract and also a six-acre meadow lying some distance from the sixty-acre tract and from Plain street, but north of Plain street, Hunt *v.* Braintree, 12 Metc. 127.

[(*f*) Ch. XVI., § 2.

(*g*) In re Bassett's Estate, L. R., 14 Eq. 54.]

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," (*h*) [or "of a handsome gratuity to each of my executors,"] (*i*) has been held void.

Gift of an indefinite part void:

[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, (*j*) 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, 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 will determine the amount to be applied for that purpose. (*k*) And a bequest of "£3000 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*) So, where a Scotch testator expressed a wish (in effect) to establish in Dundee a hospital for one hundred boys, like, but less than, Heriot's Hospital, but omitted to say how much was to be appropriated for the purpose, it was held in D. P., (*m*) that the testator had sufficiently defined his object to enable the court to determine the amount required for it. And where a testator creates a trust for the repair of an existing tomb, (*n*) or even for the building of a new one, (*o*) although this, as already noticed, (*p*) is a void trust, the court will determine what would have been required for it, if a determina-

—except where the will furnishes grounds for estimating the amount.

Bequest for maintenance, &c., of an infant or adult good, though no sum specified:

—for founding a school.

(*h*) Peck *v.* Halsey, 2 P. W. 387.

[(*i*) Jubber *v.* Jubber, 9 Sim. 503.

(*j*) 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. K. Bruce, L. J.

(*m*) Magistrates of Dundee *v.* Morris, 3 Macq. 169; see also Adnam *v.* Cole, 6 Beav. 353.

(*n*) Fisk *v.* Att.-Gen., L. R., 4 Eq. 521; In re Birkett, 9 Ch. D. 576; Fowler *v.* Fowler, 33 Beav. 616, *contra*, must be considered overruled.

(*o*) Mitford *v.* Reynolds, 1 Phil. 185.

(*p*) *Ante* p. *211, n. (*k*)

tion on that point is needed in order to give practical effect to other parts of the will. (*q*)

Where the amount is differently stated.

A bequest of a sum "not exceeding" £100, (*r*) or of "£50 or £100," (*s*) will be construed in a manner most beneficial to the legatee, and is, therefore, a good gift of the whole £100; and a bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the 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.] (*t*)

Uncertainty as to the share the devisee is to take.

An instance of uncertainty in the subject of gift occurred in Jones d. Henry *v.* Hancock, which underwent much discussion. (*u*) 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 imme*diately pass over and be given up to my second daughter Frances Henry, to whom, in that case, I bequeath it." It was held in D. P., 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 color, 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

In what the uncertainty consists.

(*q*) See Chapman *v.* Brown, and other cases presently stated.

(*r*) Thompson *v.* Thompson, 1 Coll. 395; Cope *v.* Wilmot, 1 Coll. 396, n.; Gough *v.* Bult, 16 Sim. 45.

(*s*) Seale *v.* Seale, 1 P. W. 290; and see Haggar *v.* Neatby, Kay 379.

(*t*) Philipps *v.* Chamberlaine, 4 Ves. 50.]

(*u*) 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.]

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 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.

[*361]

Devise in shares to be determined by person omitted to be named.

[But a devise to two persons in such shares as should be determined by (blank), would make them tenants in common in equal shares. (*x*) On the same principle an equal division is made where the donee of a power of distribution fails to exercise the power; (*y*) or where the gift consists of a general direction that the legatees should "participate."] (*z*)

Gift of part of a larger quantity not uncertain, where devisee is entitled to select.

And (*a*) where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator 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. (*b*)

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. (c)

Gift of any part or of so much as legatee shall select.

[Again, where a testator devised the residue of his property to his wife for life, "reserving to her power to will away any part" of it at her death, with a gift to his daughter of what his wife *should not dispose of; it was argued that it was clear the testator did not intend the power to extend to the whole, and so to disinherit his daughter, and that no limits being defined, the power was void for uncertainty; but it was held that the power extended to the whole estate. (*d*) So a trust to permit the testator's wife "to appropriate absolutely to herself such parts" of his plate as she should desire to possess, has been held to give the widow the whole of the plate. (*e*) But where a testator bequeathed his household property on trust for sale, "except such articles as his wife should wish to retain for her own use, which he thereby empowered her to appropriate," it was said that this intimated a confidence that

[(*x*) Robinson *v.* Wheelwright, 21 Beav. 214.

(*y*) Salusbury *v.* Denton, 3 K. & J. 529.

(*z*) Liddard *v.* Liddard, 28 Beav. 266. See also Greville *v.* Greville, 27 Beav. 594.]

(*a*) Peck *v.* Halsey, 2 P. W. 387.

(*b*) Grace Marshall's Case, Dy. 281, a, n., 8 Vin. Abr. 48, pl. 11.

(*c*) See Hobson *v.* Blackburn, 1 My. & K. 574; [Jacques *v.* Chambers, 2 Coll. 441; Duckmanton *v.* Duckmanton, 5 H. & N. 219; Millard *v.* Bailey, L. R., 1 Eq. 378.

(*d*) Cooke *v.* Farrand, 7 Taunt. 122.

(*e*) Arthur *v.* Mackinnon, W. N. 1879, p. 93.

the wife would make some selection, and would not take the whole; though to what extent short of that is not very clear.] (*f*)

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; (*g*) [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. (*h*) 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. (*i*) And where a testator having five leasehold messuages in L., comprised in four leases, bequeathed "his four leasehold messuages in L.," it was held that all five messuages passed upon a context somewhat favoring that construction.] (*k*)

Gift of close A, testator having two of that name, is void.

A bequest of what shall remain or be left at the decease of the prior legatee, (*l*) [or of what the legatee is possessed of at *the time of death, (*m*) or of what he does not want, (*n*) or does not spend, (*o*) or of what he can transfer, (*p*) or what he can save out of his yearly income, (*q*) or of what remains undisposed of, or is not disposed of by deed or will, (*r*) or of the "bulk" of

Gift over of what legatee has not disposed of, held too indefinite.

(*f*) Kennedy *v.* Kennedy, 10 Hare 438. In Davis *v.* Davis, 1 H. & M. 255, the donee of a power to distribute plate, &c., being also one of the objects, allotted the largest share to himself, and this was upheld. See also Reid *v.* Reid, 30 Beav. 389.]

(*g*) Richardson *v.* Watson, 4 B. & Ad. 798; but evidence is admissible to remove such an ambiguity; see next chapter.

[(*h*) Blundell *v.* Gladstone, 14 Sim. 83, better reported 8 Jur. 301. But the devise was, in fact, of all (except W.), "including trust estates," and W. was given to A.; and the decree was reversed, 3 M. & Gord. 692, on the ground that one of the two properties called W. being vested in the testator as trustee, it was to be presumed that he meant the other to pass by the particular devise.

(*i*) Richards *v.* Patteson, 15 Sim. 501.

(*k*) Sampson *v.* Sampson, L. R., 8 Eq. 479.

(*l*) 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; [Perry *v.* Merritt, L. R., 18 Eq. 152.

(*m*) Att.-Gen. *v.* Hall, 1 J. & W. 158, n., 2 Cox 355; Pope *v.* Pope, 10 Sim. 1.

(*n*) Sprange *v.* Barnard, 2 B. C. C. 587; Hudson *v.* Bryant, 1 Coll. 631; it seems that Upwell *v.* Halsey, 1 P. W. 651, cannot now be considered law; see per Lord Loughborough, 2 Ves., Jr., 532, and per Sir E. Sugden, 1 Ll. & G. 298.

(*o*) Henderson *v.* Cross, 29 Beav. 216.

(*p*) Flint *v.* Hughes, 6 Beav. 342.

(*q*) Cowman *v.* Harrison, 17 Jur. 313, 22 L. J., Ch. 993.

(*r*) Bourn *v.* Gibbs, 1 R. & My. 614;

certain property, (*s*) or a gift over of the whole legacy in case of the death of the prior legatee intestate, (*t*) 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. (*u*) 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. (*x*)

But where] property (whatever be its nature) (*y*) is expressly limited to the first taker for life, there is not, it is believed, any case in which such expressions have been held to render the ultimate gift void, [comprising as they then do the whole *corpus*.] Thus, in Cooper *v.* Williams, (*z*) [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.] So in Gibbs *v.* Tait, (*a*) 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 moneys* to other persons, no objection *seems to have been advanced to the validity of the gift on the ground of uncertainty.

Gift of what remains at the decease of A good where A takes for life only.

Gibbs *v.* Tait.

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; In 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.

(*s*) Palmer *v.* Simmonds, 2 Drew. 221.

(*t*) Cuthbert *v.* Purrier, Jac. 415; Green *v.* Harvey, 1 Hare 428; Eade *v.* Eade, 5 Mad. 118; Lighthourne *v.* Gill, 3 B. P. C. Toml. 250; Weale *v.* Ollive, 32 Beav. 421.]

(*u*) Duhamel *v.* Ardovin, 2 Ves. 162; Hands *v.* Hands, 1 T. R. 437, n.

[(*x*) See ch. XXVII.

(*y*) Except "consumable" articles, see Andrew *v.* Andrew, 1 Coll. 690; and ch. XXVI., *ad fin.*]

(*z*) Pre. Ch. 71, pl. 64.

(*a*) 8 Sim. 132.

[Again, in Constable *v.* Bull, (*b*) there was a devise 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. Sir J. K. Bruce, 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 these words the subsequent bequests would have the effect of so reducing the interest given to the widow: that there were several meanings capable of being rationally attributed to these words which would be inconsistent with the construction giving to the widow the power of disposing of the property, and that he thought the gift over was good. This construction was approved and followed by Sir C. Hall in Bibbens *v.* Potter.] (*c*)

Constable *v.* Bull.

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 favor of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power. As in Surman *v.* Surman, (*d*) 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 Lancashire *v.* Lancashire, (*e*) 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 estate as his trustees should not think

Lancashire *v.* Lancashire.

[(*b*) 3 De G. & S. 411; see also Borton *v.* Borton, 16 Sim. 552; In re Stringer's Estate, 6 Ch. D. 1. But see Flint *v.* Hughes, 6 Beav. 342.

(*c*) 10 Ch. D. 733. In In re Adams, 14 W. R. 18, "all remaining" clearly referred to the previous legacies.]

(*d*) 5 Mad. 123; [Scott *v.* Josselyn, 26 Beav. 174; In re Sanderson's Trust, 3 K. & J. 497; but see Gude *v.* Worthington 3 De G. & S. 389, which seems *contra*, but the grounds of the decision do not appear.

(*e*) 2 Phil. 657, 1 De G. & S. 288.

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, 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. (*f*)

Distinction between a gift of the *whole* except an unascertained part and a gift of the remainder after deducting an 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 Jerningham *v.* Herbert, (*g*) 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 Boyce *v.* Boyce, (*h*) 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 favor of C. failed.

[(*f*) See Cooke *v.* Farrand, 7 Taunt. 122, 2 Marsh 431; Calvert *v.* Johnston, 3 K. & J. 559, 560.

(*g*) 4 Russ. 388.

(*h*) 16 Sim. 476.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily void for uncertainty, *unless the purpose is such and so defined that the court can determine what would have been the proper amount to be expended had the object been legal or attainable, or unless (according to some recent cases) the bequest of surplus carries with it all that is not otherwise effectually disposed of. Thus in Chapman *v.* Brown, (*i*) 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 to such charitable uses as her executors should think proper. 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." Again, in Att.-Gen. *v.* Hinxman, (*k*) 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 to invest a sum of money 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 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 T. Plumer, decided that the gift of the residue of the surplus dividends, being

Gift of the residue of a fund after providing for an illegal object is void, if the amount required for such object is unascertainable.

Chapman *v.* Brown.

Att.-Gen. *v.* Hinxman.

(*i*) 6 Ves. 404.

(*k*) 2 J. & W. 270; and see Att.-Gen. *v.* Davies, 9 Ves. 535; Att.-Gen. *v.* Goulding, 2 B. C. C. 428.

Limbrey v. Gurr.

unascertainable, was void. Again, in Limbrey *v.* Gurr, (*l*) where a testator bequeathed £7000 upon trust to pay the expenses of the testator's funeral and monument, and of building eight almshouses on a particular piece of ground, and to apply the residue to the trusts directed of a legacy of £8000, which he bequeathed upon trust out of the income to pay certain weekly sums to the poor persons in the almshouses, to purchase *a quartern loaf for twenty other poor persons, and to keeping the almshouses in repair, and to apply the residue in distribution of bread as therein mentioned; Sir J. Leach held that the residue of each sum was unascertainable, by reason of the gifts to the prior objects failing, and the gift of both residues therefore void.

Secus if the amount is ascertainable.

But if the testator has so defined his object as to furnish fair and reasonable data the court will determine the amount which ought to have been expended on it if it had been legal, and thus at the same time ascertain the amount of the surplus. Thus

Mitford v. Reynolds.

in Mitford *v.* Reynolds (*m*) 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 debts and legacies. Then came a bequest of the remainder of his property to a valid charitable purpose; and it was held by Lord Lyndhurst that assuming the prior object to be void, yet it was not so uncertain as to the amount that would be required for it as to vitiate the gift to the charity. He thought the difficulties which existed in Chapman *v.* Brown had no existence here. 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. (*n*)

(*l*) 6 Mad. 151.

(*m*) 1 Phil. 185, 706.

(*n*) The L. C. held that the direction as to the monument, &c., was a disposition of an integral part of the residue, and that the "remainder" was what was left of such residue after building the monument, 1 Phil. 199. But owing to the peculiar wording of the L. C.'s declaration concerning the charitable gift, Shadwell, V. C., afterwards thought himself bound to hold that the prior purpose having failed through the refusal of the owner to sell the land, the whole residue was well given to the charity, 16 Sim. 105.

So in Fisk *v.* Att.-Gen., (*o*) where a testatrix bequeathed £1000 to the rector and churchwardens of a parish and their successors upon trust to apply such part of the dividends as should from time to time be required in keeping in repair her family grave, and to pay or divide the residue of the said dividends at Christmas in every year forever, among the aged poor of the parish; Sir W. P. Wood, V. C., cited Mitford *v.* Reynolds and *the Dundee case, (*o*) and said that, following the latter case, he ought, if the gift of the residue had been exclusive of the amount required for the repair of the grave, to have ascertained the amount required for the void purpose. But he said, "the gift is not to the executors to do certain things and pay the residue to the rector and churchwardens; the gift is out-and-out to the rector and churchwardens, and then there is a gift of a portion for a purpose which fails." That being so, he thought the better construction was that the rector and churchwardens took the whole fund. As to this, however, it is plain that the rector and churchwardens were just as much trustees of one part as of the other; and in Dawson *v.* Small, (*p*) where a sum was given on similar trusts, and the distribution was to be made (as was held) by the executors, Sir J. Bacon, V. C., asked "what difference can it make that a person is named to have the management and conduct of the gift, and that it is given to be disposed of by the executors of the testator? There is no sort of distinction." The cases, therefore, being undistinguishable, he considered himself bound by the *decision* in Fisk *v.* Att.-Gen., and held that the whole fund was well given to the residuary objects discharged from the void purpose.

Fisk *v.* Att.-Gen.

Does the void gift fall into "the residue?"

It is probable that Sir W. Wood drew the distinction in order to avoid a conflict with Fowler *v.* Fowler, (*q*) which was cited before him. In that case the gift was in the form of a direction to executors to invest and apply the income in or towards the maintenance of certain existing graves, and to pay the surplus income to the rector of B for the time being for his own use, and Sir J. Romilly held that the first trust being void, the second failed for uncertainty. He thought that the particular residue might originally have been held to

(*o*) L. R., 4 Eq. 521. See also In re Rigley's Trust, 36 L. J., Ch. 147.

(*o*) *Ante* p. *359.

(*p*) L. R., 18 Eq. 14. See also Hunter *v.* Bullock, L. R., 14 Eq. 45, before the same judge.

(*q*) 33 Beav. 616.

include what was intended for the void purpose, like a general residue, but that the contrary was quite settled.

However, in In re Williams (*r*) the decision in Fisk *v.* Att.-Gen. was again applied to a case where the distinction on which that decision was based did not exist, the trusts being committed to the executors. Sir R. Malins there said he did not agree that Fisk *v.* Att-Gen. turned on the distinction in question; he considered that the V. C. Wood really intended to overrule Chapman *v.* Brown. But if so, why did Sir W. Wood say that, but *for that distinction, he ought to have ascertained the amount required for the void purpose? This would have been an empty form, if the amount when ascertained was still to fall into the "residue." And although he intimated that the Dundee case had narrowed the authority of Chapman *v.* Brown, he was, of course, alluding only to that part of the decision in the latter case upon which alone the Dundee case had any bearing, viz. the question whether the court ought or ought not to have determined the amount required for building the chapel. Even on this part of the case Sir G. Jessel thought differently; for in his opinion there was nothing to guide the court towards determining what would have been a reasonable sum for building the chapel; the whole fund might have been required for it: the Dundee case, therefore, did not interfere with Chapman *v.* Brown, which still remained an authority for the position that, if the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole to the first object, and so there would be no ascertainable residue. (*s*)

In In re Birkett (*t*) the question again arose on a gift undistinguishable from the gift in Fisk *v.* Att.-Gen., and Sir G. Jessel, M. R., said that the prior purpose being void he was bound by the decisions of the three V. C.'s to hold that the whole income passed under the gift of surplus. But apart from the authorities, his opinion was clear that the amount required for the repairs of the tomb ought to have been ascertained (as it could be by any competent person,) and only the remainder given as surplus. He observed that the case was a singular illustration of the way in which our law gets altered.

In re Birkett.

(*r*) 5 Ch. D. 735.

(*s*) See also Cramp *v.* Playfoot, 4 K. & J. 479.

(*t*) 9 Ch. D. 576.

Reference may here be made to the case of Ford *v.* Fowler, (*u*) where the testator recommended (construed "directed") 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.]

Trusts of an ascertained fund valid, though intended to embrace another unascertained.

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.[3] Examples of both

Uncertainty as to object of gift.

(*u*) 3 Beav. 146.]

3. Whether the uncertainty relates to person or thing—object or subject matter of the gift—the rule is the same that a gift will not be void for uncertainty so long as sufficient certainty is there to identify the person or thing intended by the testator, Smith *v.* Smith, 4 Paige 271; S. C., 1 Edw. Ch. 189; Bartlet *v.* King, 12 Mass. 537; Button *v.* Am. Tract Soc., 23 Vt. 336; Newell's Appeal, 24 Penna. St. 197; Baldwin *v.* Baldwin, 3 Halst. Ch. 211; McBride *v.* Elmer, 2 Halst. Ch. 107; Minot *v.* Boston Asylum, 7 Metc. 416; Sutton *v.* Cole, 3 Pick. 232; Alabama Conference *v.* Price, 42 Ala. 39; Lee *v.* Foard, 1 Jones Eq. 125; St. Louis Hosp. Ass'n *v.* Williams, 19 Mo. 609; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Vansant *v.* Roberts, 3 Md. 119. But the court cannot remodel the will, Lepage *v.* McNamara, 5 Iowa 124. Sometimes the uncertainty as to the person is in the *number;* in such case the wrong number is generally made right. Thus in Vernor *v.* Henry, 6 Watts 192, a gift to "the two daughters of A," he having three, went to the three. Proof that by a devise to a parent the testator meant children of such parent, though the parent was known to be dead when the will was made, is not admissible. Judy *v.* Williams, 2 Ind. 449. And a gift "to *one* of my children" is too uncertain. McDermot *v.* U. S. Insurance Co., 3 Serg. & R. 607. Not so, however, a gift to the children of a child of A, "or to the children or child of such children," Stevenson *v.* Evans, 10 Ohio St. 307; nor "to my *said* grandchildren *last mentioned*," where none had been mentioned, the words "*said*," "*last-mentioned*," being rejected, Hall *v.* Hall, 123 Mass. 120; nor even a gift "to A during his life and to B. during his life—for default of male issue the land shall return to the said A and B, then to the next according to law, but it is not my will that none of it be sold," Den *v.* McMurtrie, 3 Green (N. J.) 276. Cases of misnomer are numerous, and are generally found capable of correction. Thus in Smith *v.* Smith, 4 Paige 271; S. C., 1 Edw. 189, the gift was to "Mary Smith, wife of Nathaniel Smith," and it was held that Mary, the wife of Abraham, and not Sarah, the wife of Nathaniel, was entitled. See, also, Stokely *v.* Gordon, 8 Md. 496. In Sutton *v.* Cole, 3 Pick. 232, the "First

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,) (*x*) the devise is void for uncertainty, and cannot be made good. (*y*) 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. (*z*) [So where

Parish of S." took a gift to the "South Parish of S." In Minot *v.* Boston Asylum, 7 Metc. 416, a gift to "the Boys' Asylum and Farm School" was intended for the "Boston Asylum and Farm School." In Trustees *v.* Peaslee, 15 N. H. 317, a gift to "the Franklin Seminary of Literature and Science, Newmarket, N. H.," was intended for the "Trustees of the South Newmarket Meth. Sem." So, in Baldwin *v.* Baldwin, 3 Halst. Ch. 211, "The Trustees of the Bethel Church in Newark," for "The Bethel Church in Newark." In Newell's Appeal, 24 Penna. St. 197, "The Trustees who hold the funds of the Theological Seminary at Princeton," for "The Trustees of the Theological Seminary of the Presbyterian Church at Princeton." In Button *v.* Am. Tract Soc., 23 Vt. 336, the "Am. Home Mission Tract Society," for the "Am. Tract Society." In other cases of misnomer, one of several societies, all imperfectly described, was permitted to take, Brewster *v.* McCall, 15 Conn. 274; Church Society *v.* Hatch, 48 N. H. 393. But where there was a bequest to two societies, one of which was not and never had been in existence, it was held that the testator died intestate as to the moiety intended for the society not in existence, and that the other society took only half. Telfair *v.* Howe, 3 Rich. Eq. 235. And where there is nothing to show which of two insufficiently described persons was intended, the gift must fail. Gass *v.* Ross, 3 Sneed (Tenn.) 211; Tolson *v.* Tolson, 10 Gill & J. 159. Speaking to this point in Lefevre *v.* Lefevre, 59 N. Y. 434, 440, Allen, J., says: "A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision or defeat the intention of the testator, if, either from the will itself or evidence *dehors* the will, the object of the testator's bounty can be ascertained. No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator. A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name and description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may, in all cases be proved by parol. * * * When the name of an intended beneficiary is wholly

(*x*) The uncertainty would not be removable by parol evidence; for the terms of the will 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; and next chapter.]

(*y*) See Strode *v.* Lady Falkland, 3 Ch. Rep. 183, 2 Vern. 624, 625; T. Raym. 82. [So "one of my sisters to be executrix," In re Blackwell, 2 P. D. 72.]

(*z*) Webb's case, 1 Roll. Ab. 609, (D) 1; *et vid.* Scrope's case, 49 Ed. III., pl. 4, cited 2 Bulst. 180, *nom.* Morris and Maule.

the devise was "to the testator's brother and sister's family," and the testator had two sisters; the devise was held void; (*a*) 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. (*b*)

Blank left for names.

omitted and the will is a blank, the omission cannot be supplied by the courts upon any evidence of the intention of the testator. A will cannot be made for a deceased testator by the judgment of a court of law or equity. (Hunt *v.* Hort, 3 Bro. Ch. 311.) So, too, when the name of a beneficiary is inserted, and from the circumstances and relations of the testator, and the whole terms of the will the court might conjecture that an individual not in any respect within the description, but whose name if he was intended by the testator is wholly mistaken, was in truth in the mind of the testator, and intended to be named as the beneficiary, the mistake cannot be corrected, especially when there are those in existence bearing in whole or in part the name, and coming to some extent within the description of the will. * * * As said by the court in Minot *v.* Curtis, (7 Mass. 441,) there is no reason 'why corporations may not be known by several names as well as individuals,' and if so and named in a grant or devise by any one of its recognized names, it cannot be said that the name is wholly mistaken. The ambiguity arises only from the fact that the corporation has and bears two or more names. The corporate or charter name may be entirely mistaken or wholly unknown to the testator, but if he designates it by some other name by which it is known and can be identified, the will must have effect according to the intent of the testator. A mistake in the name is not fatal so long as the testator sufficiently indicates the institution or individual intended. (Ang. & Ames on Corp., § 99.) * * * But Chief Justice Tindal states the general proposition as it is now recognized and adopted and says that 'it may be admitted that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise or to the person of the devisee,' the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really to take under the will, and this appears to us to be the extent of the maxim '*Ambiguitas verborum latens verificatione suppletur.*'" For gifts to voluntary unincorporated associations, see Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; Baptist Association *v.* Hart, 4 Wheat. 31; Witman *v.* Lex, 17 Serg. & R. 88; Bartlet *v.* King, 12 Mass. 537; Burrill *v.* Boardman, 43 N. Y. 254. See also remarks and cases on this subject in the notes to chapter IX. But a gift to a society by name, such society not being then in existence, but to be thereafter incorporated, has been held to be void for uncertainty. Zeissweiss *v.* James,

[(*a*) Doe d. Hayter *v.* Joinville, 3 East 172; and see Doe d. Smith *v.* Fleming, 2 C., M. & R. 638.

(*b*) Greig *v.* Martin, 5 Jur. (N. S.) 329. See, however, the cases ch. XXX., § 4.

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 favor of the whole class. (c) And where a testator, after devising property to his daughter A in fee, and if she die under twenty-five without leaving any

63 Penna. St. 465. See the remarks of Sharswood, J., in this case, where he says: "If there was an infidel society in Philadelphia at the date of the will, it was not then incorporated, the testator expressly referring to it as thereafter to be incorporated. If we are to infer the nature and objects of the corporation from the name, it means an association of infidels or unbelievers, for the purpose of propagating infidelity, or a denial of the doctrines and obligations of revealed religion. It must be so understood, according to the commonly received meaning of the term. Such an association, it would seem, could not be incorporated under any of the general laws of the commonwealth. The acts of April 6th 1791, 3 Smith 20, and of October 13th 1840, Pamph. L. 1841, p. 5, provide for incorporation of societies for any literary, charitable or religious purpose and beneficial societies or associations. It could scarcely be considered as within either the letter or spirit of these acts. It is highly improbable that the legislature will ever incorporate, or authorize the incorporation, of such an association. Supposing it, however, to be possible, it is *potentia remota*—that a corporation should be created, and with that name—a possibility upon a possibility, which, as Lord Coke tells us, is never admitted by intendment of law: Co. Litt. 25-6, 184, a. It is like a remainder to the heirs of a person unborn—that a person should be born and die during the continuance of the particular estate—or to an unborn son of a particular name: Fearne 251. Indeed, the very case is put in the old books that if a remainder be limited either by feoffment or devise to a corporation which is not in existence at the time of the grant or devise, the remainder is void, even though such a corporation should afterwards be erected during the particular estate, because it is *potentia remota:* Sir Hugh Cholmley's Case, 2 Rep. 51, a; Lane *v.* Cowper, Moor. 104; Cowden *v.* Clarke, Hob. 33; Noe's Case, Winch. 55; Simpson *v.* Southward, 1 Rol. Rep. 254. In the Year Book, 9 Hen. VI. 24, it is laid down that if one devise lands to the priests of a chantry or of a college in the church of A, at which time there is no chantry and no college, the devise is void notwithstanding the devise is by license of the king; and if after a chantry or college is made in the same place, yet they shall not have the land, because at the time of the devise there was no corporation in which the devise could take effect. We must conclude then that this remainder, limited to a corporation thereafter to be created, was void, because there was no devisee competent to take at the time, and the possibility that there might be such a corporation during the particular estate for life, was too remote." So, too, McCord *v.* Ochiltree, 8 Blackf. 15. The following among other objects, have been held to be sufficiently certain: for "the cause of Christ," Going *v.* Emery, 16 Pick. 107; "a public seminary," Curling *v.* Curling, 8 Dana 38; "for public schools," Bell County *v.* Alexander, 22 Tex. 350; "freedmen," McAlister *v.* McAlister, 46 Vt. 272; see, too, Jemison *v.* Smith, 37 Ala. 185; "for the purpose of aiding any of the *members of my family*, or

(c) Illingworth *v.* Cooke, 9 Hare 37.

children, then over, gave other property on trust to be conveyed equally among *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. (*d*) So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all; (*e*) and a bequest to the children of A, including the illegitimate who *of A, was held, on the same principle, to be a good bequest to the legitimate children of A, (*f*) but to include no illegitimate child.] (*g*)

Devise to three, "the one to be heir to the other."

Again, where one having (*h*) 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 other*. A, the eldest son having died, the land devised to him was claimed by the other two; but the court (Fleming, C. J., doubting) decided that nothing passed by the clause in question, as it

any other persons who may be in distress," held sufficient, as far as the members of the family are concerned, Hill *v.* Bowman, 7 Leigh 650. *Contra*, "for the support of indigent pious young men," White *v.* Fisk, 22 Conn. 50; "for the promotion of education and science among the Indians," Treat's appeal, 30 Conn. 116; for "benevolent purposes," Adye *v.* Smith, 44 Conn. 60; "poor orphan children of A," Beall *v.* Drane, 25 Ga. 430; "for the propagation of the gospel," Carpenter *v.* Miller, 3 W. Va. 174; to "the real distressed private poor of Talbot county," Trippe *v.* Frazier, 4 Harr. & J. 446; "for the benefit of poor children of St. Peter's Protestant Episcopal Church," Dashiell *v.* Att.-Gen. 5 Harr. & J. 392; "to build places of worship free for the use of all Christians who acknowledge the divinity of Christ," White *v.* Att.-Gen., 4 Ired. Eq. 19. In this case it was said: "It seems to us that it would be impossible for the court to keep any control over such personal property, and therefore that this is a trust which the court cannot undertake to execute, since it cannot execute it effectually." So, too, a bequest of money to "school commissioners and their successors in the district of South Farnham, Essex county," for certain purposes, there being school commissioners in the county, but none in South Farnham district, nor any such district, is void for uncertainty, Janey *v.* Latone, 4 Leigh 351. So, too, to the city of Baltimore in trust for necessitous persons in the Twelfth ward, is void for uncertainty, Wildeman *v.* Mayor, &c., of Baltimore, 8 Md. 551.

(*d*) Hope *v.* Potter, 3 K. & J. 206.

(*e*) 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.

(*f*) Gill *v.* Bagshaw, L. R., 2 Eq. 746.

(*g*) Mason *v.* Bateson, 26 Beav. 404.]

(*h*) Wood *v.* Ingersole, 1 Bulst. 61; S. C., but ill reported, Cro. Jac. 260; see also Pollex. 482; Hill and Baker's case, cited 1 Bulst. 63; and see Saville 92, 93.

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 (*i*) 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, (*k*) where the words were, "I give to my executors the sum of £1000 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. (*l*)

In the early case of Beal *v.* Wyman, (*m*) where a question arose on

(*i*) Hambledon *v.* Hambledon, 1 Leon. 262, Saville 92, 93, Cro. El. 164, Owen 25; see also Brook, title Devise, pl. 38.

(*k*) 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.

(*l*) 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 ch. XVI.)

(*m*) Styles 240, 2 Danv. 514, pl. 4; [and see Marwood *v.* Darrell, Lee's Cas. t. Hard. 91.]

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;" (*n*) 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 Lowndes *v.* Stone, (*o*) 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." [But in In re Thomp*son's Trusts, (*p*) where, after a life estate to A, a testator directed his real and personal estate to be sold, and the proceeds paid, "one-third to the heirs or next of kin of B deceased, one-third to the heirs or next of kin of C deceased, one-third to the heirs or next of kin of D deceased;" Sir G. Jessel, M. R., held that the statutory

To "next of kin or heir at law."

"Heirs or next of kin" held to mean statutory kin.

(*n*) 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."

(*o*) 4 Ves. 649. And see 7 Sim. 363.

[Lord Loughborough's expressions are hardly reconcilable with the notion (2 K. & J. 735) that he construed the words as implying heirship according to the nature of the property, and as intimating an intention that the rule of the statute should prevail.

(*p*) 9 Ch. D. 607.

next of kin were entitled, they being the persons indicated by the word "heirs" when used with reference to personalty.] (*q*)

To A "or his heirs, executors, administrators, or assigns."

Again, in Waite *v.* Templer, (*r*) 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 forever;" 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 substitutioual gift.

Reference to uses of *other* estates, there being more than one.

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. (*s*) It may also be occasioned by the testator's apparent misapprehension of the law regulating the devolution of property; as in Thomas *v.* Thomas, (*t*) 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 distribution 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 statutes of distribution regarding personalty, but that he must have referred to some statute which he supposed applied to real estate.

No objection that devisee is to be ascertained by future act of testator.

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 Stubbs *v.* Sargon, (*u*) 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 business, in such shares and proportions as her said trustees should think fit and deem

(*q*) See ch. XXIX.]

(*r*) 2 Sim. 524; see also Stone *v.* Evans, 2 Atk. 86. [But Waite *v.* Templar was disapproved of by Lord St. Leonards, 3 H. L. Cas. 557.]

(*s*) Leslie *v.* Duke of Devonshire, 2 B. C. C. 187.

(*t*) 3 B. & Cr. 825.

(*u*) 2 Kee. 258, 3 My. & Cr. 507.

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.

Gift to several successively, not saying in what order.

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. (*x*) 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 such in virtue of birth, (*y*) as to children, sons, or brothers, (*z*) 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 (*a*) 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 Thomason *v.* Moses, (*b*) 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.]

(*x*) 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.

(*y*) 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. *342.

(*z*) Ongley *v.* Peale, 2 Ld. Raym. 1312, 2 Eq. Cas. Ab. 358, pl. 8; [Young *v* Sheppard, 10 Beav. 207.

(*a*) Ongley *v.* Peale, *supra.*

(*b*) 5 Beav. 77.]

Construction of very obscure will.

In Prestwidge *v.* Groombridge, (*c*) 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. 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 Powell *v.* Davies, (*d*) 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 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.

(*c*) 6 Sim. 171.

(*d*) 1 Beav. 532, [and see Ashburner *v.* Wilson, 17 Sim. 204; Wilson *v.* Wilson, 1 De G. & S. 152.

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; (*e*) 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. (*f*) 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 favor of the children of both brothers. (*g*) The decision seems opposed to all the other authorities on this subject.

Charitable legacies not void for uncertainty of object.

However, where a testator bequeathed "to the surgeon and resident apothecary of the Dispensary at B." £19 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. (*h*)

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.] (*i*)

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. (*k*) Thus, the devise of a house or field, de*scribed by name, is not rendered uncertain by

All particulars in description of subject-matter of disposition need not be correct.

(*e*) Unless the uncertainty be such as to make the amount of the charitable gift also uncertain, Flint *v.* Warren, 15 Sim. 626.

(*f*) Waller *v.* Childs, Amb. 524; Bennett *v.* Hayter, 2 Beav. 81; In re Clergy Society, 2 K. & J. 615; In re Alchin's Trusts, L. R., 14 Eq. 230. 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.

(*g*) Hare *v.* Cartridge, 13 Sim. 167.

(*h*) Ellis *v.* Bartrum, 25 Beav. 109.

(*i*) Lee *v.* Pain, 4 Hare 254; see also Douglas *v.* Fellows, Kay 114. But in In re Maguire, L. R., 9 Eq. 632, the existing object (a charity) got not only its own legacy, but (through *cy près*) the other also.

(*k*) 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.]

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. (*l*) 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. (*m*)

Mistake in locality of lands.

A reference to occupancy often comes in aid of a defect or error in the locality, and *vice versa*. 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*. (*n*) Even 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. (*o*)

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. (*p*)

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; (*q*) and *vice versa*. (*r*)

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. (*s*)

(*l*) Blague *v.* Gold, Cro. Car. 447, 473; Thompson *v.* Tonson, And. 188, 2 Leon. 120.

(*m*) Chamberlaine *v.* Turner, Cro. Car. 129.

(*n*) Halstead *v.* Searle, 1 Ld. Raym. 728.

(*o*) See Owens *v.* Bean, Finch 395; Brown *v.* Longley, 2 Eq. Cas. Ab. 416, pl. 14.

(*p*) Brownl. 131, 8 Vin. Ab. 277, pl. 7.

(*q*) Denn d. Wilkins *v.* Kemeys, 9 East 366.

(*r*) Day *v.* Trig, 1 P. W. 286, *post*; Doe d. Dunning *v.* Lord Cranstown, 7 M. & Wels. 1.

(*s*) Doe d. Humphreys *v.* Roberts, 5 B. & Ald. 407, *post*; but observe that these cases were before 1 Vict., c. 26, the effect of which on such questions of construction is remarked upon *post* ch. XIII.; [see also Baddeley *v.* Gingell, 1 Exch. 319, where houses in an inclosed yard opening into a street, were held to be houses "within the street," so as to be liable to a rate imposed by statute on "houses within the street."]

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 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." (*t*) 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." (*u*) [But 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. (*x*) 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: (*y*) the testator, when he intended to give to a hospital of a special character, having so named it. (*z*) And where the description is equally applicable to two different objects, either of which would have been sufficiently designated if the other had not existed, evidence is admissible to remove the ambiguity, by showing which of them was known to the testator, and (if a charitable institution) to which of them he subscribed. (*a*) If this evidence fails to indicate which the

In description of objects all particulars need not be correct.

Misnomer of corporations.

(*t*) Att.-Gen. *v.* Corporation of Rye, 1 J. B. Moo. 267, 7 Taunt. 546. See also Fitz. Dev. 27, Dalison 78, § 8; 10 Rep. 57; Foster *v.* Walter, Cro. Eliz. 106, 2 Leon. 165. But as to gifts to corporations, *vide ante* p. *65.

(*u*) Att.-Gen. *v.* Sibthorp, 2 R. & My. 107.

[(*x*) Queen's College *v.* Sutton, 12 Sim. 521.

(*y*) See acc. In re Alchin's Trusts, L. R., 14 Eq. 230.

(*z*) 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.

(*a*) In re Kilvert's Trusts, L. R., 7 Ch. 170; In re Fearn's Will, W. N. 1879, p. 8.

testator meant, the bequest fails, unless, as already noticed, it is charitable and applicable *cy pres.* (*b*)

General rule as to name.

As a general rule, *veritas nominis tollit errorem demonstrationis;* so that 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. (*c*) [And the rule has prevailed, although besides a wrong or inaccurate description, one of the Christian names of the legatee was omitted; a gift to "my niece Elizabeth" being held a sufficient description of Elizabeth Jane, a great grand-niece. (*d*)

Misnomer of individuals.

But *nihil facit error nominis cum de corpore constat;* (*e*) and there are many 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 (*f*) the devise was 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 (*g*) 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 (*h*) 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,

(*b*) In re Clergy Society, 2 K. & J. 615.]

(*c*) Standen *v.* Standen, 2 Ves., Jr., 589, 6 B. P. C. Toml. 193; [and see Doe d. Gaines *v.* Rouse, 5 C. B. 442; Giles *v.* Giles, 1 Kee. 685; In re Blackman, 16 Beav. 377; Ford *v.* Batley, 23 L. J., Ch. 225; Pratt *v.* Mathew, 22 Beav. 334.

(*d*) Stringer *v.* Gardiner, 27 Beav. 35, 4 De G. & J. 468.

(*e*) 11 Rep. 21, a.]

(*f*) Pitcairne *v.* Brase, Finch 403; see also Gynes *v.* Kemsley, 1 Freem. 293; Rivers' Case, 1 Atk. 410.

(*g*) Dowset *v.* Sweet, Amb. 175.

(*h*) Parsons *v.* Parsons, 1 Ves., Jr., 266.

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.

In another case, (*i*) a bequest to the "Rev. *Charles* Smith, of Stapleton Tawney, clerk," was held to apply to one who answered 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.

Charles, by mistake for Richard.

So where (*k*) a testator bequeathed to his six grandchildren (*l*) 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.

Other instances of mistake in Christian name

Again, where (*m*) a testator gave to his *namesake Thomas* 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," (*n*) 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.

In cases of this kind, however, it not unfrequently happens that part of the description applies to one person, and part to another. [Here the maxims quoted above give but little help. The essence of the previous cases is that as to one term of the description it is applicable to no one; it is clearly erro-

Distinction where there is more than one claimant.

(*i*) Smith *v.* Coney, 6 Ves. 42; see In re Blackman, *sup.*

(*k*) Garth *v.* Meyrick, 1 B. C. C. 30.

(*l*) As to gift to a specified number of children, *vide post* ch XXX., § 4.

(*m*) Stockdale *v.* Bushby, G. Coop. 229, 19 Ves. 381.

(*n*) Doe d. Cook *v.* Danvers, 7 East 299.

neous. But in the cases now referred to each of the terms applies correctly, or with some degree of accuracy, to some one, and the question is, which is wrong? This can only be solved by considering the general context and the surrounding circumstances, (*o*) and although it has been said that the demonstration has generally prevailed over the name, yet numerous instances will be found on both sides.

*Thus in Garland *v.* Beverley (*p*) where a testator devised land to his nephew for life, remainder to "William, the eldest son of my said nephew" for life, remainder to the issue of W. in tail; William was, in fact, the second son, but was nevertheless held to be entitled. Again in Gillett *v.* Gane (*q*) where the testator devised to his son for life, remainder to "Robert the fourth son" of the son in fee, with an executory gift over if Robert should die under twenty-one "to ——— the fifth son," and so on to those born after the fifth; Robert Henry, in fact, was the third son, but having attained twenty-one was held to be absolutely entitled.

Cases where the name prevailed.

On the other hand, in Doe *v.* Uthwaite (*r*) where, after previous limitations, the devise was to "Stokeham U., second son of A." for life, remainder to his issue in strict settlement, remainder "to John U., third son of A." and his issue in like manner; in fact, Stokeham was the third son of A. and John was his second, and it was held that the mistake was in the name, and that John and his issue were entitled before Stokeham and his issue.

Cases where the description prevailed.

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. (*s*) 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 for life to *Elizabeth*, the natural

[(*o*) See ch. XIII.

(*p*) 9 Ch. D. 213. So in Pryce *v.* Newbolt, 14 Sim. 354, though the name was not fully given: as to which see also Bernasconi *v.* Atkinson, Gillett *v.* Gane, Charter *v.* Charter, all cited *infra*.

(*q*) L. R., 10 Eq. 29. Other cases where the name has prevailed over the description are, Bernasconi *v.* Atkinson, 10 Hare 345; Garner *v.* Garner, 29 Beav. 114; Farrer *v.* St. Catharine's College, L. R., 16 Eq. 19; In re Lyon's Trusts, W. N. 1879, p. 20.

(*r*) 3 Moore 304, 8 Taunt. 306, 3 B. & Ald. 632. See also Neeld *v.* Neeld, W. N. 1878, p. 219.

(*s*) Adams *v.* Jones, 9 Hare 485; and see Lee *v.* Pain, 4 Hare 253; In re Wolverton Estates, 7 Ch. D. 197.

daughter of the testator's servant, *Elizabeth, a single woman*, with remainder to her children. 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, and not Margaret, 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. (*t*)

The position in the will of the name of a legatee may sometimes prevent uncertainty. Thus, in Fox *v.* Collins, (*u*) where legacies 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.] Uncertainty avoided by position of name in will.

If the ambiguity is not removed by the context and by parol evidence [of the surrounding circumstances, the gift necessarily fails for uncertainty; for direct evidence of the testator's intention is inadmissible. Thus in Drake *v.* Drake, (*x*) where a testator gave a legacy to "his sister Mary Frances T. D.," and the residue of his estate to "his niece Mary Frances T. D." and three other persons. The testator had a sister-in-law, but no niece of that name, though he had nieces, one of whom was named Frances Isabella T. D., another Mary Caroline T. D., and a third Mary Elizabeth T. D.; there was no circumstance showing that one niece was intended to take the share of residue rather than another, and nothing to take it from a niece and to give it to the sister-in-law, unless, without any evidence to prove error of demonstration, there was a rigid rule that the name should prevail. It was therefore held in D. P. that the gift of one-fourth of the residue failed. Name and description evenly balanced.

The same principles are applicable for the construction of wills

(*t*) Ryall *v.* Hannam, 10 Beav. 537; and see Rickit's Trust, 11 Hare 299.

(*u*) 2 Ed. 107. See also Doe *v.* Westlake, 4 B. & Ald. 57. Other cases in which the description has prevailed over the name are, In re Feltham's Trusts, 1 K. & J. 528; Hodgson *v.* Clarke, 4 D., F. & J. 394; In re Nunn's Trusts, L. R., 19 Eq. 331; Charter *v.* Charter, L. R., 7 H. L. 364 (an important case).

(*x*) 8 H. L. Cas. 172, affirming Romilly, M. R., 25 Beav. 642.

No name except as part of the description.

where the devisee is not mentioned by name, but the description is composed wholly of "demonstration," as, where the gift is to the first or second son, or to the children, of some named person. Thus in Camoys *v.* Blundell, (*y*) (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, as more perfectly answering the description, was the person designated to take the first estate for life under the description of the second son of Edward.

Where the objects of gift are described by reference to locality, there must be some definite local limit. Thus, a gift to persons resident in the hospitals of or in the vicinity of C., has been held void for uncertainty as to what should be said to be in the vicinity of C. (*z*)

Case of indefinite reference to locality.

But where both name and description correctly describe one person, the improbability of a bequest will of course not deprive him of it in favor 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.] (*a*)

Where one answers both name and description he will take, notwithstanding improbability.

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

Effect where trust is created, but the object uncertain.

(*y*) 1 H. L. Cas. 778. See also Delmare *v.* Robello, 3 B. C. C. 447, 1 Ves., Jr., 412; Holmes *v.* Custance, 12 Ves. 279; Daubeny *v.* Coghlan, 12 Sim. 507; In re Ingle's Trust, L. R., 11 Eq. 578; Bristow *v.* Bristow, 5 Beav. 291 (where both fathers bore the same name).

(*z*) Flint *v.* Warren, 15 Sim. 626. As to the extent of London in a gift to "the hospitals of London," see Wallace *v.* Att.-Gen., 33 Beav. 384.

(*a*) Mostyn *v.* Mostyn, 5 H. L. Cas. 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.]

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.[4]

As in Stubbs *v.* Sargon, (*b*) where a testatrix endorsed a promissory note for £2000 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 £2000 due by the above note of hand, she had specially endorsed the same in her favor. Lord Langdale, M. R., was of opinion, that the promissory note was not endorsed 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 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 £2000 must be treated as part of the testatrix's personal estate. On appeal, Lord Cottenham was of the same opinion. (*c*)

[In Corporation of Gloucester *v.* Wood, (*d*) one of several testamentary papers contained the followiug words: "In a codicil to my will I gave to the corporation of Gloucester

Corporation of Gloucester *v.* Wood.

4. As to the sufficiency of words of gift to create a trust, see Bull *v.* Bull, 8 Conn. 47; Vandyck *v.* Van Beuren, 1 Cai. 84; Pennock's Estate, 20 Penna. St. 268; Farwell *v.* Jacobs, 4 Mass. 634; Bolling *v.* Bolling, 5 Munf. 334; De Bruler *v.* Ferguson, 54 Ind. 549. But where there is a plain and positive devise, the court will not raise an implied trust in the executors to favor a particular devisee. Hart *v.* Hart, 2 Desaus. 57. It would be carrying the doctrine of implied trusts further than a court is warranted to put a forced construction on a plain devise of a will to favor a particular legatee. Ibid. Where a conveyance of a portion of grantor's estate is made, in trust, to such persons as his wife should appoint, and, in default of appointment, to her heirs and assigns, reserving a life estate in the grantor, on the death of the grantor the wife takes an absolute estate. Brunson *v.* Hunter, 2 Hill (S. C.) Ch. 490.

(*b*) 2 Kee. 255; see also Harland *v.* Trigg, 1 B. C. C. 142; Robinson *v.* Waddelow, 8 Sim. 134, stated ch. XXIX. See also cases stated *ante* pp. *214, *et seq.*

(*c*) 3 My. & Cr. 507.

(*d*) 3 Hare 131.

£140,000. In this I wish that my executors would give £60,000 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 legacy 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 as a general charitable legacy, (though it was improbable that a corporation was intended to hold in trust for a private person): the purposes of the gift were therefore uncertain, and the corporation were trustees for the residuary legatees. This decision was affirmed in D. P. (*e*)

Where gift in trust, though discretional.

So if the gift be expressly "in trust," though to be disposed of in such manner, and for such purposes as the donees think fit, they are trustees, and the beneficial interest results to the heir or next of kin: (*f*) and a gift "to be expended and appropriated in such manner as the donees, or a majority of them, shall in their discretion agree upon," would probably without the words "in trust," produce the same result.] (*g*)

*For technical language, of course, is not necessary to create a trust. It is enough that the intention is apparent. [In considering the question, what expressions, though informal, are sufficient to manifest that intention, it will be convenient to deal separately with the cases (1) on precatory trusts, and (2) on words purporting to declare the purpose of the gift.]

1. Precatory trust.

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 favor such expressions are used; provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter (*h*) and the object or objects of the intended trust.[5]

(*e*) 1 H. L. Cas. 272, and see Aston *v.* Wood, L. R., 6 Eq. 419; Briggs *v.* Penny, 3 De G. & S. 525, 3 M. & Gord. 546, with which cf. Stead *v.* Mellor, 5 Ch. D. 225.

(*f*) Fowler *v.* Garlike, 1 R. & My. 232. See also Buckle *v.* Bristow, 10 Jur. (N. S.) 1095.

(*g*) Per Wood, V. C., Buckle *v.* Bristow, *sup.*; cf. Gibbs *v.* Rumsey, 2 Ves. & B. 294.

[(*h*) See In re Pinckard's Trust, 4 Jur. (N. S.) 1041, 27 L. J., Ch. 422; Reeves *v.* Baker, 18 Beav. 373; Macnab *v.* Whitbread, 17 Id. 299; Smith *v.* Smith, 2 Jur. (N. S.) 967; Hood *v.* Oglander, 34 Beav. 523.]

5. As to trusts created by precatory words in a will, see Story Eq. Jur., § 1068, *et seq.*; Hill on Trustees 73; Wms. Ex'rs (6th Am. ed.) 143, note *y*; Perry on

Thus, in Massey *v.* Sherman, (*i*) 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.

Trusts, § 112, *et seq.*; 2 Redf. on Wills 415; and for a careful and thorough review of the American cases on this subject, 2 White & Tud. L. C. Eq. 1857, *et seq.*, notes to Harding *v.* Glyn, 1 Atk. 469. Of such phrases Woodbury, J., says, in Erickson *v.* Willard, 1 N. H. 217: "The words 'desire,' 'request,' 'recommend,' 'hope,' 'not doubting,' * * are to be construed as commands clothed merely in the language of civility and they impose on the executor a duty which courts have in frequent instances enforced." But it is to be observed that "where a testator makes an absolute devise or bequest, mere precatory words of desire or recommendation annexed will not in general convert the devisee or legatee into a trustee, unless indeed it appear affirmatively that they were intended to be imperative," Sharswood, J., in Burt *v.* Herron, 66 Penna. St. 400; and further that "no commendatory terms of a will expressing a 'wish,' 'will,' 'desire,' &c., are sufficient to create a trust unless there be certainty as to the parties to take and what they are to take," Semmes, J., in Lines *v.* Darden, 5 Fla. 51. So, too, Church, C. J., in Gilbert *v.* Chapin, 19 Conn. 342: "No trust will be raised by expressions in a will importing recommendation, hope, confidence, desire, &c., unless there be certainty as to the parties who are to take; nor if a discretion whether to act or not be left with a devisee or so called trustee." See Harrison *v.* Harrison, 2 Gratt. 1. "But such expressions are not always imperative; they are deemed to be flexible in character, and must yield, if the imputed interpretation be against the rules of law, or so inconsistent with other provisions in the will that both cannot stand together, or if it appear from the whole will and the nature of the property, that the testator meant to depend on the justice and gratitude of the donee, or reposed in him a power to execute the supposed trust or not at his discretion." Tuck, J., in Negroes *v.* Plummer, 17 Md. 165, 176; see, too, Brunson *v.* King, 2 Hill (S. C.) Ch. 483. The word "desire" has been held to raise a trust, Van Dyck *v.* Van Beuren, 1 Caines R. 84; Erickson *v.* Willard, 1 N. H. 217; Burt *v.* Herron, 66 Penna. St. 400. So, too, "it is my will that," Whiting *v.* Whiting, 4 Gray 240. So, too, "wish and desire," Brasher *v.* Marsh, 15 Ohio St. 103; see also Cook *v.* Ellington, 6 Jones Eq. 371; but see, *contra*, Lines *v.* Darden, 5 Fla. 51, where it was declared to be the "wish and desire" of the testator that each grandchild should receive "a portion;" and also Brunson *v.* King, 2 Hill (S. C.) Ch. 483, 490, where it is said that the court will not "do violence to the general intent" in order to create a trust where the words used were "it is my wish." So, too, "wish and will," McRee's Adm'r *v.* Means, 34 Ga. 349. So, too, "in the full confidence that," Warner *v.* Bates, 98 Mass. 274; "with full confidence that," Bull *v.* Bull, 8 Conn. 47; "having the utmost confidence that," Ingram *v.* Fraley, 29 Ga. 553; "having implicit confidence," Steele *v.* Levisay, 11 Gratt. 454; "having full confidence that," was also so held in Coates' Appeal, 2 Penna. St. 129, and in McKonkey's Ap-

(*i*) 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.]

Pierson v. Garnet.

So, in Pierson *v.* Garnet, (*k*) 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

peal, 13 Id. 253, but these cases were both overruled by a third case on the same will, Pennock's Estate, 20 Id. 268. So, the words, "in the belief that," were held to raise a trust in Van Amee *v.* Jackson, 35 Vt. 176; and the word "recommending," Gilbert *v.* Chapin, 19 Conn. 342; but see, *contra*, Ellis *v.* Ellis, 15 Ga. 296; and even the word "allow," Hunter *v.* Stembridge, 12 Ga. 192. To the same effect in many cases words giving discretionary power have been held to impose a trust. Thus a gift to A "for the support of herself and her nephews and nieces * * * and such other persons as she from time to time may wish and request to be members of her family," Harper *v.* Phelps, 21 Conn. 257, (which was, however, held to be too uncertain to be executed;) or "in trust for and to be divided among his children in such manner and at such times as he thinks best," Freedley's Appeal, 60 Penna. St. 344; or "to be disposed of in such manner as she may think proper for the benefit of the family * * * as near equal as can be," Ward *v.* Peloubet, 2 Stockt. 304; Little *v.* Bennett, 5 Jones Eq. 156; or "to be disposed of by her and divided among my children at her discretion," Collins *v.* Carlisle, 7 B. Mon. 14; or "to her discretion do I intrust the education and maintenance of my children," they to be maintained after her death out of the profits of the estate given, Lucas *v.* Lockhart, 10 Sm. & M. 466. Moreover, "a *power of disposition* limited to a class in all creates a trust, where the property which is given is certain and the objects to which it is given are also certain," Pierson *v.* Garnett, 2 Bro. C. C. 38; Duer, J., in Dominick *v.* Sayre, 3 Sandf. 559; Heard *v.* Sill, 26 Ga. 312. But such power must be executed by the party named, it cannot be delegated, Withers *v.* Yeadon, 1 Rich. Eq. 324. On the other hand, "desire and hope" have been held insufficient to raise a trust, Hess *v.* Singler, 114 Mass. 56. So, too, "wish and desire," Negroes Chase *v.* Plummer, 17 Md. 165; so, too, "hoping and believing," Van Duyne *v.* Van Duyne, 2 McCart. 503, reversing 1 McCart. 397; so, the words "no doubt she will make distribution," &c., Kinter *v.* Jacobs, 43 Penna. St. 445; so, "to be hers forever * * * to be disposed of as she may think proper amongst her children," Thompson *v.* McKisick, 3 Humph. 631; or "for her support and the support and education of my children," Paisley's Appeal, 70 Penna. St. 153; or "to be used and applied by her to the maintenance, support and education of my children * * * but without being called upon to give any account of the manner * * * &c., * * * as it is my wish that she should have the absolute control," Biddle's Appeal, 80 Penna. St. 258. And in Reid *v.* Blackstone, 14 Gratt. 363, it was doubted whether the words, "I wish you to take the negroes to Penn'a where they will be free," created a trust in favor of the negroes; but in Negroes Chase *v.* Plummer, 17 Md. 165, it was held that the words, "it is my *wish* and *desire*, in case my sister M. die without issue that she shall will and devise all my negroes to be free," &c., did *not* create a trust in favor of the negroes. But an absolute devise to A, "for her maintenance and support, and for the maintenance and support of our children," will not create any trust for the children, Rhett *v.* Mason, 18 Gratt. 541.

(*k*) 2 B. C. C. 38, 226; [and see In re O'Bierne, 1 J. & Lat. 352.]

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, that the effect of the will was to create a trust for the descendants in the described event.

Malim v. Keighley.

Again, in Malim *v.* Keighley, (*l*) where a testator in certain events and subject to certain trusts, bequeathed the 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., and [Lord Loughborough] held, that a trust was created in favor of the children of the daughter and nephew.

So, in Birch *v.* Wade, (*m*) 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. (*n*)

Prevost v. Clarke.

So, in Prevost *v.* Clarke, (*o*) 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 pub-

(*l*) 2 Ves., Jr., 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., Jr., 630, "recommend" was held not to create a trust.]

(*m*) 3 Ves. & B. 198.

(*n*) 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, rev. 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.

(*o*) 2 Mad. 458.

lic securities, &c., added, "Convinced of the high sense of honor, the probity and affection of my son-in-law, E. C., I entreat 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 favor of the children and grandchildren.

[Again, in Pilkington *v.* Boughey, (*p*) the testator, after reciting that he had purchased an estate for a particular charitable purpose, devised it upon such trusts as certain persons should in her, his or their discretion, direct or appoint, but he trusted 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 if the purpose had been legal.

Pilkington *v.* Boughey.

In Foley *v.* Parry, (*q*) 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, affirming the decision of Sir L. Shadwell, 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: the duty was to be performed by means of the fund given.

Foley *v.* Parry.

So,] in Broad *v.* Bevan, (*r*) 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 which was bequeathed to her.

[Trusts, or powers in the nature of trusts, have also been held to be created by the following expressions:—"I desire him to give;" (*s*) "I hereby request;" (*t*) "empower and author-

Other cases of doubtful words creating a trust.

[(*p*) 12 Sim. 114.

(*q*) 5 Sim. 138, 2 My. & K. 138.]

(*r*) 1 Russ. 511, n. [See also Wilson *v.* Bell, L. R., 4 Ch. 581, where the devise being to the son for life, a direction that his sister should reside with and be maintained by him was held not to operate after his death.

(*s*) Mason *v.* Limbery, cited in Vernon *v.* Vernon, Amb. 4.

(*t*) Nowlan *v.* Nelligam, 1 B. C. C. 489; Shelley *v.* Shelley, L. R., 6 Eq. 540.

ize 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;" (*u*) "advise him to settle;" (*x*) "my dear daughters, is, that you do give my granddaughter £1000, this is my last wish;" (*y*) "require and entreat;" (*z*) "trusting that he will preserve the same, so that after his decease it may go and be equally divided, &c.;" (*a*) "well knowing;" (*b*) "under the conviction that she will dispose, &c.;" (*c*) "to apply the same;" (*d*) 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." (*e*)

*But] if the testator's language amounts merely to a general expression of good will towards the objects in question, and does not intimate any definite disposing intention in their favor, 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. (*f*) 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. forever, "hoping he will continue them in the family. (*g*)

Mere expressions of kindness not sufficient.

[Expressions sufficient *per se* to create a trust may be deprived of their effect by a context expressly declaring, (*h*) or by implication 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

Doubtful expressions explained by context.

(*u*) 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.

(*x*) Parker *v.* Bolton, 5 L. J. (N. S.), Ch. 98.

(*y*) Hinxman *v.* Poynder, 5 Sim. 546.

(*z*) Taylor *v.* George, 2 Ves. & B. 378.

(*a*) Baker *v.* Mosley, 12 Jur. 740.

(*b*) Briggs *v.* Penny, 3 De G. & S. 539, 3 M. & Gord. 546; per Wood, V. C., Johns. 289. But see per Jessel, M. R., 5 Ch. D. 227.

(*c*) Barnes *v.* Grant, 26 L. J., Ch. 92, 2 Jur. (N. S.) 1127.

(*d*) Salusbury *v.* Denton, 3 K. & J. 529.

(*e*) Liddard *v.* Liddard, 28 Beav. 266.

(*f*) Buggens *v.* Yeates, 8 Vin. Ab. 72, pl. 27. [See also In re Bond, 4 Ch. D. 238.]

(*g*) Harland *v.* Trigg, 1 B. C. C. 142.

[(*h*) Young *v.* Martin, 2 Y. & C. C. C. 582.

will be created in favor of the wives and children; otherwise the inconvenience complained of would continue. (*i*)

Where the gift is for the donee's *absolute* use, precatory words do not create a trust.

And where the words of a gift expressly point to an *absolute* enjoyment by the donee himself, (*j*) the natural construction of subsequent precatory, (*k*) words is that they express the testator's belief or wish without imposing a trust.

Meredith *v.* Heneage.

Thus,] in Meredith *v.* Heneage, (*l*) 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 D. P. that the wife was absolutely entitled for her own benefit, Lord Eldon considering that the testator intended to im*pose 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 Wood *v.* Cox, (*m*) a testatrix gave all her estate, real and personal, to A (and B, their,) his heirs, executors and assigns, "*for his and their own use and benefit* for ever, trusting and wholly confiding in his honor that he will act in strict conformity to my wishes." And she appointed A and B 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 to her father, who was her sole next of kin,) and which concluded with the following words in the testatrix's handwriting:

(*i*) Alexander *v.* Alexander, 2 Jur. (N. S.) 898, not appealed on this point, 6 D., M. & G. 593. See also Shepherd *v.* Nottidge, 2 J. & H. 766; Eaton *v.* Watts, L. R., 4 Eq. 151; M'Cormick *v.* Grogan, L. R., 4 H. L. 82.

(*j*) "Absolute" properly means not only unlimited in estate, but unfettered by trust or condition. Per James, V. C., Irvine *v.* Sullivan, L. R., 8 Eq. 673; and per Wood, V. C., Godfrey *v.* Godfrey, 2 N. R. 16.

(*k*) *Secus*, if the words are imperative, Bonser *v.* Kinnear, 2 Gif. 195; Evans *v.* Evans, 12 W. R. 508; Curtis *v.* Graham, Id. 998.]

(*l*) 1 Sim. 542, 10 Pri. 306.

(*m*) 1 Kee. 317.

"Such is the will of Sarah Compton." The words "and B their," originally written in the will, were obliterated by the direction of the testatrix. Lord Langdale, M. R., held that A was a trustee for the next of kin, [but his decision was reversed by Lord Cottenham, (*n*) who said that to make A 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.*

In Johnston *v.* Rowlands, (*o*) 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 one moiety among her own relations, and the other among such of his own as she should think proper. Sir J. K. 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." He thought that no trust was created. Johnston *v.* Rowlands.

And in Webb *v.* Wools, (*p*) where 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," Sir R. Kindersley, V. C., 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. Webb *v.* Wools, the principle recognized.

[(*n*) 2 My. & Cr. 684. See also Irvine *v.* Sullivan, L. R., 8 Eq. 673, a very similar case.

(*o*) 2 De G. & S. 356.

(*p*) 2 Sim. (N. S.) 267. See also White *v.* Briggs, 15 Sim. 33; Parnall *v.* Parnall, 9 Ch. D. 97; and the following cases bearing on the subject, Winch *v.* Brutton, 14 Sim. 379; Bardswell *v.* Bardswell, 9 Sim. 319; Williams *v.* Williams, 1 Sim. (N.S.) 358, *post* *394; Huskisson *v.* Bridge, 15 Jur. 738; Fox *v.* Fox. 27 Beav. 301; Green *v.* Marsden, 1 Drew. 646; M'Culloch *v.* M'Culloch, 11 W. R. 504.

It remains to notice the case of Ware (or Wace) *v.* Mallard, (*q*) 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. No reasons are reported. If the words "in full confidence," &c., created a trust, it is difficult to see how the widow could take any beneficial interest whatever: and if they did not, it is equally difficult to understand how she could be entitled to less than the whole.

Ware *v.* Mallard, *contra;*

The authority of the V. C. has given some currency to this decision. (*r*) But the better opinion is, that in such a case no trust is imposed on the widow. Thus, in In re Hutchinson and Tenant, (*s*) where a testator gave all his real and personal estates to his "dear wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," it was held by Sir G. Jessel, M. R., that the wife took absolutely. He considered the case undistinguishable from Lambe *v.* Eames, (*t*) where a testator gave his estate to his widow "to be at her dis*posal in any way she may think best for the benefit of herself and family,"—upon which a strong opinion was expressed by the L. JJ. that no trust was created; but assuming that there was, it could not be extended to mean a trust for the widow for life with remainder for the children in such shares as she might think fit to direct.

—questioned.

It should be observed that in some of the cases where Sir J. Parker's construction has prevailed there has been a reference to the donee's death as the time when the recommended disposition was to take effect; (*u*) and this may have been taken as marking the point of time

(*q*) 21 L. J., Ch. 355, 16 Jur. 492.

(*r*) Gully *v.* Cregoe, 24 Beav. 185; Shovelton *v.* Shovelton, 32 Beav. 143; Curnick *v.* Tucker, L. R., 17 Eq. 320; Le Marchant *v.* Le Marchant, L. R., 18 Eq. 414. *Qu.* whether in Curnick *v.* Tucker a *dictum* of Kindersley, V. C., in Palmer *v.* Simmonds, 2 Drew. 221, was correctly interpreted as a surrender by him of the principle which he enforced in Webb *v.* Wools. Were not his remarks directed exclusively to the words "confidence" and "residuary estate?" There was at least nothing said about a life estate.

(*s*) 8 Ch. D. 540.

(*t*) L. R., 6 Ch. 597. See also Mackett *v.* Mackett, L. R., 14 Eq. 49. See these cases referred to again, *post.*

(*u*) Gully *v.* Cregoe, 24 Beav. 185; Le Marchant *v.* Le Marchant, L. R., 18 Eq. 414; Cholmondeley *v.* Cholmondeley, 14 Sim. 590 (but here the words were only,

when the interest of the other beneficiaries was to commence, as well as negativing the widow's right to dispose of the *corpus* in her lifetime. (*x*) But the distinction is discountenanced by Meredith *v.* Heneage, and Johnston *v.* Rowlands, and in expressing his dissent from the construction in question, Sir G. Jessel drew no distinction between the cases where such a refereuce existed and where it did not.

And with regard to the general question of precatory trusts (*i. e.*, where the terms used do not expressly point to an absolute enjoyment by the douee himself,)] 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. (*y*) 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 [and a few of the more modern] adjudications.

Limits of the doctrine of precatory trusts.

Thus, in Curtis *v.* Rippon, (*z*) 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 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.

Instances of words being too indefinite to create a trust.

So, in Abraham *v.* Alman, (*a*) where a will contained the *following passage: "I do likewise will and bequeath to my only son J. the sum of £60 sterling per year forever; 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 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

"to be hers independent of her husband" —as to which see also Stubbs *v.* Sargon, 3 My. & Cr. 513).

(*x*) In Hart *v.* Tribe, 18 Beav. 215, 1 D., J. & S. 418, there was an express "recommendation" not to do so.

(*y*) See this opinion adopted by James, L. J., Lambe *v.* Eames, L. R., 6 Ch. 599.]

(*z*) 5 Mad. 434.

(*a*) 1 Russ. 509.

means of determining what that provision was to be, [or in what manner or out of what fund to be made.]

Again, in Sale *v.* Moore, (*b*) 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 Hoy *v.* Master, (*c*) 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 claimed by the daughter, on the ground that the wife had a life interest only, with a power of appointment in favor 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 Lechmere *v.* Lavie, (*d*) 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

(*b*) 1 Sim. 534; [See also Reeves *v.* Baker, 18 Beav. 373.]

(*c*) 6 Sim. 568.

(*d*) 2 My. & K. 197.

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, (*e*) 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, (*f*) 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 to the presumption that he meant to give the whole to the first taker.

So, in Horwood *v.* West, (*g*) 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 her*self, 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.

[(*e*) As to this, see Lefroy *v.* Flood, 4 Ir. Ch. Rep. 1, 12.]

(*f*) 1 Bro. C. C. 179. As to cases of this class, *vide ante* pp. *362, *363.

(*g*) 1 Sim. & St. 387.

So, in Ex parte Payne, (*i*) where a testator, 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 themselves were certain; and that, even if the daughter married, she might limit the estate to such uses as she thought proper: and of this opinion was Lord Abinger, C. B.

[And in Williams *v.* Williams, (*k*) 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 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 no trust was created: he thought the words of the codicil could not operate to cut down the absolute interest

Williams *v.* Williams.

(*i*) 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 requisition 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; Scott *v.* Key, 35 Beav. 291 (as to one-third); but see Malone *v.* O'Conner, 2 Ll. & Go. 465.

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

given to the wife: but he relied chiefly on the uncertainty of the objects to whom the precatory words referred.] (*l*)

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 (*m*) 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. [But inasmuch as uncertainty in the object furnishes a strong argument that a testator did not intend to create a trust, it is obvious that the two classes of cases are intimately connected with each other. For the rule that a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only, does not mean that the subject or object must be so defined that it can in fact be ascertained by the court. A precatory trust "for the benefit of ——," or of "the person named in such a paper," where no such paper is found, or "for such objects as I have communicated to" the donee, where no such communication has been made, (*n*) would completely exclude the donee from all beneficial interest, although it leaves the object wholly unascertained. (*m*) But what is meant by the rule is this: in ascertaining whether the precatory words import merely a recommendation, or whether they import a defi*nite 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

Meaning of the rule requiring certainty of object and subject for a precatory trust.

l) As to the meaning of "family," see L. R., 6 Ch. D. 600, 8 Ch. D. 542, and *post* ch. XXIX.

(*m*) Stubbs *v.* Sargon, Fowler *v.* Garlike, Corporation of Gloucester *v.* Wood, Briggs *v.* Penny, *ante* p. *383, *et seq.*

(*n*) Bernard *v.* Minshull, Johns. 276. But where the gift was "subject to such disposition thereof or of any part thereof as the testator *might* by deed or writing thereafter direct," it was held there was no trust, the testator not having made up his mind whether he would make any such disposition or not, Fenton *v.* Hankins, 9 W. R. 300.

the property, then the court will infer from the circumstance 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 suggestions 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 suggesstions 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. The question is not whether the object is so defined that it can be distinctly ascertained by the court, but whether the object is purposely left to be selected by the donee; (*p*) as, for instance, where the testator expresses a desire that the donees shall "distribute the fund as *they think* will be most agreeable to his wishes." (*q*)

Gift for a specified purpose.

Secondly, we are to consider whether in cases where words are added expressing a purpose for which the gift is made, such purpose is to be 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, (*r*) or a life-annuity, (*s*) or a house, (*t*) or to set him up in business, (*u*) or for his maintenance and education, (*x*) or to bind him appren*tice, (*y*) or towards the printing

Where the purpose is the benefit of donee alone, the gift is absolute.

(*p*) See judgment of Wood, V. C., Bernard *v.* Minshull, Johns. 287, 290.

(*q*) Stead *v.* Mellor, 5 Ch. D. 225.

(*r*) Apreece *v.* Apreece, 1 Ves. & B. 364.

(*s*) Dawson *v.* Hearn, 1 R. & My. 606; Ford *v.* Batley, 17 Beav. 303; In 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.

(*t*) Knox *v.* Hotham, 15 Sim. 82.

(*u*) Gough *v.* Bult, 16 Sim. 45.

(*x*) 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, Yates *v.* Compton, 2 P. W. 308; Barnes *v.* Rowley, 3 Ves. 305; Palmer *v.* Crauford, 3 Sw. 482; Bayne *v.* Crowther, 20 Beav. 400; Attwood *v.* Alford, L. R., 2 Eq. 479.

(*y*) Barlow *v.* Grant, 1 Vern. 255; Nevill *v.* Nevill, 2 Id. 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, Id. 309; in Lockhart *v.*

of a book, the profits on which are to be for his benefit, (*z*) the legatee may claim the money without applying it or binding himself to apply it to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money. (*a*)

These cases rest on the principle that the court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased or giving up the business: and we shall hereafter see, (*b*) that the same principle applies where property is directed to be converted, 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. So, if the annuity is to be held by trustees for the annuitant with a gift over in case he should alienate or become bankrupt, his right to receive the fund is intercepted. (c) If the gift is not immediate, but is postponed until the death of a tenant for life, and the annuitant dies before the tenant for life without alienating or becoming bankrupt, it should seem on principle that, as the event on which his interest was to be defeated has not happened, such interest, which originally and apart from the gift over was vested and transmissible, (*d*) remains intact, and that his representatives are entitled to the fund; and so it was decided in Day *v.* Day. (*e*)

Principle of the cases.

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

Where interest of legatee is left to discretion of trustees.

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 K. & J. 185; In re Colson's Trusts, Kay 133 (enjoyment of repairing fund accelerated by disentailing the estate); and cases cited *ante* p. *311, n. (*s*)

(*z*) In re Skinner's Trusts, 1 J. & 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.

(*a*) Stokes *v.* Cheek, 28 Beav. 620.

(*b*) *Post* ch. XIX., § 2.

(*c*) Hatton *v.* May, 3 Ch. D. 148; per Kindersley, V. C., Day *v.* Day, 22 L. J., Ch. 881, 17 Jur. 586, also shortly and *semb.* inaccurately reported 1 Drew. 569. But where the annuity was to be purchased *in the name* of the annuitant, it was held that a gift over was ineffectual, and the annuitant entitled absolutely, Hunt-Foulston *v.* Furber, 3 Ch. D. 285.

(*d*) Bayley *v.* Bishop, 9 Ves. 6; and cases n. (*x*), *sup.*

(*e*) *Sup.* But the point was decided otherwise by Malins, V. C., Power *v.* Hayne, L. R., 8 Eq. 262.

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. (*f*) 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. (*g*) But as soon as the trustees exercise their discretion by making a purchase for the object of their power, the thing purchased becomes the absolute property of the latter; (*h*) and instead of applying a sum specifically the trustees may hand it over to the object. (*i*)

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 language used. 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 absolute 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 distinctions, which it would require too much space to particularize; and some cases will be found almost irreconcilable with others: the preponderance, however, seems to lean in favor of giving the primary donee a discretion which he must honestly exercise, or in default, subject himself to the control of the court, with a tendency, however, rather to narrow than to extend the effect heretofore ascribed to words expressing the purpose or motive of the gift.

(*f*) In re Sanderson's Trust, 3 K. & 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.

(*g*) Cowper *v.* Mantell, 22 Beav. 231.

(*h*) Lawrie *v.* Bankes, 4 K. & J. 142. (Commission in the army purchased, and soon after sold by the object.)

(*i*) Messeena *v.* Carr, L. R., 9 Eq. 260; Palmer *v.* Flower, L. R., 13 Eq. 250. In the latter case the power was to purchase promotion in the army, and, in the meantime, purchase was abolished. In In re Ward's Trusts, L. R., 7 Ch. 727, it was held otherwise in case of a deed.

a. As to the cases in which a complete trust is created. A *gift to A, to dispose of among her children, (*k*) or for bringing up her children, (*l*) gives A no interest, but creates a complete trust for the children. And in Taylor *v.* Bacon, (*m*) 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.

a. Cases of complete trust.

In Jubber *v.* Jubber, (*n*) 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, (*o*) 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, (*p*) 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 to do for themselves,—£30 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. (*q*)

(*k*) Blakeney *v.* Blakeney, 6 Sim. 52.

(*l*) Pilcher *v.* Randall, 9 W. R. 251.

(*m*) 8 Sim. 100; see also Chambers *v.* Atkins, 1 S. & St. 382; Fowler *v.* Hunter, 3 Y. & J. 506; In re Camac's Trust, 12 Jur. 470; Barnes *v.* Grant, 26 L. J., Ch. 92; Bibby *v.* Thompson, 32 Beav. 646.

(*n*) 9 Sim. 503.

(*o*) 1 Kee. 80.

(*p*) 2 Y. & C. C. C. 372.

(*q*) See also In re Harris, 7 Exch. 344.

b. Cases in which there is a discretion liable to be controlled.

b. 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. (*r*) In Hamley *v.* Gilbert, (*s*) 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*, (*t*) and it was referred to the master to inquire what would be a sufficient sum to be appropriated for that purpose. In Gilbert *v.* Bennett, (*u*) 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 V. C. 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, (*x*) Leach *v.* Leach, (*y*) Browne *v.* Paull, (*z*) and Longmore *v.* Elcum, (*a*) words nearly similar received the same construction. It appears, as the result of these authorities, that where the interest of the children's legacies is given to a parent to

Result of the authorities.

(*r*) 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.

(*s*) Jac. 354.

(*t*) 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, Id. 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; Carr *v.* Living, 28 Beav. 644; Scott *v.* Key, 35 Beav. 291.

(*u*) 10 Sim. 371.

(*x*) 9 Sim. 438.

(*y*) 13 Sim. 304.

(*z*) 1 Sim. (N. S.) 92; see also Bowden *v.* Laing, 14 Sim. 113.

(*a*) 2 Y. & C. C. C. 363.

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; (*b*) 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. (*c*)

Crockett *v.* Crockett.

*In Crockett *v.* Crockett, (*d*) where the testator directed that all his property should be at the disposal of his wife for herself and children, the only point decided was that the wife and children were not joint tenants; but Lord Cottenham was of opinion that the wife had a personal interest in the fund, and that as between herself and her children she was either a trustee with a large discretion as to the application of it, or had a power in favor of the children, subject to a life estate in herself. The former construction would have been the more consistent with the previous authorities. The latter would not only have introduced a limitation of the wife's interest not expressed in the will, but would have left that diminished interest still subject to the charge of maintaining the children. A "recommendation" not to diminish the principal but to vest it in government or freehold securities, has been held to require this construction. (*e*)

Raikes *v.* Ward.

In Raikes *v.* Ward, (*f*) 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, (*g*) Woods *v.* Woods, (*h*) and Costabadie *v.* Costabadie. (*i*)

Other cases.

(*b*) Per Lord Cranworth, 1 Sim. (N. S.) 103.

(*c*) Id. 105.

(*d*) 2 Phil. 553, reversing the decision, 5 Hare 326 (which seems to have proceeded on some misapprehension of the decree, 1 Hare 451). See also Scott *v.* Key, 35 Beav. 291; Armstrong *v.* Armstrong, L. R., 7 Eq. 518.

(*e*) Hart *v.* Tribe, 18 Beav. 215; but see per Turner, L. J., 1 D., J. & S. 418.

(*f*) 1 Hare 445.

(*g*) 8 Beav. 347.

(*h*) 1 My. & Cr. 401.

(*i*) 6 Hare 410; and see Cowman *v.* Harrison, 10 Hare 234; Smith *v.* Smith,

The donee has been allowed to receive the legacy without his interest being declared.

In several cases, (*k*) 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.

Distinction where given in first instance *absolutely.*

But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute benefit, or to be at *the disposal, of the donee, especially if such donee be the parent, no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift. And, although it is not directly denied that the court may control the execution of a trust where the shares of the beneficiaries are left to the discretion of the donee (for the court is in the constant habit of ascertaining the amount required for maintenance of children), yet increased weight is given to that indefiniteness as showing that no trust whatever was intended. Thus, in Lambe *v.* Eames, (*l*) where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family;" the widow made a will disposing of part of her husband's estate, and giving an interest therein to a natural son of one of his children; and the questions were whether there was a trust, and if there was, whether it had been duly executed. Crockett *v.* Crockett, and other cases cited above, were pressed on the court; but with reference to them Sir W. James, L. J., expressed a strong disapproval of the "officious kindness" of the court in interposing trusts where none were intended, and said, "If the case stood alone, I should say that no sufficient trust was declared by the will; but if there be any such obligation, I think it has been fairly discharged by the way in which she (the widow) has made her will." (*m*)

c. Where primary donee held absolutely entitled.

c. Lastly, as to cases where the primary donee was held to be absolutely entitled.

2 Jur. (N. S.) 967; Godfrey *v.* Godfrey, 2 N. R. 16; Dixon *v.* Dixon, W. N. 1876, p. 225.

(*k*) 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, Id. 177; Briggs *v.* Sharp, L. R., 20 Eq. 317.

(*l*) L. R., 6 Ch. 597. See also Mackett *v.* Mackett, L. R., 14 Eq. 49. But see Scott *v.* Key, 35 Beav. 291.

(*m*) In Willis *v.* Kymer, 7 Ch. D. 181, a precatory trust for children, *simpliciter*, was held well executed in regard to daughters by limiting their shares to their separate use.

In Brown *v.* Casamajor, (*n*) 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. Brown *v.* Casamajor.

Again, in Hammond *v.* Neame (*o*) 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 niece having *no children at the testator's death*, it was held that she was entitled to the interest of the stock.] Hammond *v.* Neame.

So, in Benson *v.* Whittam, (*p*) 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 parentheses did not raise any trust in favor of the children of F; they merely expressed the motive or cause of the gift, and he commented on other passages corroborating this conclusion. Benson *v.* Whittam.

[In Thorp *v.* Owen, (*q*) 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 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 Thorp *v.* Owen.

(*n*) 4 Ves. 498.
(*o*) 1 Sw. 35.]
(*p*) 5 Sim. 22.
[(*q*) 2 Hare 607.

upon the fund or part of the fund in the hands of the legatee. (*r*) 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 V. C. in Benson *v.* Whittam; and the cases of Andrews *v.* Partington, (*s*) 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 the court of equity, *to enforce their natural claims against the parent in respect of the fund on which the trust is declared." And the V. C. added: (*t*) "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, (*u*) under a gift to A, to bring up and maintain B, A was held to be absolutely entitled. And in Byne *v.* Blackburn, (*x*) 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.," it was held that no trust was created in favor of the children, 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

(*r*) This second head has in the text been split into two divisions.

(*s*) 2 Cox 223. Compare Barrs *v.* Fewkes, 2 H. & M. 60.

(*t*) Page 614.

(*u*) 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); Wheeler *v.* Smith, 1 Gif. 300; Howarth *v.* Dewell, 29 Beav. 18.

(*x*) 26 Beav. 41. See also the judgment in Lambe *v.* Eames, L. R., 6 Ch. 597.]

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. Yet 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 is difficult to reconcile it with Sir J. Wigram's remarks cited above.]

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.

Remarks upon the cases

Sometimes a testator's recommendation in favor 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 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 Tibbits *v.* Tibbits, (*y*) 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 husband-

(*y*) 19 Ves. 656. [Compare Quayle *v.* Davidson, 12 Moo. P. C. C. 268.

like manner, and to duly pay their rents," it was held to be a trust for the cousins, who had been tenants at will.

—to employ a particular steward, &c.

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 favor 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, (*z*) 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, (*a*) where a testator devised his estates to trustees upon trust to let the same, and apply the *rents in paying off certain encumbrances, 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 Lawless *v.* Shaw, (*b*) 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 as a token of the testator's esteem for him, and after directing his executors to pay his agent £150, 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 W. 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

Lawless *v.* Shaw.

Direction to employ a particular steward.

(*z*) 3 Mer. 681. See also Saunders *v.* Rotherham, 3 Gif. 556 (direction to continue testator's trade and employ A as manager).]

(*a*) 8 Sim. 349.

(*b*) 1 Ll. & Go. 154.

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 to purchase a monumental tablet. Soon after the testator's decease, Shaw, the devisee for life, dismissed Lawless from his office as land agent, but without impeaching his character or capacity. Lawless filed a bill against Shaw, claiming to be re-instated, which was dismissed by Lord Plunket; whose decree, however, was upon a re-hearing reversed by his successor. After reading the clause of the will applicable to Lawless, Sir E. Sugden inquired, "Is that a simple recommendation to continue him in an office removable 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, removable 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 for charity, and a direction that it should be paid to Lawless, to be by him distributed. Can any one doubt that this 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 connection 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 em*ploy 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.*"

Shaw v. Lawless in D. P. reversing decision below.

[The decision of Sir E. Sugden was, however, reversed, and that of Lord Plunket established in D. P., (*c*) 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. Lord Cottenham said, "If Lawless' title is what it has been argued to be, he has an equitable charge on the legal estate of Shaw; and as he is to have the usual fees of £5 per cent., the result would be that Lawless would not only be an equitable encumbrancer 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 equit-

[(*c*) Shaw *v.* Lawless, 5 Cl. & Fin. 129. See also Finden *v.* Stephens, 2 Phil. 142.

able encumbrancer 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 encumbrancer 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 percentage on the rents *as a salary* for performing a duty, and that only so long as he performed it properly and obeyed his employer. (*d*) The due yearly performance of that duty was, therefore, a condition precedent to his right to receive his yearly precentage, and such a right to a percentage of the receipts could scarcely be converted into a right to a *like* percentage of the capital.]

(*d*) See 1 Ll. & G. 172.

*CHAPTER XIII.

PAROL EVIDENCE, HOW FAR ADMISSIBLE.

Parol evidence inadmissible to control will.

As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the

1. It has seemed to the editors desirable to confine the notes in this chapter to cases where the question raised and settled has been upon a *will*, omitting many cases of *contract* involving the same or a like principle. It has also been their endeavor to consider here only such questions as relate to the construction of wills by parol evidence, leaving for consideration elsewhere all questions relating to the execution and validity of wills—such as questions of testamentary capacity, undue influence, fraud, &c. It is well established that "there is *no material difference* of principle in the rules of interpretation *between wills and contracts*, except what naturally arises from the different circumstances of the parties." 1 Greenl. Ev., § 287. To this Mr. Greenleaf adds (§ 289): "In regard to *wills* much greater latitude was formerly allowed, in the admission of evidence of intention, than is warranted by the later cases. The *modern doctrine* on this subject is nearly or quite identical with that which governs in the interpretation of other instruments; and is best stated in the language of Lord Abinger's own lucid exposition, in a case in the exchequer. [Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 363, 367.] 'The object,' he remarked, 'in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the objects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names 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, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator, in these particulars, must be receivable as evidence, to explain the meaning of his

contents of such will; (*a*) 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

will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," that is the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it, by the general words he has used, which in their ordinary sense, may properly bear that construction. It appears to us that in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.'" The reader's attention is also called to the oft-quoted seven propositions of Vice Chancellor Wigram, which form the framework of his treatise on extrinsic evidence in aid of the interpretation of wills. They are here inserted in full for convenient reference. Wigram Extr. Ev., p. 55 (Am. ed., 1872): I. "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent, that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted,

[(*a*) Goss *v.* Lord Nugent, 5 B. & Ad. 64, 65; Wigram on Wills 5; Lowfield *v.* Stoneham, 2 Stra. 1261.]

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.[2]

are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, 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. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

2. For confirmation of this rule see Wigram's Propositions II. and VI. above given. In support of these propositions, Sir James Wigram says, Am. ed., 1872, pp. 85, 96, as to Proposition II., and pp. 178–182, as to Proposition VI.: "The rule of construction contained in this proposition is applicable to those cases in which the testator's expressions, though

Thus (among many instances), (*b*) in Strode *v.* Lady Falkland, (*c*) 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

Letters and oral declarations of testator rejected.

not precise and technical, are so far accurate as to admit of no doubt as to the sense in which they were used. In other words, when a court is once satisfied that particular words express a particular meaning, although inaccurately, it is just as much bound to adhere to that meaning, as if the most precise and technical expressions had been used. In the Attorney-General *v.* Grote (3 Mer. 316) in which the language of the will was most inaccurate throughout, Sir William Grant said, 'To authorize a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used.' In the same case Lord Eldon said 'Individual belief ought not to govern the case, it must be judicial persuasion.' The only positive exception to the second proposition, of which the writer is aware, exists in those cases in which a testator, *having no children,* devises property in default or failure of issue *of himself;* in which case the words, *in default of issue,* or *failure of issue,* contrary to their strict legal meaning, have been construed to mean issue *living at the death of the* testator. These cases are always spoken of as anomalies. The remaining cases applicable to the sixth proposition are numerous and decisive, and appear to conclude the question now under consideration, and to decide in conformity with the principle, (*supra,* pl. 9, 10,) that, if a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them, is, as a general proposition, (see the exception, *infra,* pl. 130, *et seq.,*) inadmissible—in other words, that the judgment of a court in expounding a will must be simply *declaratory* of what is *in* the will. Thus it has been laid down (either in *dictum* or decision), that evidence is inadmissible for the purpose—1, of filling up a total blank in a will; (Baylis *v.* Attorney-General, 2 Atk. 239; Castledon *v.* Turner, 3 Atk. 257; Hunt *v.* Hort, 3 Bro. C. C. 311;) or 2, of inserting a devise omitted by mistake; (Lady Newburgh's case, 5 Mad. 364; Anon., 8 Vin. Abr. 188, G. a, pl. 1;) or 3, of proving what was intended by an unintelligible word; (Goblet *v.* Beechey, App., *infra,* No. 1, and 3 Sim. 24;) or 4, of proving that a thing *in substance,* different from that described in the will was intended; (per M. R. in Selwood *v.* Mildmay, 3 Ves., Jun., 306;) or 5, of changing the person described; (Delmare *v.* Robello, 1 Ves., Jun., 412; and see per M. R. in Beaumont *v.* Fell, 2 P. Wms. 140;) or 6, of reconciling conflicting clauses in a will; (per Lord Hardwicke, C., in Ulrich *v.* Litchfield, 2 Atk. 372;) or 7, of proving to which of two antecedents a given relative was intended to refer; (Lord Walpole *v.* Lord Cholmondeley, 7 T. R. 138; Castledon *v.* Turner, 3 Atk. 256;) or 8, of ex-

(*b*) 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 J. & H. 135.]

(*c*) 3 Ch. Rep. 98.

of settlement," it was unanimously agreed by Lord Cowper, C., J. Trevor, M. R., T. Trevor, C. J., and Tracy, J., that this kind of

plaining or altering the estate; (Cheyney's Case, 5 Rep. 68;) or 9, of proving which of several testamentary guardians was intended to have the actual care of children; (Storke *v.* Storke, 3 P. Wms. 51; 2 Eq. Abr. 418, pl. 13; *contra*, Anon., 2 Ves., Sen., 56. The admissibility of evidence in this case may be satisfactorily explained; for, if guardians disagree, the court has jurisdiction independently of the will, and then the evidence may be resorted to as a guide for the independent judgment of the court;) or 10, of proving what was to be done with the interest of a legacy till the time of payment; (Mansel *v.* Price, Sugd. Vend. 138, 6th ed.;) or 11, of proving that, by a bequest of residue, a particular sum was intended; (Brown *v.* Langley, 2 Eq. Abr. 416, pl. 14; and 8 Vin. Abr. 197, pl. 36. See Dyose *v.* Dyose, 1 P. Wms. 305, disapproved by Lord Thurlow in Fonnereau *v.* Poyntz, 1 Bro. C. C. 472, and by Sir W. Grant, M. R., in Page *v.* Leapingwell, 18 Ves. 466; and see 1 P. Wms. 306, n.;) or 12, of construing the will with reference to the instructions given for preparing it; (Goodinge *v.* Goodinge, 1 Ves., Sen., 230; Murray *v.* Jones, 2 Ves. & B. 318;) or 13, of proving that an executor was intended to be a trustee of residue for next of kin; (Bishop of Cloyne *v.* Young, 2 Ves., Sen., 95; White *v.* Williams, Coop. 58; Langham *v.* Sandford, 2 Mer. 17;) or 14, of proving that an executor was intended to take beneficially, where, upon the face of the will, it was conclusively apparent that he was intended to be a trustee; (S. C.;) or 15, of controlling a technical rule of verbal construction; (per Lord Kenyon, C. J., and Lawrence, J., 6 T. R. 252, 354;) or 16, of explaining the sense in which the word 'relations' was intended to be used; (Goodinge *v.* Goodinge, 1 Ves., Sen., 230; Edge *v.* Salisbury, Amb. 70; Green *v.* Howard, 1 Bro. C. C. 31;) or 17, what a testator intended to give by the word 'plate;' (Nicholls *v.* Osborn, 2 P. Wms. 419; Kelly *v.* Powlet, Amb. 605;) or 18, what a testator intended to devise by the words 'lands out of settlement;' (Strode *v.* Russell, 2 Vern. 621;) or 19, of proving that a portion was intended to be a satisfaction of a bequest of residue; (Freemantle *v.* Bankes, 5 Ves. 85;) or 20, that a legacy in a codicil was intended to be a substitution for a legacy in the will; (Hurst *v.* Beach, 5 Mad. 351;) or 21, of proving that a devise to a wife was intended to be in bar of dower; (Leake *v.* Randall, 1 Vin. Abr. 188, G. a, pl. 3;) or 22, of supplying a use or trust; (Id., pl. 4;) or 23, of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoneration of the personal estate; (Bootle *v.* Blundell, 1 Mer. 193;) or 24, of proving that the intention, in appointing a debtor to be executor, was to release the debt; (Brown *v.* Selvin, Cases temp. Talbot 240; S. C. on appeal, 3 Bro. P. C. 607;) or 25, of rebutting a presumption which arises from the construction of words simply *qua* words; (per Lord Thurlow, 2 Bro. C. C. 527;) or 26, of raising a presumption; (Rachfield *v.* Careless, 2 P. Wms. 157;) or 27, of increasing a legacy; (per Lord Hardwicke, in Goodinge *v.* Goodinge, 1 Ves., Sen., 231;) or 28, of increasing that which is defective; (Anon., 8 Vin. Abr. 188, G. a, pl. 1;) or 29, of adding a legacy to a will; (Whitton *v.* Russel, 1 Atk. 448;) or 30, of proving what interest a legatee was intended to take in a legacy; (Lowfield *v.* Stoneham, 2 Strange 1261;) or 31, of ascertaining an intention which upon the face of the will was indeterminate, as in the case of a devise to one of the sons of A, who hath several sons; (2 Vern. 625; and see Altham's Case, 8 Rep. 155;) or 32, of proving that words of limitation

evidence 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.[3]

were intended to be construed as words of purchase; (Bret *v.* Rigden, Plow. 340; and see Doe *v.* Kett, 4 Term R. 601; Maybank *v.* Brooks, 1 Bro. C. C. 84;) or 33, of proving that executors who had acted in part, and then renounced, were intended by the testator to act only to the extent to which they had acted; (Doyle *v.* Blake, 2 Sch. & Lefr. 240;) or 34, of proving that the testator meant to use general words in this or that particular sense; (Goodinge *v.* Goodinge, 1 Ves., Sen., 231;) or 35, of adding to, detracting from, or altering, the will; (Herbert *v.* Reid, 16 Ves. 481;) or 36, (generally) of proving *intention*. (Per Buller, J., in Nomse *v.* Finch, 1 Ves., Jun., 358; per Sir William Grant, M. R., in Cambridge *v.* Rous, 8 Ves. 22, and in Bengough *v.* Walker, 15 Ves. 514; per Lord Eldon, in Herbert *v.* Reid, 16 Ves. 485–6 and 489; Attorney-General *v.* Grote, 3 Mer. 316; Maybank *v.* Brooks, 1 Bro. C. C. 84; Doe *v.* Kett, 4 T. R. 601; Lord Lansdowne's Case, 10 Mod. 98–9; Cole *v.* Rawlinson, 1 Salk. 234; Bertie *v.* Lord Falkland, 1 Salk. 231; Lowfield *v.* Stoneham, 2 Strange 1261; Chamberlayne *v.* Chamberlayne, 2 Freem. 52; Towers *v.* Moor, 2 Vern. 98; Vernon's Case, 4 Rep. 4; Cheyney's Case, 5 Rep. 68; Brett *v.* Rigden, Plow. 340; Bac. Elem. Reg. 23; 2 Bac. Abr. 309; Challoner *v.* Bowyer, 2 Leon. 70; and the following treatises—Sugd. Vend., tit. 'Ambiguity;' Phil. on Ev.; and Roberts on Wills. *Contra*—Harris *v.* Bishop of Lincoln, 2 P. Wms. 135; Pendleton *v.* Grant, 2 Vern. 517; S. C., 1 Eq. Abr. 230; Dayrel *v.* Molesworth, 1 Eq. Abr. 230; Docksey *v.* Docksey, 2 Eq. Abr. 415; but see S. C., 11 Vin. Abr. 153; Masters *v.* Masters, 1 P. Wms. 420; and see per Lord Chancellor Brougham, in Guy *v.* Sharp, 1 Myl. & K. 602, *supra*, pl. 96, note.)" See also 1 Greenl. Ev., § 275, *et seq.*; 1 Redf. on Wills 496; Wms. Ex'rs (6th Am. ed.) 1237, note; see also Am. Bible Society *v.* Pratt, 9 Allen 109, and the note to this case in Redf. Am. Cas. on Wills 600; Crosby *v.* Mason, 32 Conn. 482; Spalding *v.* Huntington, 1 Day 8; Hearn *v.* Ross, 4 Harring. 46; Wiley *v.* Smith, 3 Ga. 551; Billingslea *v.* Moore, 14 Ga. 370; Doyal *v.* Smith, 28 Ga. 262; S. C., 31 Ga. 198; Thweatt *v.* Redd, 50 Ga. 181; Walston *v.* White, 5 Md. 297; Puller *v.* Puller, 3 Rand. 83; Webley *v.* Lanstaff, 3 Desaus. 509; Grimes *v.* Harmon, 35 Ind. 198; Huston *v.* Huston, 37 Iowa 668; Caldwell *v.* Caldwell, 7 Bush 516; Timberlake *v.* Parish, 5 Dana 346; Humble *v.* Humble, 3 A. K. Marsh 126; Jackson *v.* Payne, 2 Metc. (Ky.) 570; Tucker *v.* Seamen's Aid Soc., 7 Metc. 188; Watson *v.* Boylston, 5 Mass. 417; Gregory *v.* Cowgill, 19 Mo. 415; Brownfield *v.* Wilson, 78 Ill. 467; Gilliam *v.* Brown, 43 Miss. 641; Brown *v.* Brown, 43 N. H. 17; Nevius *v.* Martin, 1 Vroom 465; Heater *v.* Van Auken, 1 McCart. 160; Brokaw *v.* Peterson, 2 McCart. 194; Cleveland *v.* Havens, 2 Beas. 101; Brearley *v.* Brearley, 1 Stockt. 21; Heslop *v.* Gatton, 71 Ill. 528; Richards *v.* Miller, 62 Ill. 417; Hyatt *v.* Pugsley, 23 Barb. 285; Arculavius *v.* Geissenhainer, 3 Bradf. 64; Mann *v.* Mann, 1 Johns. Ch. 234; S. C., 14 Johns. 1; Belt *v.* Belt, 1 Harr. & McH. 409; Taggart *v.* Boldin, 10 Md. 104; Starling *v.* Price, 16 Ohio St. 29; Painter *v.* Painter, 18 Ohio 247; Worman *v.* Teagarden, 2 Ohio St. 380; Miller *v.* Springer, 70 Penna. St. 269; Brown *v.* Brown, 6 Watts 54; Comfirt *v.* Mather, 2 Watts & S. 450; Weatherhead *v.* Sewell, 9 Humph. (Tenn.) 272.

3. "Where the inquiry is, what the words of a will express, as distinguished

Evidence of mistake by person who drew the will rejected.

So, in Brown *v.* Selwin, (*d*) (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

from what the testator meant by the words, evidence of *declarations of intention*, of *instructions* given by the testator for preparing his will, (Bernasconi *v.* Atkinson, 10 Hare, 345,) or any evidence of a similar nature, is obviously inapplicable to the point of inquiry. Such evidence, therefore, is, for the purpose of such an inquiry, inadmissible. Declarations by the testator, on a point collateral to the question of intention, may, however, be evidence of an *independent fact*, material to the right interpretation of the testator's words. Such evidence will, then, upon the general principle, be admissible. (Herbert *v.* Reid, 16 Ves. 484; Goodtitle *v.* Southern, 1 M. & Selw. 299; Benson *v.* Wittam, 2 Sim. 493; Powys *v.* Mansfield, 3 Myl. & Cr. 359; Blundell *v.* Gladstone, 11 Sim. 467.) No fact, (it may be observed), as a general proposition, can be material, which is not coincident in point of time with the making of the will. (5 B. & C. 69, in Doe d. Winter *v.* Perratt." Wigram Extr. Ev. 174, § 104. And see Wms. Ex'rs (6th Am. ed.) 1237. See also 1 Greenl. Ev., §§ 290, 291; 1 Redf. on Wills, 539, *et seq.*; Brown *v.* Saltonstall, 3 Metc. 426; Richards *v.* Dutch, 8 Mass. 506. So, too, Weatherhead *v.* Baskerville, 11 How. 329, where declarations of the testator, made at the time of making the will, were offered to prove that in a gift to *children* he did not intend to include *daughters*; or that a bequest of $90,000, "to be made up of his (legatee's) notes, &c., which will be found sealed up and among my papers and directed to him to be delivered to him," was intended to embrace other notes over and above those found in the package, Crosby *v.* Mason, 32 Conn. 482. See, too, Fowler *v.* Colt, 10 C. E. Gr. (N. J.) 202; Vernon *v.* Marsh, 2 Green Ch. (N. J.) 502; Massaker *v.* Massaker, 2 Beas. 264; Leigh *v.* Savidge, 1 McCart. 124; Yard *v.* Carman, Penn. (N. J.) 936; Farrar *v.* Ayres, 5 Pick. 407; Barratt *v.* Wright, 13 Pick. 45; Gilliam *v.* Brown, 43 Miss. 641; Johnson *v.* Johnson, 18 N. H. 594; White *v.* Hicks, 33 N. Y. 383; Arthur *v.* Arthur, 10 Barb. 9; Lewis *v.* Lewis, 2 Watts & S. 455; Comfort *v.* Mather, 2 Watts & S. 450; Woodman *v.* Good, 6 Watts & S. 169; Ritter *v.* Foxe, 6 Whart. 99; Harrison *v.* Morton, 2 Swan (Tenn.) 461; Den *v.* Van Cleve, 4 Wash. C. C. 262; Weston *v.* Foster, 7 Metc. 297. Neither are the testator's declarations admissible to show that by a gift of *moneys* he intended bonds, mortgages, &c., Mann *v.* Mann, 14 Johns. 9; nor even

(*d*) Cas. t. Talb. 240, 3 B. P. C. Toml. 607. [It must always be assumed that the language of the will is that of the testator: if proposed by his professional adviser, it is yet adopted by him; per Wood, V. C., 10 Hare 348, 349; and see per Romilly, M. R., 32 Beav. 423. And parol evidence that a will was or was not drawn by a skilled person is not admissible, though any evidence on the point apparent on the face of the will may be considered in construing it, Richards *v.* Davies, 13 C. B. (N. S.) 69, 861; and if obviously technically drawn, the technical is the primary meaning, per Byles and Willes, JJ., Thellusson *v.* Rendlesham, 7 H. L. Cas. 449, 486. But as in the case of a deed (10 East 427, 4 B. & Cr. 272), so in the case of a will, evidence is admissible to show that the instrument was in fact executed on a different day from that stated in it, Reffell *v.* Reffell, L. R., 1 P. & D. 139.]

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 D. P.[4]

his declarations shortly before his death as to why he made certain provisions in his will, although offered for the purpose of proving undue influence, Lynch *v.* Clements, 9 C. E. Gr. (N. J.) 431; or that he intended a gift in lieu of dower not to bar dower in after-acquired lands, Chapin *v.* Hill, 1 R. I. 446. But the testator's declarations at the time of making his will have been admitted to prove an intention on his part to evade the statutes as to manumission, Cobb *v.* Battle, 34 Ga. 458; see, too, Smithwick *v.* Evans, 24 Ga. 461; or to correct a misnomer of the legatee and show the person really intended, Trustees *v.* Peaslee, 15 N. H. 317; Ex parte Hornby, 2 Bradf. 420; Wms. Ex'rs (6th Am. ed.) 1240; or to identify the subject of the gift, as of testator's "*backlands*," Ryers *v.* Wheeler, 22 Wend. 148; or "*home farm*," Boggs *v.* Taylor, 26 Ohio St. 604, affirming 20 Ohio St. 516; or to prove that certain notes of legatee held by testator were given for advancements, Tillotson *v.* Race, 22 N. Y. 122; or that the omission of a child by testator was intentional, Ramsdill *v.* Wentworth, 101 Mass. 125; or that the will was different from what testator believed it to be, Reel *v.* Reel, 1 Hawks (N. C.) 248; or that the paper in question was intended to be a deed and not a will, or *vice versa*, Robertson *v.* Dunn, 2 Murphy 133. As to declarations of testator as evidence of undue influence or fraud in the procurement of the will, see *infra*, note 6. As to declarations at time of tearing a will as evidence of intention, see Dan *v.* Brown, 4 Cow. 483; Betts *v.* Jackson, 6 Wend. 173. Whether such declarations are admissible to show that a legacy to a debtor of the testator was intended as a discharge of the debt, see Eaton *v.* Benton, 2 Hill (N. Y.) 576; Cloud *v.* Clinkinbeard, 8 B. Mon. 397.

4. See 1 Redf. on Wills 536; Wigram on Extr. Ev., § 124, p. 184, § 104, p. 174. To the same effect is Canfield *v.* Bostwick, 21 Conn. 550, where the evidence of the scrivener was offered to explain why the words "*both*" and "*personal*" were struck out of the draft of the will, and this evidence was rejected. See, too, Jackson *v.* Sill, 11 Johns. 201; Nevius *v.* Martin, 1 Vroom 465; Jones *v.* Jones, 2 Beas. 236; Cleveland *v.* Havens, 2 Beas. 101; Andress *v.* Weller, 2 Green Ch. (N. J.) 604; McKay *v.* Hugus, 6 Watts 345; Robinson *v.* Bishop, 23 Ark. 378; Avery *v.* Chappel, 6 Conn. 270; Tucker *v.* Seaman's Aid Society, 7 Metc. 188; Den *v.* Cubberly, 7 Halst. 308; Gaither *v.* Gaither, 3 Md. Ch. Dec. 158; Rothmaler *v.* Myers, 4 Desaus. 215. See, however, Nolan *v.* Bolton, 25 Ga. 352, where similar evidence was admitted to show certain advancements to have been the consideration for a note of legatees held by the testator; and Clevaley *v.* Clevaley, 124 Mass., where it was admitted to identify the property devised. But letters of the testator written before the will was made have been admitted to show his assent to the provisions of the will. McNinch *v.* Charles, 2 Rich. 229.

Lord Walpole v. Earl of Cholmondeley.

Again, in Lord Walpole *v.* Earl of Cholmondeley, (*e*) 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 he 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, 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 favor 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. (*f*) The Court of C. P., and afterwards the Court of K. B., on a writ of

Express republication of antecedent will not controlled by parol evidence.

(*e*) 7 T. R. 138, 3 Ves. 402; [In re Chapman, 8 Jur. 902, 1 Rob. 1; Payne *v.* Trappes, 1 Rob. 583, 11 Jur. 854; and see Stringer *v.* Gardiner, 27 Beav. 35, 4 De G. & J. 468; In re Nunn's Trusts, L. R., 19 Eq. 332; Farrer *v.* St. Catharine's College, L. R., 16 Eq. 19. Quincey *v.* Quincey, 5 No. Cas. 154, 11 Jur. 111, and In re Thomson, L. R., 1 P. & D. 8, are *contra: sed qu.* The *decision* in the former of these two cases may perhaps be supported on the same grounds as Rogers *v.* Goodenough, 2 Sw. & Tr. 342, 31 L. J., Prob. 49; for it appears that the will mistakenly referred to had been destroyed. *Vide ante* p. *191.]

(*f*) *Ante* p. *188.

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: but 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 canceling 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."

Difference between revoking act and revoking codicil.

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 referred 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.[5] Thus, in Earl of

5. See 1 Redf. on Wills 498; McAllister *v.* Butterfield, 31 Ind. 25; Abercrombie *v.* Abercrombie, 27 Ala. 489; Caldwell *v.* Caldwell, 7 Bush 516; Webb *v.* Webb, 7 Mon. 626; Stephen *v.* Walker, 8 B. Mon. 600; Lefevre *v.* Lefevre, 59 N. Y. 434, reversing 2 Thomps. & C. 330; Cæsar *v.* Chew, 7 Gill & J. 127. In Chappel *v.* Avery, 6 Conn. 34, 270, evidence by the scrivener to prove that the wife was to have the use of all the real estate "until all the children become of lawful age," instead of one-third "during her widowhood," was rejected. So, in Comstock *v.* Hadlyme, 8 Conn. 254, to prove an omission of a $100 legacy. But where it appeared by the will itself that there was an omission in the description of the

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

property devised, parol evidence was admitted to correct it, Kenny *v.* Kenny, 3 Litt. 302. In Jones *v.* Jones, 2 Beas. 236, after a gift to the legatee of one-third part of his property, a mistake of one-third for two-thirds cannot be shown or corrected by *parol*. In Andress *v.* Weller, 2 Gr. Ch. (N. J.) 604, the evidence of the scrivener that he had omitted a legacy directed by the testator, was held inadmissible. See, too, Harrison *v.* Morton, 2 Swan (Tenn.) 461; Hawman *v.* Thomas, 44 Md. 30; Rosborough *v.* Hemphill, 5 Rich. Eq. 95. But it is competent to prove under the statute of Massachusetts that the omission of children by the testator in his will, was intentional and not by an oversight, Ramsdill *v.* Wentworth, 101 Mass. 125; Buckley *v.* Gerard, 123 Mass. 8; Converse *v.* Wales, 4 Allen 512; Wilson *v.* Foskett, 6 Metc. 404. But in Rhode Island the rule is otherwise, Chace *v.* Chace, 6 R. I. 407. But in South Carolina the court admitted parol evidence that the name of one child was omitted by mistake, and rectified the mistake. Geers *v.* Winds, 4 Desaus. 85. As to the power of chancery to correct mistakes in wills, Mr. Justice Story, in his treatise on Equity Jurisprudence, §§ 179–181, says: "In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent on the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the statute of frauds, which requires wills to be in writing (whatever may have been the case before the statute), parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. But the mistake in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So if there is a mistake in the name, or discription, or number, of the legatees intended to take, or in the property intended to be bequeathed, equity will correct it. It will be found upon examination we think that the American courts of equity have not interfered to correct alleged mistakes in the execution of wills, either as to the statutory requisites, or the manner of writing, as by inserting the name of another legatee in lieu of one which had been written by mistake of the scrivener, or applying a devise or bequest to a sub-

(*h*) 5 Mad. 364. In Langston *v.* Langston, 8 Bli. 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?

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

ject matter intended by the testator, but not fully expressed. The extent to which the English equity courts have sometimes carried this branch of their remedial powers has more the appearance of making men's wills, as they probably would do if now alive, than carrying them into effect, as they were in fact made. But one may make a binding contract to dispose of his property by will in a particular mode, and a court of equity will decree specific performance of such a contract, where otherwise it would operate as a fraud upon others. But in each of these cases the mistake must be clearly made out; for if it is left doubtful equity will not interfere. And so if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake. Neither will equity rectify a mistake if it does not appear what the testator would have done in the case, if there had been no mistake." See also Wigram on Extr. Ev. (2d Am. ed.), p. 265, *et seq.* The effect of such mistake or omission to render the will void has been denied in Comstock *v.* Hadlyme, 8 Conn. 254. In the language of Williams, J., in this case: "It is said, that this omission makes the will void; that it shows it was not her will—not the will she meant to make. Now, if a mistake in drafting a will makes it void, it is certainly very surprising that no case has been produced from an English or American book, in support of the proposition, although the various decisions relative to the construction of the statute of frauds, would fill volumes. It cannot be believed but that similar mistakes have been often made. The statute, when it required all wills to be in writing, signed by the testator and attested by witnesses, certainly intended that the evidence and the whole evidence, of the disposition of the property by will, should be the will itself; that the evidence of the intent of the devisor should be derived from the writing, signed by him and solemnly attested; otherwise innumerable would be the cases where evidence of mistake would be claimed and proved. How often is it that the words used by the scrivener convey a different estate from what the testator designed! Yet it has always been decided, that parol testimony could not be admitted to prove, that the devisor meant to give a different estate from what the will expressed. Chappel *v.* Avery, 6 Conn. 34; Farrer *v.* Ayres, 5 Pick. 407; Button *v.* Amer. Tract Society, 23 Vermt. 336. And if it is settled, that you cannot, by parol proof, alter the legal import of the terms used by the scrivener, such a will must either be void, or convey a different estate from the one intended. That such a will is not void, is proved by repeated declarations of judges, that by the legal construction, they knew the intent of the testator was frequently violated. If by the construction given to the words used, the intent may be defeated, and yet the will remain valid, why may not the same effect follow where it arises from an omission to insert certain words, which were intended? In neither case is the effect of the will exactly what the testator intended; but in neither case can the fact be ascertained without the aid of parol testimony, and if such testimony is to be admitted, we do away with part at least of the beneficial effect of the statute of frauds, and leave every will exposed to litigation, on a claim of a different intent. In contracts, mistakes have, indeed, been rectified in a Court of Chancery; but no case is recollected, where they have been holden *void*, on account of mistake. In Phillips *v.* Chamberlaine, 4 Vesey 51, 57, where an intention

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 J. 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 the Gloucester estate; and upon this issue the evidence tendered

was expressed to give a legacy to the *Humane Society*, but no sum was inserted, the will was not held to be void. And it would seem, that in this case, if any remedy existed, it would be one that would not destroy the whole will, but one which would correct the mistake and make the will what it ought to be. This has been attempted, in a recent case; and it was decided, that parol testimony could not be admitted to prove the mistake. It would be to make a will by witnesses, and not by writing; to make a will anything. Avery *v.* Chappel, 6 Conn. 270, 275. I think, then, it follows, that if courts of chancery cannot admit such evidence to prove a mistake which they might correct, courts of law cannot admit it to prove a mistake to set aside the will. The danger arising from the nature of the proof, is the same in both cases; and if the rules of law would allow that proof, it would be more congenial to principle, and more likely to effectuate the intent of the devisor, to correct the mistake, than to make void the whole instrument. And if the former cannot be done, much less can the latter." In Salmon *v.* Stuyvesant, 16 Wend. 332, where the defective clause was void as a perpetuity, Cowen, J., said that a decision avoiding the whole will for that reason "would operate as a sentence of nullity against the more important class of wills. No will of any considerable estate, embracing various kinds of property and seeking to provide for a numerous family by the bestowment of different interests, could ever stand the test of such a principle. Some slight mistake of testamentary power, some uncertainty of expression, some lapse of ademption, or one of the thousand occurrences which baffle human wisdom and forecast, always has arisen and always will arise to prevent the exact fulfillment of all the testator's purposes."

would be admissible. (*i*) No such issue was asked. The case was afterwards re-heard before the V. C., 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 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 V. C. thought that, if such a case had been originally made, they would have been entitled to such an issue; (*j*) 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 had used them under mistake or misapprehension, nor to supply

Clause improperly introduce into will may be rejected on issue *devisavit vel non.*

(*i*) The report states that a case was cited at the bar on the authority of Richards, C. B., in which Lord Eldon had sent it to the jury upon the same description of facts. [But Lord St. Leonards says (Law of Prop. 207) it could not be maintained that the omission of the word "Gloucester" in the particular devise would render the whole will void as to the Gloucester estate: because although the will did not contain all that the testator intended as to this estate, it contained in the actual devise of it nothing but what he did intend. The case was ultimately decided in D. P. upon the construction of what still appeared on the face of the will. Law of Prop., p. 367.

(*j*) Upon this Lord St. Leonards remarks—"This is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, though inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation made through carelessness or ignorance could be corrected by striking out the words improperly introduced." Law of Prop., p. 197. See also Harter *v.* Harter, L. R., 3 P. & D. 11; In re Davy, 1 Sw. & Tr. 262, 29 L. J., Prob. 161, 5 Jur. (N. S.) 252. Moreover the effect of striking out the words in Newburgh *v.* Newburgh would be the opposite of that in the decided cases: it would create a devise and not an intestacy. Per Sir J. Wigram, Wills, pl. 183, n. And see Stanley *v.* Stanley, 2 J. & H. 502.]

(*k*) 1 M. & Sc. 352. [See Wade *v.* Nazer, 12 Jur. 188, 6 No. Cas. 46, 1 Rob. 627.]

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 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.

[So parol evidence is admissible to show that a document duly executed as a will was never intended to operate as the will of the deceased; as, if two persons, intending to make their wills, each by mistake executes the document prepared for the other: (*m*) or to show that a document was not intended to be testamentary but only as a contrivance to effect some collateral object, *e. g.*, to be shown to another person to induce him to comply with the *pretended testator's wish. (*n*) In both

Execution of wrong instrument;

—of a pretended will;

(*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; In re Duane, 2 Sw. & Tr. 590, 31 L. J., Prob. 173; In re Oswald, L. R., 3 P. & D. 162.

(*m*) In re Hunt, L. R., 3 P. & D. 250.

(*n*) Lister *v.* Smith, 3 Sw. & Tr. 282, 33 L. J., Prob. 29.

these cases the *animus testandi* is wanting. So parol evidence is admissible to show that the later of two identical documents was intended to be a duplicate of the earlier one, and not a distinct instrument. (*o*)

—of a duplicate.

Parol evidence is also admissible for the purpose of counteracting fraud;[6] 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 Doe d. Small *v.* Allen, (*p*) 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. It was held in K. B. 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, (*q*) 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., thought the declarations of the testator were admissible

Rule in cases of fraud.

One will surreptitiously obtruded for another.

(*o*) Hubbard *v.* Alexander, 3 Ch. D. 738; see also Doe *v.* Strickland, 8 C. B. 724.]

6. The rule is well established, although it is rather one of *probate* than of *construction*, that parol evidence inadmissible to explain a will may be admitted to show fraud in its execution, Hearn *v.* Ross, 4 Harring. 46; Webb *v.* Webb, 7 Mon. 626; Collins *v.* Hope, 20 Ohio 493; 1 Redf. on Wills 508, *et seq.*; or a mistake (under the issue of *devisavit vel non*), Reel *v.* Reel, 1 Hawks 248; McAllister *v.* Butterfield, 31 Ind. 25; Grimes *v.* Harmon, 35 Ind. 198; or to show that testator intended for a will what was a deed in form, Robertson *v.* Dunn, 2 Murph. 133. But see as to fraud and undue influence the case of Boylan *v.* Meeker, 4 Dutch. 276. See also Cawthorn *v.* Haynes, 24 Mo. 236; Bates *v.* Bates, 27 Iowa 110. But not to show by the declarations of the testator that he had been compelled by fear to make the will and now verbally revoked it, Jackson *v.* Kniffen, 2 Johns. 31; see, too, Lewis *v.* Lewis, 2 Watts & S. 455; Means *v.* Means, 5 Strobb. 167; Hayes *v.* West, 37 Ind. 21; Harring *v.* Allen, 25 Mich. 505.

[(*p*) 8 T. R. 147.

(*q*) 1 Moo. & R. 525.]

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 occurs in the case suggested by Lord Eldon in Stickland *v.* Aldridge, (*r*) "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 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."

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*. (*s*)

Parol evidence admissible to repel a resulting trust.

It seems, too, that parol evidence is admissible for the purpose of rebutting a resulting trust;[7] 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. (*t*)

On the same principle, parol evidence was, under the old law, admissible to support the claim of an executor (now taken away by statute

(*r*) 9 Ves. 519. See also Drakeford *v.* Wilkes, 3 Atk. 539.

(*s*) See Oldham *v.* Litchfield, 2 Vern. 506; [Podmore *v.* Gunning, 7 Sim. 644; Tee *v.* Ferris, 2 K. & J. 357; Chester *v.* Urwick, 23 Beav. 407; Proby *v.* Landor, 28 Beav. 504; M'Cormick *v.* Grogan, L. R., 4 H. L. 82; Norris *v.* Frazer, L. R., 15 Eq. 318.]

7. See Mann *v.* Mann, 1 Johns. Ch. 234; S. C., 14 Johns. 9; Botsford *v.* Burr, 2 Johns. Ch. 416; Steere *v.* Steere, 5 Johns. Ch. 1; Jackson *v.* Feller, 2 Wend. 465; Iddings *v.* Iddings, 7 Serg. & R. 111; Billingslea *v.* Moore, 14 Ga. 370; Love *v.* Buchanan, 40 Miss. 758; Fitzpatrick *v.* Fitzpatrick, 36 Iowa 674. See also Mr. O'Hara's note in Wigram on Extr. Ev. 274. Parol evidence is also admissible to establish a trust, *e. g.*, by means of promises made by the devisee to the testator. Colgate D. Owing's Case, 1 Bland 370; Collins *v.* Hope, 20 Ohio 493; Jones *v.* McKee, 3 Penna. St. 496; Gaullaher *v.* Gaullaher, 5 Watts 200. But parol evidence, going to show that the will was made with the knowledge and assent of A, who declared his intention of carrying out its provisions, will not establish a binding contract to charge the estate of A with a trust in favor of C. Whitridge *v.* Parkhurst, 20 Md. 62. Nor is it competent to prove by the testator's declarations that he intended a devise to A, to be for the benefit of B. Weston *v.* Foster, 7 Metc. 297.

(*t*) Mallabar *v.* Mallabar, Cas. t. Talb. 79.

1 Will. IV., c. 40) to the undisposed-of residue of a testator's personal estate, against the presumption in favor of the next of kin created by a legacy to the executor. (*u*) Such evidence may also be adduced to repel the presumption [as distinguished from an express declaration (*x*)] 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, (*y*)] of a legacy to such child. (*z*) [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. (*a*) 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; (*b*) and in both cases its effect would be to contradict the apparent meaning of the will. (c)] 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; (*d*) [or to prove that gifts have been made to the legatee by the testator in his lifetime, and that they were of a nature to bring them within the equitable presumption, (*e*) or within the terms of an express declaration contained in the will, (*f*) that advancements should be in satisfaction of legacies. And for this purpose contemporaneous 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.]

(*u*) See 1 Rop. Leg. by White 337. [*Secus* since the act, Love *v.* Gaze, 8 Beav. 474.

(*x*) Smith *v.* Conder, 9 Ch. D. 170.

(*y*) Pym *v.* Lockyer, 5 My. & C. 29.]

(*z*) 1 Rop. Leg. by White 338.

[(*a*) Kirk *v.* Eddowes, 3 Hare 517.

(*b*) Kirk *v.* Eddowes, 3 Hare 520; White *v.* Williams, 3 Ves. & B. 72.

(*c*) Hall *v.* Hill, 1 D. & War. 94; Lee *v.* Pain, 4 Hare 216; Palmer *v.* Newell, 20 Beav. 39.]

(*d*) Powys *v.* Manfield, 3 My. & C. 359.

[(*e*) Rosewell *v.* Bennett, 3 Atk. 77; Kirk *v.* Eddowes, 3 Hare 509; Twining *v.* Powell, 2 Coll. 262.

(*f*) Whateley *v.* Spooner, 3 K. & J. 542; M'Clure *v.* Evans, 29 Beav. 422.

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[8] is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be

8. As to the inadmissibility of parol proof of the testator's *intentions*, see Robinson *v.* Bishop, 23 Ark. 378; Avery *v.* Chappel, 6 Conn. 270; Canfield *v.* Bostwick, 21 Conn. 550; Wiley *v.* Smith, 3 Ga. 551; Williams *v.* McIntyre, 8 Ga. 34; Allen *v.* Van Mater, 1 Metc. (Ky.) 264; Long *v.* Duvall, 6 B. Mon. 219; Stephen *v.* Walker, 8 B. Mon. 600; Mitchell *v.* Walker, 17 B. Mon. 61; Weston *v.* Foster, 7 Metc. 297; Armistead *v.* Armistead, 32 Ga. 597; Crocker *v.* Crocker, 11 Pick. 252; Johnson *v.* Johnson, 18 N. H. 594; Yard *v.* Carman, Penn. (N. J.) 936; Jackson *v.* Sill, 11 Johns. 201; Kelly *v.* Kelly, 25 Penna. St. 460; McKay *v.* Hugus, 6 Watts 345; Comfort *v.* Mather, 2 Watts & S. 450; Gannaway *v.* Tarpley, 1 Coldw. (Tenn.) 572; Den *v.* Van Cleve, 4 Wash. C. C. 262; Bradley *v.* Bradley, 24 Mo. 311; Coffin *v.* Elliott, 9 Rich. Eq. 244; Durant *v.* Ashmore, 2 Rich. 184; Ralston *v.* Telfair, 2 Dev. Eq. 255; Judy *v.* Williams, 2 Ind. 449; Field *v.* Eaton, 1 Dev. Eq. 283; Doe *v.* Kinney, 3 Ind. 50; Bradley *v.* Bradley, 24 Mo. 311; Fitzpatrick *v.* Fitzpatrick, 36 Iowa 674. See also 1 Redf. on Wills 594, *et seq.* It is not admissible to prove by parol that the testator, by a provision that a bequest should vest *absolutely* in his daughters *and their heirs*, intended to create a separate estate in them, Johnson *v.* Johnson, 32 Ala. 637; nor that he intended to include *grandchildren* in a gift to children, Willis *v.* Jenkins, 30 Ga. 169; Mordecai *v.* Boylan, 6 Jones Eq. 365; nor that *slaves* were not intended to be included in a general bequest of testator's *movable effects*, Humble *v.* Humble, 3 A. K. Marsh. 126; nor to prove that testator intended a bequest to a debtor to be a satisfaction of the debt, Cloud *v.* Clinkinbeard, 8 B. Mon. 397 (but this case must be considered to be overruled; see *infra*); or that "*property*" was intended to include only *personal* and not *real* property, Wheeler *v.* Dunlap, 13 B. Mon. 292; or that a remainder to A's children, B and C, was intended for all his children, including others, Osborne *v.* Varney, 7 Metc. 301; or by testator's declarations that a gift to A and his wife, and the survivor of them, was intended to give A a fee simple, Farrar *v.* Ayres, 5 Pick. 407; or that a direction to executors to provide a "handsome support" for A and B, was intended only for the case of their other means failing, Crocker *v.* Crocker, 11 Pick. 252; or that by a trust until the charter of a certain bank expire, was meant until the *original* charter expire, Barrett *v.* Wright, 13 Pick. 45; or what testator intended by the word "heirs," Love *v.* Buchanan, 40 Miss. 758; or by the word "expenses," as, for instance, that he caused the word "*funeral*," before "*expenses*," to be omitted, in order that the word might cover also expenses of settlement of the estate, Matter of Haines, 4 Halst. Ch. 506; or that the intention was to give *two*-thirds where the will gave *one*, Jones *v.* Jones, 2 Beas. 236; or that it was intended to include *illegitimate children* in the word *children*, Heater *v.* Van Anken, 1 McCart. 160; Gardner *v.* Heyer, 2 Paige 11; or *stepchildren*, Fowke *v.* Kemp, 5 Harr. & J. 135; or to include in a gift to three daughters the son of a deceased (fourth) daughter, Brokaw *v.* Peterson, 2 McCart. 194; Reitter *v.* Fox, 6 Whart. 99; or to charge legacies on the land devised, Massaker *v.* Massaker, 2 Beas. 264; Leigh *v.* Savidge, 1 McCart. 124 (in this case a distinction was made between testator's *declarations* and the *circumstances of his property*, the latter being held admissible and the former not); Andress *v.* Weller,

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,

2 Gr. Ch. (N. J.) 604. The distinction above noted in Leigh *v.* Savidge is made also in Van Winkle *v.* Van Houten, 2 Gr. Ch. (N. J.) 172; Paxson *v.* Potts, 2 Gr. Ch. (N. J.) 313; Dey *v.* Dey, 4 C. E. Gr. (N. J.) 137; Puller *v.* Puller, 3 Rand. 83. To the same effect, as to charging legacies on land, see Tole *v.* Hardy, 6 Cow. 333. But it is held, in Myers *v.* Eddy, 47 Barb. 263, that extraneous circumstances are only admissible to prove such intention in case of latent ambiguity. So parol evidence to show an intention on the part of the testator to execute a power by his will was held admissible in the way of circumstances of property, &c., but not of declarations of the testator, White *v.* Hicks, 33 N. Y. 383. And parol evidence (as to character of the land devised) is inadmissible to show that it was testator's intention to give a fee simple, Charten *v.* Otis, 41 Barb. 525; or to contradict the legal presumption of revocation in certain cases, Adams *v.* Winne, 7 Paige 97; or that it was the testator's intention that the heirs of D should together take one-fourth (instead of each one-fifth) in a gift to A, B, C and the heirs of D, *i. e.*, E and F, Bunner *v.* Storm, 1 Sandf. Ch. 357; or to show that the testator considered certain land to belong to him, and intended it to pass by a general devise, Miller *v.* Springer, 70 Penna. St. 269; or that the testator had declared his intention to die intestate, as evidence of a revocation, Lewis *v.* Lewis, 2 Watts & S. 455; or what the testator intended as to the powers under a trust erected by his will, Woodman *v.* Good, 6 Watts & S. 169; or that testator intended A's son to take a gift "to A, her heirs and assigns," in case of A's death before the testator, Sword *v.* Adams, 3 Yea. 34; or that only *sons* were intended by "*children*," Weatherhead *v.* Sewell, 9 Humph. (Tenn.) 272; Weatherhead *v.* Baskerville, 11 How. 329; or children *and grandchildren*, Harrison *v.* Morton, 2 Swan (Tenn.) 461; or that, by a gift expressly in lieu of dower, testator did not intend to bar dower in after-acquired property, although a letter of testator's to that effect was found with the will, Chapin *v.* Hill, 1 R. I. 446; or that testator intended to give only a life estate, McCray *v.* Lipp, 35 Ind. 116; or that by a bequest of a slave named "Aaron," testator meant a slave named "Lamon," Barnes *v.* Snivens, 5 Ired. Eq. 392. In this case it was said by Ruffin, C. J.: "There is no ambiguity as there would be if there were two Aarons, when it would be admissible to show which of the two was meant. But here the attempt is to show that testator did not mean any Aaron at all, but meant Lamon, a different person altogether." But parol evidence has been held admissible to show that advancements made by a testator subsequent to his will were not intended by him to satisfy the provision in the will, May *v.* May, 28 Ala. 141; Rogers *v.* French, 19 Ga. 316; Clendening *v.* Clymer, 17 Ind. 155; Hine *v.* Hine, 39 Barb. 507; or to show that certain notes taken by the testator were given for advancements made by him, Nolan *v.* Bolton, 25 Ga. 352; Tillotson *v.* Race, 22 N. Y. 122; or where a bequest of money was made to executors, to be used and disposed of by them according to verbal instructions given them, to show what those instructions were, Cagney *v.* O'Brien, 83 Ill. 72; or to show that certain of his children were intentionally omitted in his will, Ramsdill *v.* Wentworth, 101 Mass. 125; Buckley *v.* Gerard, 123 Mass. 8; Wilson *v.* Foster, 6 Metc. 400; Lorieux *v.* Kellar, 5 Iowa 196. (But this rule is different in Rhode Island—Chace *v.* Chace, 6 R. I.

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, (*g*) much less on that particular occasion, (*h*) 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 Doe d. Brown *v.* Brown, (*i*) 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

407; Missouri—Bradley *v.* Bradley, 24 Mo. 311; California—Estate of Garraud, 35 Cal. 336;) or that one child's name was omitted by mistake, Geer *v.* Winds, 4 Desaus. 85. So an intention on the part of the testator to evade a statute against manumission may be proved by parol, Smithwick *v.* Evans, 24 Ga. 461; Cobb *v.* Battle, 34 Ga. 458. So, too, an intention that a legacy to a debtor should be a discharge of the debt or otherwise, Gilliam *v.* Chancellor, 43 Miss. 437; Gilliam *v.* Brown, 43 Miss. 641; Williams *v.* Crary, 8 Cow. 246; 4 Wend. 443; Stagg *v.* Beekman, 2 Edw. 89; (whether testator's declarations are admissible for that purpose, *quære*, Eaton *v.* Benton, 2 Hill (N. Y.) 576;) Zeigler *v.* Eckert, 6 Penna. St. 13; Holmes *v.* Holmes, 36 Vt. 525; Hopkins *v.* Holt, 9 Wis. 206. And in Brown *v.* Dysinger, 1 Rawle 408, parol evidence was admitted to show that only personal property was intended by a gift of "*any earthly property* which God hath been pleased to give me;" or to show whether gold or Confederate States paper was intended by a legacy in "dollars," Elder *v.* Ogletree, 36 Ga. 64. In the foregoing enumeration of cases relating to parol evidence of intention of testator, no notice is taken of the large class of cases where there is a latent ambiguity, and such evidence is admitted to *identify the person* or *thing* designated. As to these cases, see *infra*.

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[(*g*) See per Parke, B., Shore *v.* Wilson, 9 Cl. & Fin. 558; Crosley *v.* Clare, 3 Sw. 320, n.; Millard *v.* Bailey, L. R., 1 Eq. 378.

(*h*) 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; Knight *v.* Knight, 2 Gif. 616, is *contra;* but the rule as stated in the text is firmly settled.] Observe that the rule 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 in the will. [Lee *v.* Pain, 4 Hare 251, *post;* Douglas *v.* Fellows, Kay 118.]

(*i*) 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 In re Feltham's Trusts, 1 K. & 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 to

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.

So, in Doe d. Chichester *v.* Oxenden, (*k*) (which is a leading authority,) where a testator devised his "estate of 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 C. P. 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 not to go beyond the line. This decision was affirmed in D. P. on the unanimous opinion of the judges; (*l*) and the principle of it has been since repeatedly recognized. Thus, in Doe d. Browne *v.* Greening, (*m*) the Court of K. B., on its authority, rejected evidence offered to show that, under a devise of lands "*at* Coscomb," it was intended to include lands *near* Coscomb.

Extent of "estate of Ashton" not enlarged by extrinsic evidence.

So, in Doe d. Tyrrel *v.* Lyford, (*n*) 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.

Construction of words not varied by evidence of actual intention.

Again, in Doe d. Preedy *v.* Holton, (*o*) 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*

prove the fact that the testatrix always called the surgeon Thomas. From that fact the court inferred that 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." The distinction appears to have been overlooked in In re Gregory's Settlement, 6 N. R. 282.]

(*k*) 3 Taunt. 147. This case seems to have settled a point left in doubt by Whitbread *v.* May, 2 B. & P. 593.

[(*l*) 4 Dow 65.]

(*m*) 3 M. & Sel. 171. [See also Evans *v.* Angell, 26 Beav. 202. But as to the meaning of "at," see Homer *v.* Homer, 8 Ch. D. 758.]

(*n*) 4 M. & Sel. 550. [As to Collison *v.* Girling, 4 My. & C. 63, 9 Cl. & Fin. 88, see Wigr. Wills, 43 and 48, n., 4th ed.]

(*o*) 5 Nev. & M. 391, 4 Ad. & Ell. 76.

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 Castledon *v.* Turner, (*p*) 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; 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 he 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. (*q*)

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

[(*p*) 3 Atk. 257.]

(*q*) Parol evidence is also inadmissible for the purpose of raising a case of election, Clementson *v.* Gandy, 1 Kee. 309, *post* ch. XIV.

them with, and give full scope and effect to, such seemingly repugnant context.

To this principle, it is conceived, may be referred the important case of Doe d. Beach *v.* Earl of Jersey, (*r*) 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 4000 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, (*s*) and *consequently* that a question arising upon any particular tenement was properly a question of parcel or no parcel,

Devise of the Briton Ferry estate.

(*r*) 1 B. & Ald. 550, and 3 B. & Cr. 870.

[(*s*) The same case had previously been before the Court of K. B. on a somewhat different point; and there Bayley, J., said it was clear that the devise 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.

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 Doe d. Gore *v.* Langton, (*t*) 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 K. B. 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, (*u*) 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. (*x*) [And where the testator makes use of words which in their ordinary sense are intelligible, but which are used by a certain class of persons to whom the testator

(*t*) Stated *post* ch. XXIV.

(*u*) 2 B. & Ad. 693.]

(*x*) 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, Wig. Wills, App.

Meaning of contraction used by testator.—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 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.

belonged, (*y*) or in a certain locality where he dwelt, (*z*) 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. (*a*)

*[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. (*b*) Thus, in Lee *v.* Pain, (*c*) 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 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. (*d*)] Nicknames.

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 at the date of will proper to be regarded.

[(*y*) Clayton *v.* Gregson, 5 Ad. & Ell. 302; Shore *v.* Wilson, 9 Cl. & Fin. 525.

(*z*) Per Parke, B., Richardson *v.* Watson, as reported 1 Nev. & M. 575; Smith *v.* Wilson, 3 B. & Ad. 728; Anstee *v.* Nelms, 1 H. & N. 225. In the last case, the devise was of "lands in the parish of D.," and evidence was admitted to show that a part of the testator's lands which was in another parish was generally reputed to be in the parish of D.

(*a*) Richardson *v.* Watson, 4 B. & Ad. 799, 1 Nev. & Man. 575. See Wigr. Wills, pl. 119.

(*b*) Per Lord Abinger, C. B., Doe *v.* Hiscocks, 5 M. & Wels. 368.

(*c*) 4 Hare 251.

(*d*) See also Wigr. Wills, pl. 65, and n.

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.[9] To

9. Evidence as to the condition of the testator's *property, family,* &c., is admissible to explain a *latent ambiguity.* Brainerd *v.* Cowdrey, 16 Conn. 10; Bond's Appeal, 31 Conn. 90; Billingslea *v.* Moore, 14 Ga. 370; Allen *v.* Van Meter, 1 Metc. (Ky.) 264; Mitchell *v.* Mitchell, 6 Md. 224; Darnall *v.* Adams, 13 B. Mon. 273; Kincaid *v.* Lowe, Phill. Eq. 41; Lowe *v.* Carter, 2 Jones Eq. 377; Morton *v.* Perry, 1 Metc. 449; Brown *v.* Saltonstall, 3 Metc. 426; Tucker *v.* Seamen's Aid Soc., 7 Metc. 188; McLeod *v.* McDonnel, 6 Ala. 236; Travis *v.* Morrison, 28 Ala. 494; Lamb *v.* Lamb, 11 Pick. 375; Brown *v.* Thorndike, 15 Pick. 400; Gilliam *v.* Chancellor, 43 Miss. 437; Wooten *v.* Redd, 12 Gratt. 196; Waters *v.* Howard, 1 Md. Ch. Dec. 112; Richards *v.* Miller, 62 Ill. 417 (to show whom testatrix considered her heirs-at-law); Goodhue *v.* Clark, 37 N. H. 525; Second Cong. Soc. *v.* First Cong. Soc., 14 N. H. 327; Trustees *v.* Peaslee, 15 N. H. 327; Morgan *v.* Dodge, 44 N. H. 255; Halsted *v.* Meeker, 3 C. E. Gr. (N. J.) 136 ("where there is any doubt on the face of the will," Zabriskie, C.); Van Winkle *v.* Van Houten, 2 Gr. Ch. (N. J.) 172; Paxson *v.* Potts, 2 Gr. Ch. (N. J.) 313; Dey *v.* Dey, 4 C. E. Gr. (N. J.) 137; Brearley *v.* Brearley, 1 Stockt. 21; Leigh *v.* Savidge, 1 McCart. 124; White *v.* Hicks, 33 N. Y. 383 (devise shown to be in execution of a power, by the fact that the amount bequeathed greatly exceeded the testator's private property). So in construing a gift to wife of "her lawful right of *dower* out of my estate," to one share of both real and personal property. Adamson *v.* Ayres, 1 Halst. Ch. 349. Chancellor Green uses this language in the case of Leigh *v.* Savidge, 1 McCart. 131, above cited: "Whether parol evidence is admissible as to the amount and nature of the testator's estate or other extrinsic circumstances, in order to ascertain the testator's intention to charge legacies upon real estate or to exonerate the personalty, the authorities are by no means agreed. The decided weight of the English authorities would seem to be against it. Stephenson *v.* Heathcote, 4 Eden 43, and cases cited, note (*a*); Ancaster *v.* Mayer, 1 Bro. C. C. 466; Brummel *v.* Prothero, 3 Vesey 111; Aldridge *v.* Lord Wallscourt, 1 Ball & B. 315; Booth *v.* Blundell, 1 Mer. 154; Parker *v.* Fearnley, 2 Sim. & Stu. 592; see, also, Tole *v.* Hardy, 6 Cowen 341. In Stephenson *v.* Heathcote, Lord Keeper Henley said: 'The intention of the testator must be discovered from the words of the will itself, and not from extrinsic circumstances. We are not to inquire into the amount of the personal estate to know whether it be or be not sufficient to pay the testator's debts; because that would be to establish a general rule, that in every case where the personal estate is insufficient, it must be presumed to be the testator's intention to charge his real estate with the payment of all his debts. Besides the personal estate is vague and uncertain, and subject to great fluctuations; few men know what their personal estate is.' And in the comparatively recent case of Parker *v.* Fearnley, 2 Sim. & Stuart 592, the Vice Chancellor said, 'the court cannot take into consideration the amount of the personal estate.' The authorities are, however, by no means uniform. In Stapleton *v.* Colville, Forester 202, which is one of the earliest reported cases on this subject, the question was, whether the testator, by his will, had charged the debts upon the real estate in exoneration of the personalty. The single question, said Lord Chancellor Talbot, for the judgment of the court is, whether the per-

this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose

sonal estate shall or shall not be liable to the payment of the testator's debts. What the *quantum* of the debts or the amount of the personal estate was at the testator's death, does not appear; if it did, it would give a great light into this matter. He thus took it as clear that such an examination could be gone into, although he declares, in the same opinion, that the testator's intent must govern, and that intent be collected from the will itself. See Ancaster *v.* Mayer, 1 Brown's Ch. Cas. 466; Dyose *v.* Dyose, 1 P. W. 305; Noel *v.* Noel, 12 Price 213. But whatever may be the rule of evidence elsewhere, it is well settled, in this court at least, that such evidence is admissible. In Van Winkle *v.* Van Houten, 2 Green's Ch. R. 186, Chancellor Vroom, in regard to the rule adopted by Vice Chancellor Leach in Parker *v.* Fearnley, said, 'this principle is too limited to be practically useful.'—'In ascertaining the intention of the testator, where he has not charged his lands explicitly with the payment of debts or legacies, we must be governed not only by the expressions of the will, but the situation of the property disposed of and the person taking it.' In White *v.* Executors of Olden, 3 Green's Ch. R. 362, Chancellor Pennington enumerates, as one of the grounds of his opinion for charging the legacies upon the real estate, the character of the legacies and the relations in which the legatees stood to the testator. In Adamson *v.* Ayres, 1 Halst. Ch. R. 353, upon a question of intention, Chancellor Halsted said: 'The situation of the estate, as to the comparative amounts of realty and personalty, might certainly be shown. Suppose the estate consisted of $100 in land and $10,000 in personalty, the court would not shut its eyes to that fact; and it would have a legitimate influence on the reading of the will.' In Snyder *v.* Warbasse, 3 Stock. 466, Chancellor Williamson said: 'In searching for the intention of the testator, we are not confined to the will itself, but may look at the situation of the property disposed of and the persons taking it.' These cases clearly show that, by the course of adjudication in this state upon a question of intention, parol evidence of the situation of the property disposed of, and of the persons taking it, is admissible." See, too, Irving *v.* De Kay, 9 Paige 522; Smith *v.* Wyckoff, 3 Sandf. Ch. 77; Myers *v.* Eddy, 47 Barb. 263, where the admissibility of such evidence is limited to cases of latent ambiguity; Dewitt *v.* Yates, 10 Johns. 156, where the question was whether a gift was cumulative or not. So it has frequently been admitted in cases of latent ambiguity to identify the *person* intended, Ex parte Hornbey, 2 Bradf. 420, or the *thing*, Rom. Cath. Orph. Asylum *v.* Emmons, 3 Bradf. 144; but evidence of the character of the land devised is not admissible as tending to show that the testator's intention was to devise a fee, Charten *v.* Otis, 41 Barb. 525. See, too, Edens *v.* Williams, 3 Murph. 27; Starling *v.* Price, 16 Ohio St. 29, but not to show a child *en ventre* intended to be included in a gift to "the daughters of A *now living*;" Vernor *v.* Henry, 3 Watts 393; Brownfield *v.* Brownfield, 12 Penna. St. 136. In this case Gibson, C. J., says: "To remove a latent ambiguity circumstances indicative of the state of the testator's affections towards the object of his bounty or the relative circumstance of his connections or his acts and declarations in respect to the thing given or the person of the donee are constantly admitted." And in Gannaway *v.* Tarpley, 1 Coldw. (Tenn.) 572, Carruthers, J., says of the same subject: "The rule, that the intention of the testator must be collected from the will itself, and not elsewhere or by parol evidence, except in cases of latent ambiguity, does

language he has to interpret; (*e*) 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 allowing "conjectural interpretation *to usurp the place of judicial exposition." (*f*) 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 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, (*g*)

not forbid a reference to the *state of facts under which the will was made*." See, too, Hunt *v.* White, 24 Tex. 642; Wasthoff *v.* Dracourt, 3 Watts 240; Marshall's Appeal, 2 Penna. St. 388; Glover *v.* Hayward, 4 Cush. 580; Fogle *v.* Fogle, 9 Bush 721; Gregory *v.* Cowgill, 19 Mo. 415; Stephenson *v.* Denley, 4 Ind. 519. Nor can it be admitted to show what a testator meant by a devise "in fee simple *for life*," McAllister *v.* Tate, 11 Rich. 509.

(*e*) 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 V. C. 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; In re Herbert's Trusts, 1 J. & 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.]

(*f*) *Vide* Wigram on Wills, 2d ed., 75; a work which should be perused by every person who wishes to acquire an intimate acquaintance with this intricate subject.

(*g*) Doe *v.* Roberts, 5 B. & Ald. 407; [see Baddeley *v.* Gingell, 1 Exch. 319;]

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. (*h*) 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; [or a gift to the testator's nephews, as a gift to his wife's nephews, he having none, and there being, at *the date of his will, no possibility of his ever having any:] (*i*) and lastly, in the rule which reads a devise or bequest to apply to a person or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them. (*k*) 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. (*l*)

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

but learn the limits of this doctrine from Miller *v.* Travers, 1 M. & Scott 342, 8 Bing. 244.

[(*h*) 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 on Wills, pp. 102, 103, 164, 167; Auther *v.* Auther, 13 Sim. 422, where the V. C. 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.

(*i*) Sherratt *v.* Mountford, L. R., 8 Ch. 928.

(*k*) King's College Hospital *v.* Wheildon, 18 Beav. 33.]

(*l*) 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; Sherratt *v.* Mountford, L. R., 8 Ch. 928.

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. (*m*) 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. (*n*) 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*)

(*m*) Stephenson *v.* Heathcote, 1 Ed. 38; Cave *v.* Cave, 2 Ed. 144; Sibley *v.* Perry, 7 Ves. 532; Lord Inchiquin *v.* French, Amb. 40; Abbott *v.* Middleton, 4 H. L. Cas. 257, (per Lord St. Leonards); Wigram on Wills, p. 81, 3d ed.; Doe *v.* Gillard, 5 B. & Ald. 788, is *contra: sed qu.* But it is otherwise if it appears by the will that the testator is estimating the amount of his property and its sufficiency for the payments he directs; Barksdale *v.* Gilliatt, 1 Sw. 565; Colpoys *v.* Colpoys, Jac. 451, 457; and see Singleton *v.* Tomlinson, 3 App. Cas. 418, 425. And as to real estate see Stanley *v.* Stanley, 2 J. & H. 503: with which compare Davenport *v.* Coltman, 12 Sim. 605; Tennent *v.* Tennent, 1 J. & Lat. 384.

(*n*) It is otherwise in the case of a specific bequest of stock belonging to the testator at the date of the will, Att.-Gen. *v.* Grote, 3 Mer. 316, 2 R. & My. 699; 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; Fonnereau *v.* Poyntz, 1 B. C. C. 472, cit. 6 Ves. 401.

(*o*) *Post* ch. XXXI.; and see Doe d. Allen *v.* Allen, 12 Ad. & Ell. 451.

(*p*) Per Sugden, C., Att.-Gen. *v.* Drummond, 1 D. & War. 367. And see per Cotton, L. J., Everett *v.* Everett, 7 Ch. D. 433, 434. The expression "surrounding circumstances" is sometimes strained to include matters wholly outside the scope of the rule, as, instructions given by the testator for preparing his will, Birks *v.* Birks, 4 Sw. & Tr. 23, 34 L. J., Prob. 90 (referred to another ground, *ante* *175, n.,) or declarations of intentions by the testator, In re Ruding's Settlement, L. R., 14 Eq. 266.

"when the court has possession of all the facts which it is entitled to know, they will 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 1 Vict., c. 26.

And it is material to observe, that the statute 1 Vic., 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 ascer-*tain what is comprehended in the terms of a given description, referring to an extrinsic fact.[10] Thus, if a

(*q*) See however Lake *v.* Currie, 2 D., M. & G. 536; Nelson *v.* Hopkins, 21 L. J., Ch. 410; *ante* p. *326, *et seq.*; *post* ch. XX., §§ 4, 5.]

10. Thus evidence is admissible to locate land "bounding east on the harbor at the foot of bank," Nichols *v.* Lewis, 15 Conn. 137; or "running to a heap of stones at the shore at Elwell's corner," Storer *v.* Freeman, 6 Mass. 440; or "beginning at the corner of A between A and B" (there being two such corners), Den *v.* Cubberly, 7 Halst. 308; or "an east course to a post, the corner of J. B. and my home place," Brownfield *v.* Brownfield, 20 Penna. St. 55, affirming 12 Penna. St. 136; or to show that by "section 4, township 60," "with access to the 'Big Spring,'" the testator intended section 4, township 59, he owning no land in township 60, but owning land in section 4, township 59, and the "Big Spring" being in the latter section, Riggs *v.* Myers, 20 Mo. 239; Creasy *v.* Alverson, 43 Mo. 13. But this is not admissible in Iowa; Fitzpatrick *v.* Fitzpatrick, 36 Iowa 674; or Illinois, Kurtz *v.* Hibner, 55 Ill. 514. See, too, Walston *v.* White, 5 Md. 297. Evidence is also admissible to identify such description as "the house now occupied by me;" Brown *v.* Saltonstall, 3 Metc. 426. "My plantation whereon I now live;" Holton *ads.* White, 3 Zab. 330. "The old homestead whereon I lived at the time of making my will;" Waugh *v.* Waugh, 28 N. Y. 94. "The farm which I now oc-

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 Sanford *v.* Raikes, (*t*) decided by Sir W. Grant, a judge 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

cupy, Jackson *v.* Sill, 11 Johns. 201; my "backlands," Ryers *v.* Wheeler, 22 Wend. 148; "my home farm;" Boggs *v.* Taylor, 26 Ohio St. 694, affirming 20 Ohio St. 516; "the McKinstry farm at present occupied by B," Coleman *v.* Eberley, 76 Penna. St. 197; "the tract I bought of A in Green county," McConry *v.* King, 3 Humph. (Tenn.) 267; the "Limburger Plantation," Kincaid *v.* Lowe, Phill. Eq. 41; Hopkins *v.* Grimes, 14 Iowa 73; Warner *v.* Miltenberger, 21 Md. 264; Adams *v.* Morrow, 42 Md. 434; Wilson *v.* Robertson, 1 Harp. Eq. 56; or to show that by a bequest of "my bond for $1500, given to A," a bond was intended which the testator had made to B, and delivered to A as B's agent, Smith *v.* Wyckoff, 3 Sandf. Ch. 77; or to explain a bequest of a right to live in testator's house, "and enjoy the same privileges as she now does," Maeck *v.* Nason, 21 Vt. 115; or a bequest of the "increase" (actual or future,) of a female slave, Reno *v.* Davis, 4 Hen. & Mun. 283. And, in general, evidence is admissible to identify the subject of the devise, Pritchard *v.* Hicks, 1 Paige 270; Ashworth *v.* Ashworth, 12 Ohio St. 381; Young *v.* Twigg, 27 Md. 620. But parol evidence is inadmissible to contradict or vary a plain description of the thing bequeathed, as, for instance, to show that land "now occupied by me" was intended to include adjoining land in the occupancy of a tenant, Brown *v.* Saltonstall, 3 Metc. 426; Holton *ads.* White, 3 Zab. 330; Jackson *v.* Sill, 11 Johns. 201; Bethea *v.* Bethea, 1 Hill (S. C.) 64; Fraim *v.* Millison, 59 Ind. 123; or that "all my land" meant part only, Mitchell *v.* Walker, 17 B. Mon. 61; Hand *v.* Hoffman, 3 Halst. 71. But see Brown *v.* Dysinger, 1 Rawle 408, where "earthly property" was shown to mean personal property only. Neither can it be shown that a direct line between given points was intended to be a crooked one, Den *v.* Cubberly, 7 Halst. 308; Brown *v.* Brown, 6 Watts 54; Best *v.* Hammond, 55 Penna. St. 409; Waugh *v.* Waugh, 28 N. Y. 94. Nor is parol evidence admissible by way of conjecture, where the uncertainty is complete and identification impossible, as, for instance, a devise of "a small tract of land," Weatherhead *v.* Sewell, 9 Humph. (Tenn.) 272; or a "share," Armistead *v.* Armistead, 32 Ga. 597. See, too, Lefevre *v.* Lefevre, 59 N. Y. 434; Smith *v.* Smith, 4 Paige 270.

(*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

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 £7350, 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. 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 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 rendered as certain, as if the number, value, or situation of the trees, had been specified in the will."

Reference to an extrinsic document.

So, in Ongley *v.* Chambers, (*u*) where a testator devised the rectory

(*u*) 8 J. B. Moo. 665, 1 Bing. 483.

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 Ricketts *v.* Turquand, (*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 Lord Cottenham, who said, "If a testator 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 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

Devise of "my estate called A."

[(*x*) 1 H. L. Cas. 472; 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 K. & J. 580 (as to which *vide ante* p. *329, n.); Gauntlett *v.* Carter, 17 Beav. 586; Ross *v.* Veal, 1 Jur. (N. S.) 751; Harrison *v.* Hyde, 4 H. & N. 805.]

very perceptible. But in Doe *v.* Oxenden the word *of* was held equivalent to *at*, a construction which makes it easier to refer the cases to the opposite principles which governed them, and which are in themselves clear enough.]

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 object of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself, though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems however to be no valid ground for the objection. Every description must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the objects may not depend as well upon the acts or conduct, past or future, of the testator, as upon any other contingent circumstance; [provided only the acts are not testamentary.] Hence it was decided in Stubbs *v.* Sargon, (*y*) that a devise in favor of the persons *who might be partners of the testatrix or to whom she might sell her business, was valid; Lord Langdale observing that if the description be such as to distinguish the devisee from every other person, it is sufficient, without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the course of his affairs, or in the ordinary management of his property.

Sufficient if testator provide means of ascertaining the object of gift.

[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 a *patent* ambiguity, or "that which appears to be ambiguous upon the deed or instrument," and admits it in the case of a *latent* ambiguity, or "that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity." (*z*)[11] In the latter

Rule as to patent and latent ambiguities, how far conclusive in deciding on admissibility of evidence.

(*y*) 2 Kee. 255, [3 My. & Cr. 507, *ante* p. *94.

(*z*) Bacon's Maxims, Reg. 23.]

11. For the rule restricting the admissibility of parol evidence to cases of *latent*, as contrasted with *patent*, ambiguity, see

case, ambiguity being raised by 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

in general: Grimes *v.* Harmon, 35 Ind. 246; Timberlake *v.* Parish, 5 Dana 346; Breckinridge *v.* Duggan, 2 A. K. Marsh. 51; Jackson *v.* Payne, 2 Metc. (Ky.) 570; Haydon *v.* Ewing, 1 B. Mon. 13; Stephen *v.* Walker, 8 B. Mon. 600; Stackpole *v.* Arnold, 11 Mass. 29; Spencer *v.* Higgins, 22 Conn. 521; Cotton *v.* Smithwick, 66 Me. 360; McAllister *v.* Butterfield, 31 Ind. 25; Marshall *v.* Haney, 4 Md. 498; Love *v.* Buchanan, 40 Miss. 758; Pickering *v.* Pickering, 50 N. H. 349; Halsted *v.* Meeker, 3 C. E. Gr. (N. J.) 136; Brearley *v.* Brearley, 1 Stockt. 21; Cleveland *v.* Havens, 2 Beas. 101; Hand *v.* Hoffman, 3 Halst. 71; Fitzpatrick *v.* Fitzpatrick, 36 Iowa 674; Stokely *v.* Gordon, 8 Md. 496; Panton *v.* Tefft, 22 Ill. 366; Mann *v.* Mann, 1 Johns. Ch. 234, affirmed 14 Johns. 1; Worman *v.* Teagarden, 2 Ohio St. 380; Hyatt *v.* Pugsley, 23 Barb. 285, where, after a devise to Samuel, William and James, there was a subsequent devise "to the said Samuel, William, *Benjamin* and James," and evidence to identify Benjamin was held inadmissible, as a case of patent ambiguity. The reader's attention is also called to the following cases cited in Mr. Morgan's edition of Addison on Contracts, vol. 1, p. 338, note, as discussing the question of *patent* and *latent* ambiguities in contracts: Morris *v.* Edwards, 1 Ohio 189; Cahot *v.* Windsor, 11 Allen 546; Hinnemann *v.* Rosenbeck, 39 N. Y. 98; Richardson *v.* Beede, 43 Me. 161; Brown *v.* Cambridge, 3 Allen 474; The Lady Franklin, 8 Wall. 325; Tucker *v.* Maxwell, 11 Mass. 143; Johnson *v.* Johnson, 11 Mass. 359; Johnson *v.* Weed, 9 Johns. 310; Delaney *v.* Towns, 1 Allen 407; Wilkinson *v.* Scott, 17 Mass. 249; Putnam *v.* Lewis, 8 Johns. 389; City Bank *v.* Adams, 45 Me. 455; Billings *v.* Billings, 10 Cush. 178; Shaw *v.* Shaw, 50 Me. 94; Parker *v.* Syracuse, 31 N. Y. 376; Nichols *v.* Williams, 7 C. E. Gr. (N. J.) 63; Young *v.* Gregory, 46 Me. 475; Gould *v.* Norfolk Lead Co., 9 Cush. 338; Rogers *v.* McPheters, 40 Me. 114; Whitney *v.* Slayton, 40 Me. 224. See also 1 Redf. on Wills 573, *et seq.* The most valuable contribution, however, to the discussion of this whole question is the following statement of Vice Chancellor Wigram's conclusions after review of the recent English cases cited in the text, and more particularly of Miller *v.* Travers, 8 Bing. 244; Gord *v.* Needs, 2 M. & W. 129; and Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 363: "From these judgments it will appear, that the decisions have affirmed the doctrine, that where the description in the will, of the *person* or *thing* intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator. The cases of Richardson *v.* Watson, already referred to, and Morgan *v.* Morgan are to the same effect. It can scarcely be necessary to observe, that in order that a case may be brought within the scope of this proposition, it is not necessary that the description in the will should be in all respects *accurate or perfect.* All that the law requires on this point is that the description shall be so far perfect as to describe with *legal certainty* each of the subjects to which it is sought to be applied,—it must (as a description) satisfy the mind of the judge, that it does describe the subject to which he applies it,—it must, as a description be *sufficient to his mind.* With respect to the particular evidence which is admissible for the purpose of determining which of several subjects was intended by the testator,—where the description in the will is applicable to more than one subject,—as the

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

question in such cases is, what the testator *intended* to have expressed; any evidence, which *upon general principles* is relevant and material to that inquiry, will be admissible. And it seems, from the cases which have been referred to, that facts affording an inference of intention, and declarations by the testator at the time of making his will, are equally admissible. Declarations of intention, however, made before or after the date of the will, are, it is said inadmissible. This distinction does not appear to have been adverted to in all the cases which have been referred to. It is a distinction depending upon the general rules of evidence, and is unaffected by any principle peculiar to the subject of this work. The cases have also decided, that if the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is inadmissible to prove who or what the testator really intended to describe. The Chief Justice of the Court of Common Pleas appears, indeed, in one part of the judgment in Miller *v.* Travers, to lay some stress upon the circumstance that 'the devise in question had a certain operation and effect, namely, the effect of passing the estate in the city of Limerick.' It is impossible, however, to read the whole judgment without seeing that the grounds upon which it proceeded are wholly independent of that circumstance, and that the objections there pointed out, to the admission of extrinsic evidence *to prove intention*, would have applied with equal force whether the will had contained a devise of land in the *city* of Limerick or not. The devise of lands in the *county* of Limerick was *independent* of that in the *city* of Limerick, and the will would not have expressed more plainly than it did, an intention to devise *other* lands than those which the testator had in the *city* of Limerick, if this latter devise had been wholly omitted. Where the terms of a *single* devise can be in any way satisfied, the argument against enlarging its effect is irresistible. But, where there are two distinct devises, the fact that one of them is satisfied cannot furnish an argument for refusing to give effect to the other. The decisions have also overruled the distinction taken in Seldwood *v.* Mildmay (3 Ves., Jr., 306) as to the *substance* of the thing intended being sufficiently described, and the *denomination* only mistaken; for clearly the testator in Miller *v.* Travers, intended to devise some *real estate* besides that in the city of Limerick. This, indeed, is involved in the last observation. The cases of Day *v.* Trig and Goodtitle *v.* Southern cited in the judgment in Miller *v.* Travers, do not touch the question of admitting extrinsic evidence *to prove intention*. For in those cases, after rejecting words of mere surplusage, there remained (as the Chief Justice observed) a 'sufficient description in the will to ascertain the thing devised.' The question of admitting extrinsic evidence *to prove intention* does not therefore, arise in such cases. In cases like the latter, indeed, a question might be made whether the words referring to *the occupation of the farm* were not restrictive; and if admitted to be so, a court would (so long as it received the

(*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. on Wills, 65 66, 178, whence the views expressed in the text have been adopted.

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

instrument as the will of the testator) be bound to give effect to them. But in that particular case, the court was of opinion, *upon the construction of the words alone,* that they were not restrictive but mere surplusage and that the only operative words in the devise were, 'all that my farm called Trogue's farm.' In Miller *v.* Travers, the learned judge said, that there were two classes of cases only to which the maxim '*Ambiguitas verborum latens verificatione suppletur*,' applied, and these cases he illustrates with great exactness. The learned reader, however, may perhaps still consider that a class of cases, which existed before the decision in Miller *v.* Travers, has not been satisfactorily adjudicated upon by the decision in that case. The judgment of the Vice Chancellor in that case, and the judgments in previous cases already referred to, had decided that a description *wholly* inapplicable to the subject intended might be corrected by evidence *proving the intention* of the testator; from which it would follow, of course, that a description *partially* correct might be aided by the same means, although such description when taken in connection with the circumstances of the case alone, might not be sufficient to satisfy the mind of a judge. A case, however, might easily be suggested, in which a judge knowing *aliunde* for whom or for what an imperfect description was intended, would discover a sufficient certainty to act upon, although, if ignorant of the intention, he would be far from finding judicial certainty in the words of the devise. The question then, which Miller *v.* Travers may be considered as having left undecided, is,—whether extrinsic evidence *to prove intention* is admissible in the case of such a description as that which has just been suggested? The question arises from the high authority of the case of Beaumont *v.* Fell, which is a case in point. There was no resemblance in that case between the names of *Gertrude Yardley* and *Catharine Earnley*, except in the resemblance *in sound* between Gatty and Katy, which possibly might (as the court ingeniously guessed) have occasioned the mistake in the will. Assuming that the court could not, in such a case, act upon the description in the will *without first inquiring who was really intended*, could such an inquiry be lawfully gone into? The case of Hiscocks *v.* Hiscocks has decided this point also. In point of principle, it is submitted, that a description which is so imperfect as to be *useless as it stands, i. e.* useless unless it be aided *by evidence of intention*, is not distinguishable from one which is wholly incorrect. The case of Selwood *v.* Mildmay, as explained in Miller *v.* Travers, proceeded upon a correct principle: but that principle, it is submitted, was altogether misapplied, and the case is one which ought not to be followed in specie. Upon this point, also, the decision in Hiscocks *v.* Hiscocks appears to be conclusive. The case of Beaumont *v.* Fell, just adverted to, is one which is extremely difficult, if not impossible to reconcile with Miller *v.* Travers, unless it be upon the ground that the description of the legatee was, in the circumstances of that case, sufficient without reference to what the testator *had declared*. The difficulty in the way of this explanation is, that the case is always referred to as a leading authority for the admissibility of evidence to *prove intention* in cases in which the description of the *person* or *thing* intended is sufficient without the aid of such evidence. The case is pointedly noticed with disapprobation in Hiscocks *v.* Hiscocks. The MS. case (*supra* pl. 146) is clearly overruled by Miller *v.*

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 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 proposition tenable, it must be supposed to assert only 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 if this interpretation of the rule be admitted, 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. The conclusion is either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the canon, in its second branch, asserts 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.

Evidence of intention, when admissible.

It remains to inquire 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.[12] The uncertainty as to which of these was in

Travers, and the two subsequent cases of Gord *v.* Needs, and Hiscocks *v.* Hiscocks. The conclusion, then, which these cases appear to warrant, is, 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." Wigram 232, §§ 184–194.

(*b*) See cases *ante* p. *409, n. (*b*).

(*c*) See Wigr. on Wills 121; per Romilly, M. R., Stringer *v.* Gardiner, 27 Beav. 38.

(*d*) Per Alderson, B., 13 M. & Wels. 204.

12. Where there are several persons answering with inexactness to the description in the will, evidence will in general be admitted to show which person was designated. Thus Brewster *v.* McCall, 15

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. (*e*)]

"Equivocation."

Conn. 274; Cromie *v.* Louisville Orphan Home, 3 Bush 371; Bodman *v.* Am. Tract Soc., 9 Allen 447; Graydon *v.* Graydon, 8 C. E. Gr. (N. J.) 230; St. Luke's Home *v.* Association for Indigent Females, 52 N. Y. 191; Lefevre *v.* Lefevre, 59 N. Y. 434, reversing 2 Thomps. & C. 330 on other points; Ward *v.* Espy, 6 Humph. (Tenn.) 447; Wood *v.* White, 32 Me. 340. See, too, Smith *v.* Smith, 1 Edw. 189, where the gift was to Mary, wife of Nathaniel Smith, and there being no such person it was held that Mary, wife of Abraham Smith was intended, and not Sarah, wife of Nathaniel Smith. So where the gift was to James Vernor Henry, describing him as the testator's nephew, and son of his deceased sister E., and there was no such person, evidence of testator's affection was admitted to show that James Vernor Henry, his greatnephew, and the grandson of E., was intended, and not Robert R. Henry, the only son of E. Vernor *v.* Henry, 3 Watts 393. But in Stokeley *v.* Gordon, 8 Md. 496, where the devise was to "Anna Maria German wife of Jonathan German," and Anna Maria was his daughter, while the wife's name was Catharine, it was held by Mason, J., that parol testimony was inadmissible to show whether the devise was intended for the wife or the daughter. And in Tucker *v.* Seamen's Aid Soc., 7 Metc. 188, where there was a society answering exactly to the name in the will, it was not permitted to another society of the same character, but different name, to show that it was intended. See, too, Jackson *v.* Hart, 12 Johns. 97, where George Hosmer claimed under a land patent issued to George Houseman, described as in a certain regiment and company, of which Hosmer was a member but not Houseman, and the evidence as to Hosmer was not admitted. And where there are two or more persons or things answering to the description in the will, parol evidence may be received to show which of them testator meant, but not to show that he meant a different person or thing. Per Van Fleet, V. C., Burnet *v.* Burnet, 2 N. J. Law Jour. 185; S. C., 3 Stew. (N. J.) 595. The rule as to two or more objects, all answering partially, and none perfectly, to the description of the will, applies also to the subject of the gift. Worthington *v.* Hylyer, 4 Mass. 202; Boggs *v.* Taylor, 26 Ohio St. 604. In the case of the American Bible Soc. *v.* Pratt, 9 Allen 109, a bequest of "all moneys due me at the time of my decease from the Dedham Bank, Dedham," was not allowed to pass deposits in the "Dedham Institution for Savings," although testator had never had a deposit in the "Dedham Bank." But in Rom. Cath. Orphan Asy. *v.* Emmons, 3 Bradf. 144, a bequest of shares in "the Mechanics Bank so usually called in the city of New York," was held to pass testator's shares in the "City Bank," on its being shown that he never had any in the Mechanics' Bank.

[(*e*) See, as to the meaning of the word

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. (*f*) 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.

Effect where there are two subjects or objects answering to description.

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, (*g*) 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 son John the younger; for, observes Lord Coke, no inconvenience can arise, if an averment in such case be taken; (*h*) 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.

So, in Jones *v.* Newman, (*i*) 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 favor of one of them was admitted. (*k*)]

Evidence admitted to show which of two persons answering to the name was intended.

Declarations of testator admitted.

Again, in Doe d. Morgan *v.* Morgan, (*l*) 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*

ambiguity, Wigr. Wills, pl. 210; Cic. Q. Tusc. III., 9.]

(*f*) See 1 M. & Sc. 343.

(*g*) 5 Rep. 68, b.

(*h*) 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.

(*i*) W. Bl. 60.

[(*k*) Reynolds *v.* Whelan, 16 L. J., Ch. 434.]

(*l*) 1 Cr. & M. 235.

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 Doe d. Gord *v.* Needs, (*m*) 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 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 characterized 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 Doe d. Allen *v.* Allen, (*n*) a testatrix devised her land to her

[(*m*) 2 M. & Wels. 129. See also Phillips *v.* Barker, 1 Sm. & Gif. 583.

(*n*) 12 Ad. & Ell. 451. In Bennett *v.* Marshall, 2 K. & 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 hearing the same name. It is not stated however

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 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 favor 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 favor, was admissible.]

Contra, where ground for preferring either is afforded by the will;

On the other hand, in Doe d. Westlake *v.* Westlake, (*o*) 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, 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,) (*p*) 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 reasons for the testator preferring one person to another of the same name: (*q*) for there is properly no "ambiguity" until all the facts of the case have been given in evidence and found insufficient for a definite decision.] (*r*)

To "my brother," &c., the testator having 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

what was the nature of the parol evidence admitted. See also per Malins, V. C., Webber *v.* Corbett, L. R., 16 Eq. 518.]

(*o*) 4 B. & Ald. 57; [see also Douglas *v.* Fellows, Kay 114; Webber *v.* Corbett, L. R., 16 Eq. 518; and cf. Fleming *v.* Fleming, 1 H. & C. 242.

(*p*) See Wigram Wills, pl. 144.

(*q*) Jefferies *v.* Michell, 20 Beav. 15.

(*r*) Wigr. Wills, Prop. VI. and VII.

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 description applies to each of several persons, and part to neither, evidence admitted

Sometimes it happens that one part of the description applies to each of several claimants in common, and another part to neither of them; as in the case of Careless *v.* Careless, (*v*) 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' 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' son lived at a distance, and was almost unknown to him,

(*s*) See acc. per Lord Thurlow, 1 Ves., Jr., 415; and Hampshire *v.* Peirce, 2 Ves. 216—the gift to "the four children of B"—as to which case, however, see 5 M. & Wel. 371. 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.

(*v*) 1 Mer. 384.

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 anybody 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 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. (*x*) 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 reconcilable 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 Still *v.* Hoste, (*y*) a testator bequeathed a legacy to *Sophia*

(*x*) See also Webber *v.* Corbett, L. R., 16 Eq. 520.

(*y*) 6 Mad. 192.

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 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 said 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 inaccurate 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.

Where part of description applies to one and part to another, evidence of intention is inadmissible.

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.[13] 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

[(*z*) 4 Ves. 679.

(*a*) In Doe *v.* Hiscocks, 5 M. & Wels. 370.

(*b*) Legal certainty, not perfect accuracy, is required, see Wigr. on Wills, pl. 186.]

13. See Smith *v.* Smith, 1 Edw. 189; S. C., 4 Paige 271, where the bequest was to Mary Smith, wife of Nathaniel Smith, and the persons claiming were Mary Smith, wife of Abraham Smith, (who took) and Sarah Smith, wife of Nathaniel Smith. So in Vernor *v.* Henry, 3 Watts 393, cited in note 12, *ante* p. 748.

or subject of the gift. (c) But in] 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 the 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 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

[(*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, 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 is said to have been ultimately compromised, per Lord Brougham, 1 H. L. Cas. 797.

(*d*) 5 M. & Wels. 363.

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 (*i. e.* equally applicable in all its parts) to each of several subjects."

The rule stated,

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 contemporaneous 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*)

Declarations need not be contemporaneous with will.

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 applicable 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. Some examples illustrating this principle have already been given. (*h*) It is further exemplified by the well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation, even though the

Evidence of *immaterial* circumstances rejected;

(*e*) Wigr. on Wills, pl. 215; 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; Charter *v.* Charter, L. R., 7 H. L. 364, 377. In In re Blackman, 16 Beav. 377, the rule was transgressed, but the decision seems right without the questionable evidence, *ante* p. *379.

(*f*) 12 Ad. & El. 455; Wigr. on Wills 162.

(*g*) Langham *v.* Sandford, 19 Ves. 649; 2 Tayl. Evid., p. 1009, 7th ed. Lord Kenyon's *dictum*, Thomas *v.* Thomas, 6 T. R. 677, seems therefore to be overruled.

(*h*) *Ante* p. *424.

most conclusive evidence of intention to use them in some popular or secondary sense be tendered: (*i*) whence it follows that 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 favor, support his claim against another person exactly or more nearly answering to all the particulars in the description.][14]

Thus, in Delmare *v.* Robello, (*j*) 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 Estella 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 coventual name did not prevent the applicability of the former name: it was a part of the profession, and was not meant for the rest

—*e. g.* to exclude an object answering the description.

(*i*) Wigr. on Wills, Prop. II., *supra* *417. And see Horwood *v.* Griffith, 4 D., M. & G. 708. In Grant *v.* Grant, L. R., 5 C. P. 727, Blackburn, J., cited with approval, "Blackburn on Contracts," where it is said that in applying the rule a distinction must be observed between contracts and wills, and a greater latitude allowed in construing wills, because in them the testator soliloquized, but that in a contract each party spoke to the other: and accordingly it was held in that case that "nephew" meant "wife's nephew," although it would not have been insensible with reference to extrinsic circumstances if it had been strictly interpreted. *Sed qu.*: a testator speaks to all persons interested under or against his will; and in Wells *v.* Wells, L. R., 18 Eq. 505, Sir G. Jessel, M. R., reaffirmed Sir J. Wigram's proposition and declined to follow Grant *v.* Grant.]

14. See Tucker *v.* Seamen's Aid Soc., 7 Metc. 188; Jackson *v.* Hart, 12 Johns. 97; Am. Bible Society *v.* Pratt, 9 Allen 109; Rom. Cath. Orph. Asylum *v.* Emmons, 3 Bradf. 144.

(*j*) 1 Ves., Jr., 412.

of the world; the former name, therefore, continued, and by that such persons were always spoken of.

Evidence not admissible to exclude a person answering to description.

So, in Andrews *v.* Dobson, (*k*) where the bequest was to "James, 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 L. 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

(*k*) 1 Cox 425.

(*l*) 12 Ves. 279; see also Doe *v.* Westlake, 4 B. & Ald. 57, *ante* p. *433; [In re Ingle's Trust, L. R., 11 Eq. 578.

(*m*) 1 Y. & C. C. C. 654.

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 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. K. Bruce held, that the Orphan Working School was sufficiently described by the will, and therefore that none of the evidence was admissible.

In Maybank *v.* Brooks (*n*) the rule was 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 im-*possible 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 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.

(*n*) 1 B. C. C. 84.

(*o*) See as to this, *ante* p. *338.

(*p*) Per Lord Abinger, Doe *v.* Hiscocks, 5 M. & Wels. 369.]

(*q*) Hampshire *v.* Peirce, 2 Ves. 218.

[And in Miller *v.* Travers, (*r*) where a testator devised all his free-
Same rule as to subject of gift.
hold and real estates whatsoever, situate in the *county of Limerick*, and in the city of Limerick, to trustees and

[(*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 Clergy Society, 2 K. & J. 615; In re Peel, L. R., 2 P. &. D. 46; Barber *v.* Wood, 4 Ch. D. 885. Beaumont *v.* Fell, 2 P. W. 141, 2 Eq. Cas. Ab. 366, pl. 8, where a legacy to "Catherine Earnley" was, upon evidence of intention, held well bequeathed to Gertrude Yardley, is overruled (5 H. L. Cas. 168); unless it can be deemed a case of nick name—which is questionable. The same may be said of Masters *v.* Masters, 1 P. W. 425, where on a legacy to "Mrs. Sawyer" inquiry was directed whether Mrs. Swapper was the person intended.][15]

15. It is a well established rule that a misnomer of the legatee or devisee is immaterial, if the person really intended can be identified by the description in the will. Alabama Conference *v.* Price, 42 Ala. 39; Billingslea *v.* Moore, 14 Ga. 370; Smith *v.* Smith, 4 Paige 270; Gardener *v.* Hyer, 2 Paige 11; President, &c., *v.* Norwood, 1 Bush. Eq. 65; Dom. & For. Miss. Soc. Appeal, 30 Penna. St. 425; Cresson's Appeal, 30 Penna. St. 437; Gass *v.* Ross, 3 Sneed (Tenn.) 211; Ayres *v.* Weed, 16 Conn. 291; Preachers' Aid Society *v.* Rich, 45 Me. 552; Second Cong. Soc. *v.* First Cong. Soc., 14 N. H. 315. Thus "Phillis" has been shown to mean "Philip," Tudor *v.* Terrel, 2 Dana 49; "Priscilla Picard" to be intended for "Paris Picard," Hart *v.* Marks, 4 Bradf. 161; "Daniel" for "David," Jackson *v.* Stanley, 10 Johns. 133; "Cornelia Thompson" for "Caroline Thomas," Thomas *v.* Stevens, 4 Johns. Ch. 607; "Samuel, son of Samuel," for "William, son of Samuel," Powell *v.* Biddle, 2 Dall. 70; "E. A. C." for "E. A. S." (married name of E. A. C., which was unknown to the testator), Scanlan *v.* Wright, 13 Pick. 527; "John Evans, the son of my nephew James Evans," for "James Hooper Evans, the son of the testator's nephew James Evans," Evans *v.* Hooper, 2 Gr. Ch. (N. J.) 204; "my nephew James, son of Frederick," for "my nephew James' son Frederick," *ex parte* Hornby, 2 Bradf. 420; "Cormac, son of my brother Cormac," for "Cormac, son of the testator's only brother James," Connolly *v.* Pardon, 1 Paige 291. So "The American Home Missionary Tract Society," for the "American Tract Society," Button *v.* Am. Tract Soc., 23 Vt. 336; "the Methodist Episc. Mission at Bombay," for "the Meth. Episc. Mission at Lucknow," McAllister *v.* McAllister, 46 Vt. 272; "The Congregational Foreign Missionary Society," for the "American Board of Commissioners of Foreign Missions," Howard *v.* Am. Peace Soc., 49 Me. 288; the "Meth. Episc. Missionary Society of Maine," for the "Trustees of the East Maine Conference of the Meth. Episc. Church," Straw *v.* Trustees, 67 Me. 493; the "Franklin Seminary of Literature and Science, Newmarket, N. H.," for the "Trustees of the South Newmarket Methodist Seminary," Trustees, &c., *v.* Peaslee, 15 N. H. 317; the "trustees who hold the funds of the Theological Seminary at Princeton," for the "Trustees of the Theological Seminary of the Presbyterian Church at Princeton," Newell's Appeal, 24 Penna. St. 197; the "New Colonization Society in Africa," for the "American Colonization Society for settling free persons of color in Africa," Maund *v.* McPhail, 10 Leigh 199. In describing the subject matter of the gift, parol evidence is also admissible to correct a misdescription. Thus in Allen *v.* Lyons, 2 Wash. C. C. 475, it was held that a house and lot on Fourth street were intended by a devise of a house and lot

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.]

Total blanks for names not to be supplied.

And in no instance has a total blank for the name been filled up by parol evidence. (*s*) 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 favor to bequeath the projected legacy. (*t*)

Partial blanks supplied.

The effect of partial or imperfect descriptions, however, has often come under consideration. In Hunt *v.* Hort, (*u*) 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, (*x*) 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 Blundell *v.* Gladstone, the V. C. 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.* (*y*) But besides that evidence there was parol evidence (*z*) of the testator having, both before and after making his will, and even after correction of his mistake, repeatedly called the

on Third street, the testator having no property on Third street; so, in Winkley *v.* Kaime, 32 N. H. 268, by a part of "lot 37 which I purchased of A" was intended lot 97, there being no lot 37; so, a farm described as containing eight fields will pass, though it is shown to contain nine fields, Coleman *v.* Eberley, 76 Penna. St. 197. See also Doe *v.* Roe, 1 Wend. 541.

[(*s*) Baylis *v.* Att.-Gen., 2 Atk. 239; Ulrich *v.* Litchfield, Id. 372; Taylor *v.* Richardson, 2 Drew. 16.

(*t*) Per Parke, B., Doe *v.* Needs, 2 M. & Wels. 139.]

(*u*) 3 B. C. C. 311; see also 1 M. & Sc. 351.

(*x*) 3 Ves. 148; [and see In re De Rosaz, 2 P. D. 66.

(*y*) 11 Sim. 488.

(*z*) Id. 470.

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 D. P., (where the suit was carried,) Parke, B., said, they thought it was rightly received. (*a*) 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 ultimately it is found to be immaterial and has to be excluded from consideration.] (*b*)

(*a*) 1 H. L. Cas. 778, *nom.* Camoys *v.* Blundell.

(*b*) See also Lowe *v.* Lord Huntingtower, 4 Russ. 532, n.; Sayer *v.* Sayer, 7 Hare 381, Wigr. on Wills, pl. 103.]

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